

IN THE SUPREME COURT  
OF SOUTH CAROLINA

---

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Erin D. Dean, Special Referee

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COURT OF APPEALS OPINION NO.: 2024-UP-018  
CASE NO.: 2019-CP-07-00818  
APPELLATE TRACKING NO.: 2021-00321

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Mare Baracco, .....Petitioner,

v.

County of Beaufort, ..... Respondent.

---

APPENDIX  
VOLUME 2 OF 2

---

April 10, 2024

Thomas R. Goldstein, S. C. Bar No. 2186  
P. O. Box 71121  
N. Charleston, S. C. 29415-1121  
(843) 554 4291; (843) 554 5566 (fax)  
[tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)  
Attorneys for Petitioner

E. Richardson LaBruce  
Finger, Melnick & Brooks, P.A.  
Post Office Box 24005  
Hilton Head, South Carolina 29925-4005  
(843) 681-7009  
[erlabruce@fingerlaw.com](mailto:erlabruce@fingerlaw.com)  
Attorneys for Respondent

**RECEIVED**

**Apr 11 2024**

**S.C. SUPREME COURT**

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**Date : 6/30/2016 2:32:21 PM**

**From : "Ben Gecy"**

**To : jrembold@bcgov.net, Rusty.Nealis@faa.gov, "Stephens, James" , "Keaveny, Thomas"**

**Cc : "Paul Sommerville" , "Chuck Newton" , lhigh@islandpacket.com, rmathlaw@aol.com**

**Subject : 2nd Notice**

**Attachment : 20160630.pdf;**

Jon

Thank you for the recent letter requesting permission to enter our property for a tour associated with 34 to 1 obstruction removal on July 7, 2016. I have enclosed a letter sent to you and other Beaufort County officials several weeks ago strictly prohibiting anyone from entering our property.

Unfortunately we are unable to accommodate you and your contractors at this time. Please do not enter the property. This is your 2<sup>nd</sup> notice! Beaufort County does not have an easement recorded on this property.

Sincerely

River City Developers  
Palmetto Place HOA



County Council of Beaufort County  
Beaufort County Airport  
39 Airport Circle  
Beaufort, South Carolina 29907



June 24, 2016

From: Jon Rembold, Beaufort County Airports Director  
To: River City Developers, LLC  
1857 Ribaut Road  
Port Royal, SC 29935  
SUBJ: Runway 7 Tree Project; Pre-Bid Site Tour

The Runway 7 Approach Tree Obstruction Removal Project is currently out for bidding. In order to provide potential contractors the best opportunity to understand the scope of work, we have scheduled a pre-bid site tour.

The tour will take place on July 7 from 4:00pm until 6:00pm. Contractors will be escorted by County personnel during the tour. If property owners would like to be present on their property in order to explain important items such as septic tanks, drain field locations, etc., we encourage you to plan for that.

If you have questions, please contact me at 843.441.5871 or at [jrembold@bcgov.net](mailto:jrembold@bcgov.net).

Kindest Regards,

Jon Rembold  
Airports Director

# River City

DEVELOPERS

05/06/16  
County Council of Beaufort  
Beaufort County Airport  
39 Airport circle  
Beaufort SC 29907


Dear Mr. Rembold,

Please accept this letter as notice that Palmetto Place Subdivision formerly known as Tradewinds Plantation does not authorize any tree cutting and or removal of trees on the following described property:

See attached exhibit and parcel numbers

Any attempt to enter the property for any reason will be considered trespassing. Please accept this letter as formal notice. It has come to our attention the Avigation Easement previously recorded is not valid or recorded properly and incomplete.

Sincerely

  
Benjamin Geoy  
River City Developers

cc Paul Somerville  
cc Tom Keaveney  
cc Gary Kubic

Exhibit

1/1

**LEGAL DESCRIPTION:**

ALL that certain parcel of land, with improvements thereon, situate on Lady's Island, Beaufort County, South Carolina, containing 10.81 acres, more or less and being shown and described on a plat prepared by David E. Gasque, SCRLS dated June 7, 1999 last revised on April 26, 2002 and recorded in Plat Book 86 at Page 149 in the Office of the Register of Deeds for Beaufort County, South Carolina. For a more complete description as to metes, courses, distances and bounds of said property, reference may be had to the aforementioned plat of record.

Lot	TMS Number
1	200 018 000 0678 00
2	200 018 000 0679 00
3	200 018 000 0681 00
4	200 018 000 0682 00
5	200 018 000 0683 00
6	200 018 000 0684 00
7	200 018 000 0685 00
8	200 018 000 0686 00
9	200 018 000 0687 00
10	200 018 000 0688 00
11	200 018 000 0689 00
12	200 018 000 0690 00
13	200 018 000 0691 00
14	200 018 000 0692 00
15	200 018 000 0693 00
16	200 018 000 0694 00
17	200 018 000 0695 00
18	200 018 000 0696 00
19	200 018 000 0697 00
20	200 018 000 0698 00
21	200 018 000 0699 00
23	200 018 000 0701 00
25	200 018 000 0703 00
26	200 018 000 0704 00
28	200 018 000 0706 00
29	200 018 000 0707 00
30	200 018 000 0708 00
31	200 018 000 0709 00
32	200 018 000 0710 00
33	200 018 000 0711 00
34	200 018 000 0712 00
35	200 018 000 0713 00
36	200 018 000 0714 00
37	200 018 000 0715 00

Exhibit

2/2

Lot	TMS Number
38	200 018 000 0716 00
39	200 018 000 0717 00
40	200 018 000 0718 00
41	200 018 000 0719 00
42	200 018 000 0720 00
43	200 018 000 0721 00
44	200 018 000 0722 00
45	200 018 000 0723 00
46	200 018 000 0724 00
47	200 018 000 0725 00
48*	200 018 000 0726 00
48*	200 018 000 0727 00
50	200 018 000 0728 00
51	200 018 000 0729 00
52	200 018 000 0730 00
53	200 018 000 0731 00
54	200 018 000 0732 00
55	200 018 000 0733 00
56	200 018 000 0734 00
57	200 018 000 0735 00
58	200 018 000 0736 00
59	200 018 000 0737 00
60	200 018 000 0738 00
61	200 018 000 0739 00
62	200 018 000 0740 00
63	200 018 000 0741 00
64	200 018 000 0742 00
65	200 018 000 0743 00
66	200 018 000 0744 00
67	200 018 000 0745 00
68	200 018 000 0746 00
69	200 018 000 0747 00
70	200 018 000 0748 00
71	200 018 000 0749 00
72	200 018 000 0750 00
73	200 018 000 0751 00
74	200 018 000 0752 00
75	200 018 000 0753 00
76	200 018 000 0754 00
77	200 018 000 0755 00
78	200 018 000 0756 00
79	200 018 000 0757 00

Exhibit

3/3

Lot	TMS Number
Open space .210 acres	200 018 000 0764 00 00
Right of way 2.65 acres	200 018 000 0050 00 00
Open space 2.06 acres	200 018 000 050a 00 00
Open space .10 acres	200 018 000 0758 00 00
Open Space .40 acres	200 018 000 0759 00 00

\*\* Lot 48 is listed twice on PB 129 p 85 - No Lot 49 shown on plat.

**Less and Except:**

All those certain parcels or lots of land, with improvements thereon, situate on Lady's Island, Beaufort County, South Carolina being shown as Lots 22, 24 & 27 of Tradewinds Plantation on a subdivision plat prepared for The O'Neal Development Group, Inc. by David E. Gasque, dated January 12, 2006 and recorded in Plat Book 129 at Page 85.

This being a portion of the same property conveyed to Mortgagor by deed of O'Neal Development, Inc., dated February 23, 2006 and recorded March 3, 2006, in Book 2329, at Page 1398.

**Parcel Two:**

ALL that certain parcel of land, situate on Lady's Island, Beaufort County, South Carolina containing 2.30 acres, more or less as shown and designated on a plat or map surveyed and drawn by David E. Gasque, SCRLS dated February 4th, 2003 as recorded in Plat Book 1883 at Page 711 having the following metes and bounds, starting on the Northeast corner and running South for a distance of 299.50', then turning West and running for a distance of 252.91', then turning North and running for distance of 299.54', then turning East and running for a distance of 339.72' back to the Northeast corner. This being a portion of property formerly known as Lots 4, 5, and 6 as shown on a Plat by H.F. Wilson Jr. dated November 30, 1962 and recorded in Plat Book 14 at page 13.

TMS# R200-018-0050A.

Date : 3/18/2019 4:07:02 PM  
From : "Stu Rodman"  
To : "Somerville, Paul"  
Cc : "Weaver, John" , "Keaveny, Thomas"  
Subject : Fwd: 1501 Bay Street Building  
Attachment : Letter .docx;MOU with.pdf;2019 Sig.pdf;Collabo.docx;image003.jpg;

Paul,

I would appreciate it if you would handle this sub-lease issue even though it is directed to me as I serve on the Board. I accept the blame if this was not being handled correctly and trust that it can be cured in a straightforward and timely manner.

Thanks and cheers,

Stu

----- Forwarded message -----

From: **Andy Beall** <[abeall@santa-elena.org](mailto:abeall@santa-elena.org)>  
Date: Mon, Mar 18, 2019 at 10:48 AM  
Subject: 1501 Bay Street Building  
To: Stu Rodman <[sturodman@gmail.com](mailto:sturodman@gmail.com)>, <[psomerville@bcgov.net](mailto:psomerville@bcgov.net)>  
Cc: Megan T. Morris <[mmorris@santa-elena.org](mailto:mmorris@santa-elena.org)>

Please see the attached letter and enclosures. A hard copy will be mailed.

Thank you very much.

Andrew J. Beall, MBA, DBA

Chairman

Santa Elena Foundation





*Board of Directors:*  
 COL US Army (RET) Christopher Allen  
 Dr. Andrew J. Beall, Chairman  
 Deborah Dykes  
 COL US Army (RET) Gregory Dyson  
 Lieutenant General Jack Klimp, U.S. Marine Corps (Ret.)  
 Dr. Martha Moriarty, Associate Vice Chancellor at USC Beaufort  
 Professor Larry Rowland  
 Stu Rodman, Beaufort County Commissioner  
 Richard Thomas  
 John Trask III  
 Megan T. Morris, Executive Director

## MEMORANDUM OF UNDERSTANDING

The Santa Elena Foundation (SEF), a non-profit public charity, operates the Santa Elena History Center within the Beaufort County-owned building located at 1501 Bay Street, Beaufort, South Carolina. Reconstruction Beaufort Inc. (RBI), also a non-profit public charity, seeks to share space within the building at 1501 Bay Street.

The building at 1501 Bay Street includes display space for interpretation, a lecture hall, meeting rooms, event space, reception areas, retail space, offices and storage. Both the Santa Elena Foundation and Reconstruction Beaufort Inc. have need for space configured as is available within the Bay Street building. The two organizations operate through a combination of paid-staff, contractors, and volunteers.

Each entity has a unique charter and therefore require private offices and areas for workspace. The two entities are able to share the use of the lecture room, meeting room, storage, reception, break room, and restrooms.

Operations for SEF in the facility on Bay Street include: public interpretation of history (on the first and second floors), research and preservation of culture and history, lectures and presentations, limited retail of books and memorabilia, and private office space. Hours of public operation are Tuesday through Saturday, 10am to 4:30pm, and for other events as scheduled.

Operations for RBI in the facility on Bay Street include: meeting space and presentation area, workspace for research and exhibit design, storage space and private office space. RBI and SEF will coordinate and share the responsibility of greeting the public at the front desk.

Given the alignment of operational models and activities for the organizations, the two entities wish to share use and operational costs for the building. RBI will occupy two private offices on the first floor, the rear wing of the main corridor, and the basement of the 1501 Bay Street building, as specified and agreed by SEF Executive Director. With usage of these areas, RBI will make a monthly donation in the amount of \$2,500.00 by the 10<sup>th</sup> of each month to the Santa Elena Foundation to assist with operational costs for the location. Desired cosmetic upgrades in the areas RBI occupies must be approved by the SEF Executive Director and are the responsibility of RBI.

The Santa Elena Foundation operates the physical plant for the building, provides utilities and supplies landscape maintenance, trash collection, Wi-fi and Internet access, cleaning service, required inspections, and administration for the facility. The building has security, fire alarm, and sprinkler systems operated by SEF. Use of building outside of the scheduled hours will be

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SANTA ELENA  
FOUNDATION

*Board of Directors:*

- COL US Army (RET) Christopher Allen
- Dr. Andrew J. Beall, Chairman
- Deborah Dykes
- COL US Army (RET) Gregory Dyson
- Lieutenant General Jack Klimp, U.S. Marine Corps (Ret.)
- Dr. Martha Moriarty, Associate Vice Chancellor at USC Beaufort
- Professor Larry Rowland
- Stu Rodman, Beaufort County Commissioner
- Richard Thomas
- John Trask III
- Megan T. Morris, Executive Director

agreed to by both parties. Any event not directly associated with RBI will be contracted and managed by SEF.

The Santa Elena Foundation is a party to a lease agreement granting use of the 1501 Bay Street building by Beaufort County through October 2020, and for the unpaved parking lot across North Street. SEF is the host organization and lessee of the building; all communication and coordination with Beaufort County, the lessor, will be by SEF. Shared use of the building by the RBI is not a sub-lease. Both parties may choose to work together to secure use of the facility beyond the current lease term, which concludes in October 2020.

Reconstruction Beaufort Inc. must provide commercial liability insurance and property insurance for assets, inventory, and other property located within the building.

RBI may apply for and place City-approved signage on the grounds of the building that is complementary to the existing Santa Elena History Center sign.

This MOU is agreed to by both parties for the duration of the Santa Elena Foundation lease, ending in October 2020. Every six months, or as needed, a review of facility usage will allow expansion of space allotment. Renegotiation of the value and terms of this agreement is required by September 30, 2019 or sooner. A minimum of 2-month notice of termination by either party is required. Failure by RBI to make the monthly donation within 10 business days of the due date will result in termination of this agreement.

The terms and timeframe detailed in this agreement provide opportunity for the organizations' needs to be re-evaluated to determine the next phase of facility usage.

Agreed to:

Billy Keyserling  
Executive Director  
Reconstruction Beaufort Inc

Date: 2-6-2019

Megan Thibault Morris  
Executive Director  
Santa Elena Foundation

Date: 2/6/19

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1501 Bay Street is successfully established as the Santa Elena History Center and flourishing as a cultural institution for our community. While developing the interpretation of Santa Elena history and archaeology is the priority, the Foundation operates as a leader of Heritage Tourism to positively benefit Beaufort County.

The Santa Elena History Center has received more than 22,000 visitors through the front door since opening in 2016. Approximately 60% are from outside of the County. Several organizations and groups in the community have utilized and benefitted from the renovated facility, to include:

- BAHA, Beaufort Accommodations and Restaurant Assoc.
- Beaufort Art Association
- Beaufort County Water Festival
- Beaufort Sail and Power Squadron
- Heritage Groups, ie DAR, Colonial Dames
- Heritage Library of Hilton Head (Draft MOU attached)
- Historical Society of Beaufort County
- Leadership Beaufort, Sr. Leadership
- NPS Reconstruction Staff
- OLLI, Osher Lifelong Institute
- Pat Conroy Literary Center
- Reconstruction Beaufort Inc. (MOU attached)
- USC-Beaufort meetings, events and student projects

Facility sharing often extends beyond our walls to the courtyard and the adjacent lot to host:

- Farmer's Market
- Festival support: Shrimp Festival, Taste of Beaufort, Dragonboat Beaufort, TCL Graduations, Lowcountry Jaycees
- Food Truck location by City ordinance
- Hub for Cultural District Free Shuttle

Programming collaboration at the History Center and special events include:

- Friends of Fort Freemont
- Coastal Discovery Museum
- Heritage Library
- South Carolina Institute of Archaeology
- Mitchelville
- Parris Island Historical Society
- Port Royal Sound Foundation
- Experience Beaufort History Packages with Beaufort History Museum and Verdier House.

Frequent hosting of travel writers, tour planners, and special guests of the Beaufort/Port Royal CVB, Lowcountry and Resort Islands Tourism Commission, SC Parks Recreation and Tourism to support the promotion of Beaufort County. Santa Elena Representatives have given several talks – an underestimate of 100 - to groups around the State, and as far up as Washington DC in the past 4 years.

Thousands of local students visit the History Center on Field Trips and participate in "Student Day" at the Lowcountry Fair. While the majority of 5,000+ students are within Beaufort County, some out of County are included.

The Santa Elena Foundation events outside of facility have drawn about 15,000 to the Lowcountry Fairs, Scholars Conference, and Replica ship Ports of Call. An April 2019 Shipwreck Scholars Conference and Santa Maria replica ship are upcoming. A Spring 2020 Lowcountry Fair is being planned.



*Board of Directors:*  
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 Dr. Andrew J. Beall, Chairman  
 Deborah Dykes  
 COL US Army (RET) Gregory Dyson  
 Lieutenant General Jack Klimp, U.S. Marine Corps (Ret.)  
 Dr. Martha Moriarty, Associate Vice Chancellor at USC Beaufort  
 Professor Larry Rowland  
 Stu Rodman, Beaufort County Commissioner  
 Richard Thomas  
 John Trask III  
 Megan T. Morris, Executive Director

## MEMORANDUM OF UNDERSTANDING

The Santa Elena Foundation (SEF), a non-profit public charity, operates the Santa Elena History Center within the Beaufort County-owned building located at 1501 Bay Street, Beaufort, South Carolina. Heritage Library History & Ancestry Research Center (HLF), also a non-profit public charity, agrees to share space within the building at 1501 Bay Street.

The building at 1501 Bay Street includes display space for interpretation, a lecture hall, meeting rooms, event space, reception areas, retail space, offices and storage. Both the Santa Elena Foundation and the Heritage Library Foundation have need for space configured as is available within the Bay Street building. The two organizations operate through a combination of paid-staff, contractors, and volunteers.

Operations for SEF in the facility on Bay Street include: public interpretation of history (on the first and second floors), research and preservation of culture and history, lectures and presentations, limited retail of books and memorabilia, and private office space. Hours of public operation are Tuesday through Saturday, 10am to 4:30pm, and for other events as scheduled.

Operations for HLF in the facility on Bay Street include workspace for research, storage space for materials, and meeting space and presentation area. HLF and SEF will coordinate and share the responsibility of greeting the public at the front desk.

Given the alignment of operational models and activities for the organizations, the two entities wish to share use and operational costs for the building. HLF will occupy a large office and workspace on the first floor, near the lobby, to include bookshelves for storage, as specified and agreed by SEF Executive Director. HLF will continue to have access to two desktop computers, one printer/copier and furniture loaned by SEF, and HLF will incur expenses related to this equipment. HLF will have the ability to reserve the shared lecture room and conference rooms as needed.

With usage of these areas, HLF will make a monthly donation of the program fees it receives for special programs held at Santa Elena History Center; this is to assist with operational costs for the location. Desired cosmetic upgrades in the areas HLF occupies must be approved by the SEF Executive Director and are the responsibility of HLF.

The Santa Elena Foundation operates the physical plant for the building, provides utilities and supplies landscape maintenance, trash collection, Wi-fi and Internet access, cleaning service, required inspections, and administration for the facility. The building has security, fire alarm, and sprinkler systems operated by SEF. Use of building outside of the scheduled hours will be

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**SANTA ELENA**  
FOUNDATION

*Board of Directors:*  
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Dr. Andrew J. Beall, Chairman  
Deborah Dykes  
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Lieutenant General Jack Klimp, U.S. Marine Corps (Ret.)  
Dr. Martha Moriarty, Associate Vice Chancellor at USC Beaufort  
Professor Larry Rowland  
Stu Rodman, Beaufort County Commissioner  
Richard Thomas  
John Trask III  
Megan T. Morris, Executive Director

agreed to by both parties. Any event not directly associated with HLF will be contracted and managed by SEF.

The Santa Elena Foundation is a party to a lease agreement granting use of the 1501 Bay Street building by Beaufort County through October 2020, and for the unpaved parking lot across North Street. SEF is the host organization and lessee of the building; all communication and coordination with Beaufort County, the lessor, will be by SEF. Shared use of the building by the HLF is not a sub-lease. Both parties may choose to work together to secure use of the facility beyond the current lease term, which concludes in October 2020.

HLF must provide commercial liability insurance and property insurance for assets, inventory, and other property located within the building.

This MOU is agreed to by both parties for a twelve month term, ending February 1, 2020, at which point this agreement will continue on a month-to-month basis. A minimum of 2-month notice of termination by either party is required. Failure by HLF to make the monthly donation within 10 business days of the due date will result in termination of this agreement.

The opportunities to collaborate and strengthen their organizations through this collaboration in an ideal destination/facility, with free parking and a free shuttle, are the driving reasons of this fair and equitable partnership.

Agreed to:

\_\_\_\_\_  
Barbara Catenaci  
Executive Director  
Heritage Library Foundation

\_\_\_\_\_  
Megan Thibault Morris  
Executive Director  
Santa Elena Foundation

Date: \_\_\_\_\_

Date: \_\_\_\_\_

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**Date : 1/8/2016 11:43:11 AM**  
**From : "Stu Rodman"**  
**To : "Josh G" , "Keaveny, Thomas"**  
**Cc : "Sommerville, Paul" , "Jerry Stewart"**  
**Subject : Alliance Motion**  
**Attachment : Allianc.docx;**

All,

Attached is a simplified version as you consider the draft motion.

Cheers,

Stu

## **Beaufort County Economic Development**

**Motion:** That Beaufort County join an alliance contingent upon a minimum of eight Member of County Council affirmatively:

- 1. Nominating an alliance no later than February 8, 2016**
- 2. Voting for the negotiated contract with that alliance**

### **Process**

**Step 1:** Motion, requiring a simple majority, to be considered Monday, January 11th, at Government Committee and Council.

**Step 2:** If passed, Members will advise Paul and Stu of their nomination of a specific alliance. If no alliance receives 8 nominations by February 8<sup>th</sup>, the Motion dies.

**Step 3:** If and when an alliance is nominated by 8 Members, negotiations with the selected alliance will be initiated, during which time Council and the Mayors will debate staffing, organizational structure, operating protocols, etc.

**Step 4:** The negotiated contract to be considered by Council and executed upon receiving the approval of 8 Members.

Chairman Stu Rodman  
Councilman Paul Sommerville  
Beaufort County Council  
PO Drawer 1228  
Beaufort, South Carolina 29901-1228



**SANTA ELENA**  
FOUNDATION

*Board of Directors:*

COL US Army (RET) Christopher Allen  
 Dr. Andrew J. Beall, Chairman  
 Deborah Dykes  
 Greg Dyson  
 Lieutenant General Jack Klimp, U.S. Marine Corps (Ret.)  
 Dr. Martha Moriarty, Associate Vice Chancellor at USC Beaufort  
 Professor Larry Rowland  
 Stu Rodman, Beaufort County Commissioner  
 Richard Thomas  
 John Trask, III  
 Megan T. Morris, Executive Director

Chairman Stu Rodman  
 Councilman Paul Sommerville  
 Beaufort County Council  
 PO Drawer 1228  
 Beaufort, South Carolina 29901-1228

March 18, 2019

Ref: 1501 Bay Street Building

Chairman Rodman and Councilman Sommerville:

We understand Beaufort County may view joint occupancy of the 1501 Bay Street building by organizations other than the Santa Elena Foundation to require County approval. Enclosed are two Memorandum of Understandings (MOUs), one signed and one in process: Reconstruction Beaufort and the Beaufort Branch of the Hilton Head Heritage Library. They occupy four unused rooms.

Reconstruction Beaufort made donations totaling \$9,000. No financial donations have been made by the Heritage Library; yet now that the organization has an established presence in Northern Beaufort County, the organization wishes to make donations based on revenues they collect in the Beaufort Branch.

Enclosed also is a report of the numerous organizations with which the Santa Elena collaborates. A listing of the events within the 1501 Bay Street and at other sites across the Lowcountry is included. Generous assistance from Beaufort County helped make possible extensive progress made to discover and share the unique history and culture of this region.

Shared use of common areas—conference room, reception area, lecture hall, event room—and specific space assigned to each organization increases efficient utilization of the facility and enhances service to the public. Donations made by partner organizations help cover operating costs.

Other organizations made donations or paid event-specific use fees to the Santa Elena Foundation for events, tours, programs, and meetings. Activities at the building help make the History Center a vibrant location, and financial support received helps cover operating costs.

Please approve use of the building under the supervision of the Santa Elena Foundation as described in the MOUs. Both organizations are history-focused, not-for-profit groups that rely on volunteers to conduct activities serving the public.

Once again, thank you for helping bring the remarkable history of Beaufort County to life!

Sincerely,

Dr. Andrew J. Beall, Chairman, Santa Elena Foundation

---

PO Box 1005 · Beaufort, South Carolina 29901 · [www.Santa-Elena.org](http://www.Santa-Elena.org)

*Santa Elena Foundation is a registered non-profit 501(c)(3) charitable organization*

CountyFOIA#3\_000059



*Board of Directors:*  
 COL US Army (RET) Christopher Allen  
 Dr. Andrew J. Beall, Chairman  
 Deborah Dykes  
 COL US Army (RET) Gregory Dyson  
 Lieutenant General Jack Klimp, U.S. Marine Corps (Ret.)  
 Dr. Martha Moriarty, Associate Vice Chancellor at USC Beaufort  
 Professor Larry Rowland  
 Stu Rodman, Beaufort County Commissioner  
 Richard Thomas  
 John Trask III  
 Megan T. Morris, Executive Director

## MEMORANDUM OF UNDERSTANDING

The Santa Elena Foundation (SEF), a non-profit public charity, operates the Santa Elena History Center within the Beaufort County-owned building located at 1501 Bay Street, Beaufort, South Carolina. Heritage Library History & Ancestry Research Center (HLF), also a non-profit public charity, agrees to share space within the building at 1501 Bay Street.

The building at 1501 Bay Street includes display space for interpretation, a lecture hall, meeting rooms, event space, reception areas, retail space, offices and storage. Both the Santa Elena Foundation and the Heritage Library Foundation have need for space configured as is available within the Bay Street building. The two organizations operate through a combination of paid-staff, contractors, and volunteers.

Operations for SEF in the facility on Bay Street include: public interpretation of history (on the first and second floors), research and preservation of culture and history, lectures and presentations, limited retail of books and memorabilia, and private office space. Hours of public operation are Tuesday through Saturday, 10am to 4:30pm, and for other events as scheduled.

Operations for HLF in the facility on Bay Street include workspace for research, storage space for materials, and meeting space and presentation area. HLF and SEF will coordinate and share the responsibility of greeting the public at the front desk.

Given the alignment of operational models and activities for the organizations, the two entities wish to share use and operational costs for the building. HLF will occupy a large office and workspace on the first floor, near the lobby, to include bookshelves for storage, as specified and agreed by SEF Executive Director. HLF will continue to have access to two desktop computers, one printer/copier and furniture loaned by SEF, and HLF will incur expenses related to this equipment. HLF will have the ability to reserve the shared lecture room and conference rooms as needed.

With usage of these areas, HLF will make a monthly donation of the program fees it receives for special programs held at Santa Elena History Center; this is to assist with operational costs for the location. Desired cosmetic upgrades in the areas HLF occupies must be approved by the SEF Executive Director and are the responsibility of HLF.

The Santa Elena Foundation operates the physical plant for the building, provides utilities and supplies landscape maintenance, trash collection, Wi-fi and Internet access, cleaning service, required inspections, and administration for the facility. The building has security, fire alarm, and sprinkler systems operated by SEF. Use of building outside of the scheduled hours will be

---

PO Box 1005 · Beaufort, South Carolina 29901 · [www.Santa-Elena.org](http://www.Santa-Elena.org)

*Santa Elena Foundation is a registered non-profit 501(c)(3) charitable organization*



**SANTA ELENA**  
FOUNDATION

*Board of Directors:*

COL US Army (RET) Christopher Allen  
Dr. Andrew J. Beall, Chairman  
Deborah Dykes  
COL US Army (RET) Gregory Dyson  
Lieutenant General Jack Klimp, U.S. Marine Corps (Ret.)  
Dr. Martha Moriarty, Associate Vice Chancellor at USC Beaufort  
Professor Larry Rowland  
Stu Rodman, Beaufort County Commissioner  
Richard Thomas  
John Trask III  
Megan T. Morris, Executive Director

agreed to by both parties. Any event not directly associated with HLF will be contracted and managed by SEF.

The Santa Elena Foundation is a party to a lease agreement granting use of the 1501 Bay Street building by Beaufort County through October 2020, and for the unpaved parking lot across North Street. SEF is the host organization and lessee of the building; all communication and coordination with Beaufort County, the lessor, will be by SEF. Shared use of the building by the HLF is not a sub-lease. Both parties may choose to work together to secure use of the facility beyond the current lease term, which concludes in October 2020.

HLF must provide commercial liability insurance and property insurance for assets, inventory, and other property located within the building.

This MOU is agreed to by both parties for a twelve month term, ending February 1, 2020, at which point this agreement will continue on a month-to-month basis. A minimum of 2-month notice of termination by either party is required. Failure by HLF to make the monthly donation within 10 business days of the due date will result in termination of this agreement.

The opportunities to collaborate and strengthen their organizations through this collaboration in an ideal destination/facility, with free parking and a free shuttle, are the driving reasons of this fair and equitable partnership.

Agreed to:

\_\_\_\_\_  
Barbara Catenaci

Executive Director  
Heritage Library Foundation

Date: \_\_\_\_\_

\_\_\_\_\_  
Megan Thibault Morris

Executive Director  
Santa Elena Foundation

Date: \_\_\_\_\_

**Date : 1/8/2016 11:43:11 AM**  
**From : "Stu Rodman"**  
**To : "Josh G" , "Keaveny, Thomas"**  
**Cc : "Sommerville, Paul" , "Jerry Stewart"**  
**Subject : Alliance Motion**  
**Attachment : Allianc.docx;**

All,

Attached is a simplified version as you consider the draft motion.

Cheers,

Stu

## **Beaufort County Economic Development**

**Motion**: That Beaufort County join an alliance contingent upon a minimum of eight Member of County Council affirmatively:

- 1. Nominating an alliance no later than February 8, 2016**
- 2. Voting for the negotiated contract with that alliance**

### **Process**

**Step 1**: Motion, requiring a simple majority, to be considered Monday, January 11th, at Government Committee and Council.

**Step 2**: If passed, Members will advise Paul and Stu of their nomination of a specific alliance. If no alliance receives 8 nominations by February 8<sup>th</sup>, the Motion dies.

**Step 3**: If and when an alliance is nominated by 8 Members, negotiations with the selected alliance will be initiated, during which time Council and the Mayors will debate staffing, organizational structure, operating protocols, etc.

**Step 4**: The negotiated contract to be considered by Council and executed upon receiving the approval of 8 Members.

## **Beaufort County Economic Development**

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**Step 4**: The negotiated contract to be considered by Council and executed upon receiving the approval of 8 Members.

**Date :** 6/6/2018 4:22:56 PM  
**From :** "Kenny Zentner"  
**To :** tkeaveny@bcgov.net, psommerville@hargray.com  
**Subject :** Vacant Land  
**Attachment :** Vacant L.pdf;image001.jpg;image004.jpg;

See attached answer will suffice.  
He came through after being a bit of a jerk first.  
This concludes the matter.

Kenny Zentner  
Zentner Insurance Services, LLC

2 Merchants Lane, Suite 112  
Beaufort, SC. 29907  
Phone: 843-322-0224  
Fax: 843-322-0913  
wireless: 843-812-8881  
email: zentner@hargray.com  
Like us on facebook! <https://www.facebook.com/ZentnerInsuranceServicesLlc?ref=hl>

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---

**From:** James, Gary [mailto:gjames@bcgov.net]  
**Sent:** Wednesday, June 06, 2018 12:20 PM  
**To:** Kenny Zentner (zentner@hargray.com)  
**Cc:** Keaveny, Thomas; Sommerville, Paul  
**Subject:** Vacant Land

See Attached.

**Gary N. James**  
Beaufort County Assessor  
Beaufort County Government Robert Smalls Complex  
Post Office Box 1228, Beaufort, SC 29901-1228  
[gjames@bcgov.net](mailto:gjames@bcgov.net)  
(843) 255-2394





COUNTY COUNCIL OF BEAUFORT COUNTY  
**Office of the Assessor**  
Beaufort County Government Robert Smalls Complex  
Post Office Box 1228, Beaufort, South Carolina 29901-1228  
Phone: (843) 255-2400 Fax: (843) 255-9404  
*Web Site: [www.bcgov.net](http://www.bcgov.net)*

### **Vacant Land Definition**

Reference: The Dictionary of Real Estate Appraisal

**vacant land.** *See* unimproved land.

**unimproved land.** Vacant land or land that lacks the essential, appurtenant improvements required to make it useful

---

Reference: The Real Estate Dictionary, Fifth Edition. John Talamo, J.D.

**Vacant Land** – Land without buildings. May or may not have improvements such as grading, sewers, etc.

---

*NOTE: Typically, we consider land "Vacant" as being any land that has no "man-made" improvements; or has all improvements removed from it through demolition of the improvements located on the land.*

Date : 7/1/2018 5:56:49 PM  
From : "Keaveny, Thomas"  
To : "Sommerville, Paul" , "Sommerville, Paul"

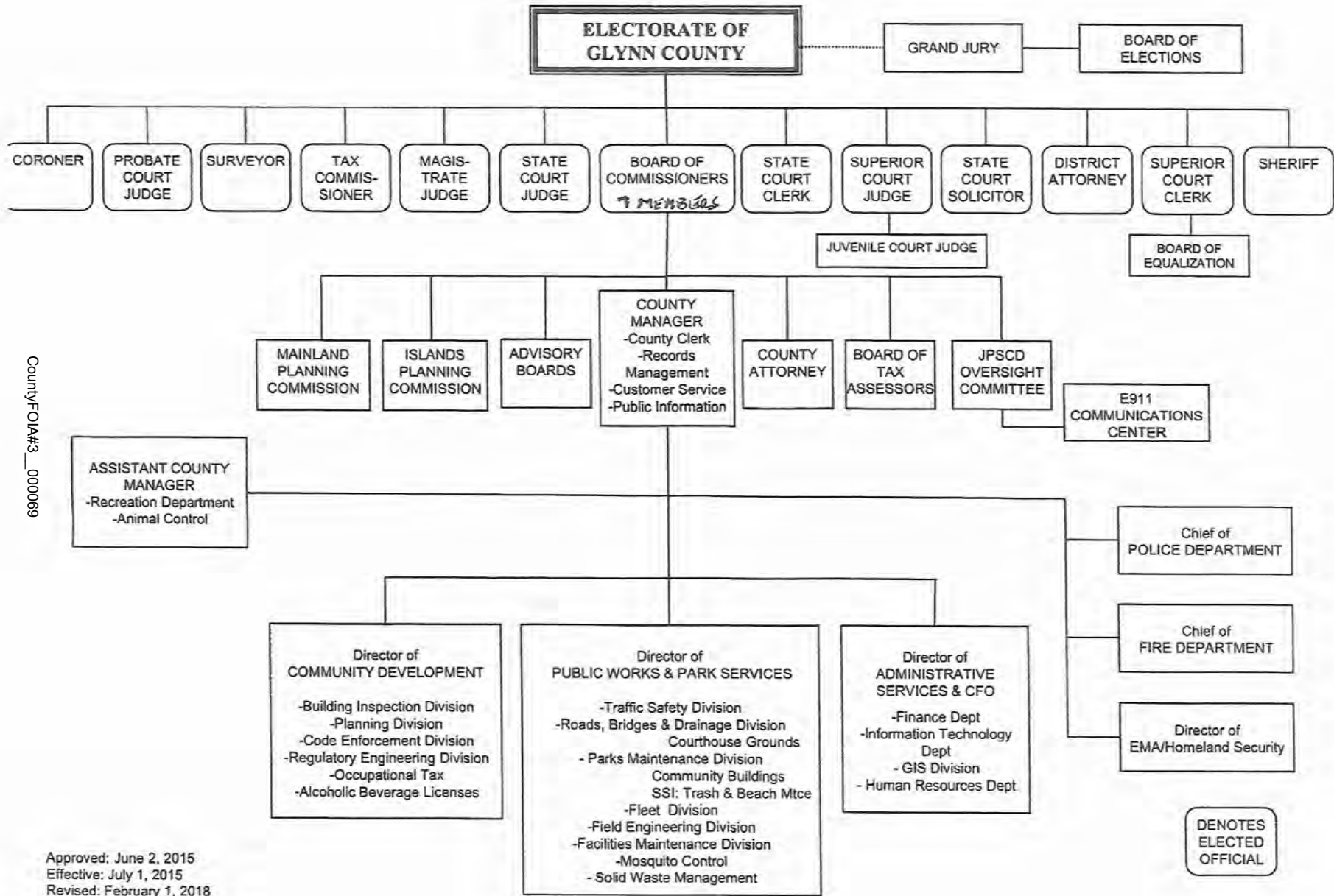
Thomas J. Keaveny II  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tel: (843) 255-2025  
Fax: (843) 255-9414



**From:** bcattorneykon@bcgov.net [mailto:bcattorneykon@bcgov.net]  
**Sent:** Sunday, July 1, 2018 3:00 PM  
**To:** Keaveny, Thomas

**ALAN OURS**

# GLYNN COUNTY GOVERNMENT ORGANIZATIONAL CHART



514 0479

CountyFOIA#3\_000069

CountyFOIA#3\_000069

Approved: June 2, 2015  
Effective: July 1, 2015  
Revised: February 1, 2018

DENOTES  
ELECTED  
OFFICIAL

## **Glynn County hires new administrator**

**By Carole Hawkins**

Posted Jul 6, 2010 at 10:31 PM

BRUNSWICK - The Glynn County Commission voted Tuesday to hire Alan Ours as county administrator.

He will begin work Aug. 9, replacing Charles Stewart, who retired this month.

"I think he was pretty much everyone's choice and all around the best candidate for the position," County Commissioner Tony Thaw said after the vote. "He has a good vision, a lot of enthusiasm and experience in working with different counties."

In public service for nearly 30 years, Ours has worked as an administrator for Lowndes County and Pickens County, S.C., and currently serves as the Lee County administrator.

Commissioner Jerome Clark said Ours struck him as someone with a cooperative spirit who could unify the community. Commissioner Don Hogan was impressed that Ours, a family man with 10 children, was so enthusiastic about wanting to live in Glynn County.

Commissioner Tom Sublett said Ours has the expertise needed for the job and appeared to have a thoughtful and professional management style.

"He came across as someone who would do the analysis and work and then refer the decision to all seven commissioners," Sublett said.

The commissioners adopted a compensation plan in which Ours will be paid more than Stewart.

Ours will receive a salary of \$135,000, a \$6,000 vehicle allowance, a \$540 cell phone allowance and benefits equal to those enjoyed by other county employees. The county will also pay Ours a housing allowance of \$1,200 a month for up to a

year or until his house in Albany sells. The county will also pay moving expenses.

Stewart's annual salary had been \$115,337, with a \$4,800 annual vehicle allowance and \$540 cell phone allowance.

While Glynn County leaders were busy praising Ours, in Lee County folks were already saying he would be missed.

Reached by telephone while on vacation, Ours said he felt honored to be chosen as Glynn's new county administrator.

"Glynn has a well-educated workforce. There's a commitment by the board of commissioners to do things well, things that add value to the citizens who live here and people seeking to locate their businesses here," he said.

Ours said one way Glynn County is similar to Lee County is both will again face growth issues once the economy recovers.

In Pickens County, Ours ran a government that was close in size to Glynn, with 650 employees and a \$50 million budget.

But facing issues particular to the coast will be new to him, and he's already begun researching that.

Though Glynn will be the eighth government he's worked for, Ours said he'd like for it to be his last. His family has vacationed here for years and Ours said it seems like a great place to live.

"I hope I'm able to retire in Glynn County. I still have small children, so that's going to be a long time," he said.

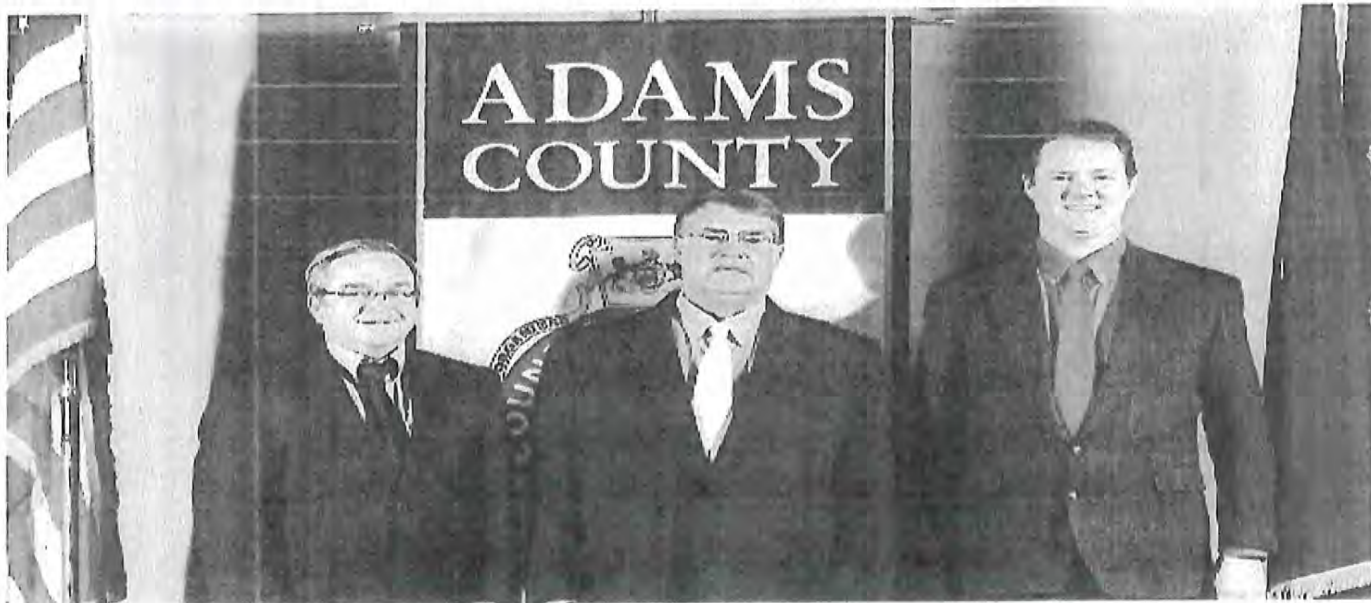
**ALBERT PENSKA**



( / ) ( / )

You are here: [Adams County \(/Pages/default.aspx\)](#) > [Departments \(/Dept/Pages/default.aspx\)](#) > [Commissioners \(/Dept/Commissioners/Pages/default.aspx\)](#)

## Commissioners Office



### About Us

The County of Adams is a unitary governmental entity of the Commonwealth of Pennsylvania. The County acts as an agent for the Commonwealth on various functions as specified by Pennsylvania State law. These functions include the delivery of numerous human services and the administrative oversight of various health and public safety programs and the maintenance of various County bridges. In addition to these functions, the County of Adams is responsible for maintaining the Court of Common Pleas, the Minor Judiciary System, and specific offices charged with keeping records of legal and judicial proceedings. The services of the county commissioners began with the maintenance of the local judicial system and the local prison.

### Contact Information

#### County Of Adams

#### Commissioners

117 Baltimore Street  
Room 201  
Gettysburg, PA 17325  
**Phone:** 717-337-9820

#### Hours:

8:00a.m. - 4:30p.m.  
Monday - Friday

### Meet Your Commissioners

Randy Phiel, Chairman (/Dept/Commissioners/Pages/CommissionerRandyPhiel.aspx)

Jim Martin, Vice Chairman (/Dept/Commissioners/Pages/CommissionerJimMartin.aspx)

Marty Karsteter Qually, Commissioner (/Dept/Commissioners/Pages/Commissioner-Marty-Karsteter-Qually.aspx)

### **Commissioners Staff**

County Manager (/Dept/Commissioners/Pages/County-Manager.aspx)

Chief Clerk (/Dept/Commissioners/Pages/Chief-Clerk.aspx)

### **County Clicks**

Calendar (/Pages/Calendar.aspx)

TGIF Newsletter (/Dept/Commissioners/Pages/TGIFNewsletter.aspx)

Photo Gallery (/Dept/Commissioners/Pages/Photo Gallery.aspx)

County Profile (<http://adamsgis.maps.arcgis.com/apps/Cascade/index.html?appid=2344c4425e1543f4aa631e373ca991dd>)

County Plans (/Dept/Planning/Pages/CountyPlans.aspx)

Organizational Chart (/Dept/Commissioners/PublishingImages/AC Organizational Chart.png)

### **County of Adams**

17 Baltimore Street

Gettysburg, PA 17325

Phone: 717-334-6781

Fax: 717-334-2091

Hours: 8:00am - 4:30pm

Monday thru Friday

### **Quick Navigation**

### **Resources**



( / ) ( / )

You are here: Adams County (/Pages/default.aspx) > Departments (/Dept/Pages/default.aspx) > Commissioners (/Dept/Commissioners/Pages/default.aspx) > County Manager (/Dept/Commissioners/Pages/County-Manager.aspx)

## County Manager

### About Us

The County Manager, is appointed by the Board of Commissioners. The County Manager is Albert Penksa, who, in his position as the County Manager, is charged with carrying out the policies established by the County Commissioners and provides general management of County government. Adams County is a value driven organization dedicated to providing responsive, respectful and excellent service to a vibrant community in a cost effective manner. To deliver excellent public service that enhances quality of life and addresses our community's needs, now and in the future. The County Manager's Office provides professional recommendations to the Adams County Board of Commissioners, in Financial Operations, Economic Development, Emergency Services, Administrative and Human Resource matters for the County. Responsibilities are, Implementing the Vision and Policies of the Board. Ensuring high quality services, with outstanding customer service, at a good value to taxpayers. Fostering economic growth and fiscal sustainability. Enhancing the County's reputation as a high performing, learning, caring organization that operates in a manner consistent with its mission and values, making Adams County an employer of choice. The County Manager is the principal administrative officer of the County and is responsible for carrying out policies determined by the Board of Commissioners, and for the day-to-day operations and management of a broad range of county services.

### The CCAP Academy of Excellence Award

Advanced Certification (/Dept/Commissioners/Documents/ccapaward.pdf)

### County Manager Receives Professional Certification

Credentialed Manager (/Dept/Commissioners/Documents/icmacm.pdf)

### Contact Information:

**Albert M. Penksa, Jr.**

**ICMA-CM, CGFM**

**County Manager** (/Dept/Commissioners/Documents/icmacm.pdf)

### County of Adams

#### Commissioners

117 Baltimore Street  
Room 201  
Gettysburg, PA 17325

**Phone:** 717-337-9820

**Fax:** 717-334-2091

**apenksa@adamscounty.us** (mailto:apenksa@adamscounty.us)

### Hours

8:00a.m. – 4:30p.m.

Monday - Friday

Albert M. Penksa Jr., CGFM, ICMA-CM  
P.O. Box 4350  
814-242-6281(cell), email: amp5599@gmail.com

Gettysburg, PA 17325

October 22, 2015

County Commissioners  
601 SE 25<sup>th</sup> Ave.  
Ocala, FL 34471

MARION COUNTY  
THEN  
APPLIED TO  
WINTER HANER  
(ATTACHED)

Dear Commissioners:

This letter is requesting consideration for the position of County Administrator listed with GovHR. Marion County has similar traits to the county I manage with its challenges of balancing agriculture and economic development. As Marion County grows it will experience the pressures of tourism, a national forest, maintaining parks and natural resources along with desires of the citizens to maintain a positive outlook for economic development. All of these issues excite me and encourage me to attain my goal of working, living and enjoying a growing community.

Having been a leader throughout my career, you will find that my leadership skill will enable me to follow the mission of the county and engage the dynamics that make up the communities within the county. All said these experiences will be of value in the performance of duties and implementation of policies to meet the goals by engaging the issues, assessing approaches, collaborating with departments and striving to meet the goals and objectives desired by the Commissioners to maintain a sound financial position.

My resume demonstrates to you my varied experiences in management, financial operations, budgeting, governmental relations, business and economic development in a tourist area. Being an effective manager I have been able to balance budgets, add to fund balance, maintain positive relationships with the financial sector and improve upon the credit rating.

Specifically, my administration will address the challenge of growing revenue, identify areas to reduce expenditures and also approach the challenge of enhancing the economic development as outlined in the comprehensive plan 2035. Development will require a measured approach to lead a team effort of all contributing entities to seek and encourage the right businesses to partner with the county and its partners for the most effective benefit to enhance the desires of the whole county community.

The employees of Marion County are a valued asset and I will strive to mentor, coach and lead by example to ensure their growth and convey appreciation for the service that they provide on behalf of the Commissioners and administration. You will find that I am an administrator that enjoys being in the departments in order to get to know staff and to see how operations perform but not to micro manage. As a collaborative leader, my management experiences and direction will allow the staff to meet objectives and mandates as they partner with me to exceed expectations as the needs of the citizens are met. This will allow for engaging of the initiatives

envisioned with determination to ensure their completion effectively and on target while allowing for the County to grow in the manner desired.

I have the ability to advise and foster an effective Commission decision making process and hopefully you will trust that my visionary and futuristic approaches to address the needs of the Board will add value to your objectives. Information will always be forthcoming so that decision making is based on all available information that can be acquired. Information submitted to the Board will be in the manner prescribed - with or without a recommendation as would be preferred.

Under my management there will be a critical and analytical approach to the budget, a relentless effort to improve efficiencies and the evaluation of programs to ensure their effectiveness in their current structure. Successfully negotiating union contracts in my role has provided for stability and improved working conditions for our collective bargaining unit staff.

I welcome the opportunity to be a contributor to the mission of Marion County and to augment the leadership of the Board as you desire to have the County maintain the quality of life desired for the residents while preserving the healthy financial position the County has attained.

I look forward to meeting with you to discuss the prospects of my contribution to Marion County.

Sincerely,

*Albert M. Penksa Jr*

Albert M. Penksa Jr.

## Albert M. Penksa, Jr.

---

### Contact Information

Address: 620 Coon Ridge Rd.  
Johnstown, Pennsylvania 15905

Cell: 814-242-6281  
Work: 717-337-9815

Email: amp5599@gmail.com

---

### Education

- Bachelor of Arts – Economics  
University of Pittsburgh, Pittsburgh, Pennsylvania

---

### Work History

**2010 to Present**

Adams County, Pennsylvania (102,000)

County Manager

**July 2010 to December 2010**

Antis Township, Pennsylvania (population 6,500)

Township Manager

**2009**

Self-Employed Business Consultant

**2000 to 2009**

Commonwealth of Pennsylvania

Western Regional Director/Supervisor-Bureau of Invest-  
PA Department of Treasury

**January 2000 to August 2000**

CBIZ Services

Senior Manager Business Development

**1988 to 2000**

Cambria County, Pennsylvania (population 152,200)

Controller

**1984 to 1988**

Records Management Consultant

**1979 to 1984**

Deputy Register of Wills

**Work History – cont'd**

1973 to 1979

Quaker Sales Corporation

Lead Worker &amp; Equipment Operator

---

**Data Summary:**

Candidate:	Albert M. Penksa
Organization:	Adams County, Pennsylvania
Position:	County Manager
Budget:	\$71 million
Total Number of Employees:	535
Current Salary:	\$96,600
Expected Salary:	\$180,000
Reporting Relationship:	Reports to the County Commission
Years of Experience:	36

---

**Professional Affiliations:**

- International City/County Management Association
- Government Finance Officers Association
- Pennsylvania Economic Development Association
- Association of Government Accountants

Section 9

Albert M. Penksa Jr. CGFM  
County Manager ICMA-CM  
Gettysburg, PA 17325  
814-242-6281(cell), email: amp5599@gmail.com

November 15, 2016

City Council  
City of Winter Haven  
451 Third St. NW  
Winter Haven, FL 33881

Dear Council Members

This letter is requesting consideration for the position of City Manager posted with the Colin Baenziger & Associates. Being a manager that likes to engage people face to face with a gracious smile and firm hand shake' Doing so is to express my willingness to listen to the residents, business community and government leaders.

Having displayed leadership throughout my career which is illustrated in my resume, it is that leadership skill that will enable me to engage the mission of the city and objectives of city council. Furthermore, under your direction the objective is to become an integral part of the community, engage the departments, maintain an eye to finances, development and to be aware of the dynamics that make up the community.

My resume will demonstrate to you my varied experiences in management, financial operations, budgeting, governmental relations, business and economic development. These experiences will be of value in the performance of policies set forth to achieve the Council's goals. Then to develop the strategic plan and enhance the efforts to expand on the redevelopment of the downtown and capital projects. Additionally, while forging lasting relationships to grow the city's economic development which will improve the financial ability of the city to meet its obligations.

The experiences garnered through my positions as an official in the State and as County Manager in Adams County, Gettysburg Pennsylvania will allow me to provide the leadership and direction required by Council. Furthermore, having served under the watchful eye of the public, holding press conferences, addressing large groups and making presentations to executives will allow me to handle the needs of the position in a professional and confident manner. Having the ability to develop and maintain relationships with business owners, community leaders and public officials on both sides of the aisle will hopefully augment the objectives of Council.

Section 9

As your city manager my day will be to diligently engage each department, the management team and the citizens to address each issue whether it is simple, complex or challenging. In governing there is reality and then there is the perception of the issue, being very cognizant of reality verses perceptions of issues, my actions will be quickly to convey them as I become aware or understand them.

My management experiences in the supervision of staff to meet objectives and mandates will allow for effective continuity of the programs in place while allowing for the breaking of new ground for growth ahead. I believe that the employees of the city are its greatest asset which coincides with the public opinion results. As the manager I will strive to mentor, coach and lead by example to ensure their growth and share our appreciation for the service that they provide on behalf of the administration and the Council.

I have the ability to advise and foster an effective decision making process and hopefully you will trust that my visionary and futuristic approaches to address the needs of the City will add value to your objectives. Information will be forthcoming in a manner prescribed by council and timely. Under my management there will be a prudent eye on the finances, a daily effort to improve efficiencies and ongoing analysis of programs to ensure their effectiveness. That has been accomplished in the County of Adams while improving fund balance and having built a solid financial position for the future.

Winter Haven will afford me the opportunity to operate in an arena that is suited to my skills, my visioning and my progressive approach to governing and advising. I look forward to meeting with you to discuss the prospects of my contribution to your administration. Winter Haven is a very appealing vibrant growing city to which I desire to contribute to the high levels of service in a cost effective manner of a dynamic city on the move.

Sincerely,

*Albert M. Penksa Jr*

Albert M. Penksa Jr.



## Winter Haven residents to have chance to meet city manager candidates

By Mike Ferguson

Posted Jan 18, 2017 at 8:20 PM

The event, sponsored by the city and Greater Winter Haven Chamber of Commerce, will introduce the three remaining candidates for city manager Friday night.

WINTER HAVEN — Residents will get a chance to meet the man who could be the city's next top appointed official at a meet-and-greet Friday night.

The event, sponsored by the city and Greater Winter Haven Chamber of Commerce, will introduce the three remaining candidates for city manager. Earlier this month, the City Commission narrowed a field of eight semifinalists to four, but Caryn Gardner-Young withdrew her name from consideration Tuesday in an email to City Clerk Vanessa Castillo.

"I very much appreciate your consideration of me as the City Manager of Winter Haven," she wrote. "After further thought my family and I believe Winter Haven is not the right fit for me so I have decided to withdraw my application for this position in order for you to move forward with someone who would be a better fit."

Gardner-Young was the only candidate from Florida. She was most recently city manager in Parkland before resigning in October.

The city of Winter Haven has been without a city manager since Sept. 12 when the commission voted 3-2 to fire Deric Feacher, citing a lack of communication. Feacher's final annual salary was about \$133,000.

The remaining candidates are:

n Al Penska, county manager of Adams County, Pa.

n John Shepherd, township manager of Township of North Huntingdon, Pa.

n Thomas Thomas, former city manager of Rock Island, Ill.

"I'm looking forward to the opportunity to speak to each candidate on the collaborative effort of the city," Chamber President and CEO Katie Worthington said.

"The secret sauce for Winter Haven the last three to five years has been the collaboration of the community," she said. "Positivity and collaboration have been important over the last five years in creating momentum and I want to see how (the candidates) would work to keep that going."

#### **PENSKA**

Penska, 61, said he was attracted to Winter Haven because it's pro-growth and caters to all facets of the community, including businesses and families. Penska said he was excited the chamber was willing to sponsor the event Friday, because it shows its involvement.

"I have a broad range of experience in government," Penska said. "I hope to show my expertise and experience to the citizens and the commission."

Penska hasn't worked in Florida, but considers it an "exciting challenge."

He said he would make a good fit because he understands the importance of growth, economic development and relationship building.

"These things are what I like to do and what I'm all about," he said. "I'm excited to lend my time and my expertise."

#### **SHEPHERD**

Shepherd, 49, hasn't worked in Florida, but said he and his family frequently visit Central Florida and the Gulf Coast.

"I think it's a good location for me and my background," Shepherd said. "Winter Haven is a really good fit — the size, their goals."

Shepherd said he was looking forward to meeting the residents and the commission.

"I think I would bring a lot of experience and I think I would bring a fresh perspective," he said. "I think I would bring a lot of energy to the job as well."

## **THOMAS**

Though Thomas, 49, most recently worked in Illinois, he has previously worked in Tallahassee, Largo and Pinellas Park.

"I'm definitely looking forward to meeting the mayor and (commission) and just getting a feel for the community," Thomas said. "I was looking for a city that was that size and was progressive. I was looking forward to a community that had diversity, which was really important to me and my family."

Thomas said he's well-rounded and could bring new perspective and ideas to the city.

"I've worked in several states and I've worked at just about every level of government," he said. "I like to think that I can be an asset to the organization. I'm looking forward to meeting everyone."

## **DETAILS**

Friday's event is to begin at 5 p.m. and last until about 6:30 p.m. on the second floor of the chamber, 401 Ave. B NW.

Each of the three candidates will make a brief introduction. Admission is free and open to the public. Light refreshments will be served.

The City Commission will conduct interviews of the candidates at 8:15 a.m. Saturday at City Hall. Each of the five commissioners will then individually talk with the candidates in a forum closed to the public.

Commissioners will reconvene in the afternoon at which time a decision could be made.

"It's an opportunity for the citizens and business owners to provide their feedback (on the candidates) to the commissioners," Worthington said. "This is one of the only opportunities to meet with the candidates before the commission makes a decision."

— *Mike Ferguson can be reached at [Mike.Ferguson@theledger.com](mailto:Mike.Ferguson@theledger.com) or 863-401-6981.*

*Follow Mike on Twitter [@MikeWFerguson](https://twitter.com/MikeWFerguson).*

**ROGER RENLEMAN**

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# County Commission

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## [Commission District Map](#)

A county is a political subdivision of the State of Alabama. Among the principal governmental functions vested in Alabama counties are law enforcement; tax assessment, levy and collection; administration of decedent's estates and probate matters; maintenance of real and personal property title records; construction and maintenance of public roads and bridges; and maintenance of the county courthouse, which provides office space for various county officials and departments.

Lee County is governed by a six-member County Commission, composed of a Chairman and five Commissioners. The Probate Judge, who serves as Chairman of the County Commission, is elected countywide for a six-year term. The other five members of the County Commission are elected from single-member districts for four-year terms. Each Commissioner must be a registered voter and live within the district they represent. Commissioners are not all elected at the same time. Three commissioners are elected in one election cycle, and the other two members are elected in the next election cycle two years later, so that the terms are staggered for continuity.

Three members of the Commission constitute a quorum for the conduct of business. A simple majority vote of those present and voting determines county policies. The Chairman is authorized to vote only in case of a tie. The Chairman presides over the meetings and is responsible for keeping the minutes of the meetings of the County Commission.

NOTHING MORE  
AND WEBSITE

RE

COUNTY ADMINISTRATOR



The County Commission employs a County Administrator, who serves as its chief administrative officer. It is the responsibility of the County Administrator to carry out the policies and directives of the Commission, and for the development and management of the County's annual operating budget. The Administrator serves as the budgetary agent for all county offices. The County Administrator is also responsible for the supervision and management of various department heads, and for ensuring that all agreements, leases and other contractual obligations of the Commission are properly performed. The County Administrator works with Lee County Commissioners and other elected county officials to facilitate the delivery of quality and effective services to the citizens of Lee County.

A



Date : 7/3/2018 12:38:56 PM  
From : "Keaveny, Thomas"  
To : "Sommerville, Paul" , "Sommerville, Paul"  
Cc : "Gregory, Suzanne"

Thomas J. Keaveny II  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tel: (843) 255-2025  
Fax: (843) 255-9414

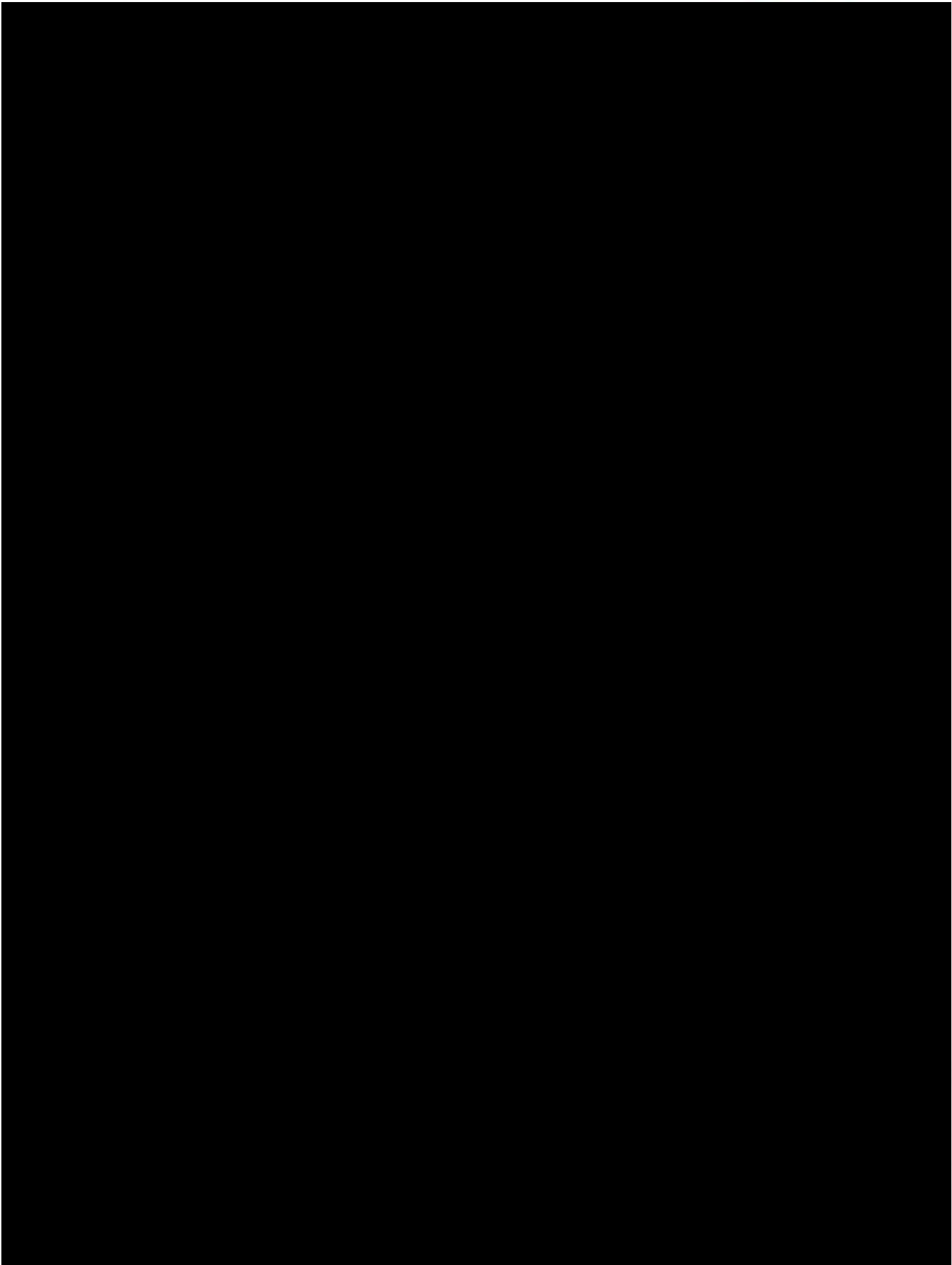


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**Sent:** Tuesday, July 3, 2018 8:07 AM  
**To:** Keaveny, Thomas

CountyFOIA#3\_\_000093

0499

534



CountyFOIA#3\_\_000094

0500

535

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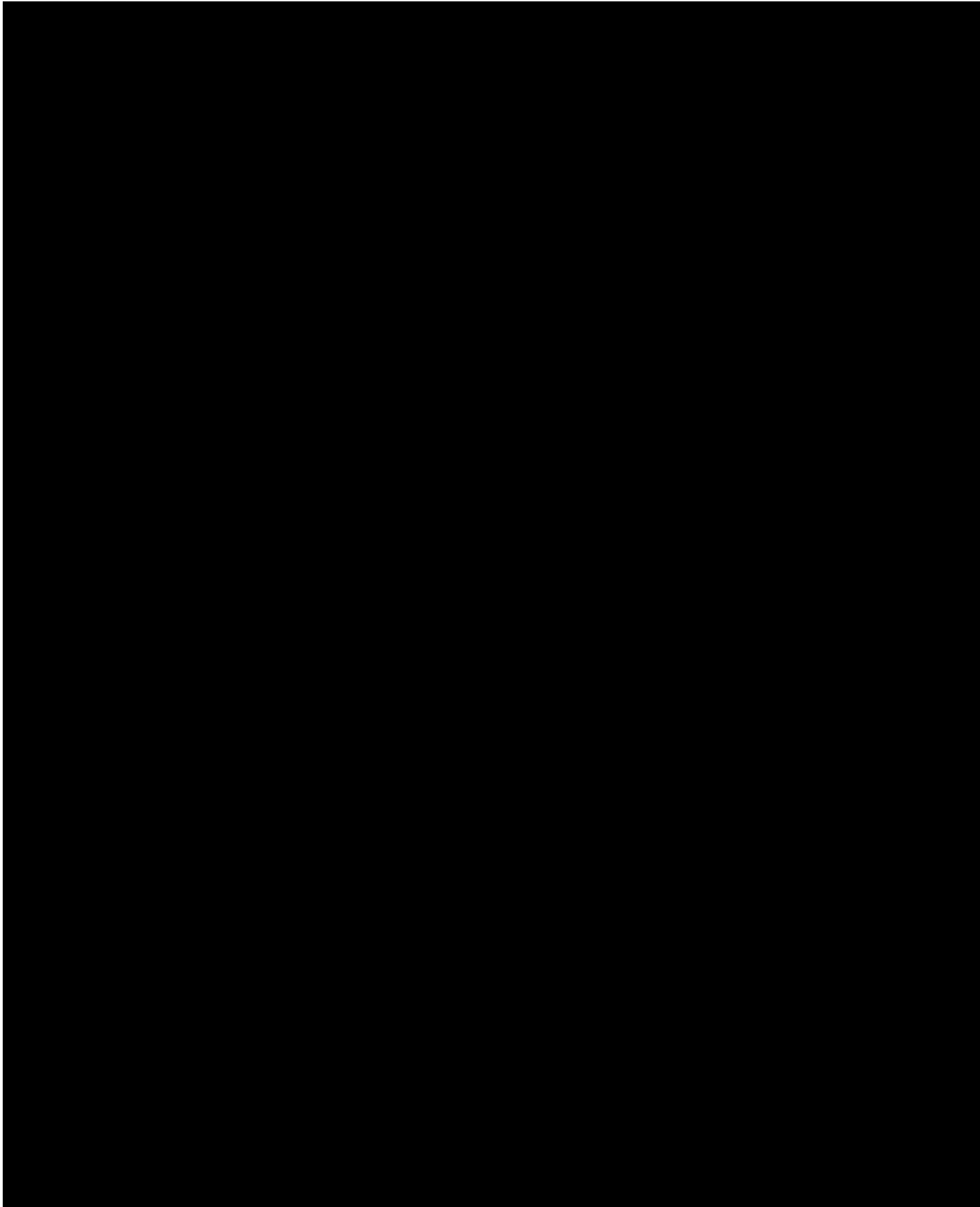
Thomas J. Keaveny II  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tel: (843) 255-2025  
Fax: (843) 255-9414

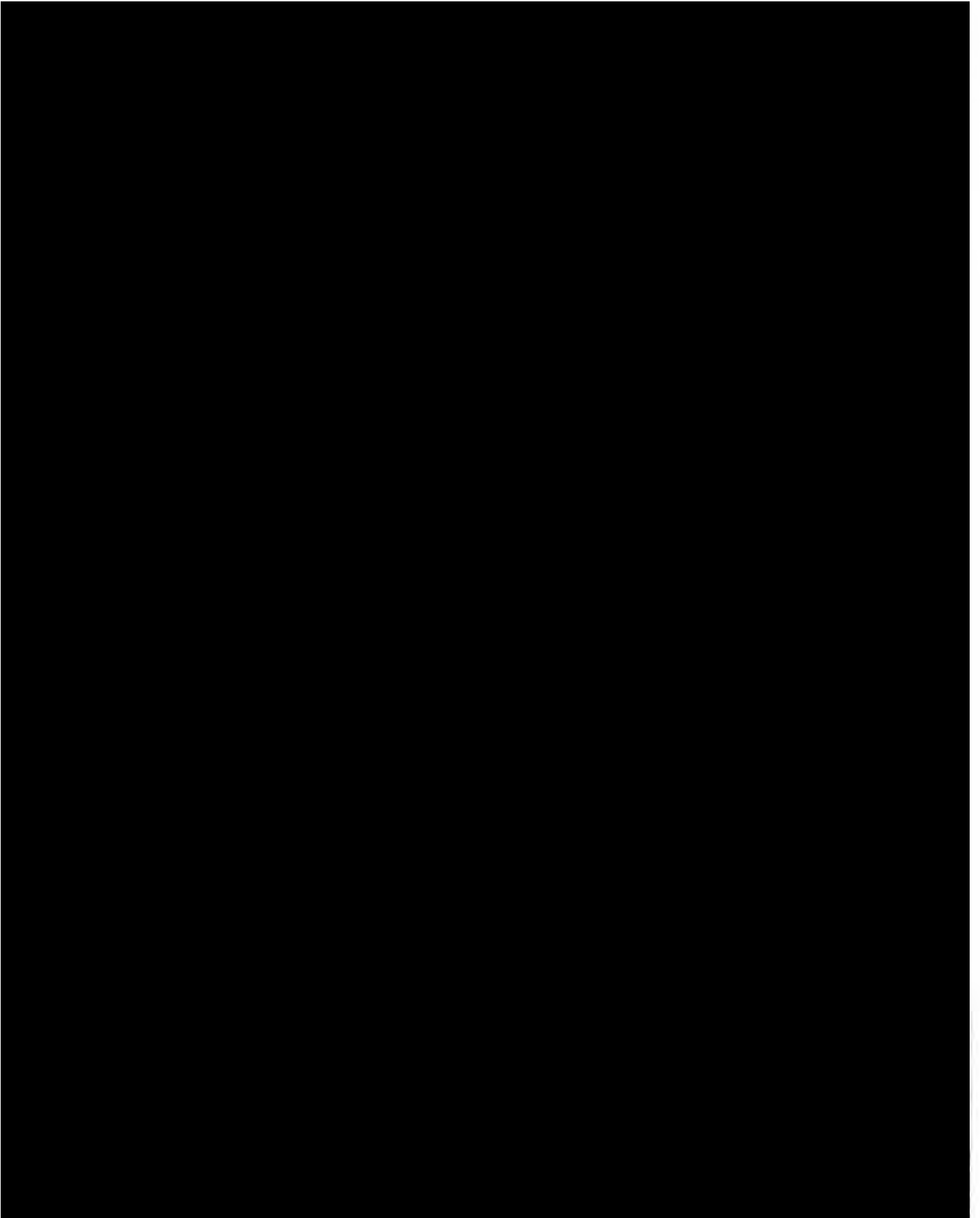


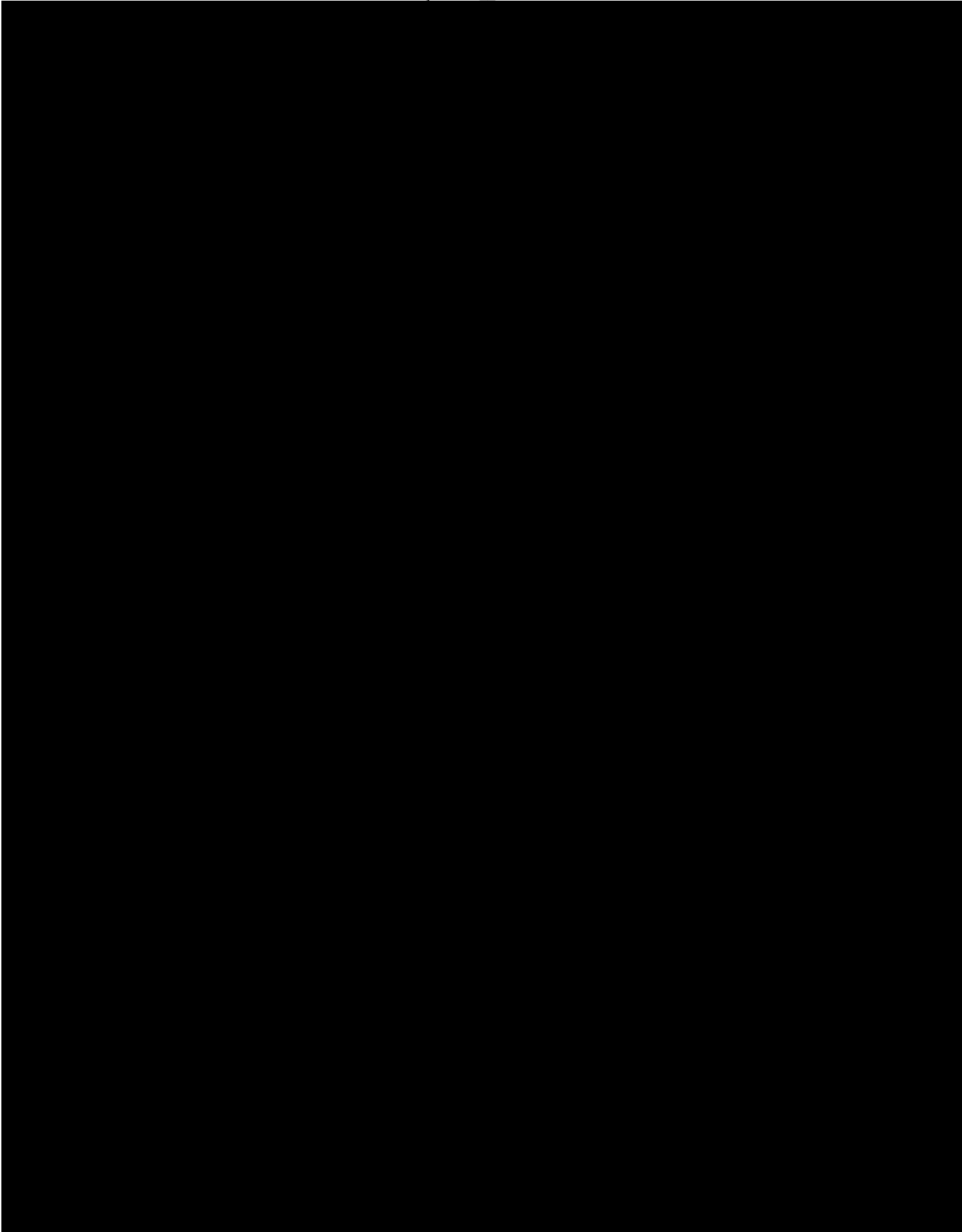
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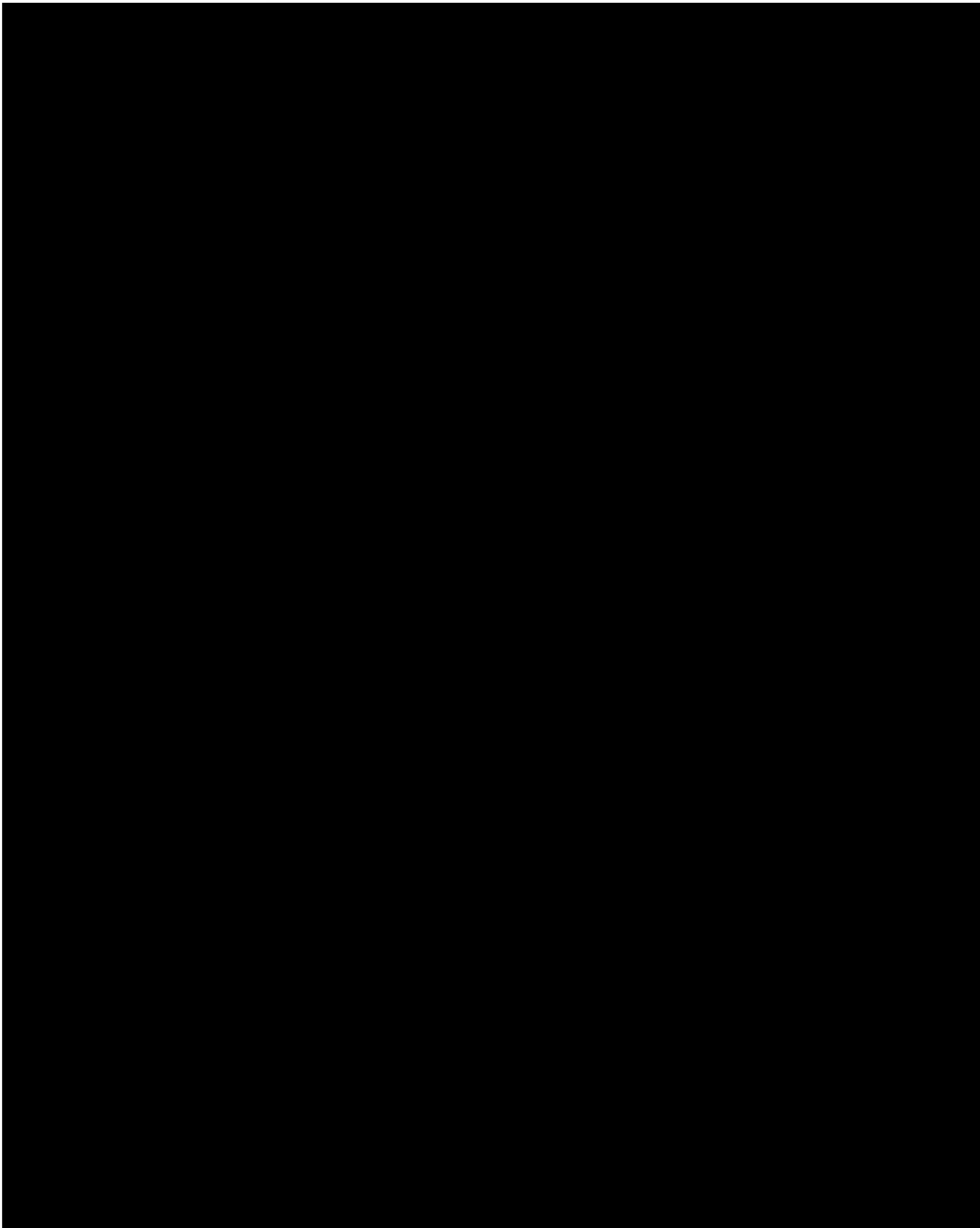
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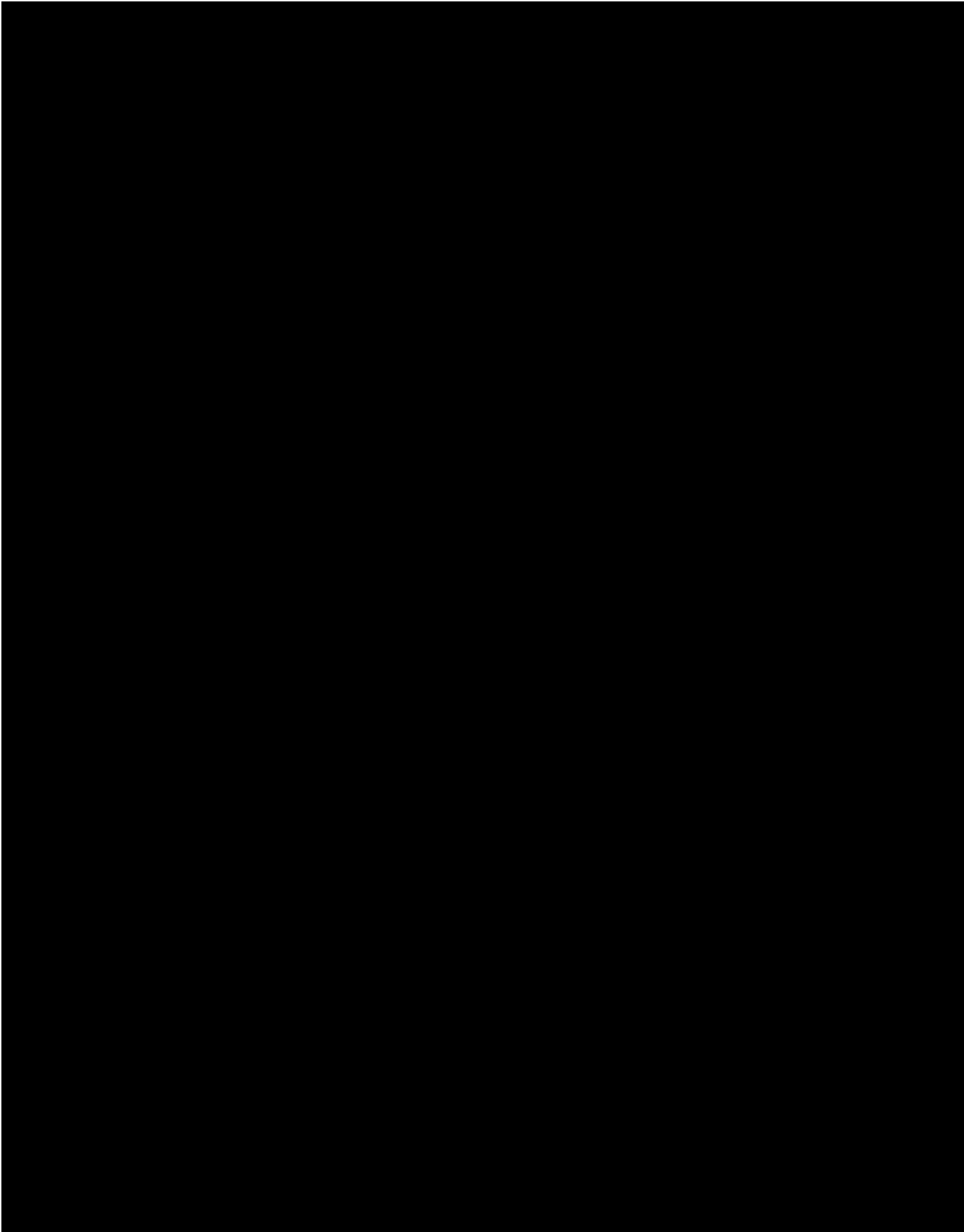
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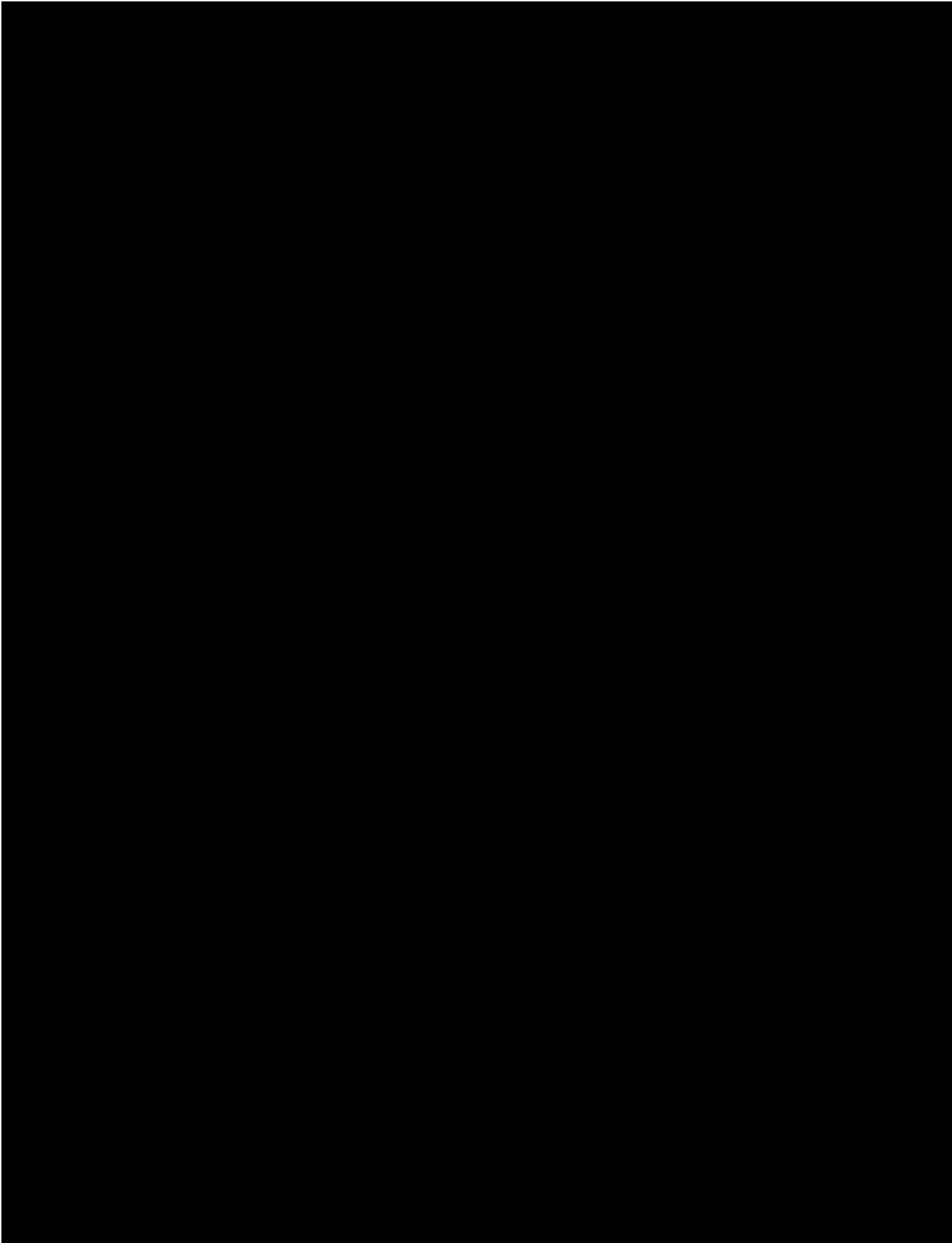


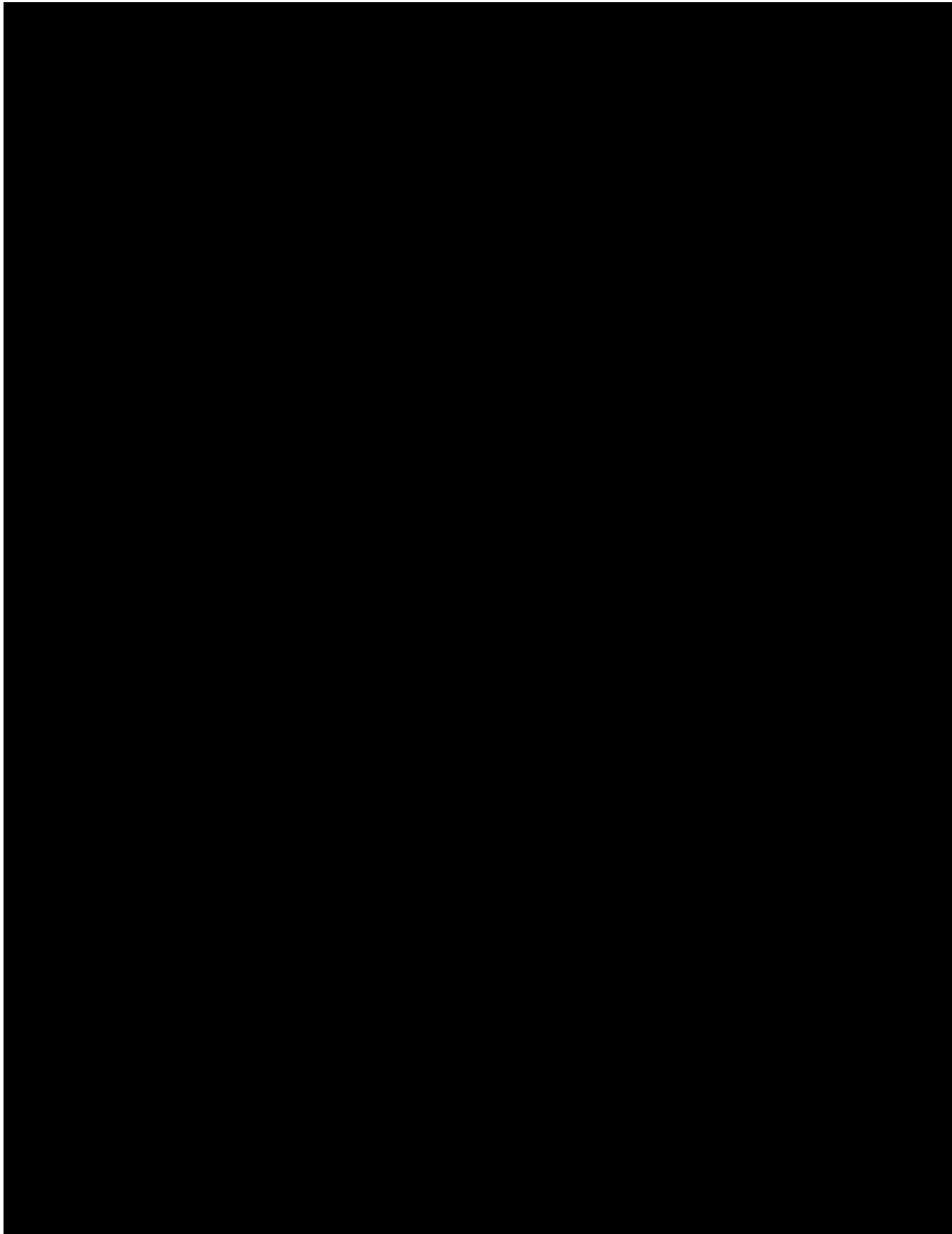


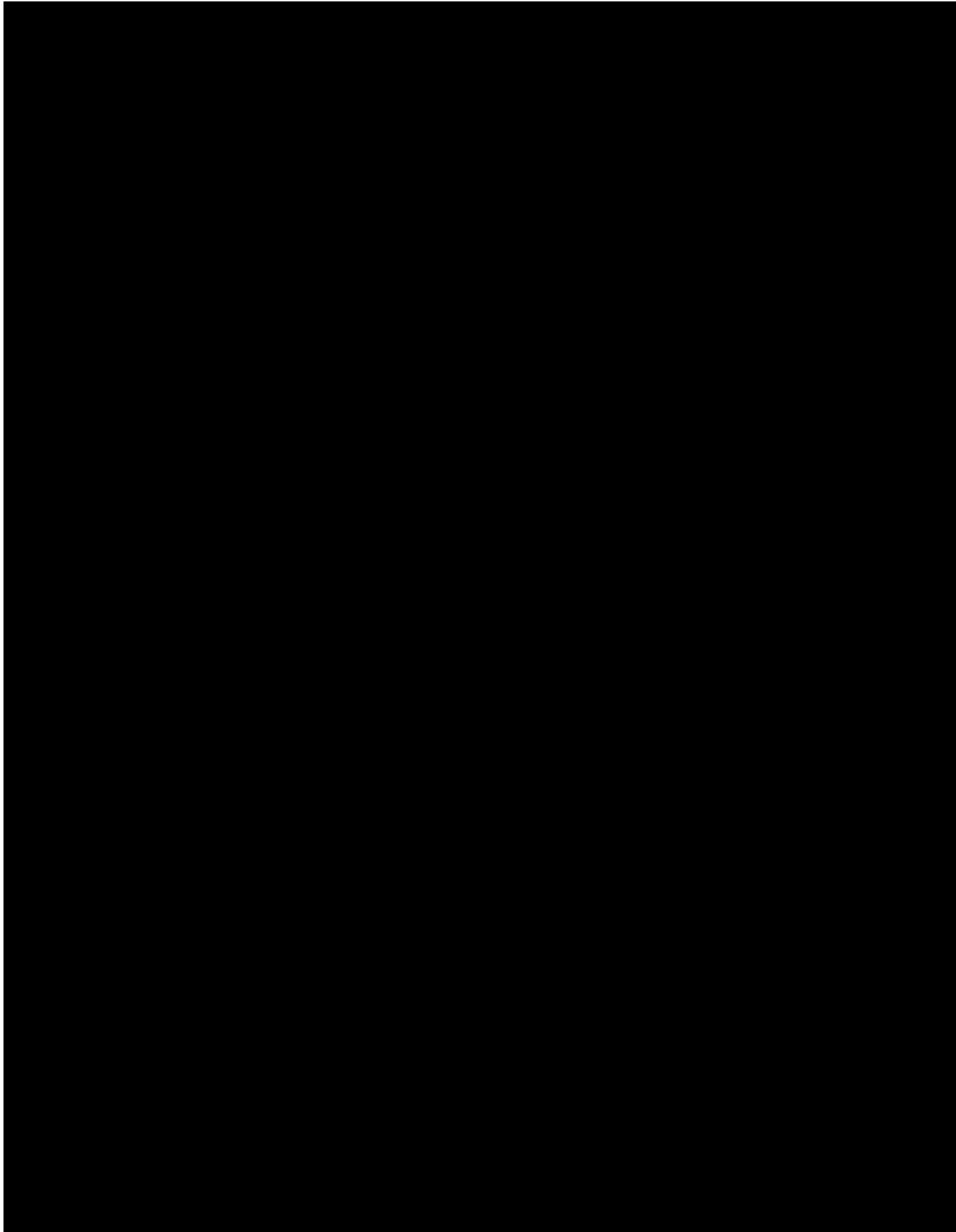


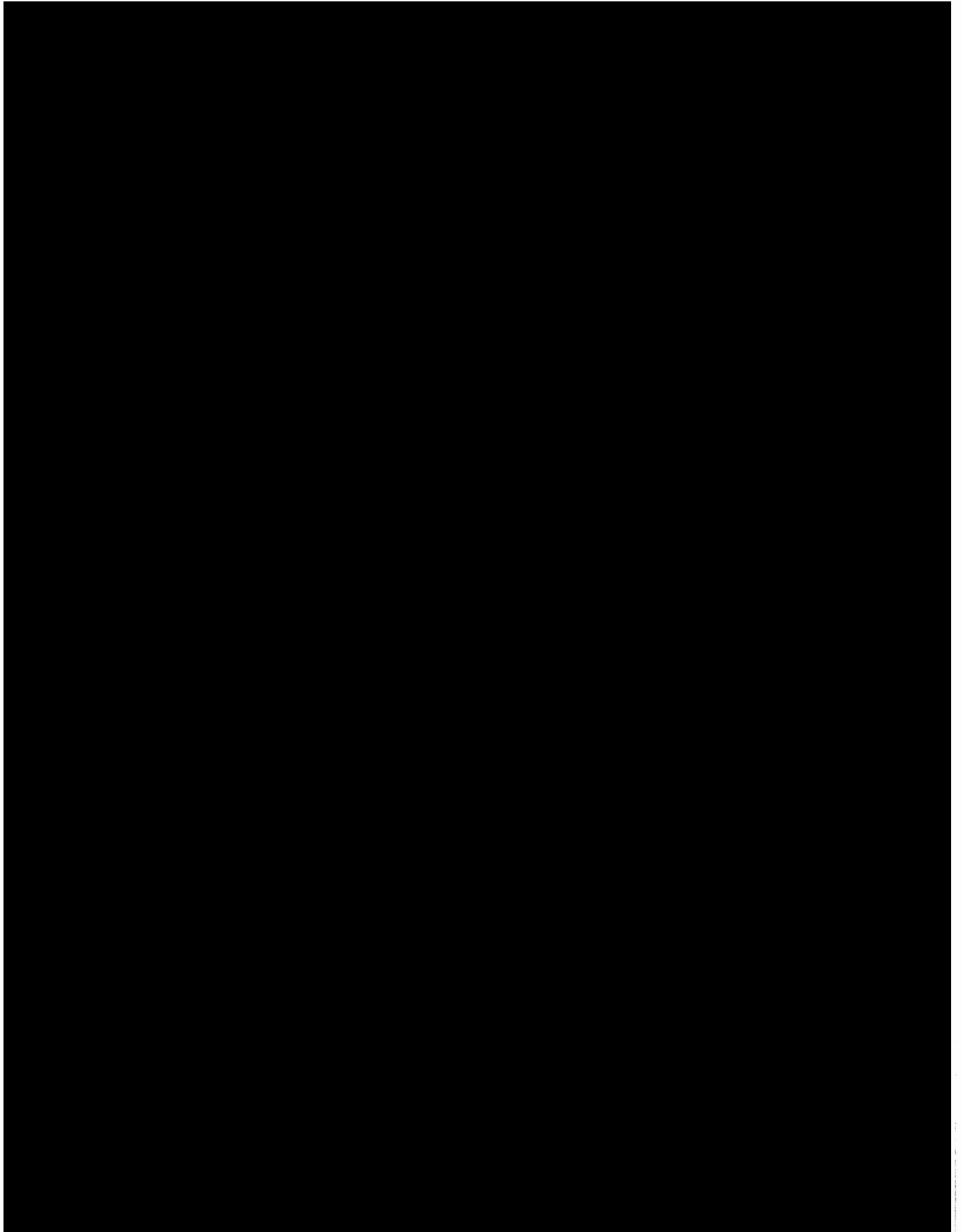


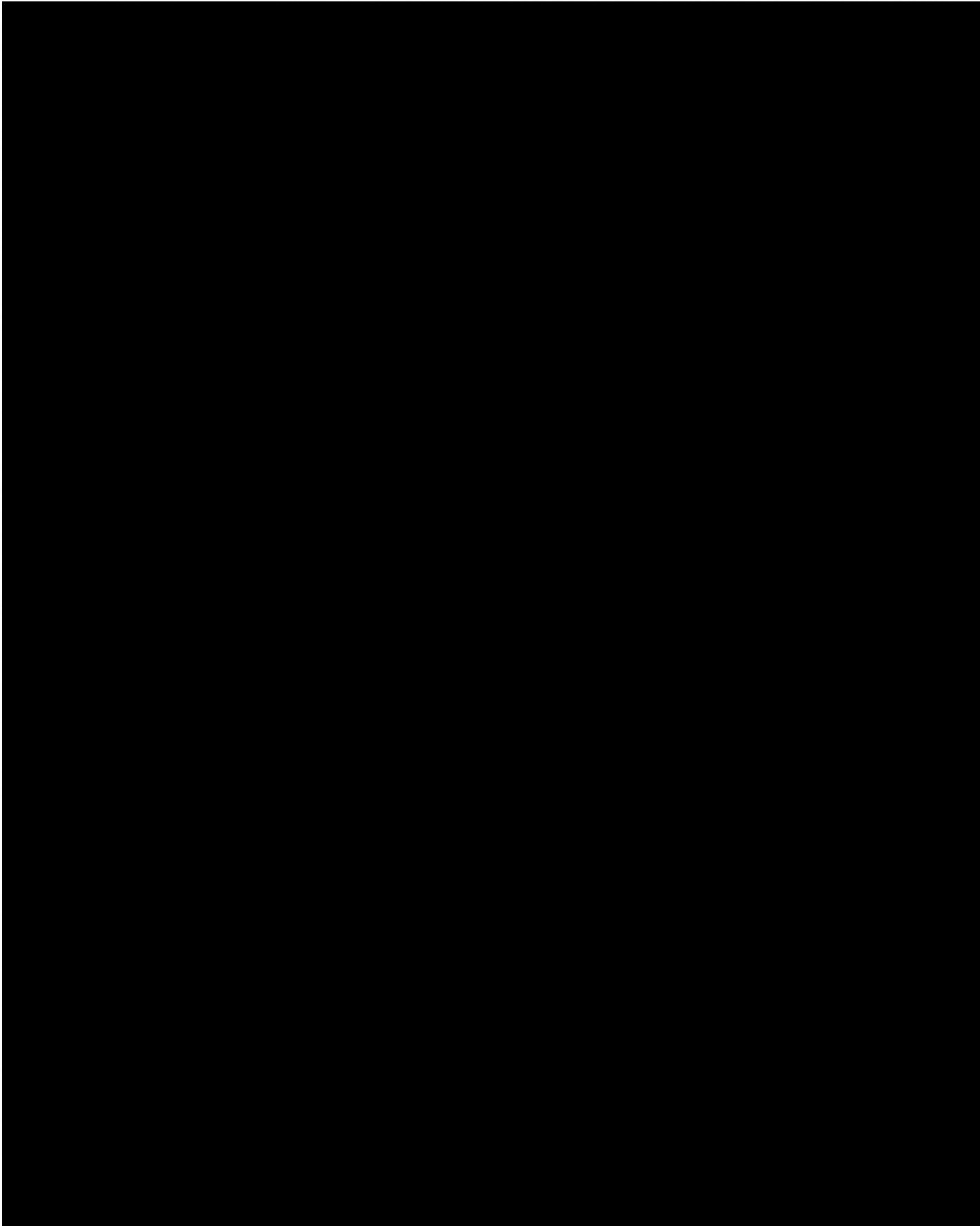


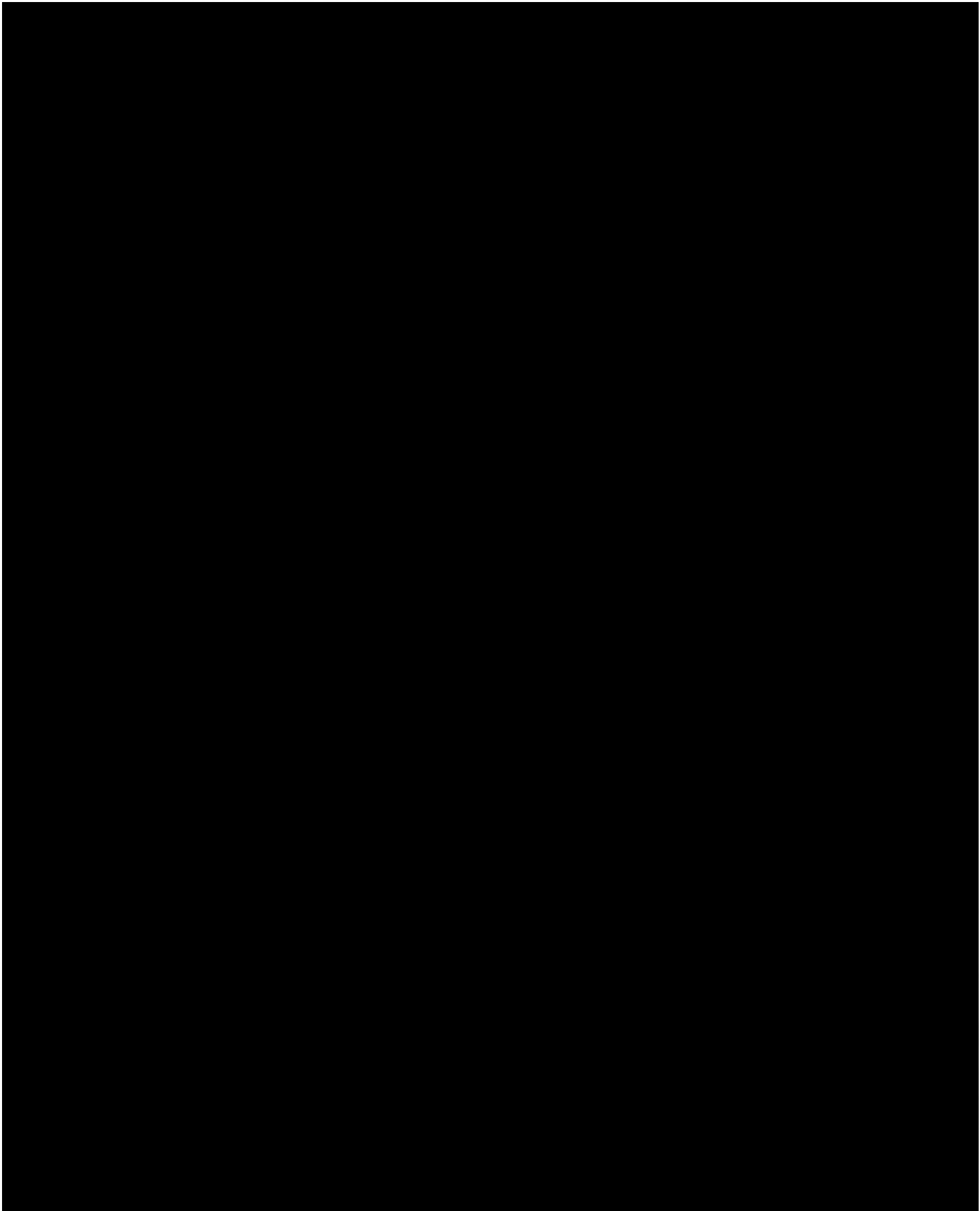


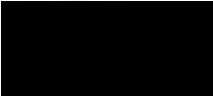
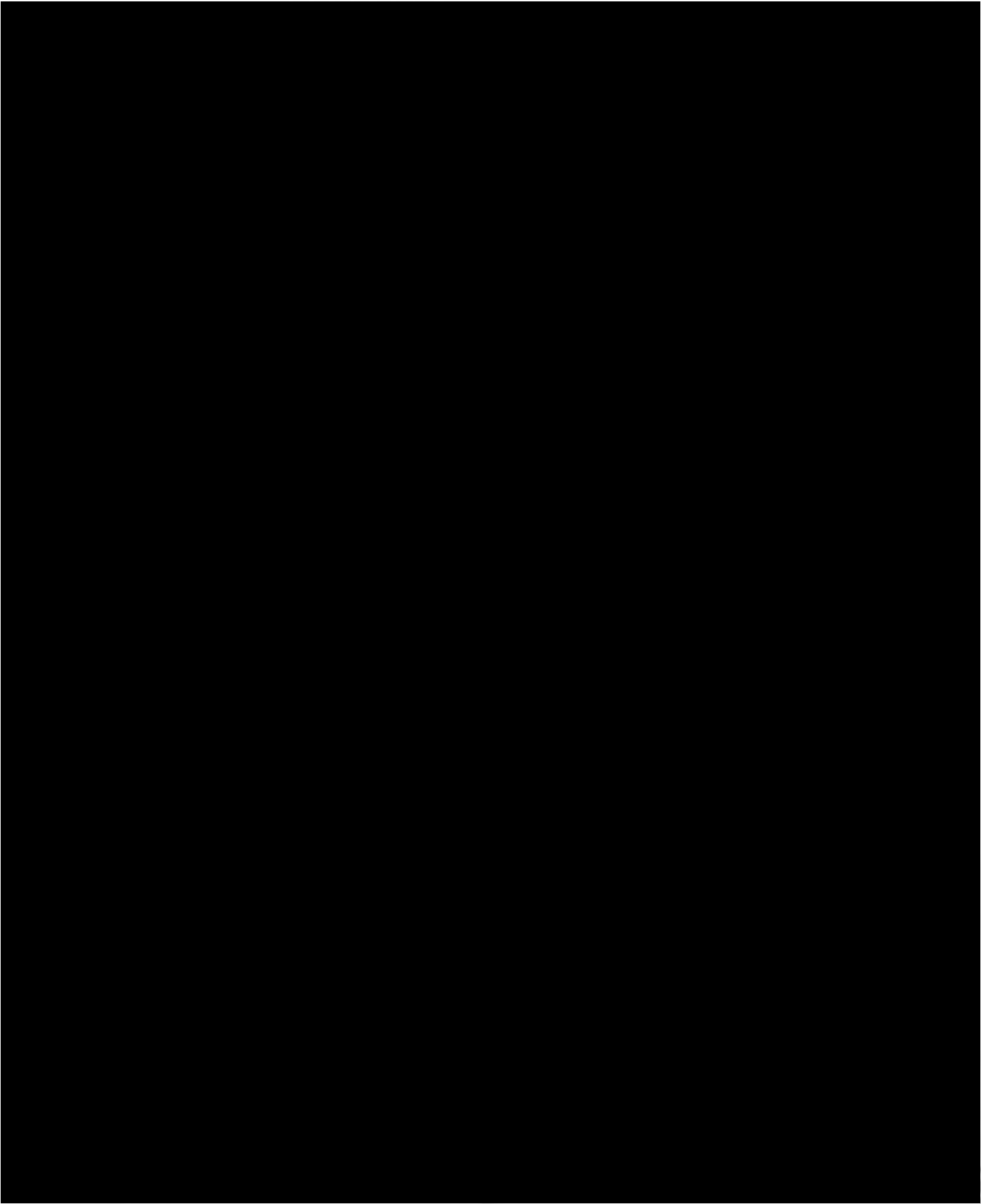


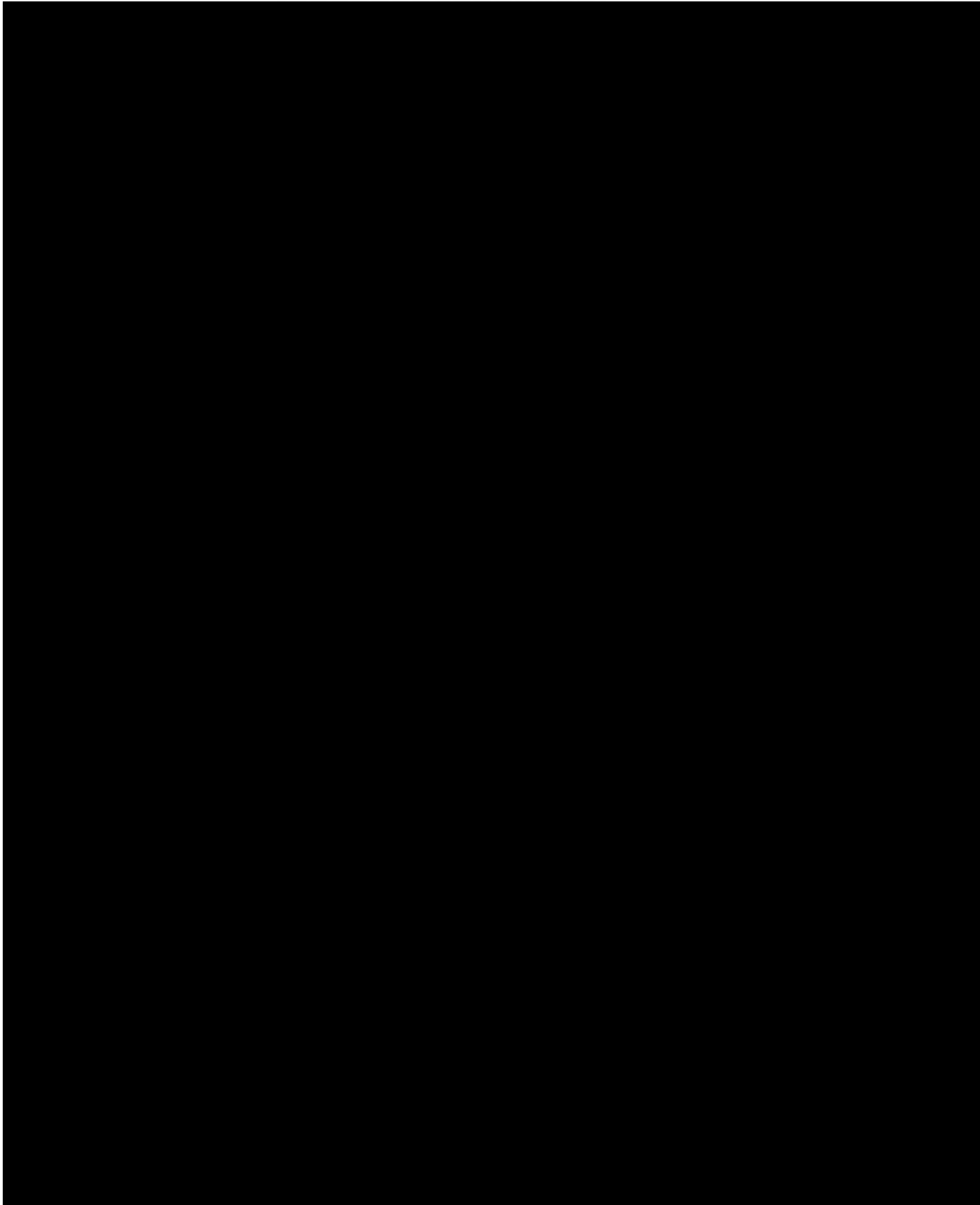


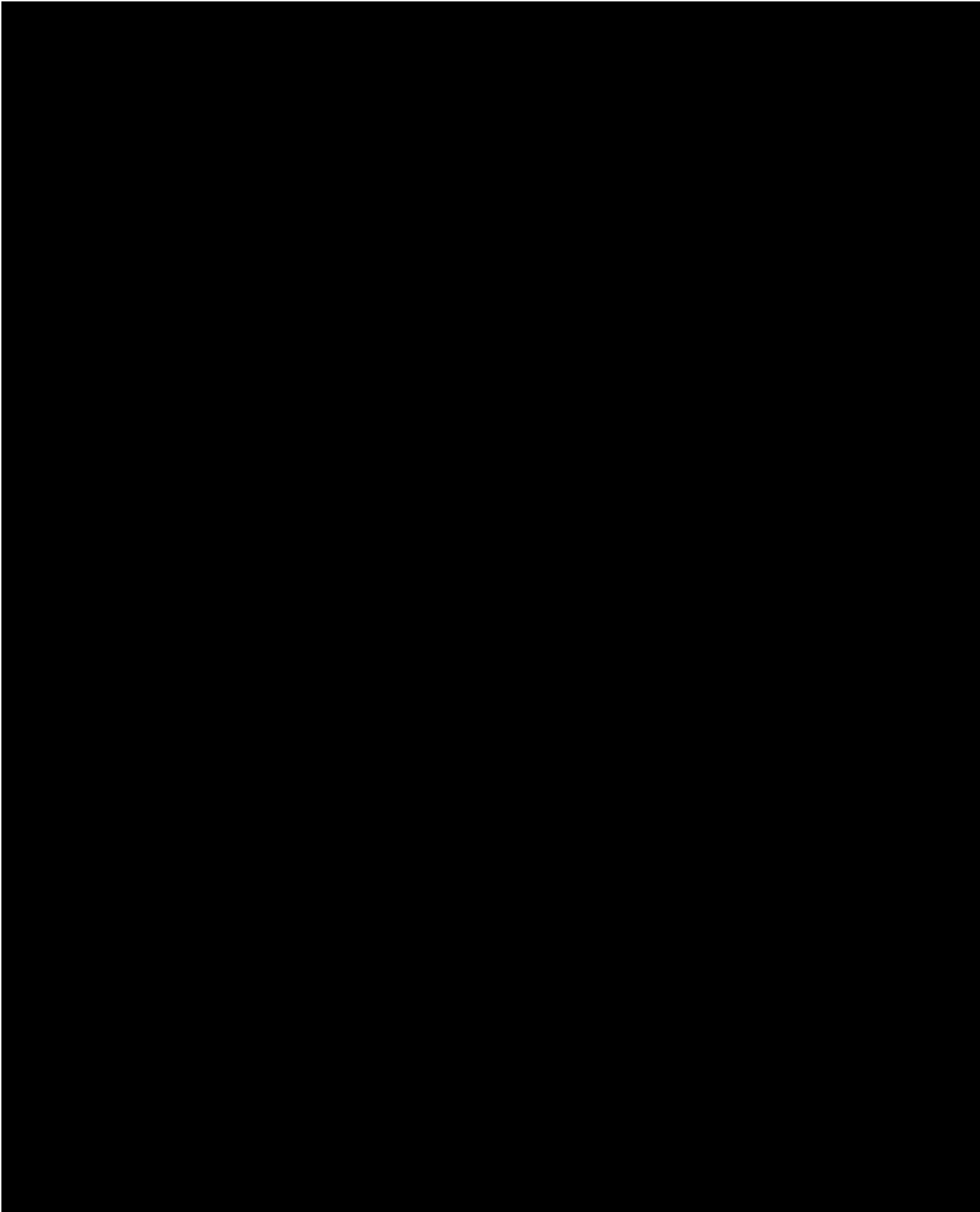


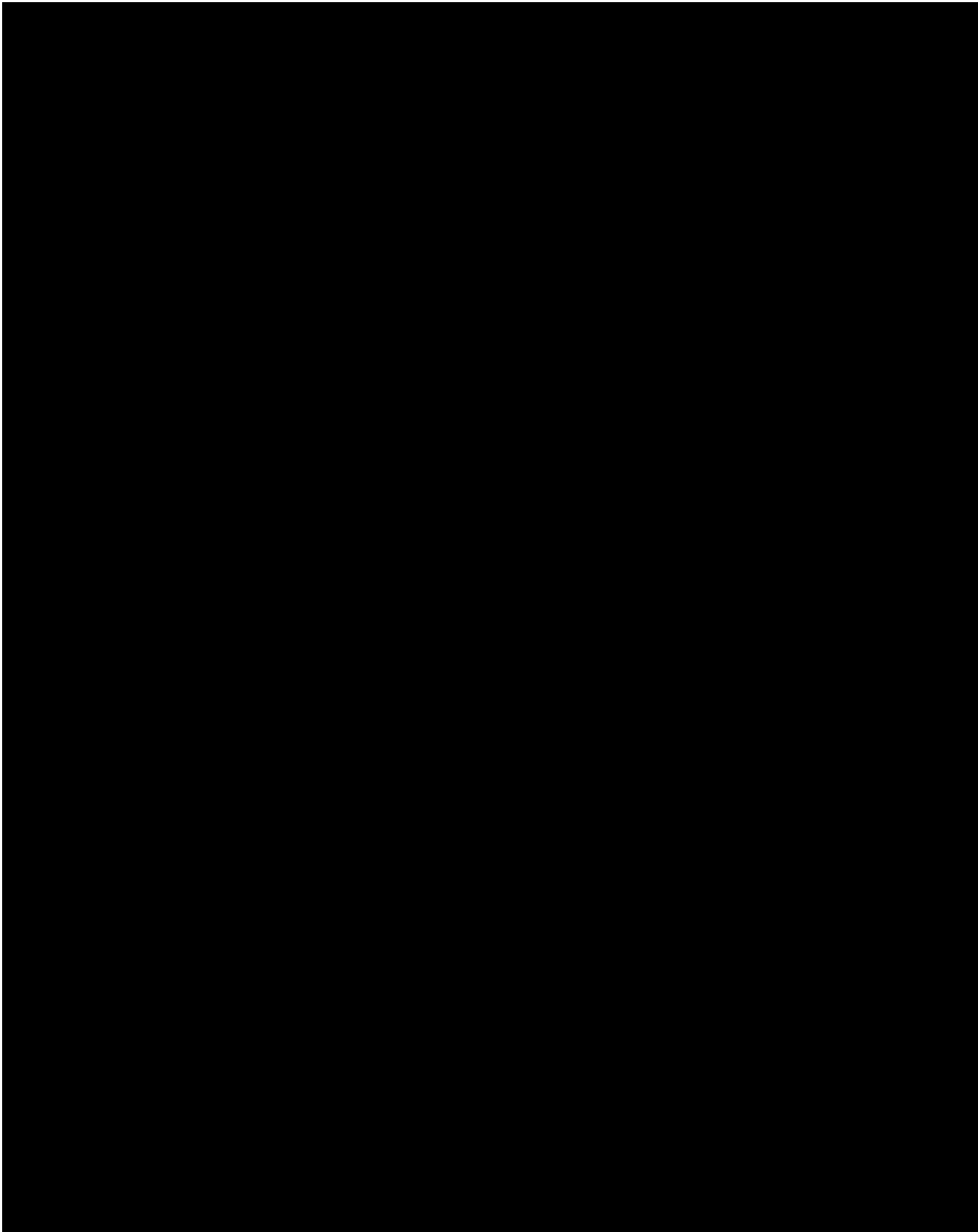


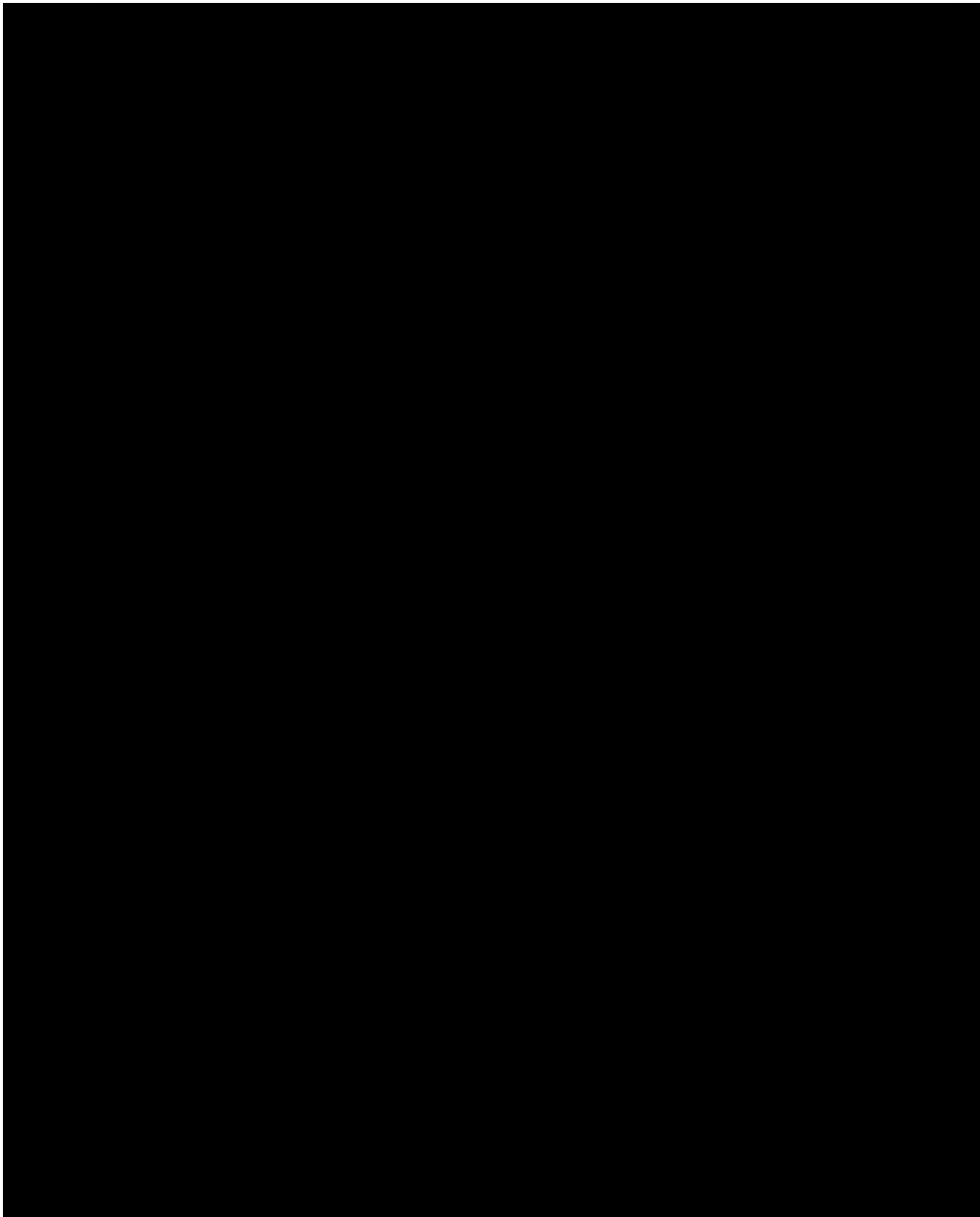


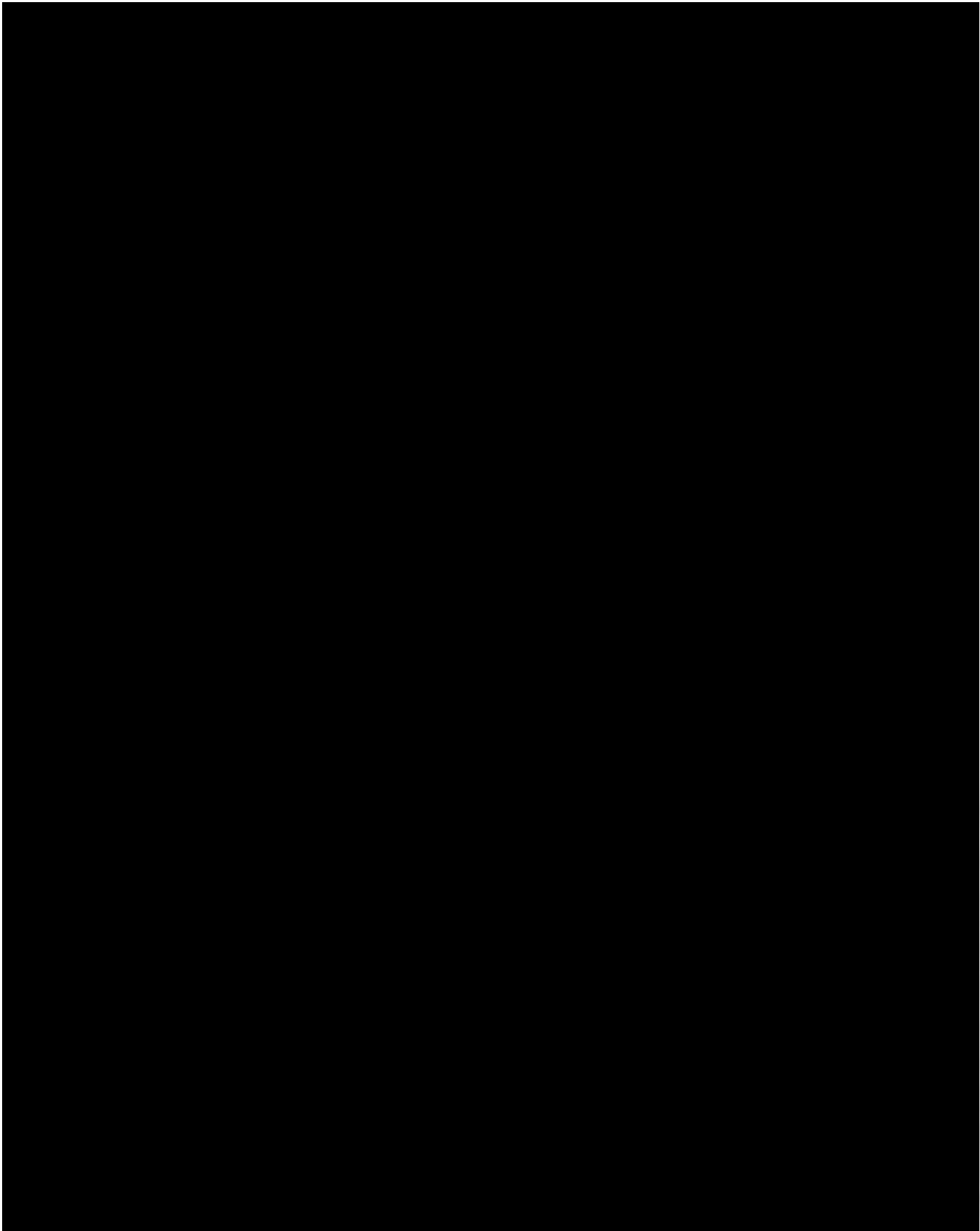


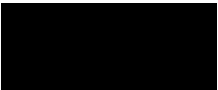
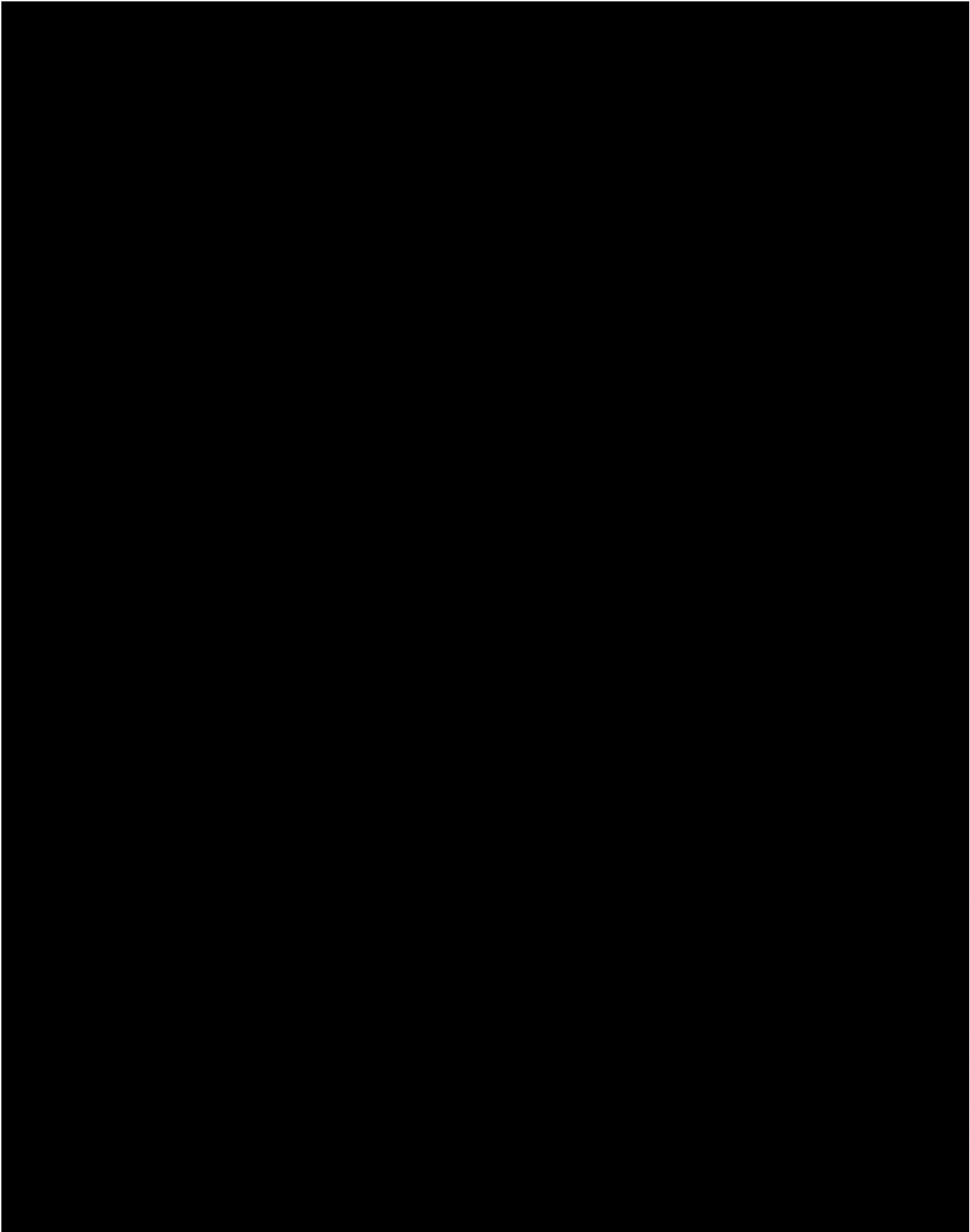


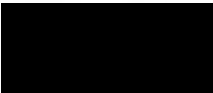
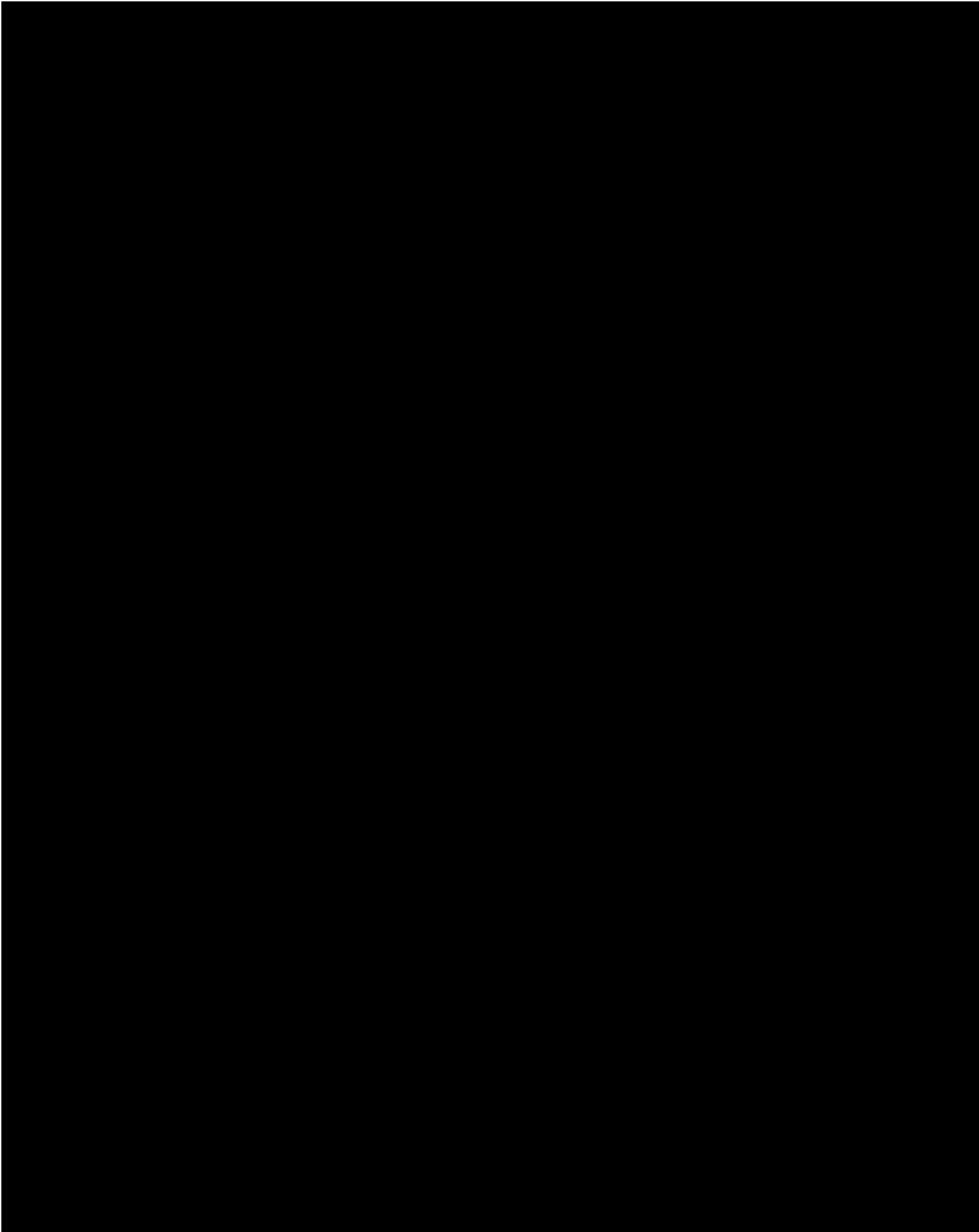


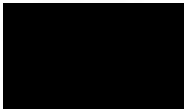
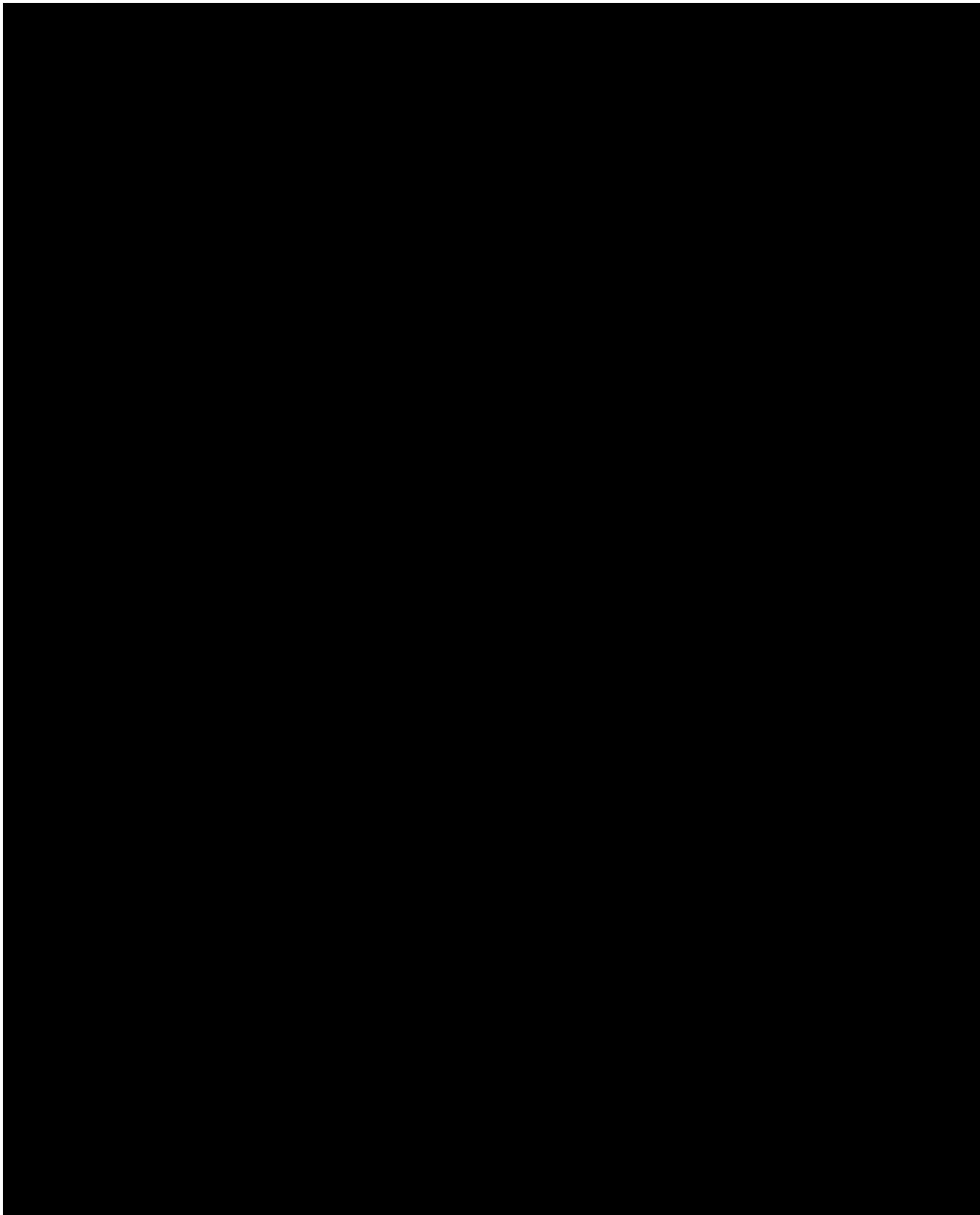


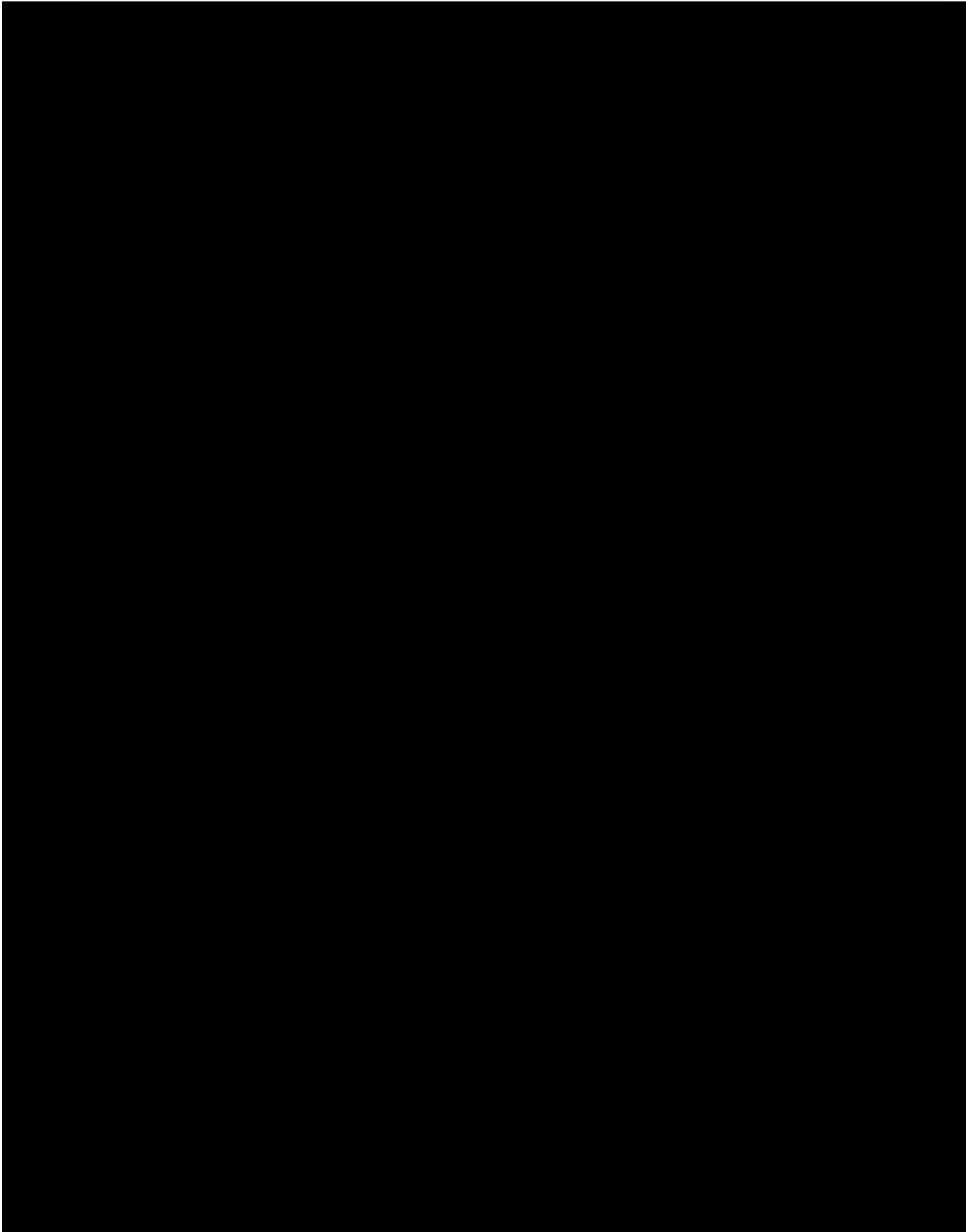


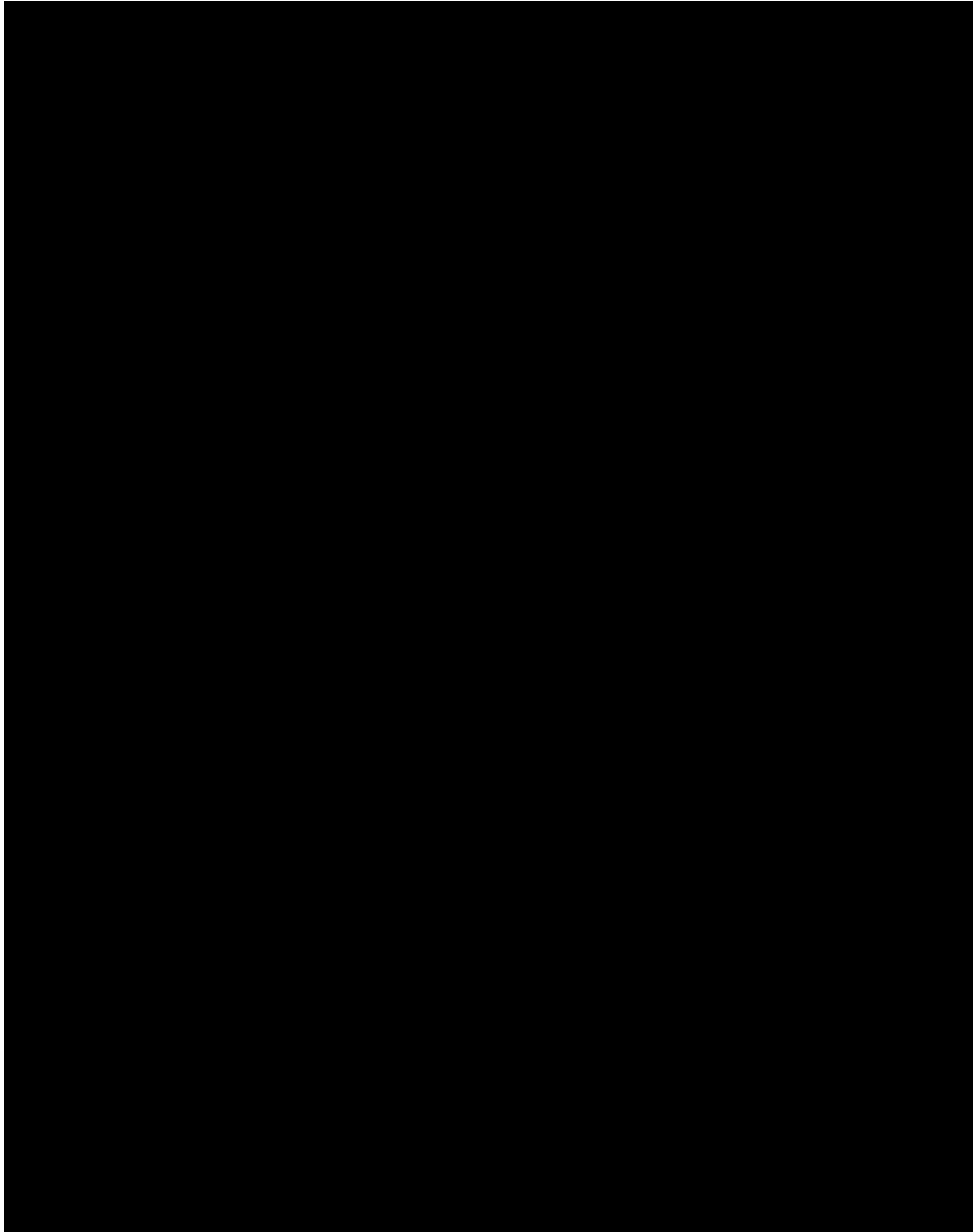


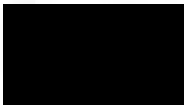
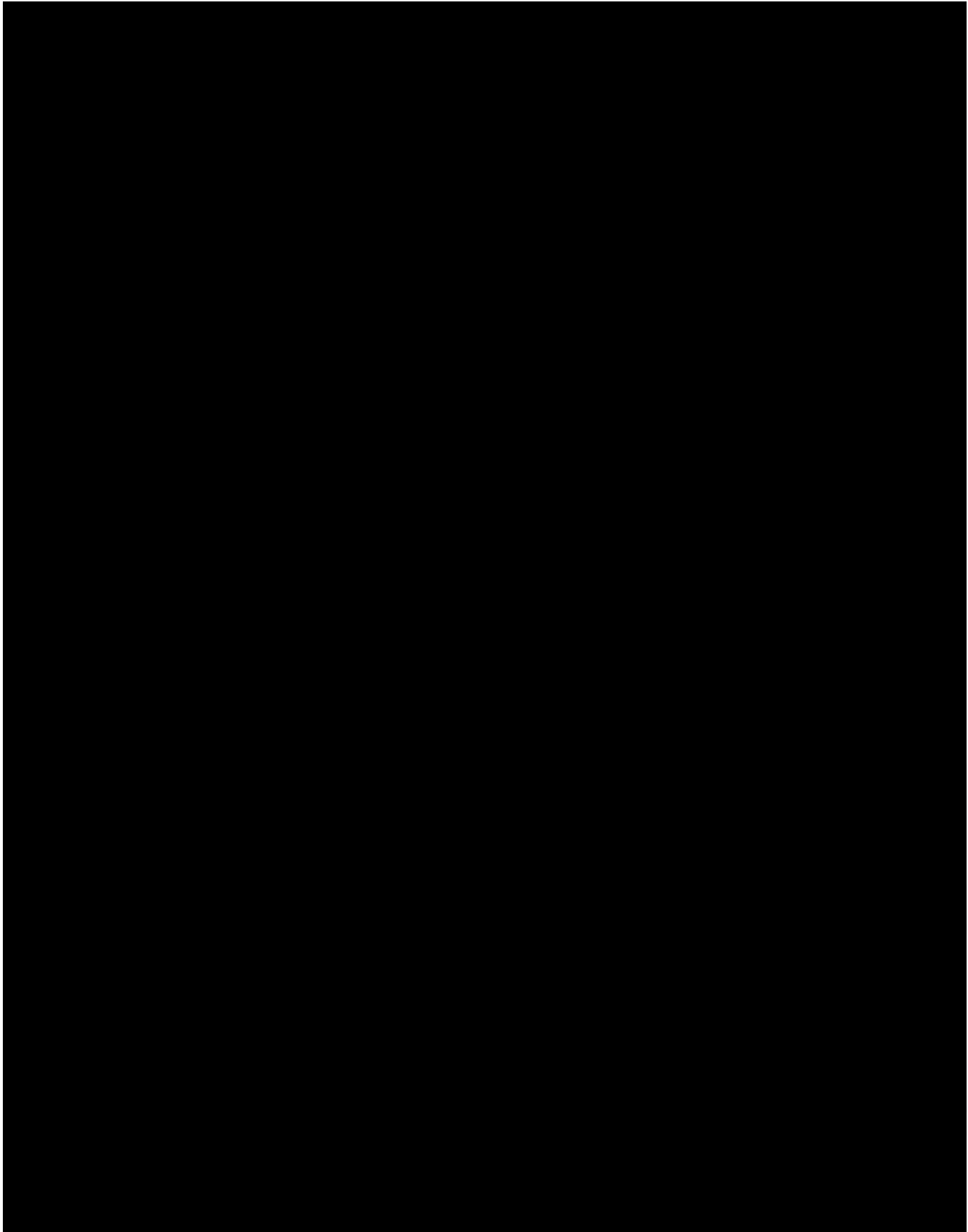


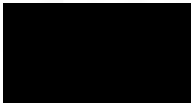
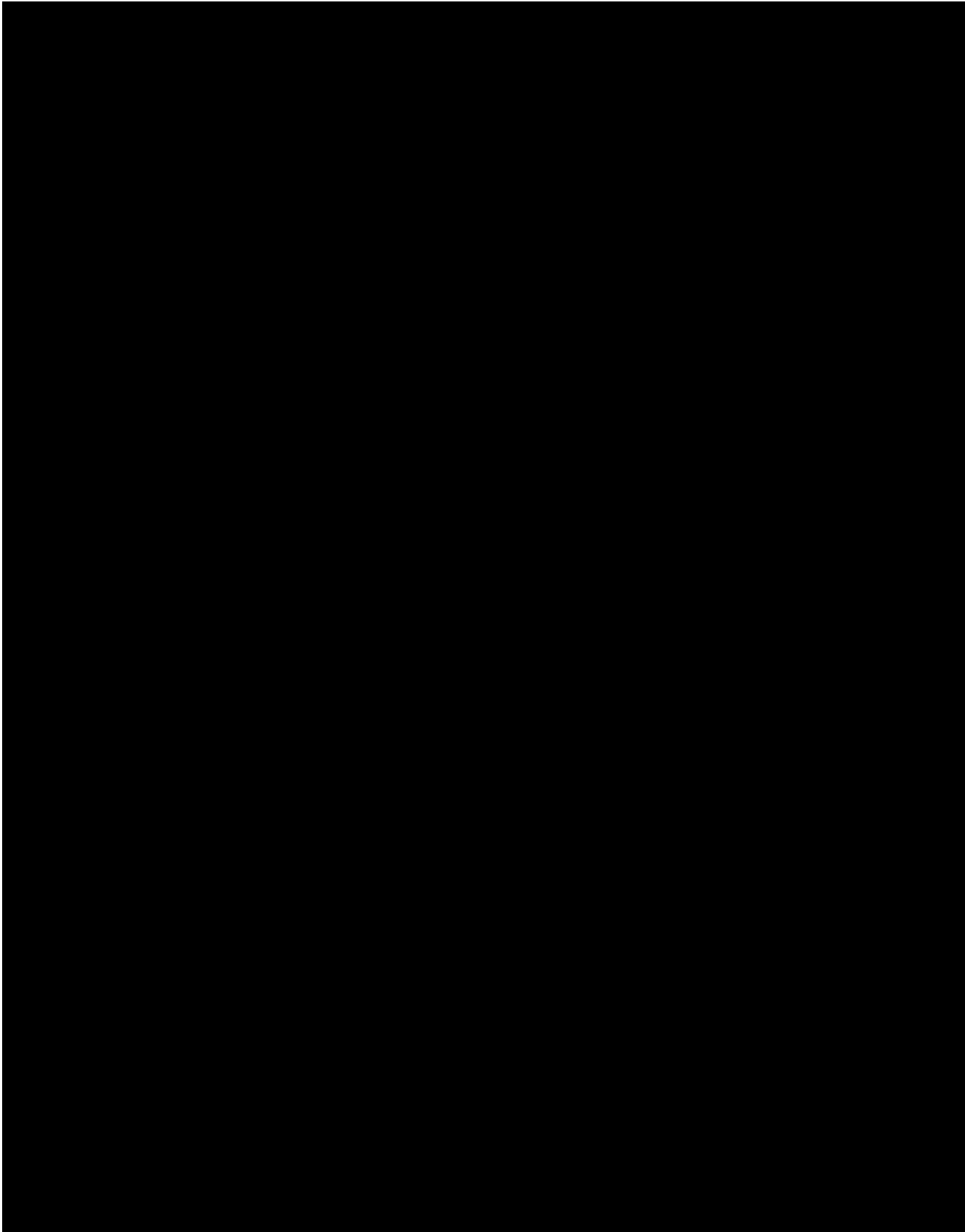


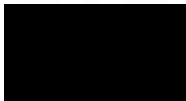
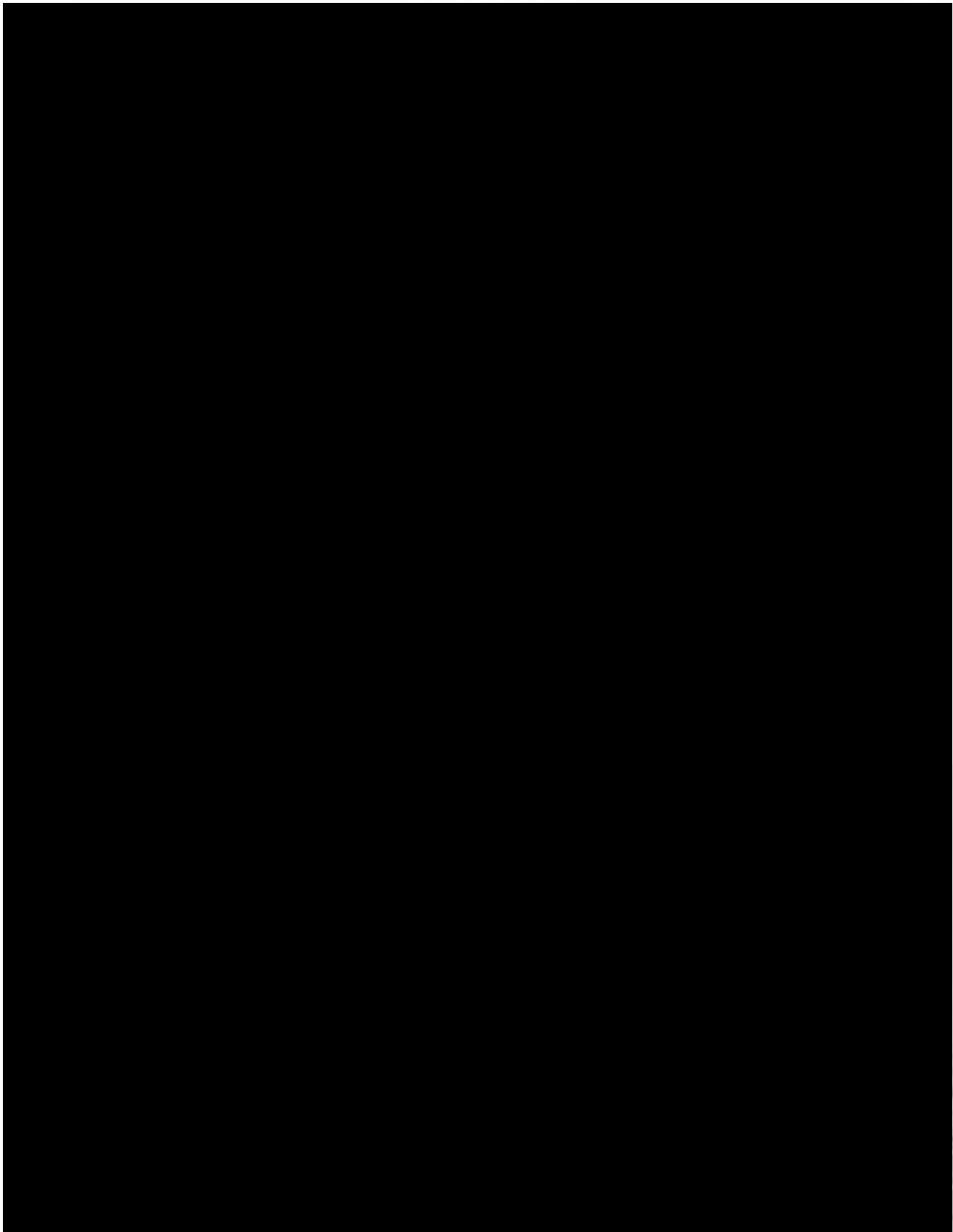


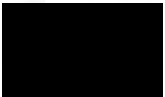
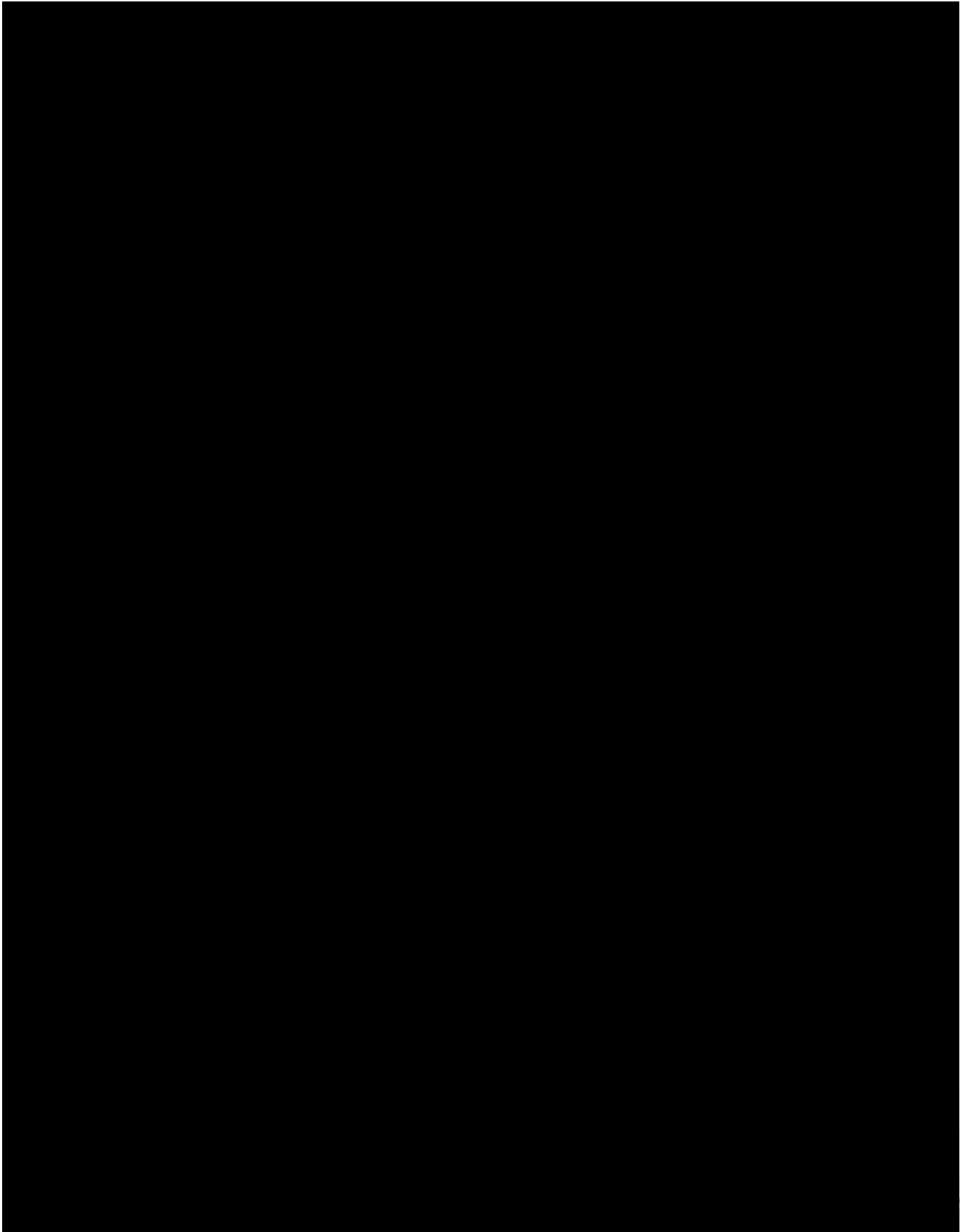


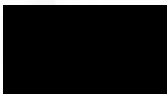
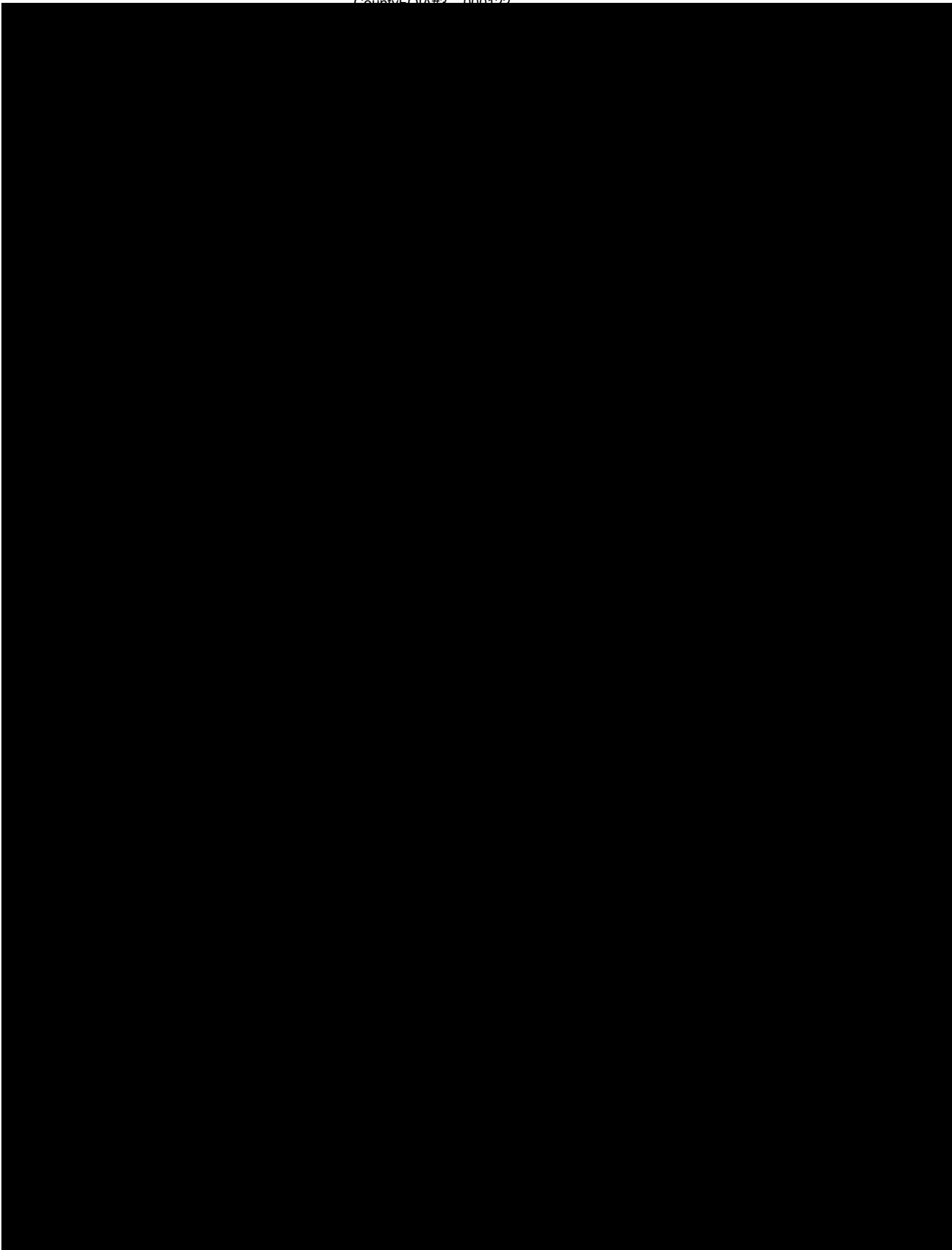


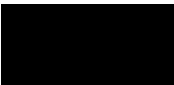
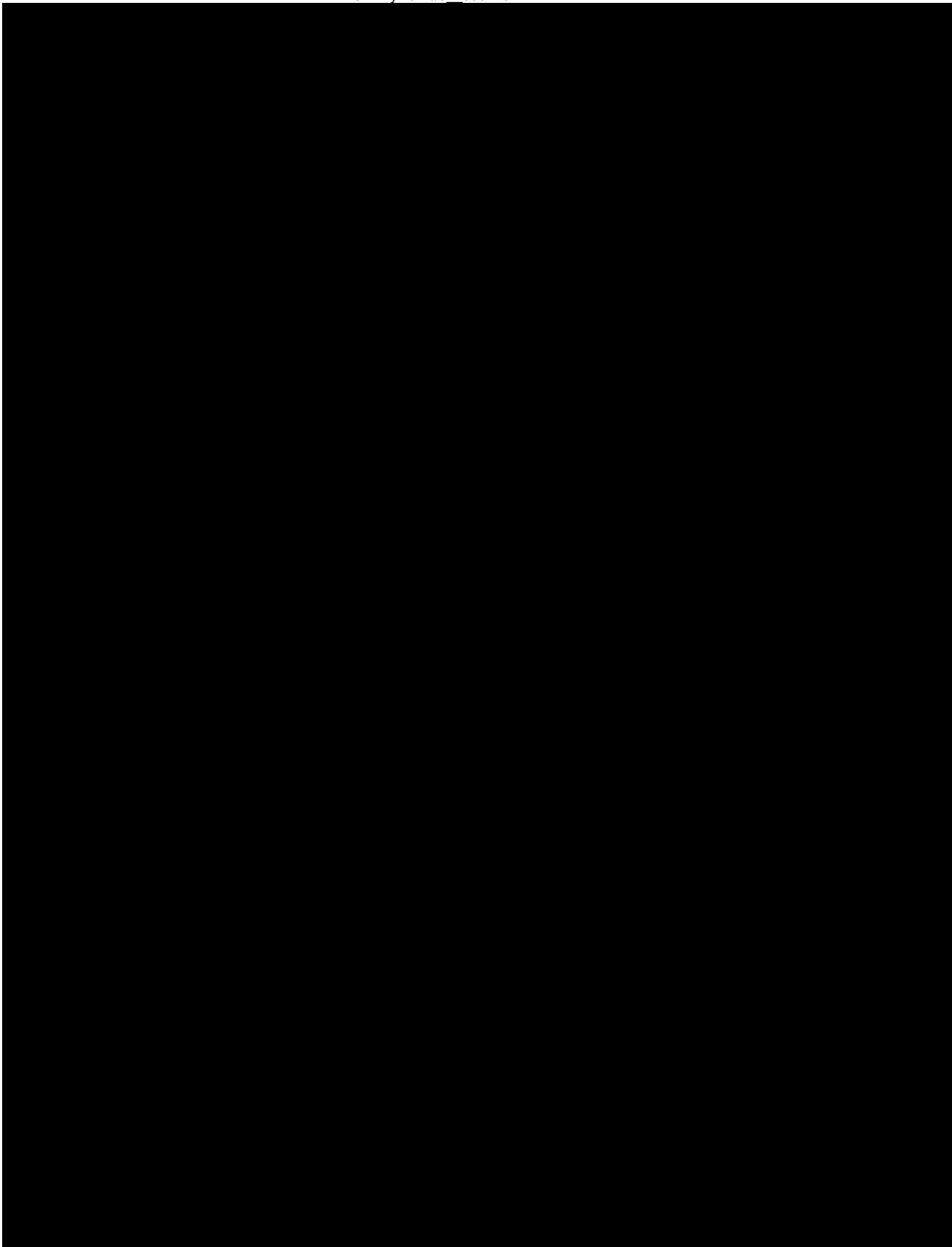


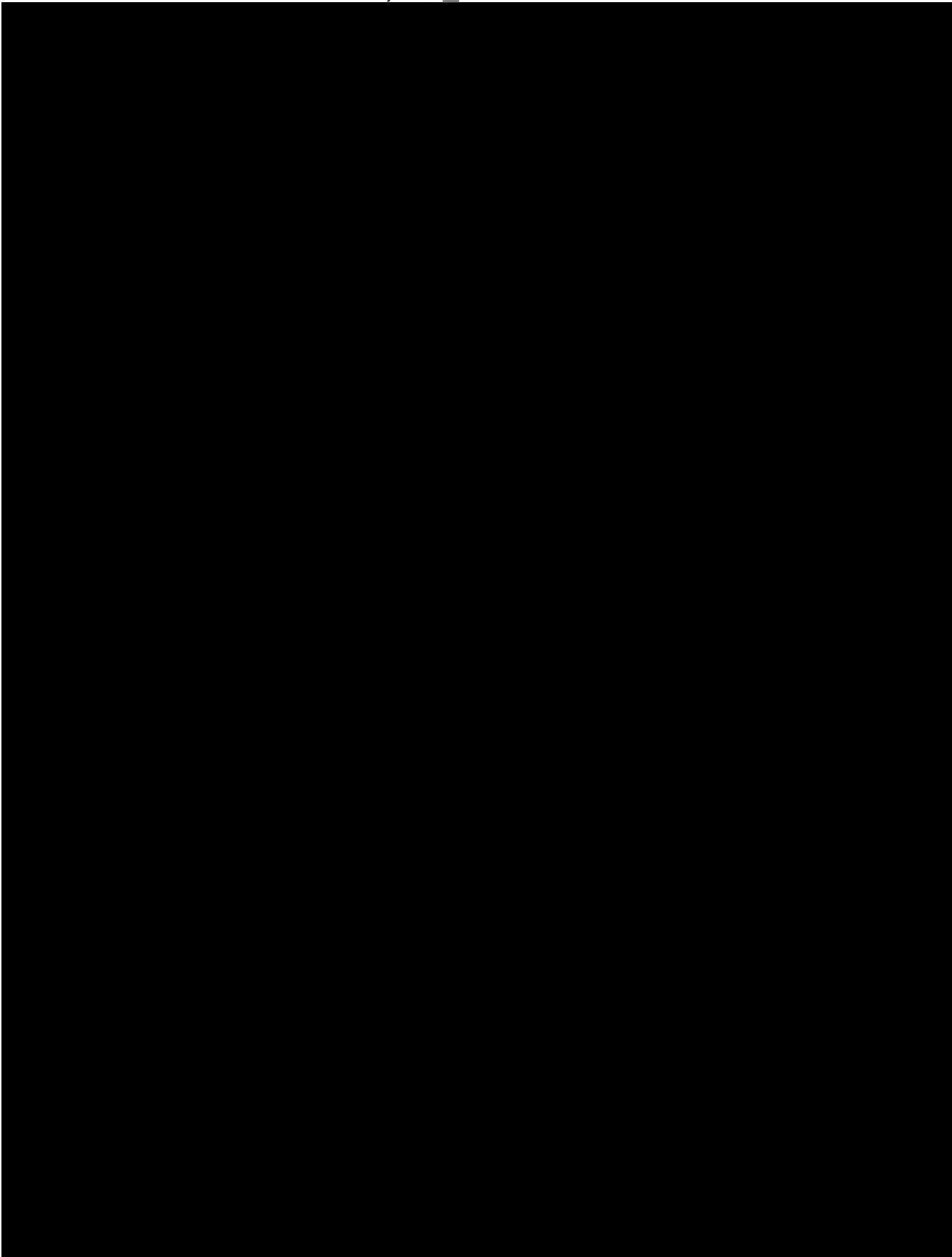


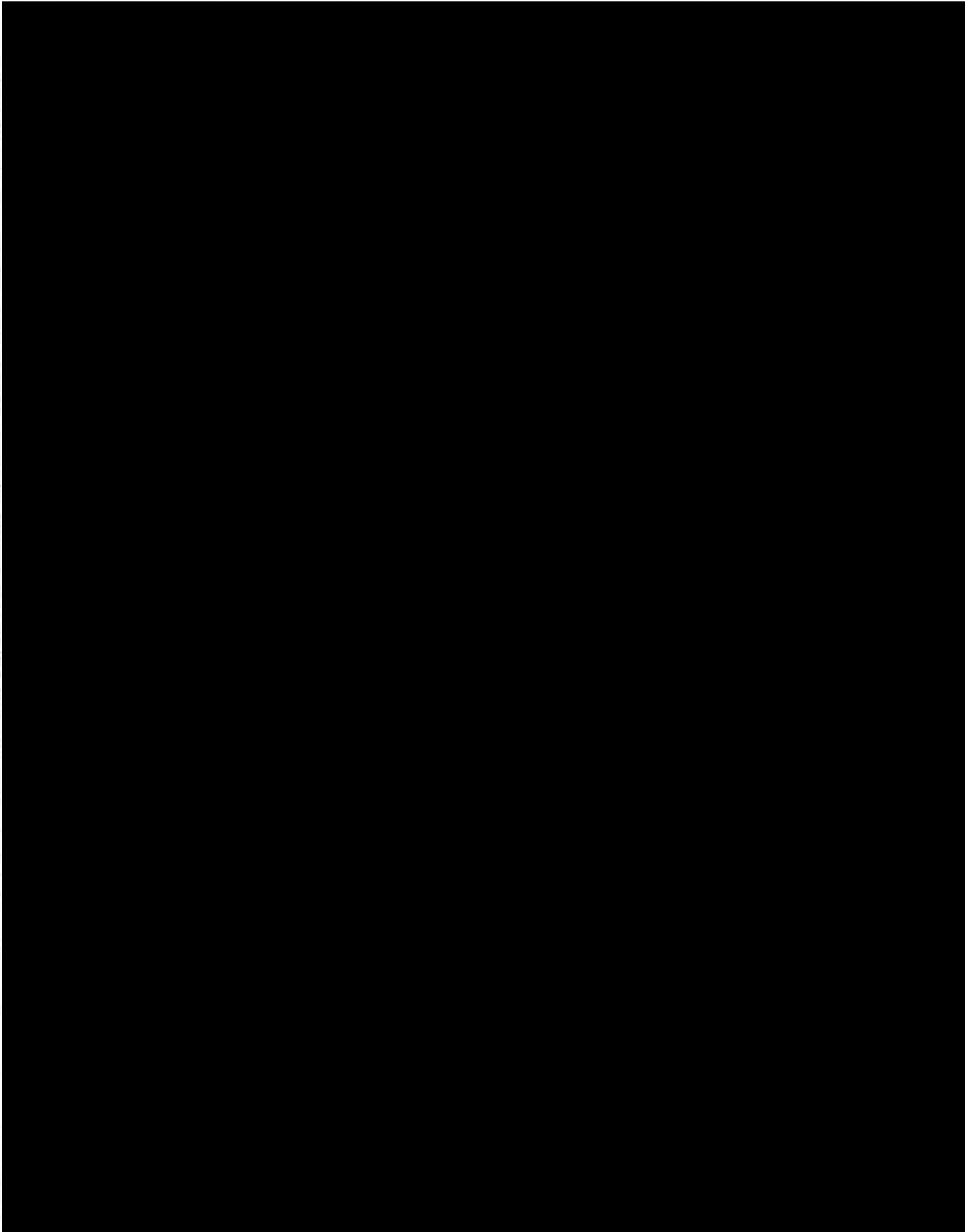


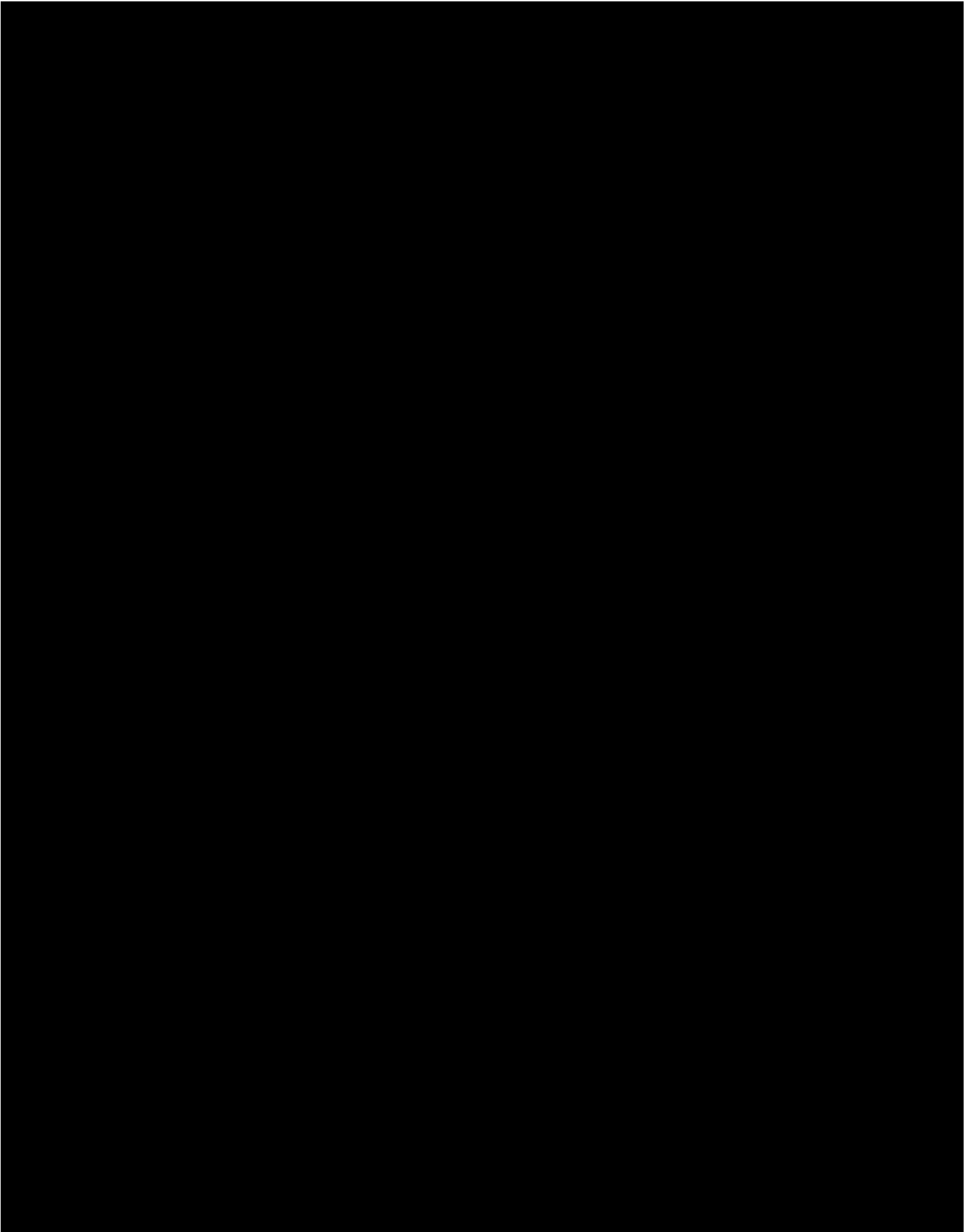


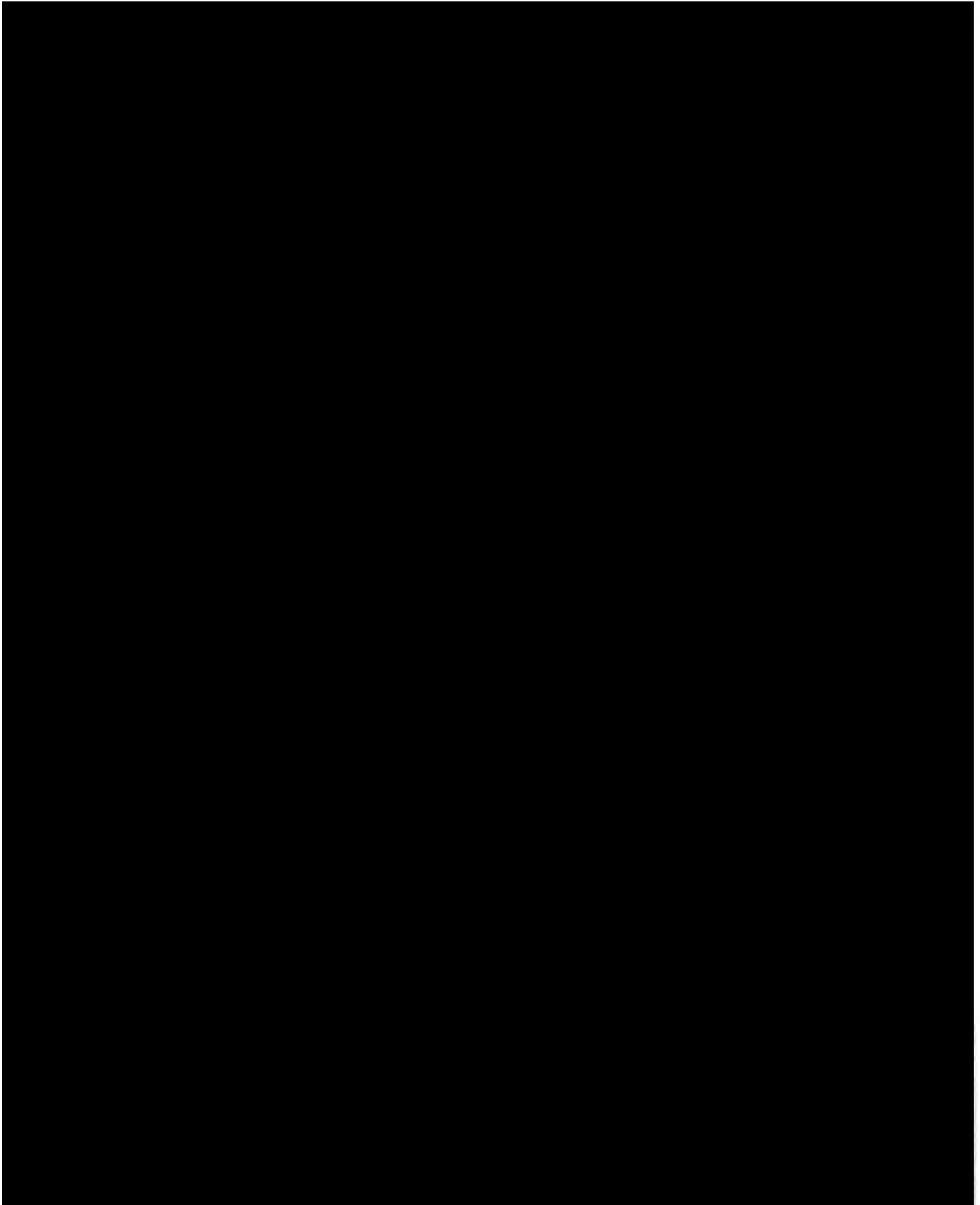


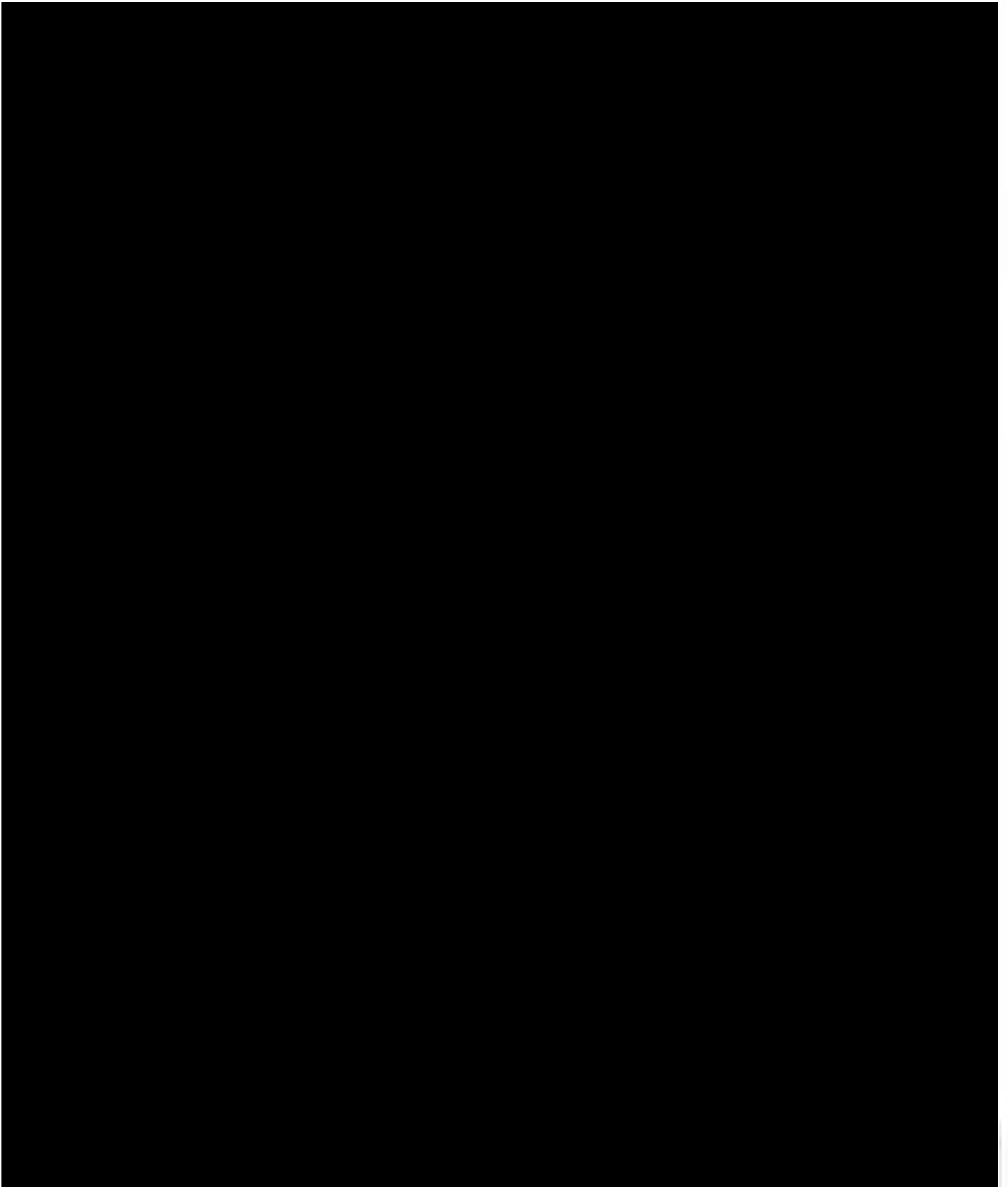


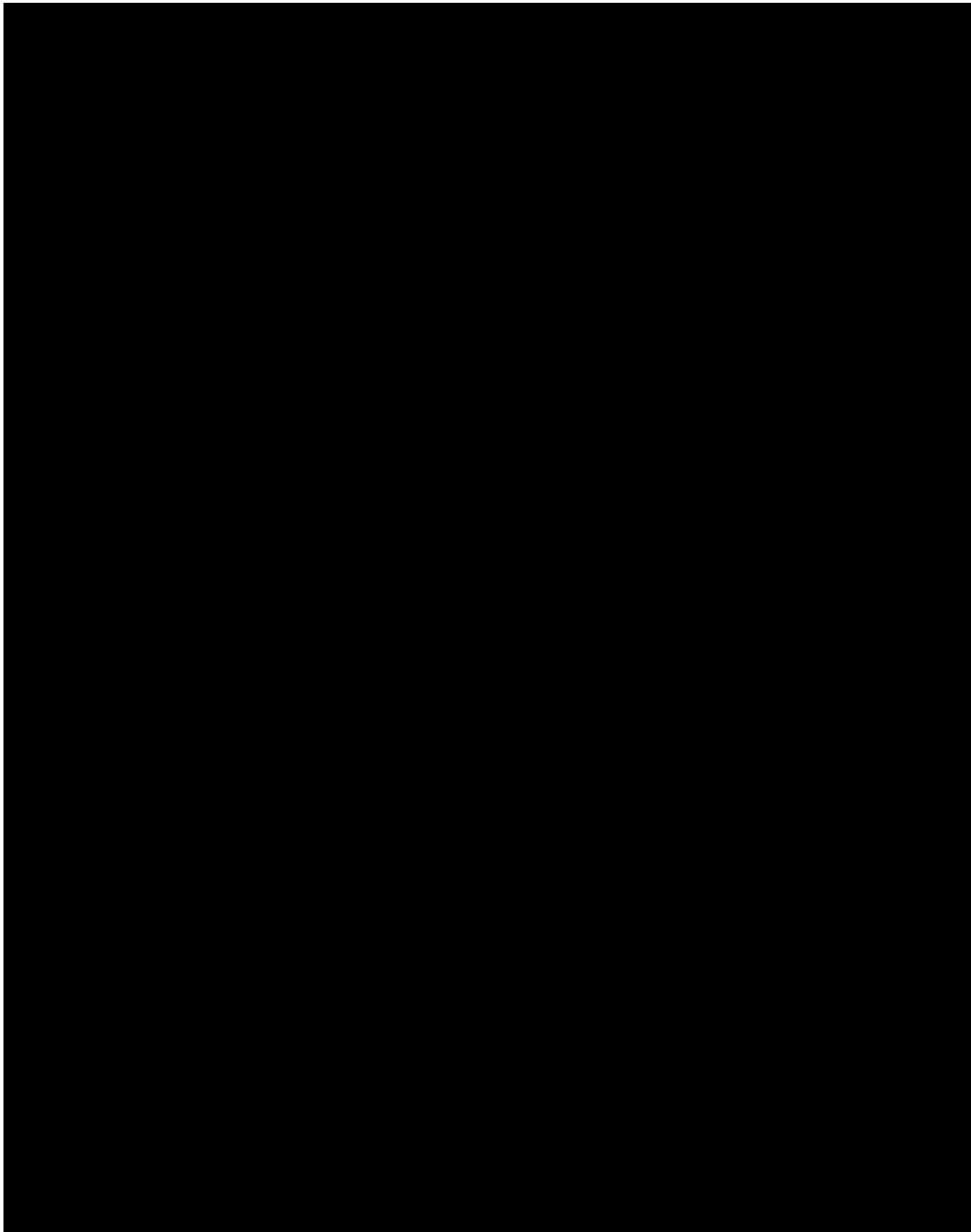


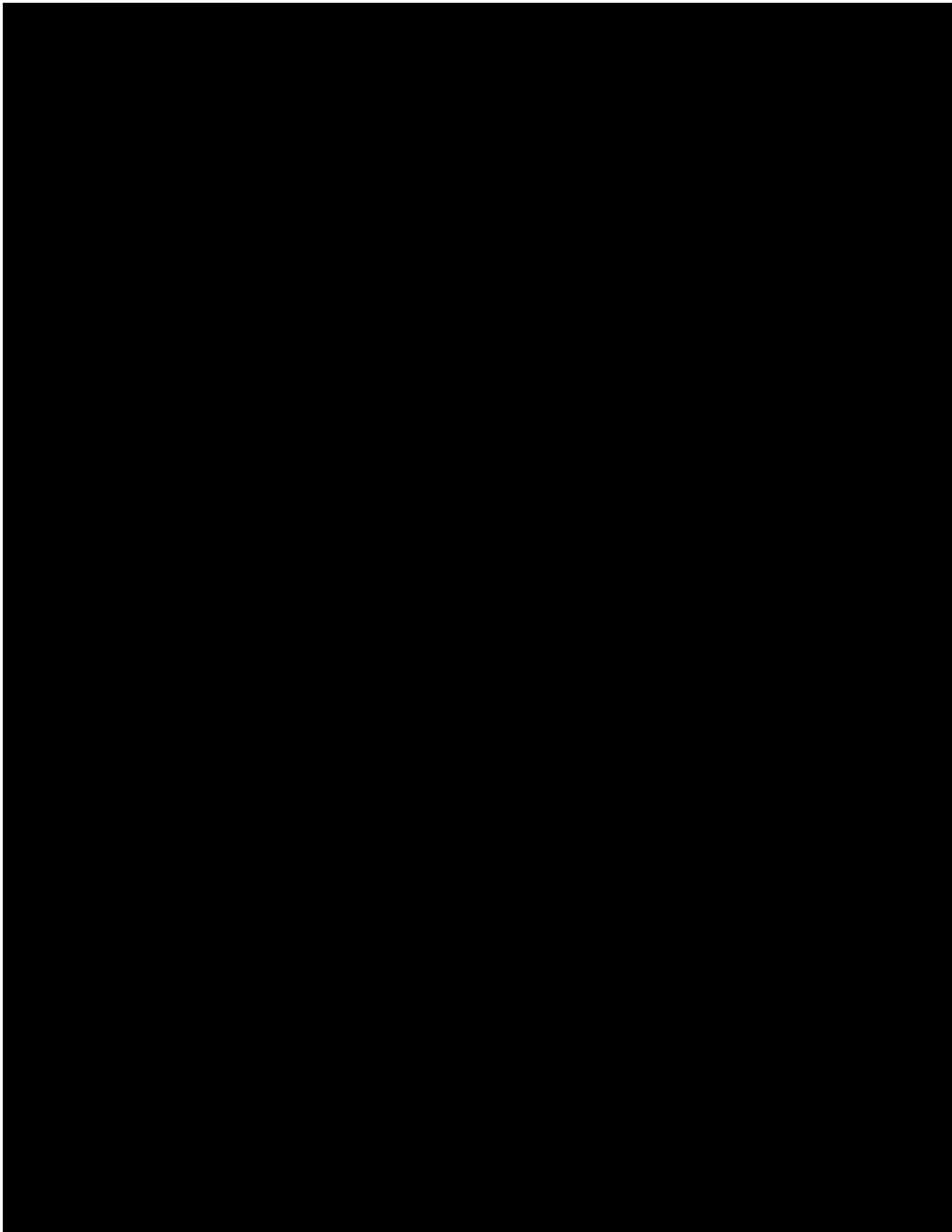


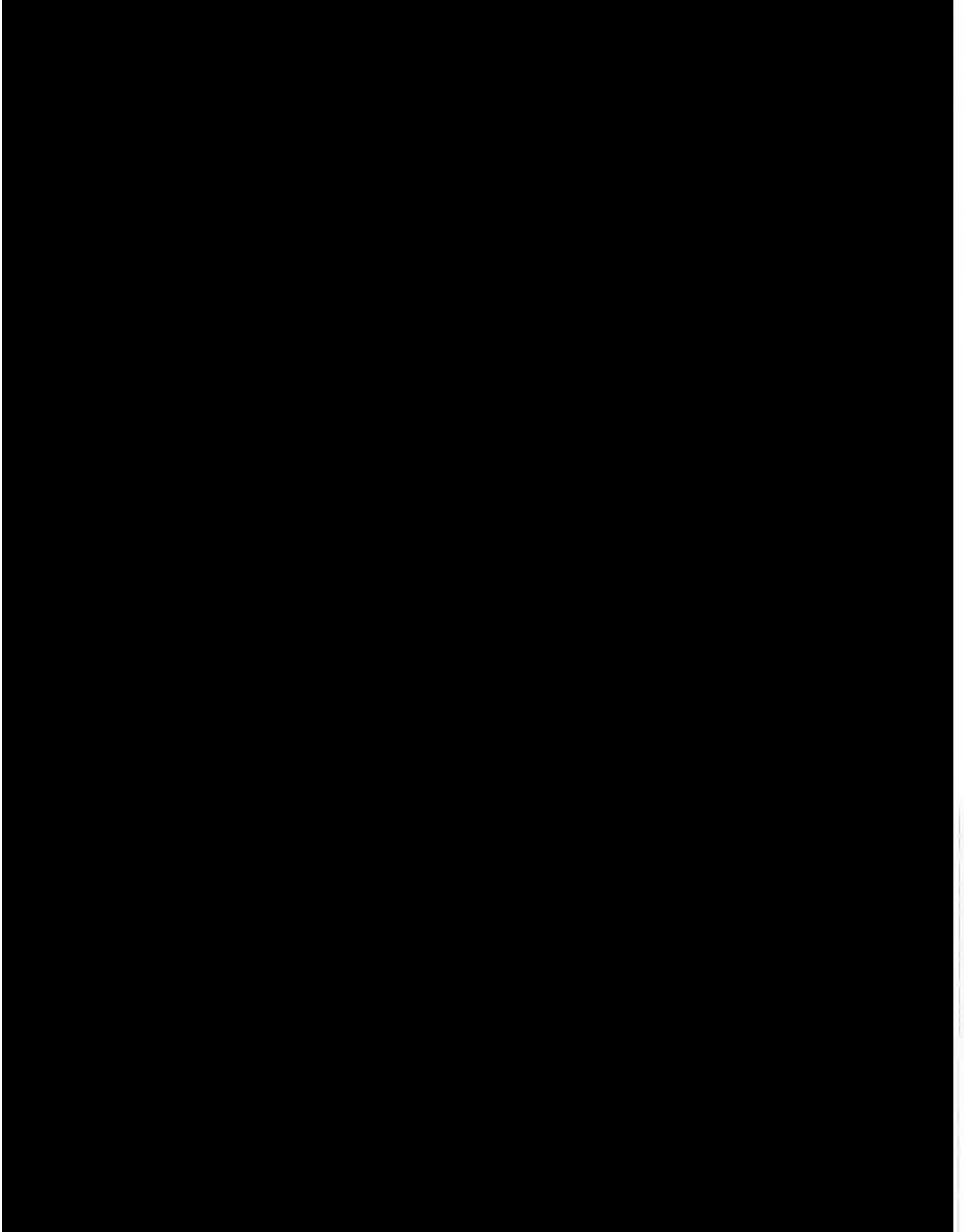


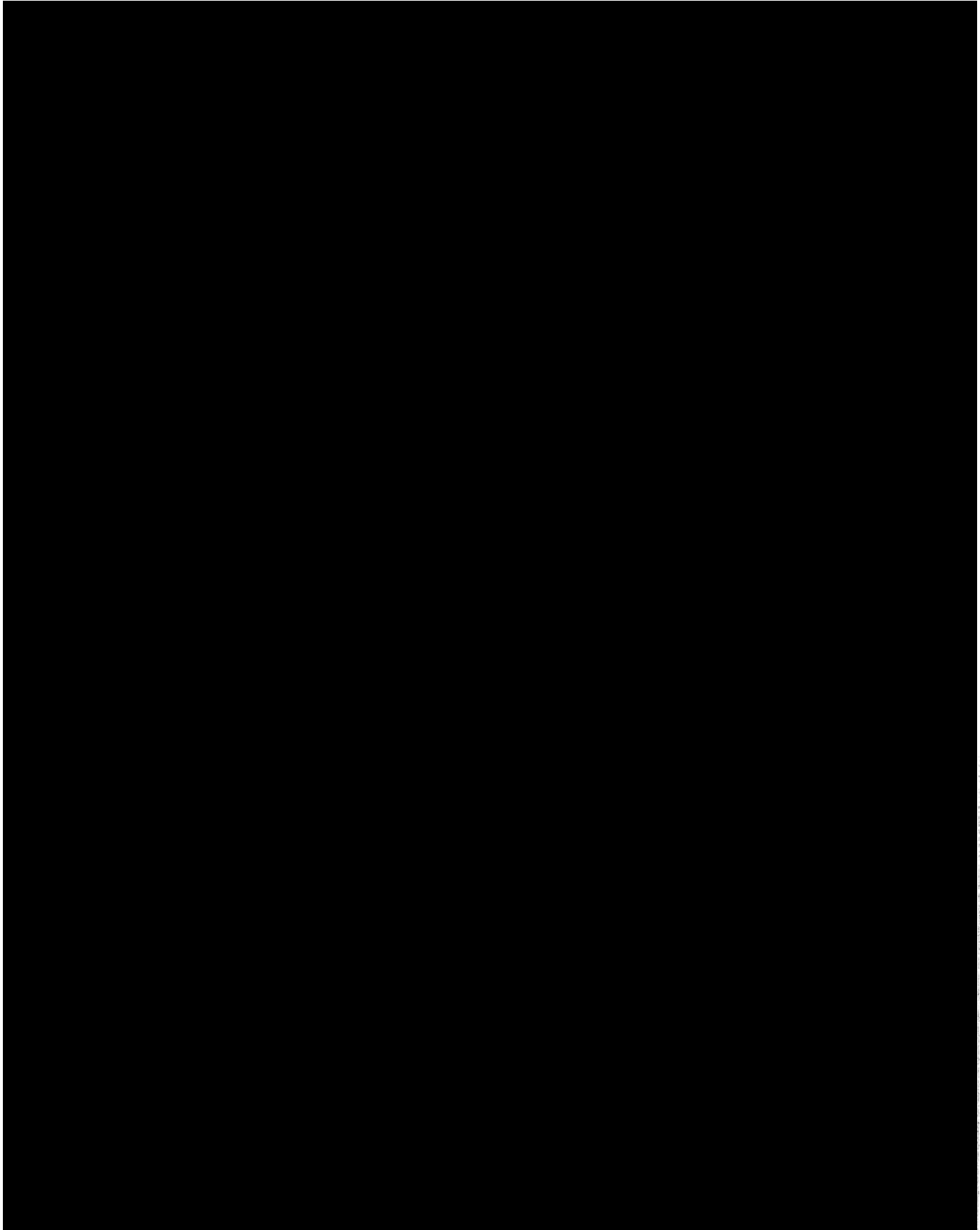


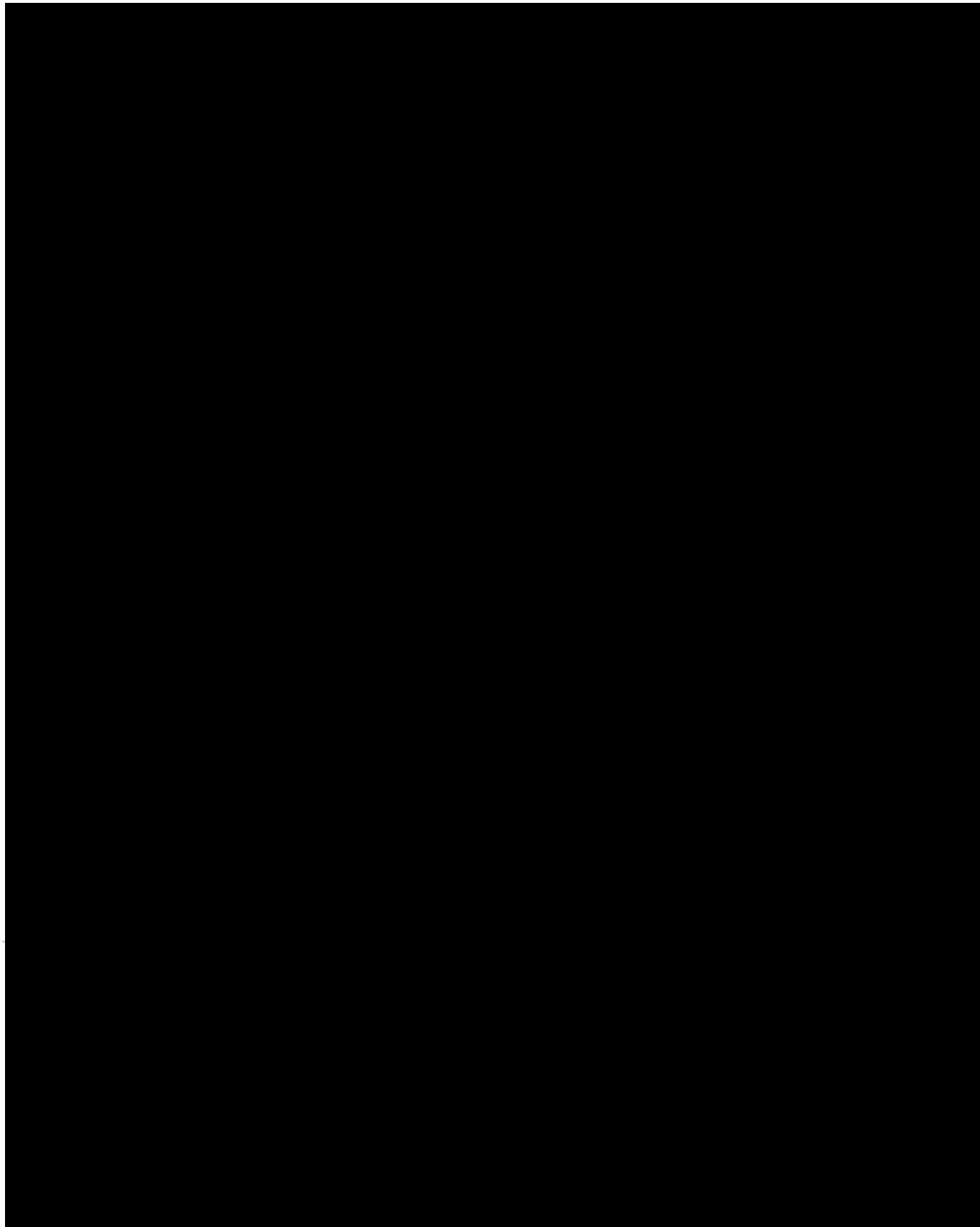


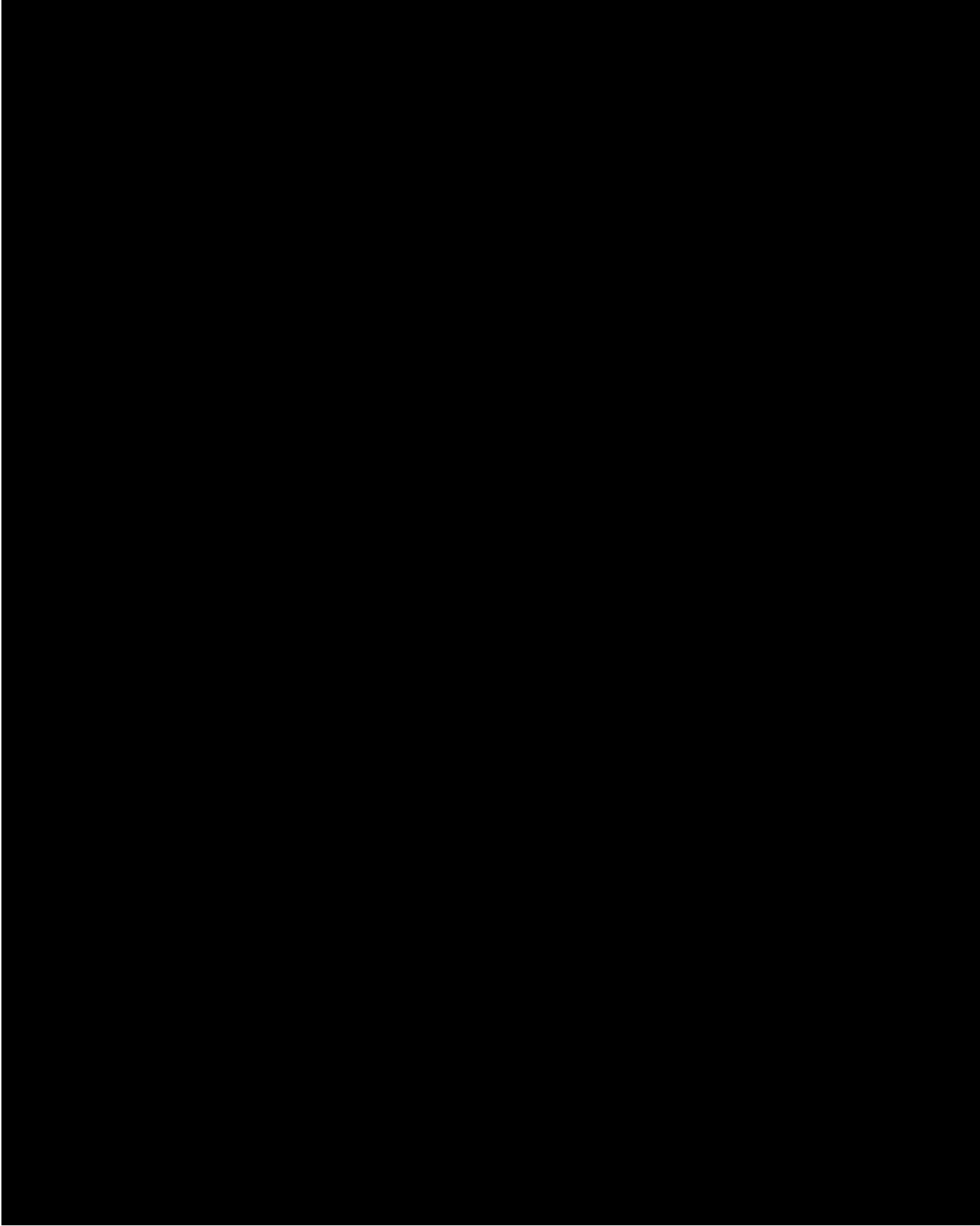


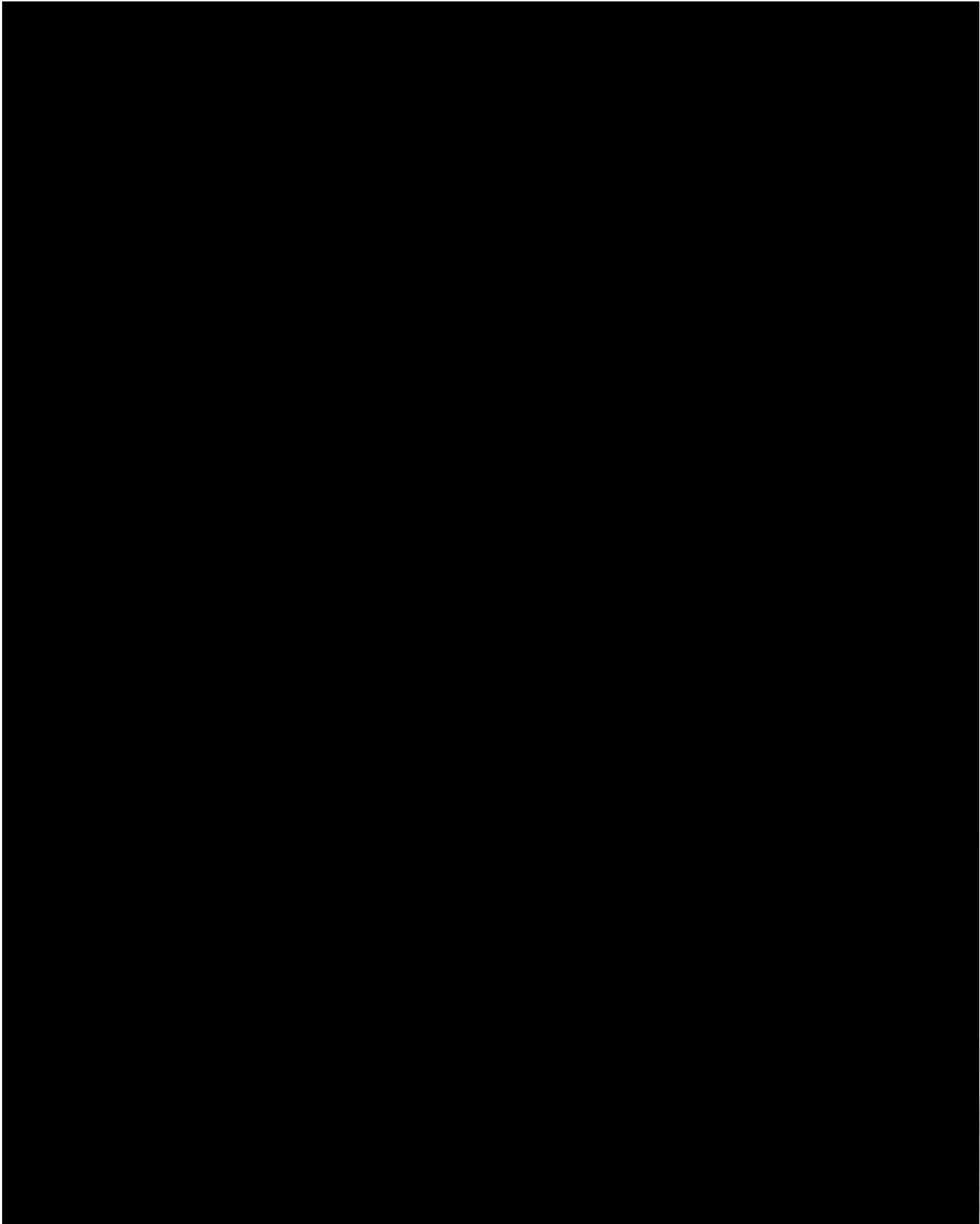


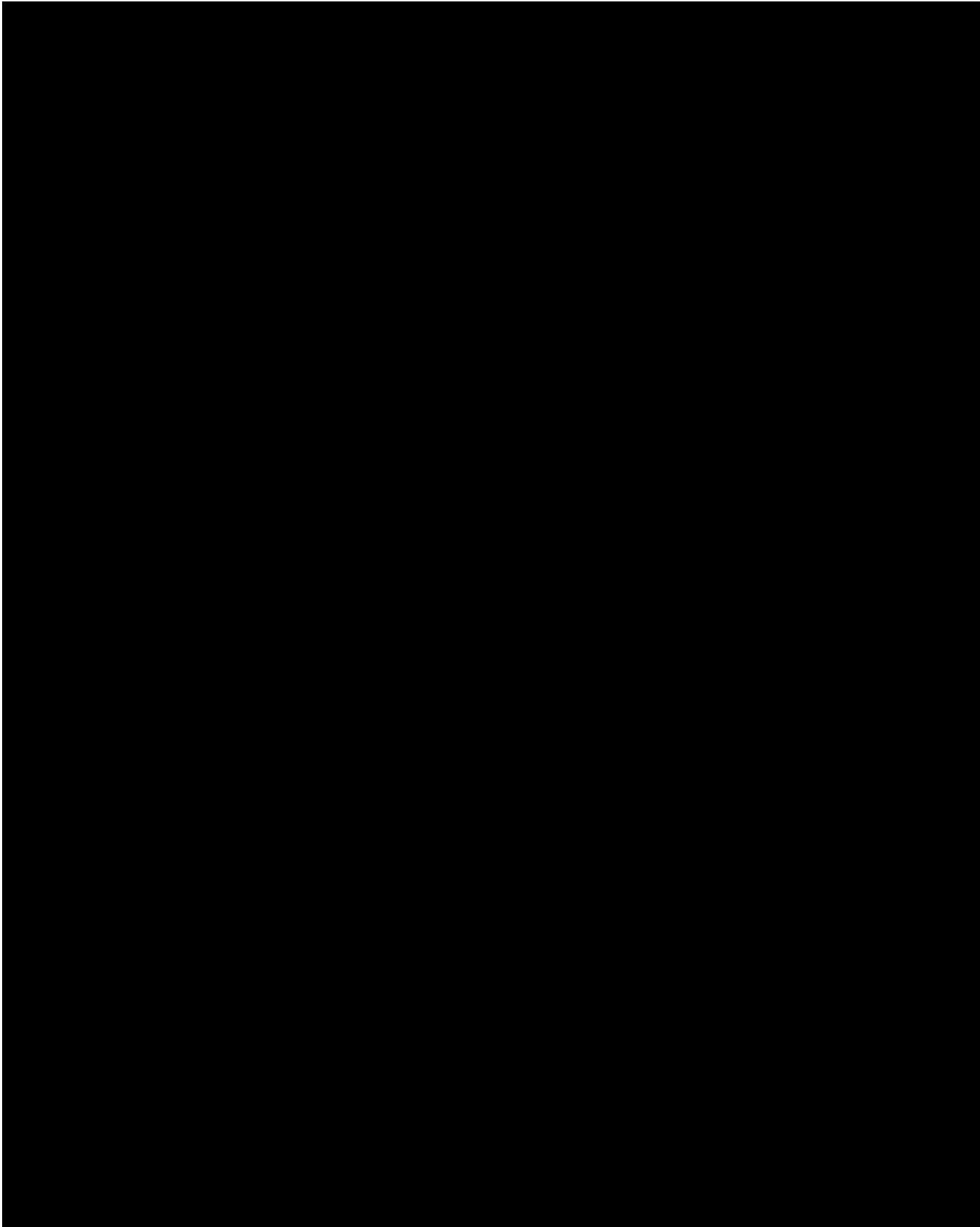


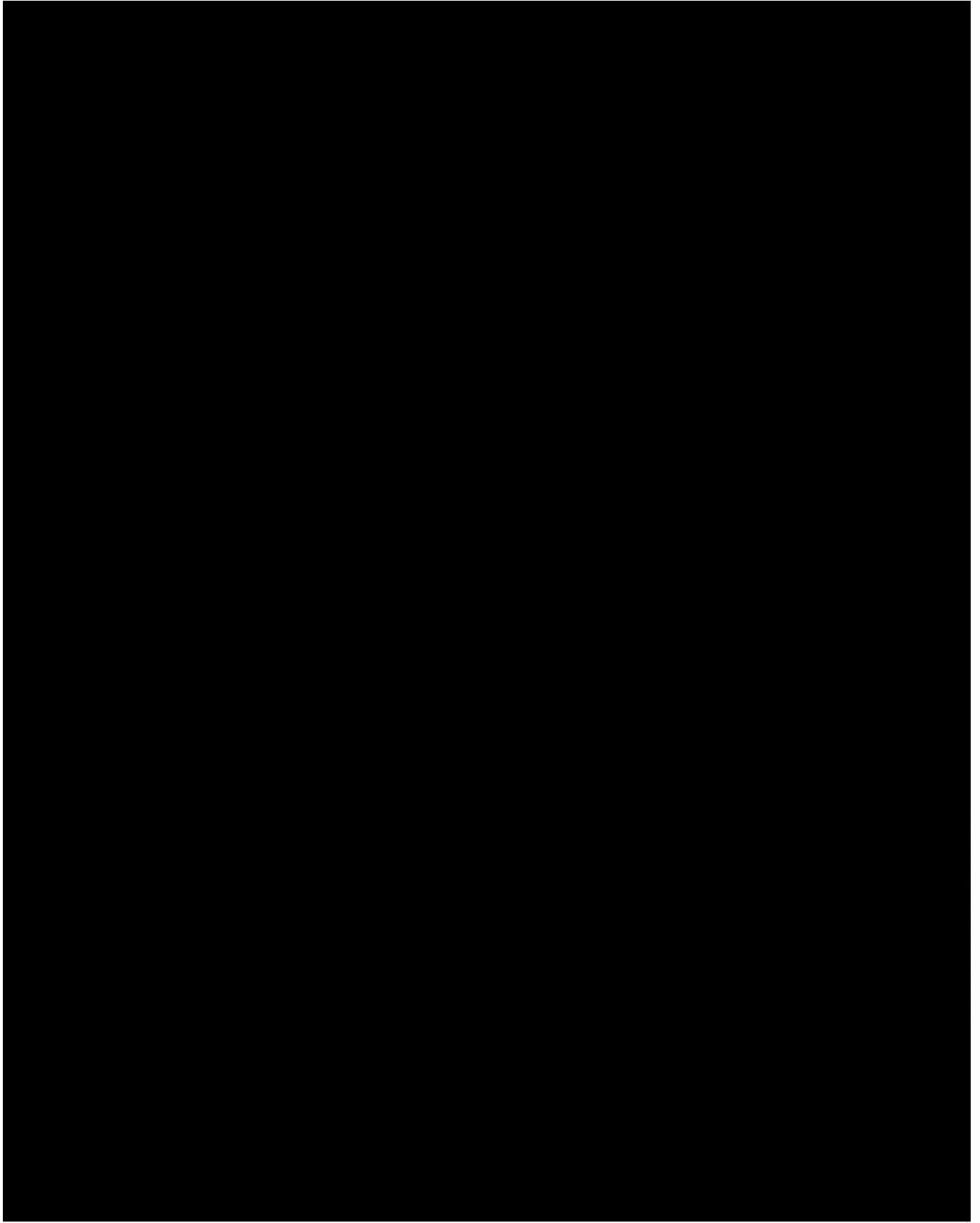


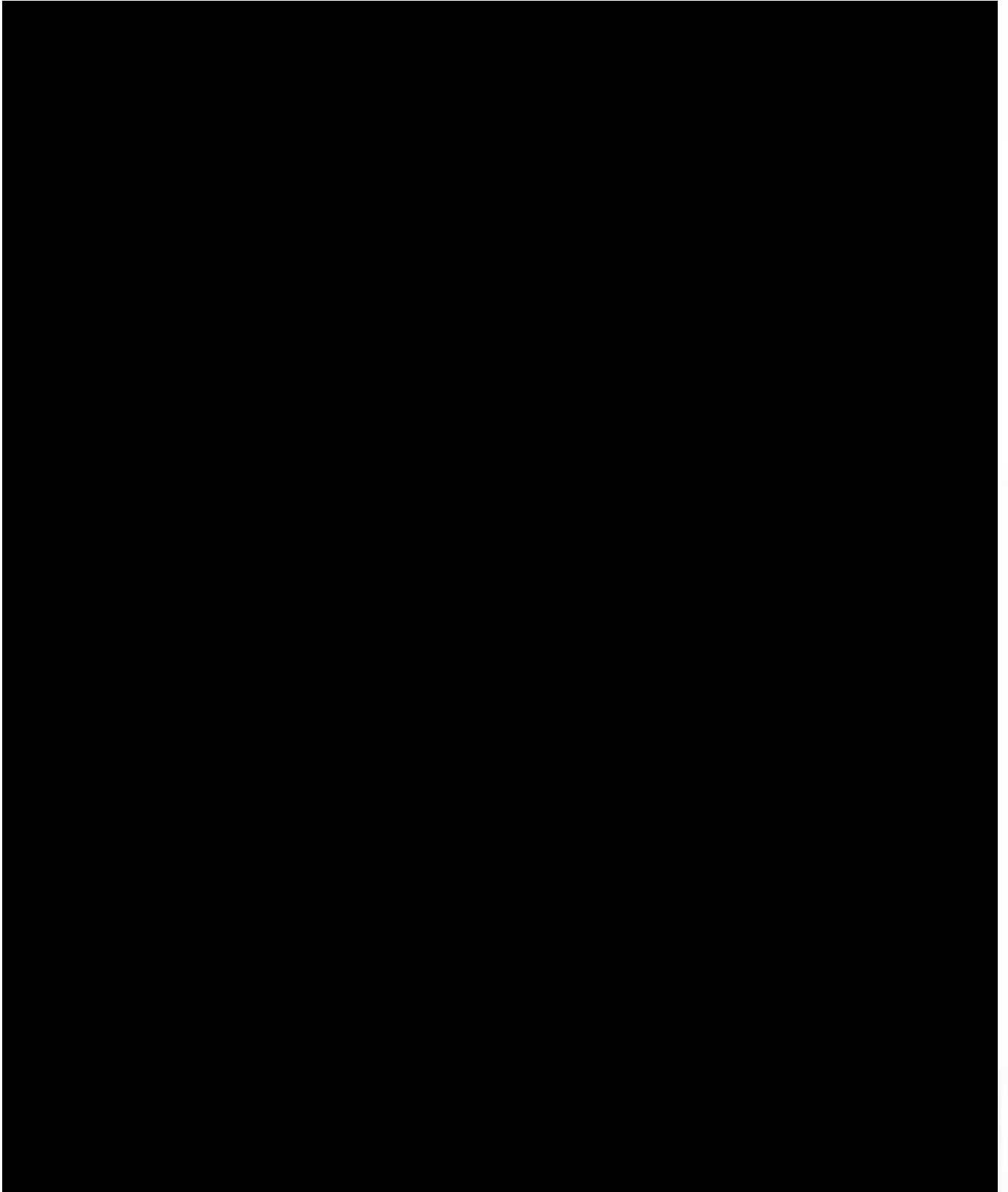












Date : 7/9/2018 1:20:41 AM  
From : "Keaveny, Thomas"  
To : "Sommerville, Paul" , "psommerville@hargray.com"  
Cc : "Rainey, Sue" , "Gregory, Suzanne"

**From:** Sarah McKee <[smckee@govhrusa.com](mailto:smckee@govhrusa.com)>  
**Date:** July 8, 2018 at 8:37:57 PM EDT  
**To:** "Keaveny, Thomas" <[ikeaveny@bcgov.net](mailto:ikeaveny@bcgov.net)>  
**Subject:** FW: Release Form

See attached.

GovHR USA  
630 Dundee Road, Suite 130  
Northbrook, IL 60062  
Direct Line: 847-867-5151  
Main Line: 847-380-3240  
Fax: 866-401-3100  
Email: [smckee@govhrusa.com](mailto:smckee@govhrusa.com)  
[www.GovHRusa.com](http://www.GovHRusa.com)

---

**From:** [alanmours@bellsouth.net](mailto:alanmours@bellsouth.net)  
**Sent:** Sunday, July 8, 2018 5:45 PM  
**To:** [Sarah M. McKee](mailto:Sarah M. McKee)  
**Cc:** [Marshall Ours](mailto:Marshall Ours)  
**Subject:** Release Form

Sarah,  
Good evening. Please find attached release form for Beaufort County.

Thanks

Alan

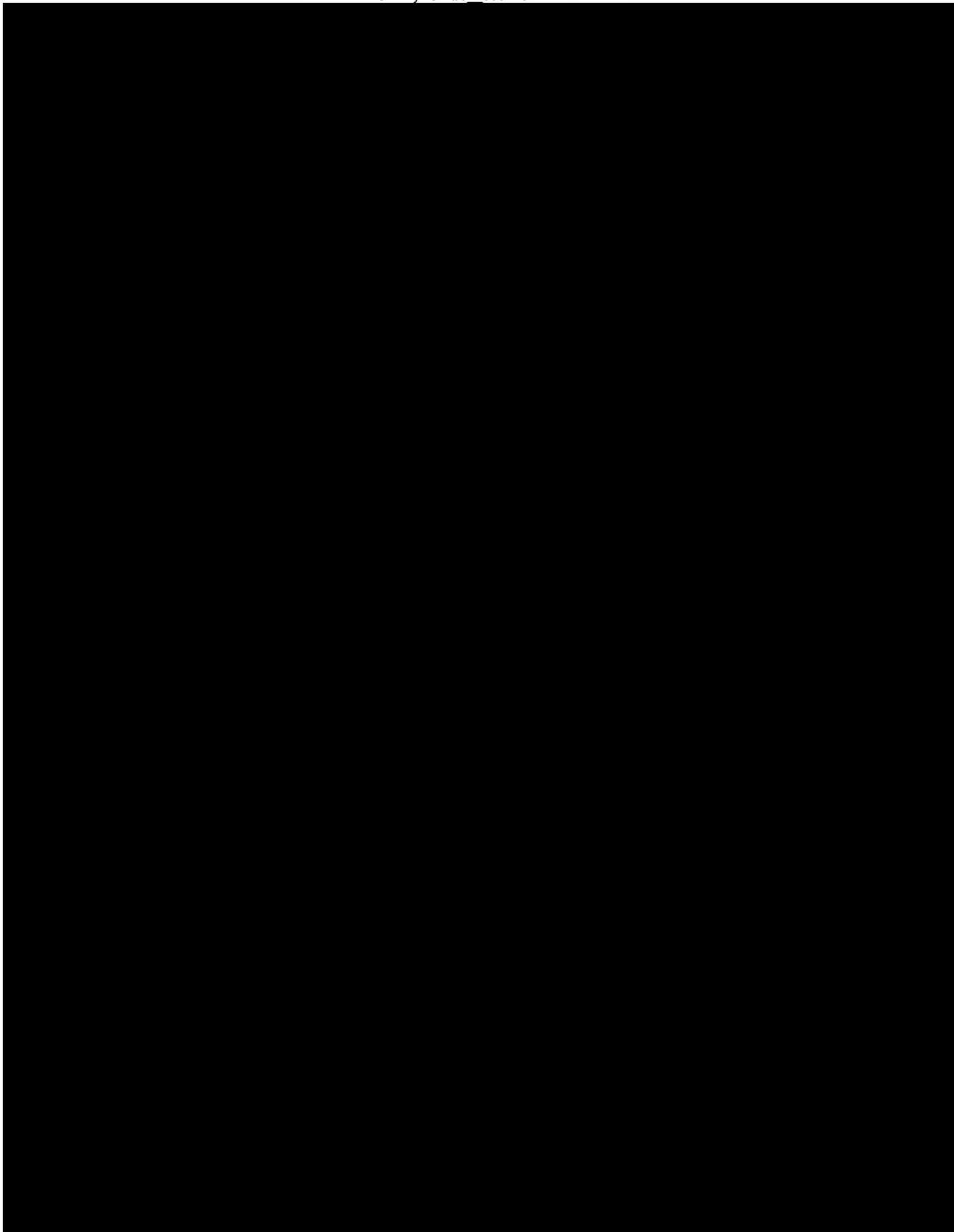
Sent from my iPhone

sending scanned document



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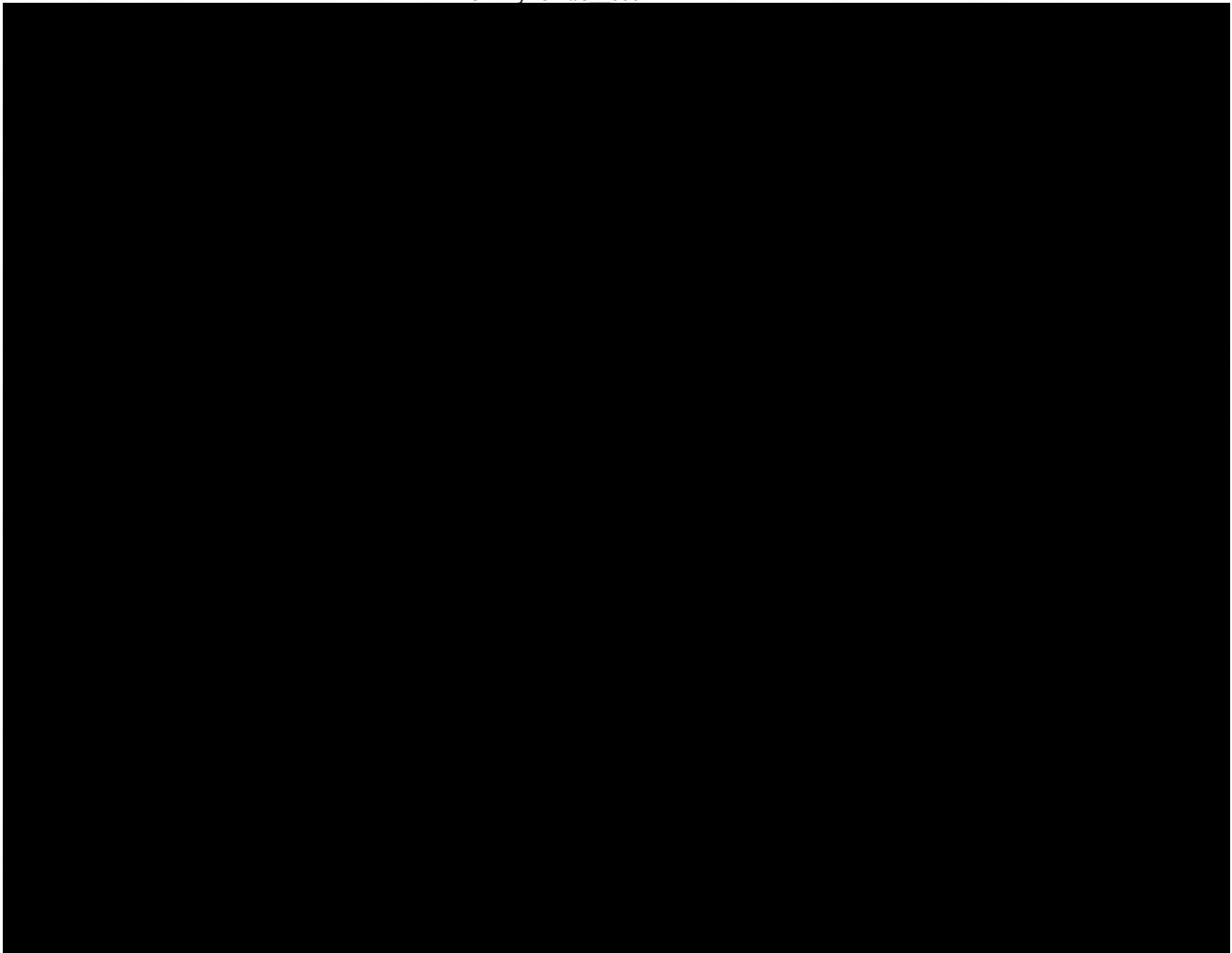
Thomas J. Keaveny II  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tel: (843) 255-2025  
Fax: (843) 255-9414



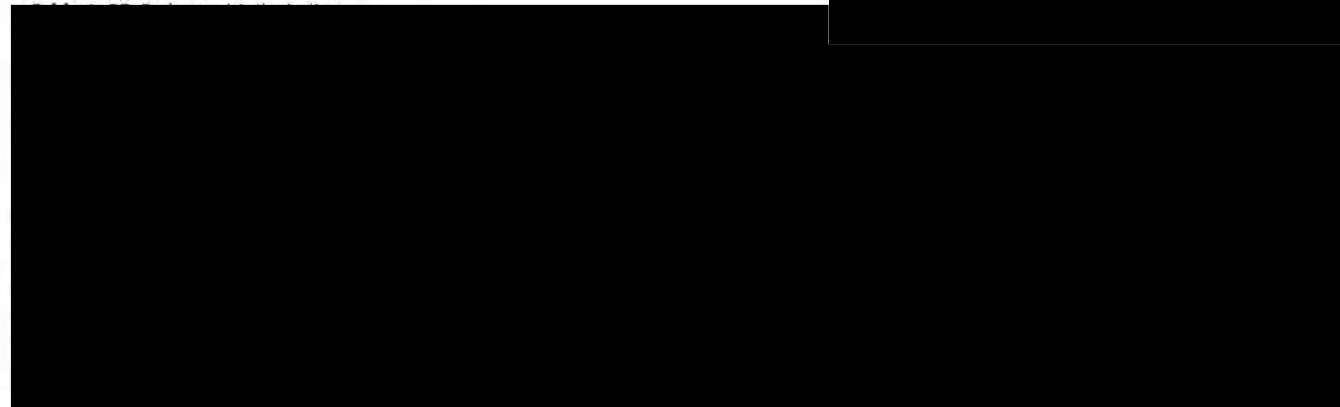
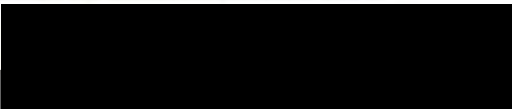
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**From:** Sarah McKee [mailto:smckee@govhrusa.com]  
**Sent:** Tuesday, July 10, 2018 9:47 AM  
**To:** Keaveny, Thomas  
**Cc:** Rainey, Sue

**From:** [Keaveny, Thomas](#)  
**Sent:** Tuesday, July 10, 2018 8:38 AM  
**To:** [Sarah McKee](#)  
**Cc:** [Rainey, Sue](#)



**From:** Sarah McKee [mailto:[smckee@govhrusa.com](mailto:smckee@govhrusa.com)]  
**Sent:** Monday, July 9, 2018 12:54 PM  
**To:** Keaveny, Thomas



**From:** [Keaveny, Thomas](#)  
**Sent:** Monday, July 9, 2018 12:44 PM  
**To:** [BillS12342@Yahoo.com](mailto:BillS12342@Yahoo.com)  
**Cc:** [Sarah McKee](#); [Gregory, Suzanne](#)





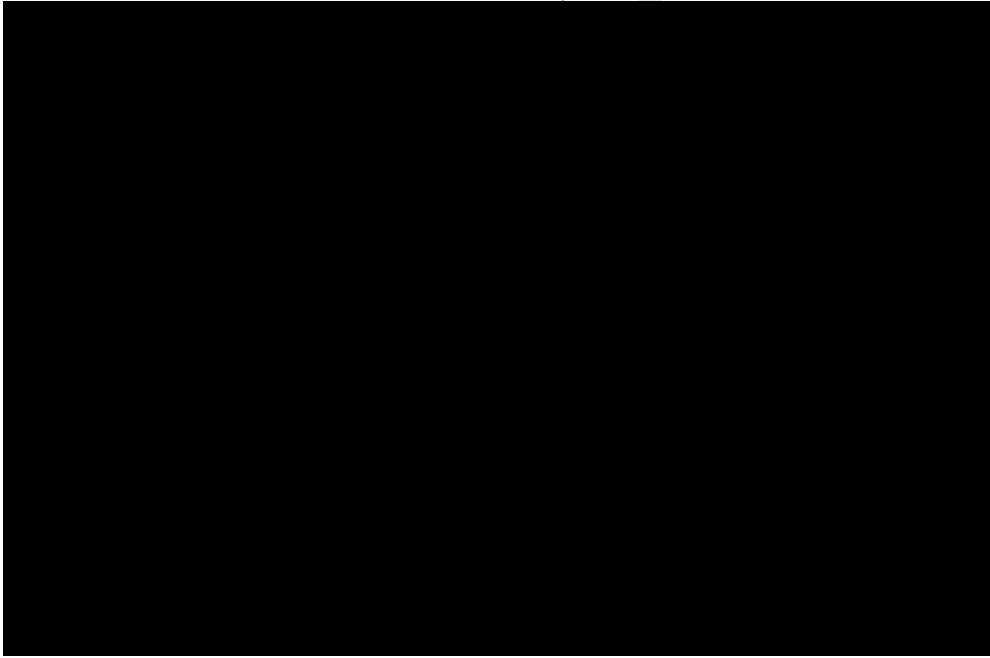
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From : "Keaveny, Thomas"  
To : "PSOMMERVILLE" , "Stu Rodman"  
Cc : "Stewart, Jerry"

Tom  
Thomas J. Keaveny, II  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tele: (843) 255-2025

—Original Message—  
From: PSOMMERVILLE [mailto:psommerville@hargmy.com]  
Sent: Monday, July 16, 2018 5:14 PM  
To: Keaveny, Thomas; Stu Rodman  
Cc: Stewart, Jerry

> Tom  
> Thomas J. Keaveny, II  
> Beaufort County Attorney  
> P. O. Drawer 1228  
> Beaufort, SC 29901-1228  
> Tele: (843) 255-2025

> Sent: Monday, July 16, 2018 7:36 AM  
> To: Keaveny, Thomas  
> Cc: Sommerville, Paul; Stewart, Jerry



**From:** Keaveny, Thomas <tkeaveny@bcgov.net>  
**Sent:** Monday, July 16, 2018 5:57 PM  
**To:** Vaux, Tabor; Sommerville, Paul  
**Cc:** Keaveny, Thomas

**Tom**  
Thomas J. Keaveny, II  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tele: (843) 255-2025



**From:** Vaux, Tabor  
**Sent:** Tuesday, July 10, 2018 12:24 PM  
**To:** Keaveny, Thomas; Sommerville, Paul

**From:** "Keaveny, Thomas" <tkeaveny@bcgov.net>  
**Date:** Tuesday, July 10, 2018 at 12:14 PM  
**To:** "psommerville@bcgov.net" <psommerville@bcgov.net>, "tvaux@bcgov.net" <tvaux@bcgov.net>

Tom  
Thomas J. Keaveny, II  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tele: (843) 255-2025



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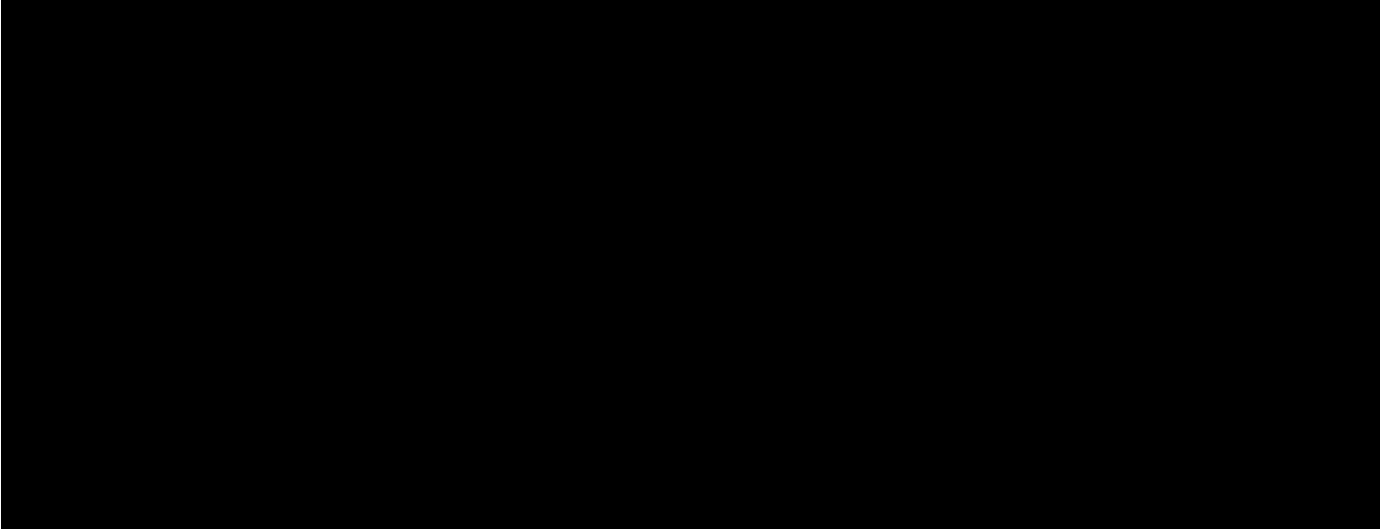
**From:** Sommerville, Paul  
**Sent:** Tuesday, July 10, 2018 12:11 PM  
**To:** Keaveny, Thomas

**From:** "Vaux, Tabor" <[tvaux@bcgov.net](mailto:tvaux@bcgov.net)>  
**Date:** July 10, 2018 at 12:09:03 PM EDT  
**To:** "Sommerville, Paul" <[psommerville@bcgov.net](mailto:psommerville@bcgov.net)>, "Covert, Michael" <[mcovert@bcgov.net](mailto:mcovert@bcgov.net)>

**From:** "[psommerville@bcgov.net](mailto:psommerville@bcgov.net)" <[psommerville@bcgov.net](mailto:psommerville@bcgov.net)>  
**Date:** Tuesday, July 10, 2018 at 12:05 PM  
**To:** "Covert, Michael" <[mcovert@bcgov.net](mailto:mcovert@bcgov.net)>  
**Cc:** "[tvaux@bcgov.net](mailto:tvaux@bcgov.net)" <[tvaux@bcgov.net](mailto:tvaux@bcgov.net)>

**From:** Covert, Michael  
**Sent:** Tuesday, July 10, 2018 11:59 AM  
**To:** Vaux, Tabor; Keaveny, Thomas; Sommerville, Paul; Stewart, Jerry; Caporale, Rick; Dawson, Gerald; Flewelling, Brian; Fobes, Steve; Glover, York; Howard, Alice G.; Rodman, Stewart

CountyFOIA#3\_\_000147

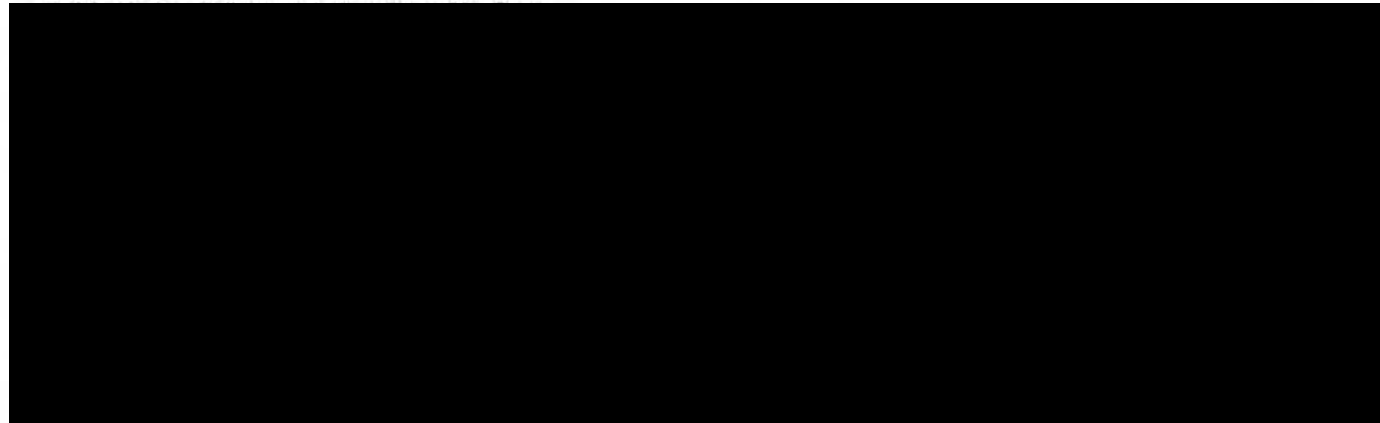


**From:** Vaux, Tabor

**Sent:** Tuesday, July 10, 2018 11:32 AM

**To:** Keaveny, Thomas; Sommerville, Paul; Stewart, Jerry; Caporale, Rick; Covert, Michael; Dawson, Gerald; Flewelling, Brian; Fobes, Steve; Glover, York; Howard, Alice G.; Rodman, Stewart

**Cc:** Rainey, Sue

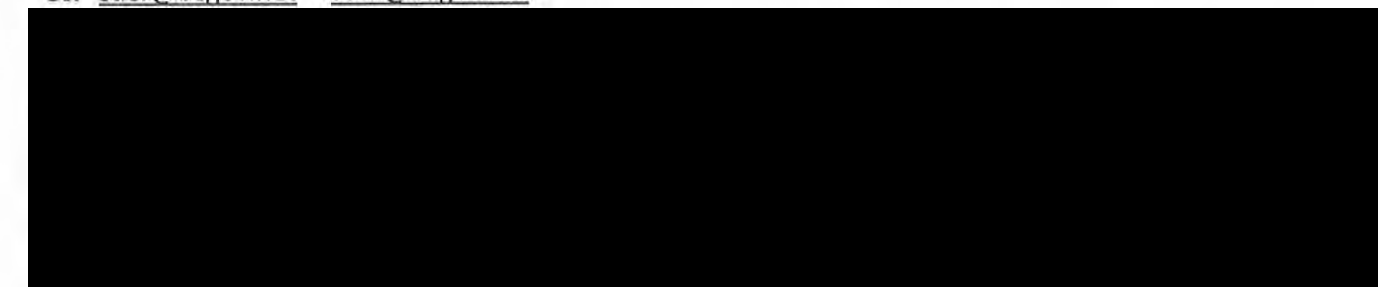


**From:** "Keaveny, Thomas" <tkeaveny@bcgov.net>

**Date:** Tuesday, July 10, 2018 at 10:29 AM

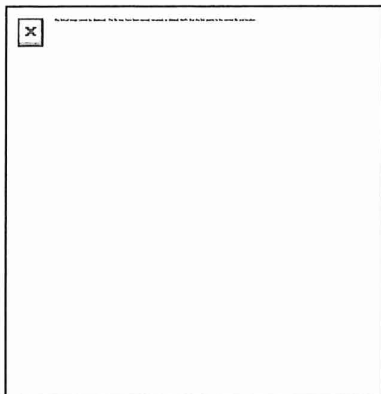
**To:** "psommerville@bcgov.net" <psommerville@bcgov.net>, "jstewart@bcgov.net" <jstewart@bcgov.net>, "rcaporale@bcgov.net" <rcaporale@bcgov.net>, "Covert, Michael" <mcovert@bcgov.net>, "gdawson@bcgov.net" <gdawson@bcgov.net>, "brianf@bcgov.net" <brianf@bcgov.net>, "sfobes@bcgov.net" <sfobes@bcgov.net>, "Glover, York" <yglover@bcgov.net>, "Howard, Alice G." <ahoward@bcgov.net>, "srodman@bcgov.net" <srodman@bcgov.net>, "tvaux@bcgov.net" <tvaux@bcgov.net>

**Cc:** "suer@bcgov.net" <suer@bcgov.net>



Thomas J. Keaveny II  
Beaufort County Attorney

P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tel: (843) 255-2025  
Fax: (843) 255-9414

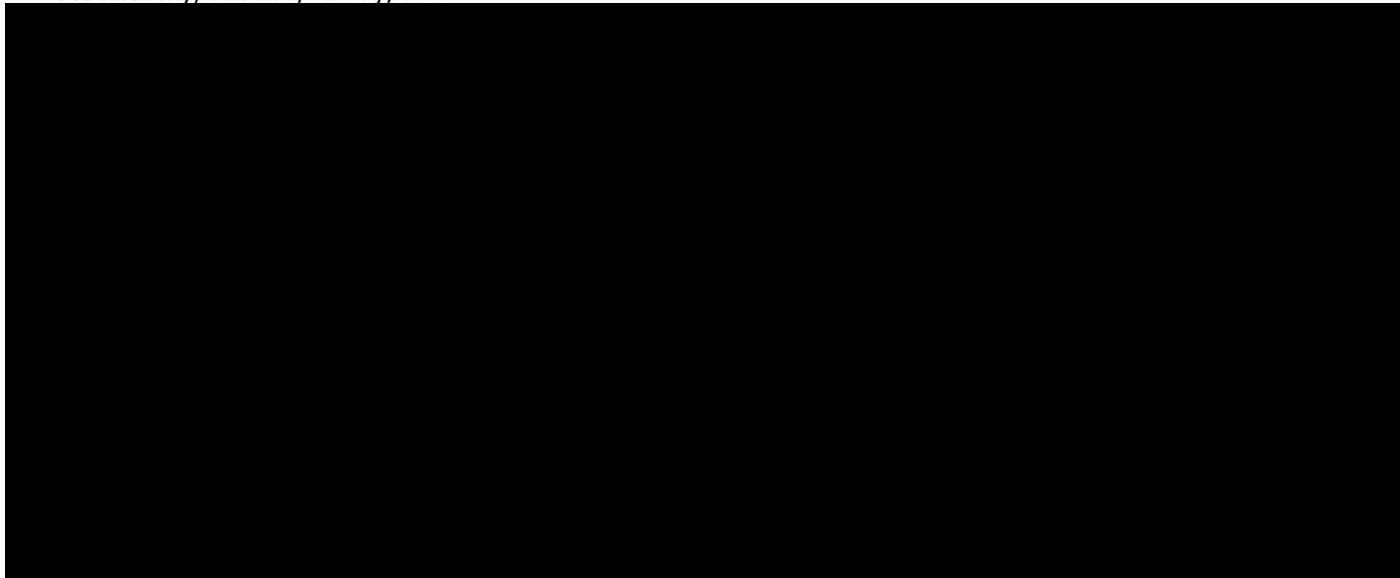


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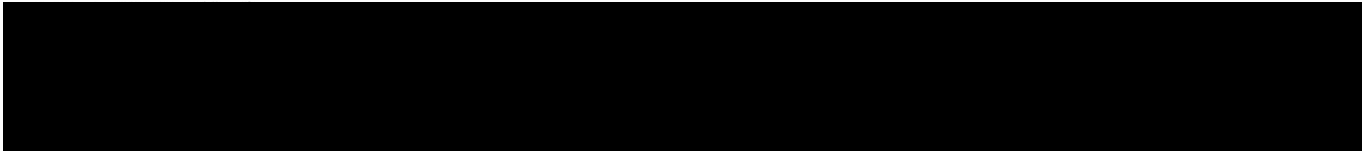
**From:** Sarah McKee [<mailto:smckee@govhrusa.com>]

**Sent:** Tuesday, July 10, 2018 9:51 AM

**To:** Keaveny, Thomas; Rainey, Sue

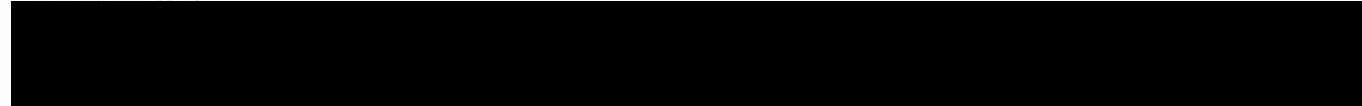


Date : 7/16/2018 10:09:34 PM  
From : "Keaveny, Thomas"  
To : "PSOMMERVILLE" , "Stu Rodman"  
Cc : "Stewart, Jerry" , "Vaux, Tabor"



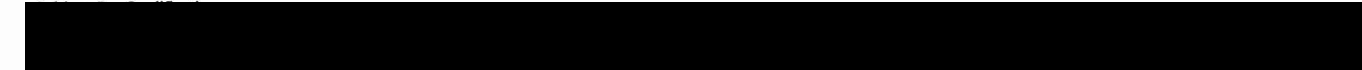
Tom  
Thomas J. Keaveny, II  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tele: (843) 255-2025

—Original Message—  
From: Keaveny, Thomas  
Sent: Monday, July 16, 2018 6:00 PM  
To: 'PSOMMERVILLE'; Stu Rodman  
Cc: Stewart, Jerry

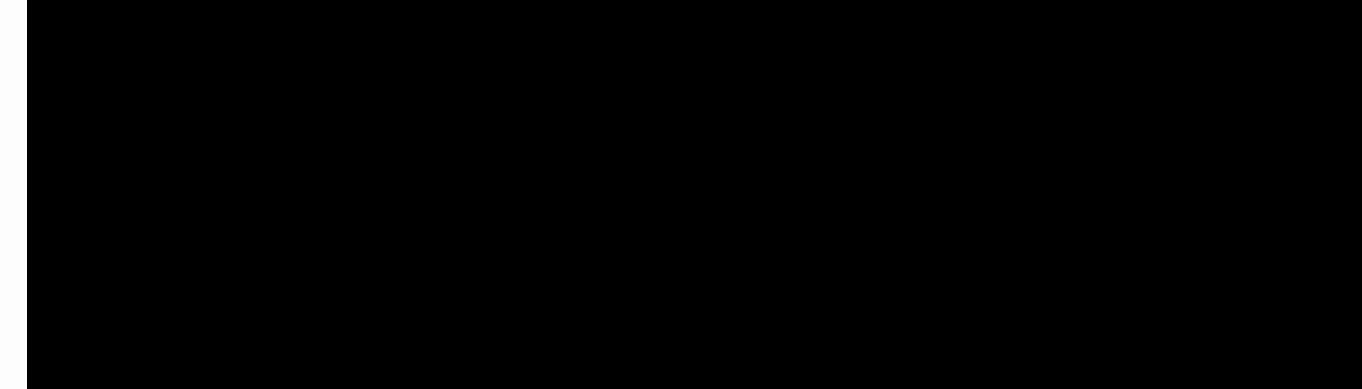


Tom  
Thomas J. Keaveny, II  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tele: (843) 255-2025

—Original Message—  
From: PSOMMERVILLE [<mailto:psommerville@hargray.com>]  
Sent: Monday, July 16, 2018 5:14 PM  
To: Keaveny, Thomas; Stu Rodman  
Cc: Stewart, Jerry



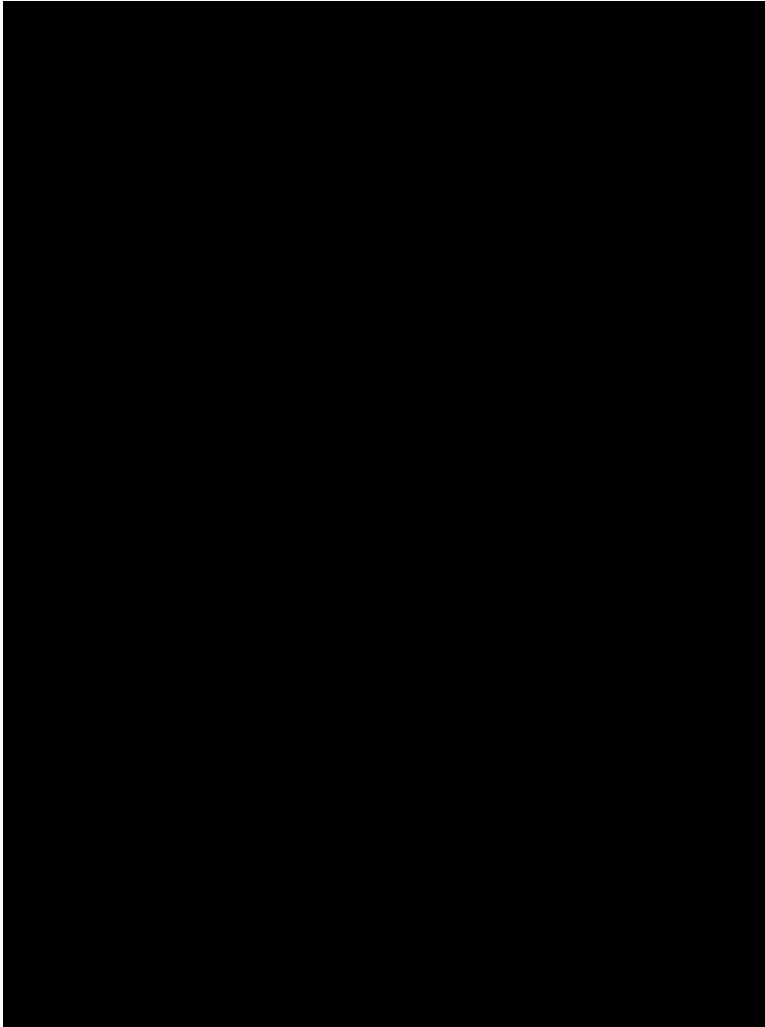
On Mon, 16 Jul 2018 16:11:38 +0000  
"Keaveny, Thomas" <[keaveny@bcgov.net](mailto:keaveny@bcgov.net)> wrote:



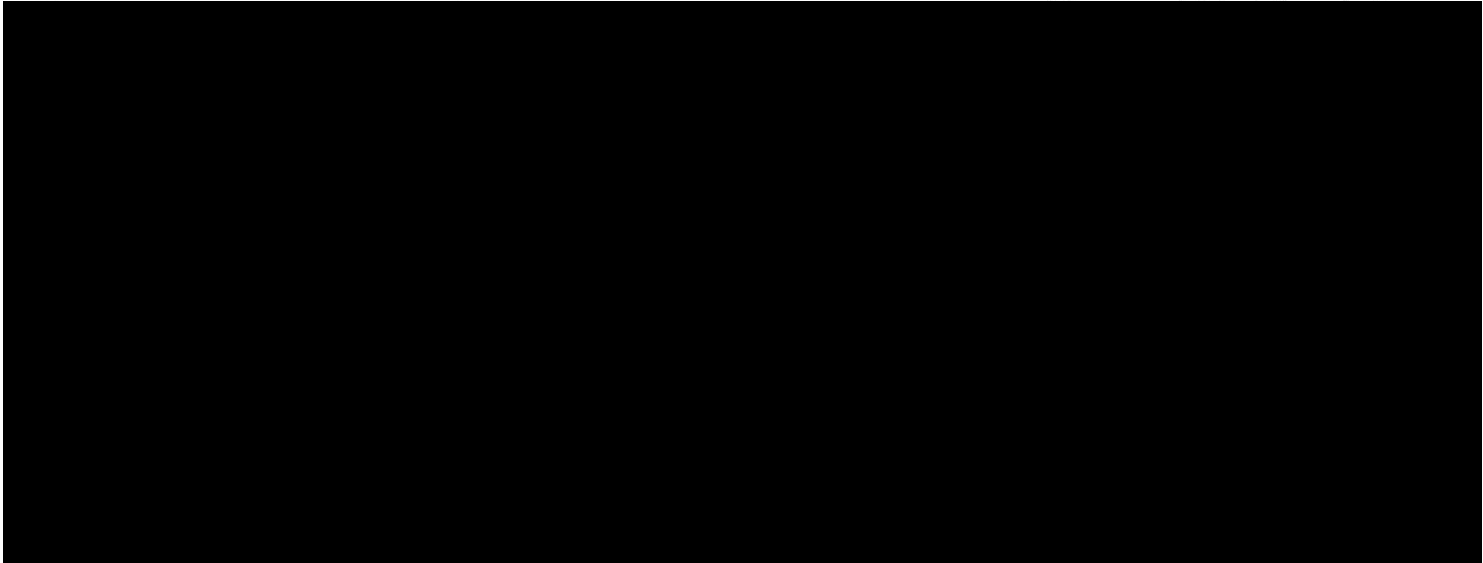
> Tom  
> Thomas J. Keaveny, II  
> Beaufort County Attorney  
> P. O. Drawer 1228  
> Beaufort, SC 29901-1228  
> Tele: (843) 255-2025  
>  
> [cid:image003.png@01D41CFE.25B81940]  
>



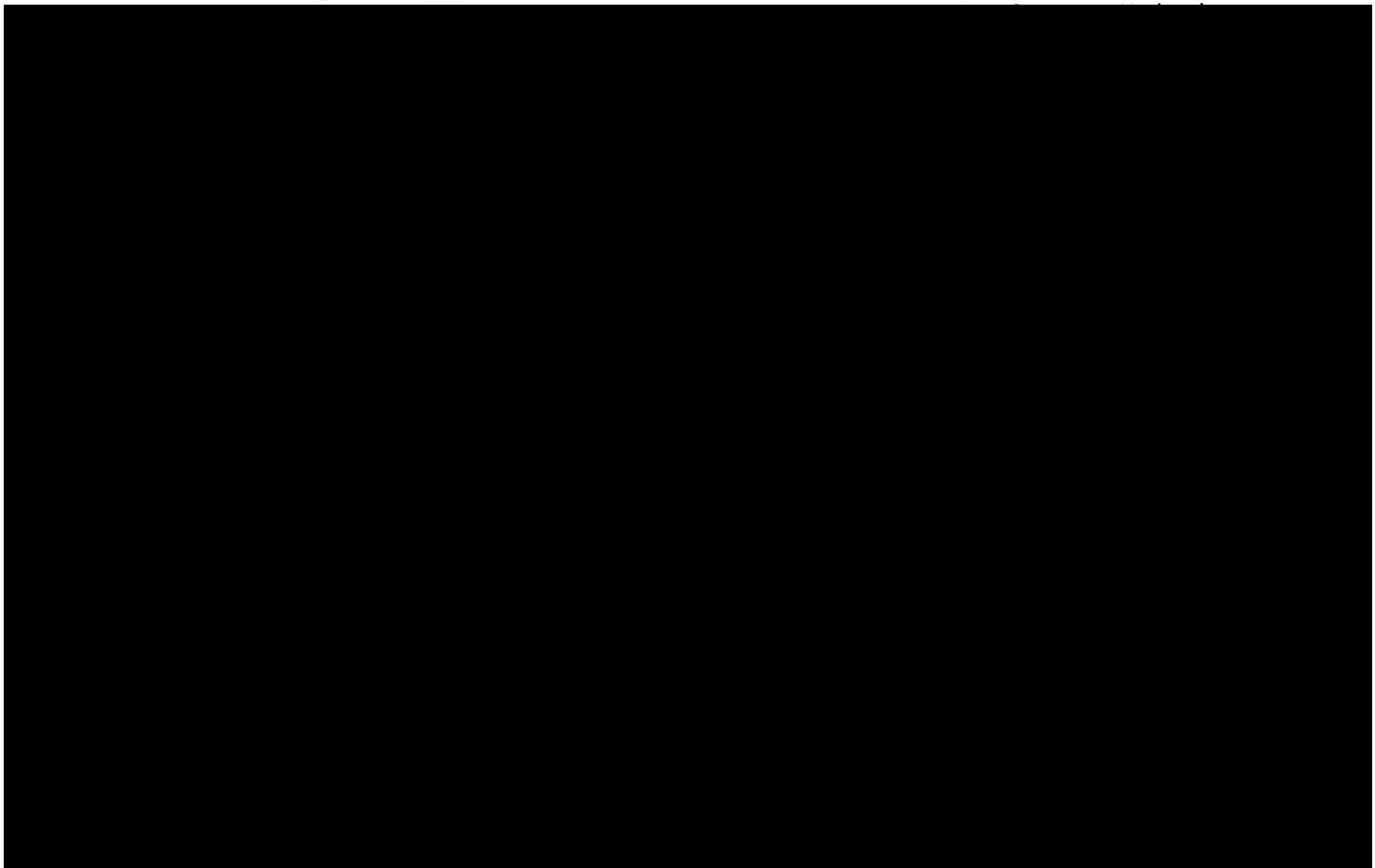
> Sent: Monday, July 16, 2018 7:36 AM  
> To: Keaveny, Thomas  
> Cc: Sommerville, Paul; Stewart, Jerry



**From:** Linda Edwards <lpedwards@gsblaw.net>  
**Sent:** Monday, July 16, 2018 12:21 PM  
**To:** Keaveny, Thomas  
**Cc:** Kathy McGrath



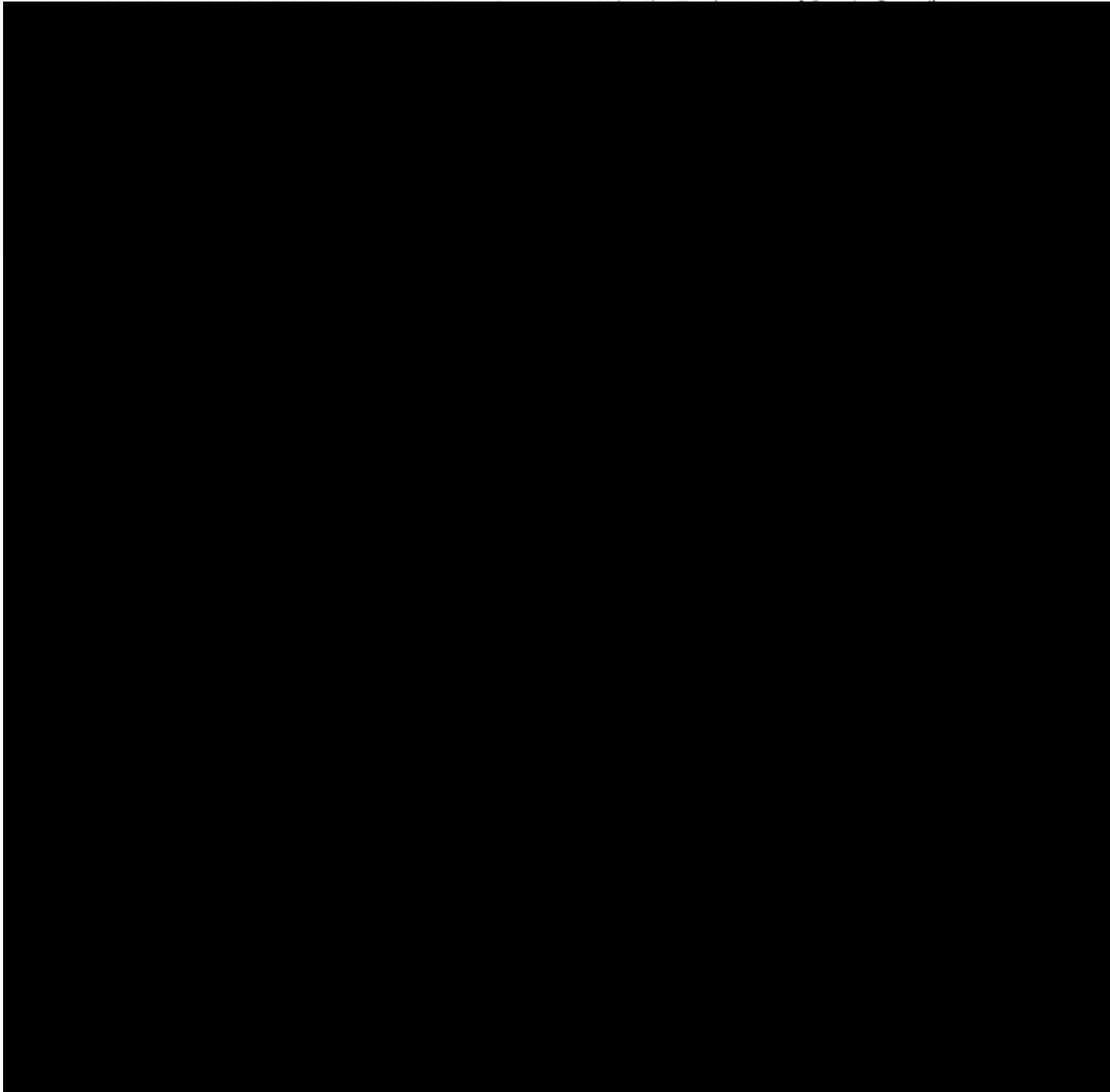
**From:** Keaveny, Thomas <tkeaveny@bcgov.net>  
**Sent:** Monday, July 16, 2018 11:53 AM  
**To:** Linda Edwards <lpedwards@gsblaw.net>

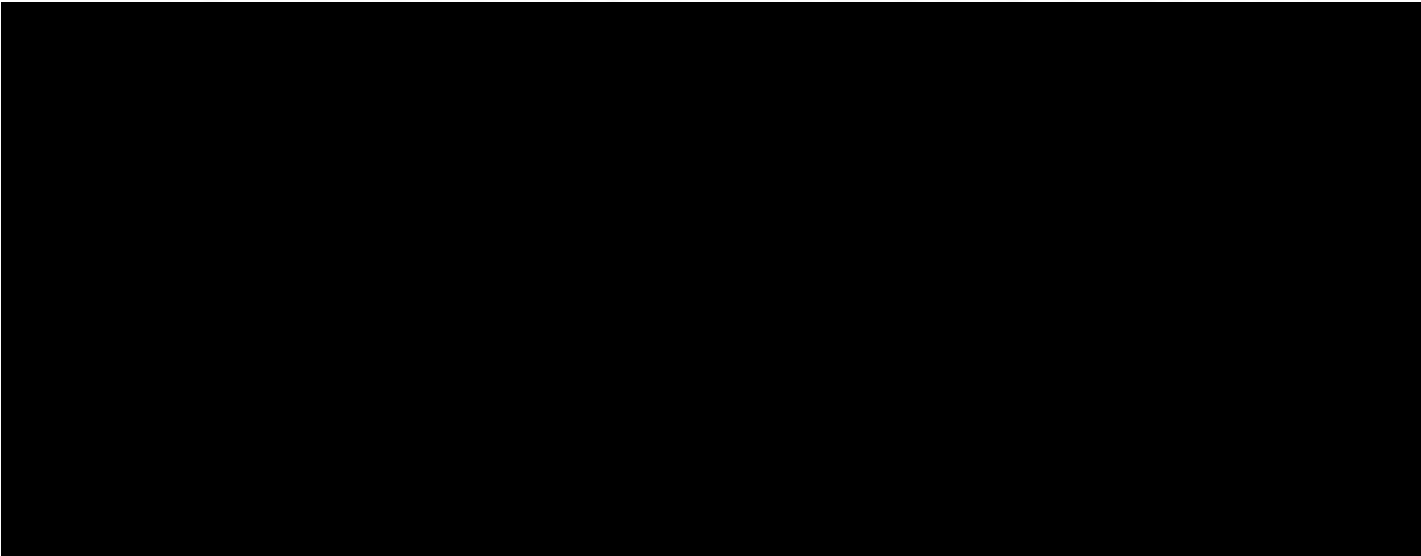




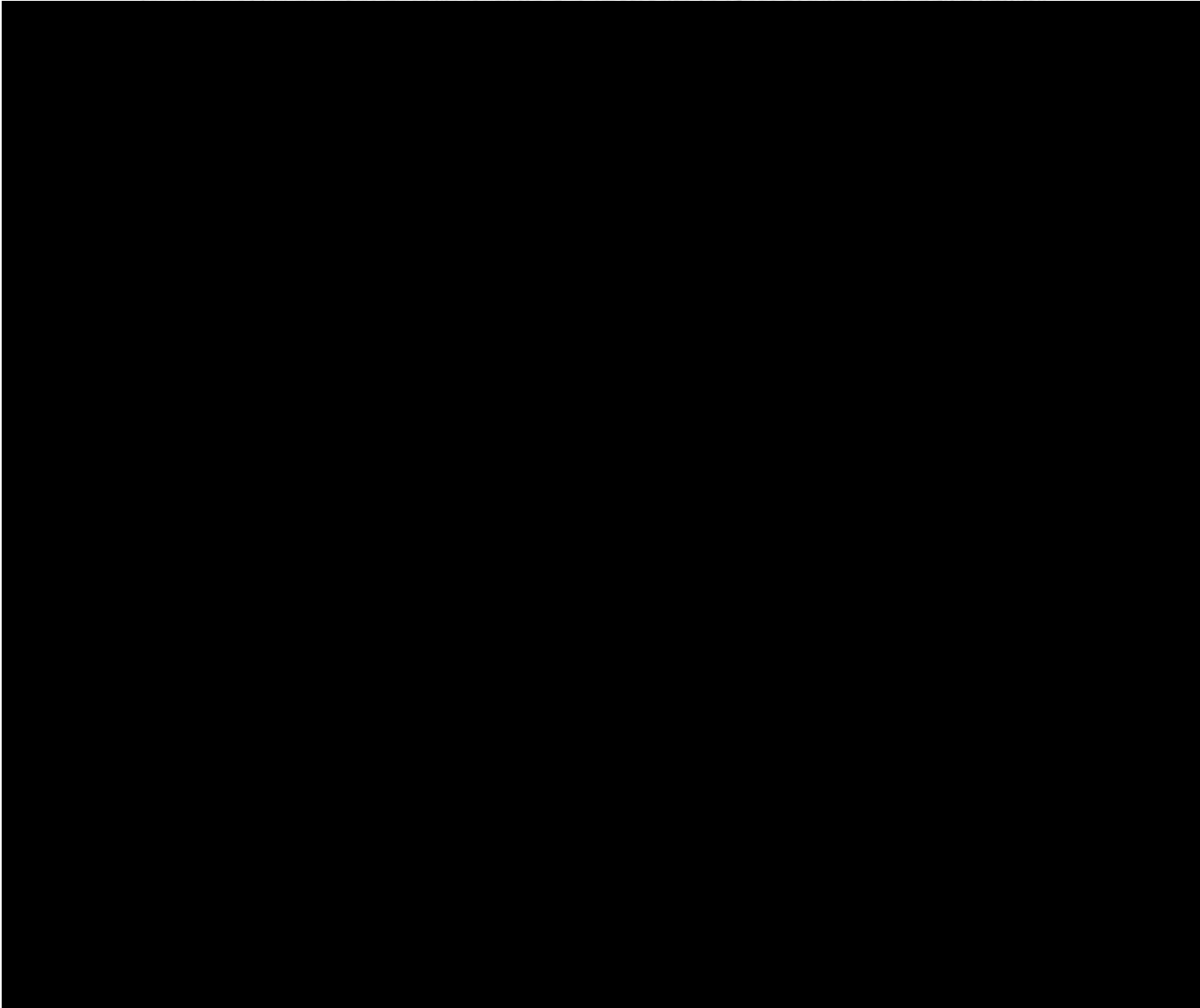
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**From:** Covert, Michael  
**Sent:** Wednesday, July 11, 2018 10:44 AM  
**To:** Keaveny, Thomas





**From:** Covert, Michael  
**Sent:** Tuesday, July 10, 2018 7:37 PM  
**To:** Keaveny, Thomas; Sommerville, Paul



CountyFOIA#3\_\_000154

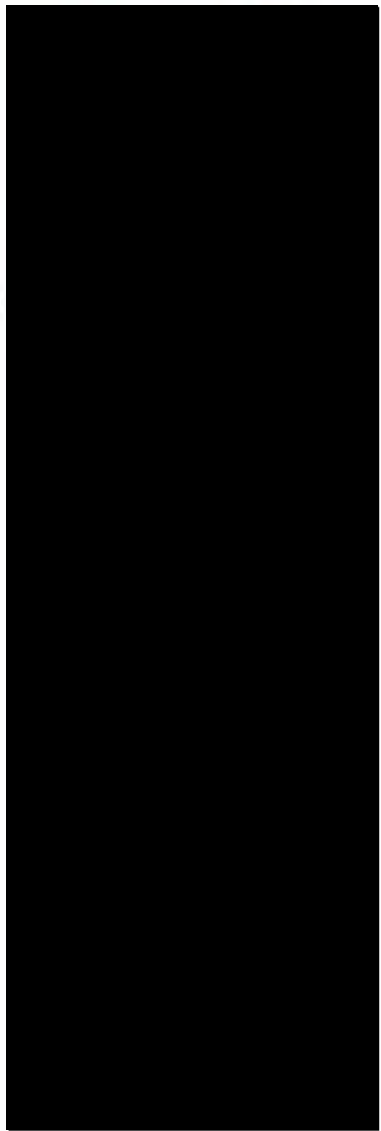
3

0560

595

**Date : 8/29/2018 3:16:57 AM**  
**From : "PSOMMERVILLE"**  
**To : tkeaveny@bcgov.net**  
**Cc : psommerville@bcgov.net**  
**Subject : Draft Letter to Council**  
**Attachment : Council.docx;**

Please edit as you see fit and feel free to seek input from any of your staff members. Thanks. Paul



At our Council meeting on Monday I fully intended to remind all of us about a critical issue, but due to our heavy agenda, I was overtaken by other matters and failed to do so. Because of the type of government we have, our only employee, aside from our clerk, is the county administrator. This means that we are prohibited from directing staff. I understand that as a practical matter, there may be times where, in the interest of time, it is appropriate/acceptable to ask a staff member a simple question that can be answered immediately and that does not require research. Unfortunately, some of us are tasking staff with projects and questions that require research and considerable staff time. As a result, we have staff members who are overwhelmed with requests from individual council members and are unable to perform their normal responsibilities. Obviously, we cannot expect staff members to have 12 bosses. All of us need to be considerate of staff and follow our protocols which require that any task or question that is complex or requires research be initiated at a committee meeting. The committee can then charge the county administrator with bringing all of the appropriate information back to the committee where it can be shared and discussed with all committee members. This is consistent with FOIA laws.

Date : 8/29/2018 12:14:58 PM  
From : "Stu Rodman"  
To : "Somerville, Paul" , "Jerry Stewart"  
Cc : "Keaveny, Thomas" , "Holland, Alicia"  
Subject : Work Session Sept  
Attachment : Draft F.docx;

Paul and Jerry,

1. York raised the issue that the Referendum has 2 questions the second being authorization to bond additional money if there is sales tax shortfall. I totally missed that there was a second question. Bad on me. It is unnecessary as the sales tax will generate probably \$35, not \$30 million per year and, more importantly, it will confuse the voters and perhaps sink the Referendum. Tom is going to review whether it is practical to remove the second question, which would be an Ordinance change. I raise the issue as the Work Session could serve for a Reading were we to consider deleting the second question.
2. Attached is my comments that I was prepared to make at Finance Committee on the Financial Policies. I gave a copy to Alicia, who suggested that it might be a good work session discussion. I am good with doing the Finance Policy (and for that matter Pooled Cash) at a work session or at Finance.
3. The work session might be a good place on close on my suggestion that courtesy nominations (where we defer to specific members and organizations) by-pass Committee and go directly to Council through the Clerk. Monday was a good example at both Committee and Council of why these nominations are so cumbersome and delay filling open positions.

Cheers,

Stu

## Draft Financial Policy Comments

- **2.7 (p3) substitute “expected” for “conservative” as the combination of expected with adequate reserves to cover swings is more financially prudent.**
  
- **2.11 (p4) substitute “three-year” for “five-year” forecast is more practical for operating budgets. Five-year for capital (3.2) is appropriate.**
  
- **3.3 (p5) replace “at least every two years” with “every year” as capital should be reviewed every year.**
  
- **3.11 (p6) words missing?**
  
- **4A (p7) define two Reserves:**
  - 1. Reserve to be defined and exclude encumbered assets.**
  - 2. Readily Available Cash Reserve to include unencumbered cash and equivalents and immediately available borrowing.**
  
- **4.A.1 (p7) set the General Fund Reserve to be a minimum of 2 months (17%) throughout the year. Refer to the Reserve rather than a number in subsequent paragraphs. Eliminate the maximum as it serves no purpose and may be counterproductive.**
  
- **4.A.7 (p7) Require that the Readily Available Cash Reserve be a minimum of 3 months during hurricane season.**

- **A.B.6&7 (p8) Probably needs some explanation for the average citizen and me.**

Date : 9/8/2018 6:04:22 PM

From : "Keaveny, Thomas"

To : "psonmerville@hargray.com", "Stewart, Jerry", "Caporale, Rick", "Covert, Michael", "Dawson, Gerald", "Flewelling, Brian", "Fobes, Steve", "Glover, York", "Howard, Alice G.", "sturodman@gmail.com", "Vaux, Tabor"

Cc : "Larson, Eric", "McFee, Robert", "Kinton, Colin", "Holland, Alicia", "Spells, Monica", "Foot, Philip", "McBride, Ray"

Subject : Fwd: Hurricane Florence Update #2 9.8.18

Attachment : Florence.pdf;ATT00001.htm;

Members of Council,

I am forwarding a Hurricane Florence Update which I received from Col. Baxley a few minutes ago. I will keep you informed of all developments. If you have any questions, please call my cell: (843) 709-3721.

Please be advised I have provided you with the latest information I have at this time. I will update you after our 5:30 conference with EMD.

Tom

Thomas J. Keaveny II

Interim County Administrator

Beaufort County Attorney

This message is being sent from my iPhone. Please excuse typographical errors.

Begin forwarded message:

From: "Baxley, Neil" <neilb@bcgov.net>

Date: September 8, 2018 at 1:14:01 PM EDT

To: "Baxley, Neil" <neilb@bcgov.net>, "Allen, Ed" <eda@bcgov.net>, "Amber Bryson" <bluecrab1981@gmail.com>, "Bill Rouse" <williamrouse@scdps.gov>, "Chad Sitz" <chad.sitz@usmc.mil>, "Charles Huggins" <huggins@palmettobluffonline.com>, "Kinton, Colin" <ckinton@bcgov.net>, "debbie szpanka" <dszpanka@townofbluffton.com>, "Dennis Boniecki" <dboniecki@scdps.gov>, "Wilhelm, David" <dwillhelm@bcgov.net>, "Larson, Eric" <elarson@bcgov.net>, "Gretchen Birt" <gbirt@emd.sc.gov>, "jlake@charlestoncounty.org" <jlake@charlestoncounty.org>, "Justin Baxley" <justin.baxley@yorkcountygov.com> <justin.baxley@yorkcountygov.com>, "Major E.J. Pinales USMC" <eduardo.pinales@usmc.mil>, "Murray, Louise" <louisem@bcgov.net>, "Neal Pugliese" <nealpugliese@gmail.com>, "Ownby, Dorna" <downby@bcgov.net>, "Cobb, Pamela" <pcobb@bcgov.net>, "pambaxley@yahoo.com" <pambaxley@yahoo.com>, "Baxley, Pam" <pbaxley@bcgov.net>, "Rep Shannon Erickson" <repshannonerickson@gmail.com>, "Roland Gardner" <rgardner@BJHCHS.org>, "Cook, Suzanne" <suzannec@bcgov.net>, "Tom Dunn" <thomasd@hiltonheadislandsc.gov>, "Van Willis" <vwillis@portroyal.org>, "Wells Morrison" <datawsecurity@islc.net>, "William Winn" <WWINN@uscb.edu>, "bradt@hiltonheadislandsc.gov" <bradt@hiltonheadislandsc.gov>, "Kline, Bruce" <chiefkline@lshfd.org>, "Eddie Boys" <mboys@hargray.com>, "harry roundtree" <chief@burtonfd.org>, "John Thompson" <jthompson@blufftonFD.com>, "Jones, Buddy" <bjones@bcgov.net>, "Josh Horton" <joshhorton@fipsd.org>, "Reece Bertholf" <rbertholf@cityofbeaufort.org>, "Tom Webb" <webbt@burtonfd.org>, "Viens, Angela" <angelavi@bcgov.net>, "Angelo, William" <wangelo@bcgov.net>, "Baird, Brian" <brianb@bcgov.net>, "Neill, William" <wneill@bcgov.net>, "Bromage, Robert" <roberth@bcgov.net>, "Tuten, Robert" <bobbyt@bcgov.net>, "Sankowski, Chris" <chris@bcgov.net>, "Runnion, Charles" <crunnion@bcgov.net>, "Covington, Jason" <jcovington@bcgov.net>, "Zeoli, David" <dzeoli@bcgov.net>, "Givens, Alfredo" <agivens@bcgov.net>, "Zanelotti, Glenn" <gzanelotti@bcgov.net>, "Bukofsky, Jim" <jimbu@bcgov.net>, "Walton, Jimmy" <jimw@bcgov.net>, "Johnson, Scott" <scottj@bcgov.net>, "Blackmon, Kyle" <kblackmon@bcgov.net>, "Legree, Jackie" <jackiew@bcgov.net>, "Mattox, Mark" <markm@bcgov.net>, "Averill, Matt" <mttav@bcgov.net>, "Purdy, Jeff" <jpurdy@bcgov.net>, "Berry, Renita" <rberry@bcgov.net>, "Roper, Richard" <rickyr@bcgov.net>, "Arbello, Robert" <rarbello@bcgov.net>, "Avery, Tammy" <tavery@bcgov.net>, "McLellan, Eric" <EMcLellan@bcgov.net>, "Washington, Ilexia" <iwashington@bcgov.net>, "Marks, Jacqueline" <jmarks@bcgov.net>, "Flack, Kyle" <kflack@bcgov.net>, "Akins, Malasia" <makins@bcgov.net>, "Wells, Lacey" <lwilburn@bcgov.net>, "Metcalf, Barbara" <bmetcalf@bcgov.net>, "Davis, Felisa" <flavis@bcgov.net>, "Jefferson, LaShawn" <lshawnj@bcgov.net>, "Charlton, Marshina" <mcharlton@bcgov.net>, "Mowery, Erin" <emowery@bcgov.net>, "Smith, Melanie" <melanies@bcgov.net>, "Nix, Dennis" <dnix@bcgov.net>, "Mowery, Erin" <emowery@bcgov.net>, "Lallemont, Jessica" <jlallemon@bcgov.net>, "Bristow, Keisha" <kbristow@bcgov.net>, "Christian, LaSundra" <lchristian@bcgov.net>, "Mervin, Ankanette" <amervin@bcgov.net>, "Charlton, Marshina" <mcharlton@bcgov.net>, "Helfin, Jessica" <jhelfin@bcgov.net>, "Neill, William" <wneill@bcgov.net>, "alan beach" <abeach@portroyal.org>, "Daniel Gambrell" <dgambrell@scprt.com>, "Henry Garbade" <hgarbade@mailbox.sc.edu>, "matt clancy" <mclancy@cityofbeaufort.org>, "Michael Paul Thomas" <lthomasM@dnr.sc.gov>, "Peter G. Lawson" <peter.g.lawson@navy.mil>, "Ray Stevens" <rstevens@scprt.com>, "Robb Carson" <rcarson@cityofbeaufort.org>, "SA George French" <george.french@ic.fbi.gov>, "SA George Graves" <george.graves@ic.fbi.gov>, "SA Mike Pierce" <michael.j.pierce1@navy.mil>, "Horton, Allen" <allenh@bcgov.net>, "Hatfield, Michael" <mikeh@bcgov.net>, "Bonner, Patricia" <pbonner@bcgov.net>, "Chaplin, Amy" <achaplin@bcgov.net>, "Cooler, Bonnie" <bonniec@bcgov.net>, "Givens, Elaine" <egivens@bcgov.net>, "McCarthy, Felicia" <feliciam@bcgov.net>, "Bishop, Hope" <hopec@bcgov.net>, "Hughes, Diana" <dhughes@bcgov.net>, "Rodriguez, Jaycee" <jrodriguez@bcgov.net>, "Morris, Kiera" <kieram@bcgov.net>, "Seder, Lisa" <lseder@bcgov.net>, "Tuten, Lori" <lutent@bcgov.net>, "Allen, Daniel" <daniela@bcgov.net>, "Bilcz, Aaron" <aaronb@bcgov.net>, "Cajigas, Hector" <hcajigas@bcgov.net>, "Seronka, Chelsea" <ChelseaS@bcgov.net>, "david randall" <davidr29910@botmail.com>, "Ferguson,

John" <jferguson@bcgov.net>, "DiFalco, John" <jdfalco@bcgov.net>, "Simpson, Joseph" <jsimpson@bcgov.net>, "Gregg, Keith" <kgregg@bcgov.net>, "Korinek, Kurt" <kkorinek@bcgov.net>, "Merrill, Jeffery" <jmerrill@bcgov.net>, "Williams, Paul" <paulw@bcgov.net>, "Herlong, Robert" <rherlong@bcgov.net>, "Tanzuzzi, Michael" <mtanzuzzi@bcgov.net>, "Ferguson, Todd" <tferguson@bcgov.net>, "Winston, Michael" <mwinston@bcgov.net>, "Paul, Adam" <apaul@bcgov.net>, "Abell, Brian" <babell@bcgov.net>, "Disbrow, Brandon" <bdisbrow@bcgov.net>, "Garcia, Craig" <cgarcia@bcgov.net>, "Watts, Caleb" <cwatts@bcgov.net>, "Seronka, Chad" <chads@bcgov.net>, "Boone, Danel" <dboone@bcgov.net>, "Kline, Dustin" <dkline@bcgov.net>, "Robbins, Derek" <d Robbins@bcgov.net>, "Tafuya, David" <dtafuya@bcgov.net>, "Saunders, Justin" <jsaunders@bcgov.net>, "Tunis, James" <jtunis@bcgov.net>, "Webb, Jeremiah" <jwebb@bcgov.net>, "Keener, John" <jkeener@bcgov.net>, "Scott, Jacob" <jacobs@bcgov.net>, "Guise, Jon" <jguise@bcgov.net>, "Breland, Kyle" <kbreland@bcgov.net>, "Riccobene, Matthew" <mrizzo@bcgov.net>, "Moore, Mabrena" <mmore@bcgov.net>, "Perkins, Michael" <mperkins@bcgov.net>, "Thomas, Nicholas" <nthomas@bcgov.net>, "Myers, Nichole" <nmyers@bcgov.net>, "O'Neal, Patrick" <poneal@bcgov.net>, "Byrd, Robert" <rbyrd@bcgov.net>, "Logan, Scott" <slogan@bcgov.net>, "Mowery, Steven" <smowery@bcgov.net>, "Mattox, Thomas" <tmattox@bcgov.net>, "Krapf, Troy" <tkrapf@bcgov.net>, "Breighner, William" <wbreighner@bcgov.net>, "Andrew Calore" <andrewc@bcgov.net>, "Kaase, Brian" <bkaase@bcgov.net>, "Burns, Brent" <bburns@bcgov.net>, "Gibson, Corey" <cgibson@bcgov.net>, "Cleveland, Kevin" <kcleveland@bcgov.net>, "Collier, Jonathan" <jcollier@bcgov.net>, "Dickman, Jeremy" <jdickman@bcgov.net>, "Hansen, Gary" <ghansen@bcgov.net>, "Greninger, Justin" <jgreninger@bcgov.net>, "Hardy, Matthew" <mhardy@bcgov.net>, "Huggins, Matthew" <mhuggins@bcgov.net>, "Whittenton, Jeremy" <jwhittenton@bcgov.net>, "Meza, Krysta" <kmeza@bcgov.net>, "Klein, John" <jklein@bcgov.net>, "Lear, Joseph" <jlear@bcgov.net>, "Malonis, Michael" <mmalonis@bcgov.net>, "Mankin, Stuart" <smankin@bcgov.net>, "Murphy, William" <wmurphy@bcgov.net>, "Aroneck, Robert" <raroneck@bcgov.net>, "Carter, Ryan" <rcarter@bcgov.net>, "Meehan, Robert" <rmeehan@bcgov.net>, "Hunt, Stephen" <shunt@bcgov.net>, "Scheemaker, Joshua" <jscheemaker@bcgov.net>, "Slauson, Paul" <pslauson@bcgov.net>, "Snyder, Ryan" <rsnyder@bcgov.net>, "Stuckey, Jason" <jstuckey@bcgov.net>, "Toomey, Sean" <stoomey@bcgov.net>, "Crowley, Wallace" <wcrowley@bcgov.net>, "Musser, William" <wmusser@bcgov.net>, "Weich, William" <wwweich@bcgov.net>, "Welsh, Jennifer" <jwelsh@bcgov.net>, "Williamson, Richard" <rwilliamson@bcgov.net>, "Cushman, Zachariah" <zcushman@bcgov.net>, "Zeman, Jesse" <jzeman@bcgov.net>, "Zsamar, Adam" <adzamar@bcgov.net>, "Townsend, Brian" <btownsend@bcgov.net>, "Calandra, Joel" <jcalandra@bcgov.net>, "Denham, Karen" <kdenham@bcgov.net>, "Fripp, Isaac" <ifripp@bcgov.net>, "Hall, Richard" <rhall@bcgov.net>, "Hoyt, James" <jhoyt@bcgov.net>, "Malphus, Daryl" <dmalphus@bcgov.net>, "Moberly, Mike" <mmoberly@bcgov.net>, "Rowell, Patrick" <patrickr@bcgov.net>, "Stettmier, Mike" <mstettmier@bcgov.net>, "Vaughn, Anthony" <avaughn@bcgov.net>, "Washington, Craig" <cwashington@bcgov.net>, "Wilson, Jason" <jwilson@bcgov.net>, "Capps, Christopher" <ccapps@bcgov.net>, "Angstadt, Eric" <eangstadt@bcgov.net>, "Garst, Ryan" <rgarst@bcgov.net>, "Hovest, Travis" <thovest@bcgov.net>, "Stuckey, Jason" <jstuckey@bcgov.net>, "Bush, Kevin" <kbush@bcgov.net>, "Lamb, Owen" <olamb@bcgov.net>, "Mooney, Daniel" <dmooney@bcgov.net>, "Prusinowski, James" <jamesp@bcgov.net>, "Parnell, Rhett" <rparnell@bcgov.net>, "Ricker, Eric" <ericker@bcgov.net>, "Thomas, Martin" <mthomas@bcgov.net>, "Cooler, Brandon" <bcooler@bcgov.net>, "Washington, Craig" <cwashington@bcgov.net>, "DiCarlo, Robert" <rdicarlo@bcgov.net>, "Hardy, Erik" <ehardy@bcgov.net>, "Collier, Jonathan" <jcollier@bcgov.net>, "Klein, John" <jklein@bcgov.net>, "Albertin, Laurel" <lalbertin@bcgov.net>, "Lauver, Jeff" <jlauver@bcgov.net>, "Morris, Erin" <emorris@bcgov.net>, "Heroux, Raymond" <theroux@bcgov.net>, "Bailey, Paul" <pbailey@bcgov.net>, "Gilbert, Arnold" <agilbert@bcgov.net>, "Mossburg, Dale" <dmossburg@bcgov.net>, "Griffin, Keith" <kgriffin@bcgov.net>, "Hook, Erin" <ehook@bcgov.net>, "Weller, Justin" <jweller@bcgov.net>, "Thompson, Brandy" <bthompson@bcgov.net>, "Faucett, Andrew" <aFaucett@bcgov.net>, "Calhoun, Todd" <scalhoun@bcgov.net>, "Chapman, Brian" <bchapman@bcgov.net>, "Langford, Alan" <alangford@bcgov.net>, "Florencio, Andres" <andresf@bcgov.net>, "Jemmings, Mike" <mjemmings@bcgov.net>, "Fraser, Jeremiah" <jfraser@bcgov.net>, "Light, Jeff" <jefll@bcgov.net>, "Moreno, George" <gmoreno@bcgov.net>, "Tuten, Robert" <rbobbyt@bcgov.net>, "Vido, Thomas" <tvido@bcgov.net>, "Butters Maj William G" <williambutters@usmc.mil>, "jbabkiewicz@townofbluffton.com" <jbabkiewicz@townofbluffton.com>, "e911cef@hargray.com" <e911cef@hargray.com>, "Spencer, Jerry" <jspencer@bcgov.net>, "wickenhost@scdot.org" <wickenhost@scdot.org>, "Bowers, Angelica" <abowers@bcgov.net>, "pamelaf@bjwsa.org" <pamelaf@bjwsa.org>, "stevell@bjwsa.org" <stevell@bjwsa.org>, "William Bettis" <WilliamB@bjwsa.org>, "Turner, Michael K." <TurnerMK@scdot.org>, "sepstein@townofbluffton.com" <sepstein@townofbluffton.com>, "Harris, Cheryl" <cherylh@bcgov.net>, "thelm@oldfieldsc.com" <thelm@oldfieldsc.com>, "Hunt, Gregg" <ghunt@bcgov.net>, "wsaleeby@palmetto.coop" <wsaleeby@palmetto.coop>, "pbrown@montagehotels.com" <pbrown@montagehotels.com>, "Shea, Danielle" <dshea@bcgov.net>, "denver.edick@usmc.mil" <denver.edick@usmc.mil>, "French, Stephanie" <stephanief@bcgov.net>, "Frazier, Marquise" <mfrazier@bcgov.net>, "Becker, Garrett" <gbecker@bcgov.net>, "Hinson, Cassandra" <chinson@bcgov.net>, "Smith, Brittany" <bchaplin@bcgov.net>, "Anderson, Christian" <christiana@bcgov.net>, "Cochenour, Alex" <acochenour@bcgov.net>, "Harris, Lyle" <lharris@bcgov.net>, "Whaling, Nicholas" <nwhaling@bcgov.net>, "Breland, Kyle" <kbreland@bcgov.net>, "DeMars, James" <jdemars@bcgov.net>, "Ireland, Daniel" <direland@bcgov.net>, "Adams, Gabe" <gadams@bcgov.net>, "Laudato, Courtney" <claudato@bcgov.net>, "Hewitt, Jonathan" <jhewitt@bcgov.net>, "Madison, Izaac" <imadison@bcgov.net>, "Mendicino, James" <jmendicino@bcgov.net>, "Swalm, Taryn" <tswalm@bcgov.net>, "Green, Brandon" <bgreen@bcgov.net>, "Lynn, Erin" <elynn@bcgov.net>, "Madison, Izaac" <imadison@bcgov.net>, "Hewitt, Jonathan" <jhewitt@bcgov.net>, "Johnston, Natalie" <njohnston@bcgov.net>, "Arcuri, Melissa" <marcuri@bcgov.net>, "Kaiser, Shawn" <skaiser@bcgov.net>, "mdanyov@townofbluffton.com" <mdanyov@townofbluffton.com>, "Averill, Matt" <mtav@bcgov.net>, "Trout, Chylah" <ctrout@bcgov.net>, "Bryson, Amber" <abryson@bcgov.net>, "Armstead, Arthur" <aarmstead@bcgov.net>, "Light, Heidi" <hlight1@bcgov.net>, "Stevens, Ray" <rstevens2@bcgov.net>, "Swank, Julie" <jswank1@bcgov.net>, "Lachelle Funk" <lfunk@pruitthealth.com>, "King, Kimberley" <kking@bcgov.net>, "dchandler@townofbluffton.com" <dchandler@townofbluffton.com>, "Israel, Princess" <pisrael@bcgov.net>, "Russell, Deja" <drussell@bcgov.net>, "Ernis, Michael" <mennis@bcgov.net>, "aaron.beck@securitasinc.com" <aaron.beck@securitasinc.com>, "Caparulo, Amy" <acaparulo@bcgov.net>, "Williams, Phillip"

<pwilliams1@bcgov.net>, "Polillo, Edward" <epolillo@bcgov.net>, "Johnson, Kerry" <kjohnson2@bcgov.net>, "Ahrens, Korey" <kahrens@bcgov.net>, "Lewis, Russell" <rlewis1@bcgov.net>, "Prusinowski, Jason" <jasonp@bcgov.net>, Zoe Voulgarelis <Zoe@irtsoftware.com>, "Reynolds, Penny" <preynolds@bcgov.net>, "Heyward, Jermaine" <jheyward@bcgov.net>, "Keaveny, Thomas" <tkeaveny@bcgov.net>, "Able, Hope" <hable@bcgov.net>, "chuggins@palmettobluff.com" <chuggins@palmettobluff.com>, "Draisen, Adam" <adraisen@bcgov.net>, "hcb@bcob.org" <hcb@bcob.org>  
**Subject: Hurricane Florence Update #2 9.8.18**

Good afternoon,

Please find the latest information from the SC Department of Natural Resources.

The potential of this storm is very serious. Everyone is encouraged to monitor the situation closely. Citizens should be making and reviewing their family plans now before the storm directly threatens Beaufort County.

Beaufort County Emergency Management is in constant contact with South Carolina Emergency Management, the National Weather Service and our response partners.

Everyone is encouraged to obtain their information from trusted sources and to avoid misinformation spread through social media.

#### Recommended Sources

NIXLE Alerts: <https://local.nixle.com/beaufort-county-sheriffs-office/>

BCSO Facebook: <https://www.facebook.com/BeaufortCoSO/>

BCSO PIO Twitter: <https://twitter.com/bcsopio>

BCSO Emergency Management Facebook:

<https://www.facebook.com/BeaufortCoEmergencyManagement/>

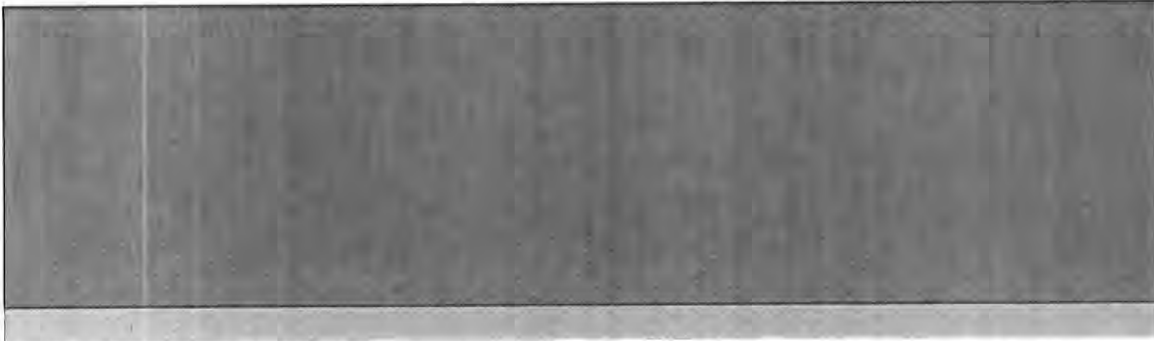
BCSO Emergency Management Twitter: <https://twitter.com/BCSOTraffic>

Beaufort County Sheriff's Office website: <http://www.bcsos.net/>

SC Emergency Management: <https://www.scemd.org>

National Hurricane Center: <https://www.nhc.noaa.gov>

National Weather Service Charleston: [www.weather.gov/chs](http://www.weather.gov/chs)



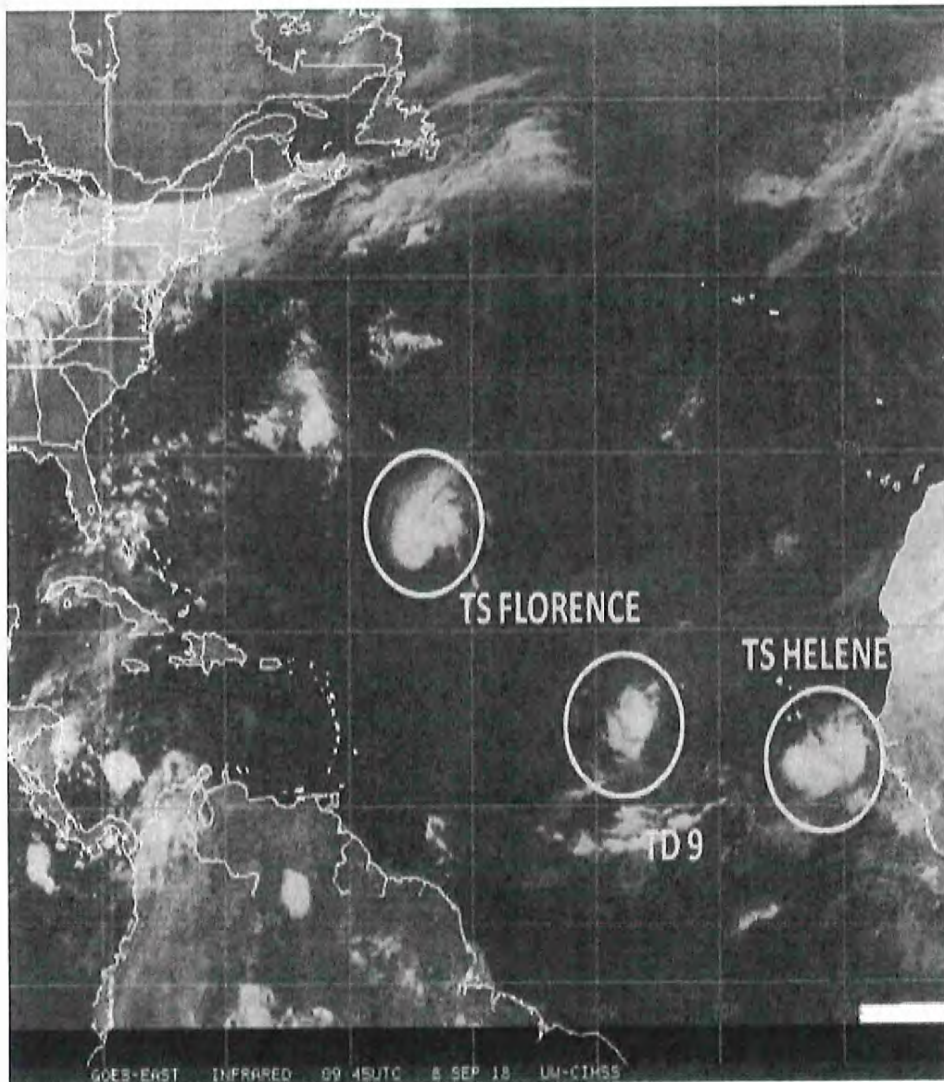
Good Morning,

At 5 AM, Tropical Storm Florence was 1650 mile ESE of Charleston tracking west at 9 mph. This slow westward track continues until Monday morning. Maximum estimated sustained winds are still 65 mph, ...for now. Shear has lessened and Florence has become better organized

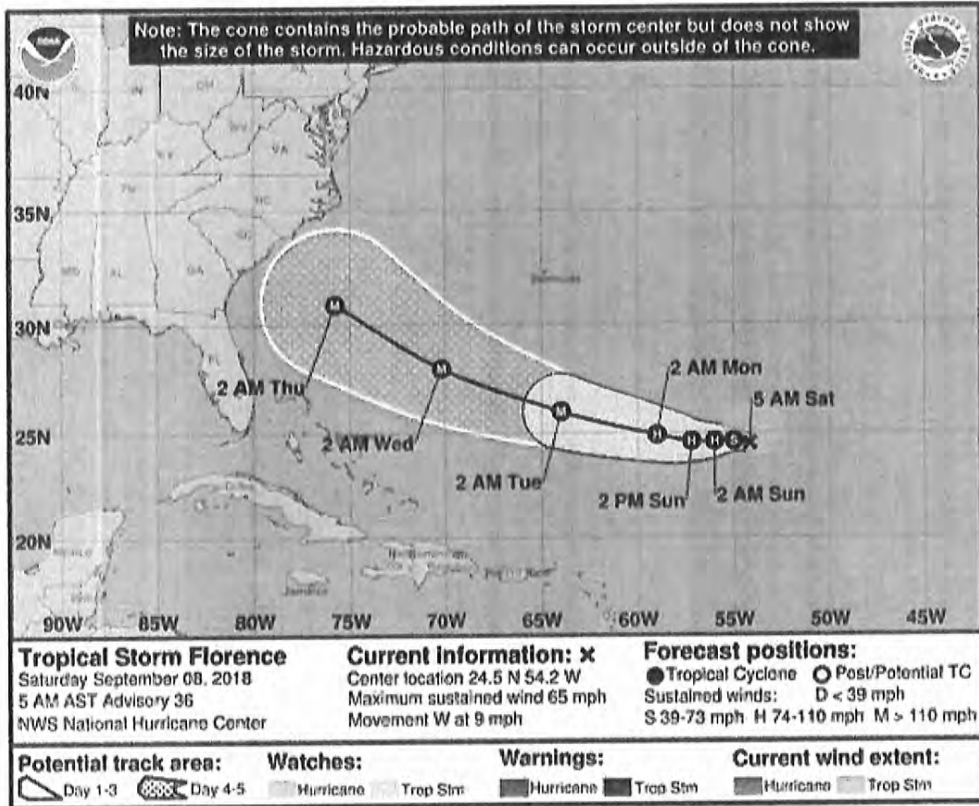
overnight. Symmetry has improved with hints of an eye and cloud tops have cooled to -80 degrees C. Florence will begin to track over abnormally warm sea surface temperatures and deep heat content during the next 36-48 hours. The official NHC forecast calls for Florence to become a 145 mph hurricane by Wednesday night, 270 miles ESE of Myrtle Beach.

The forecast reasoning remains the same with Florence steered westward by a persistent ridge to the north for the next 5-7 days. Models, consensus and deterministic have shifted the track solutions southwards. This a rare storm where the intensity forecast has been consistent out to five days with a murkier track forecast for the same period. A NOAA WP-3 is scheduled to intercept Florence this morning and data from that flight may help tighten up the 5-day track forecast.

TD 9 tracks west into the Caribbean in 8-9 days. TS Helene recurves over the central Atlantic as a strong hurricane.



NHC's 5 AM, 5-day track forecast:



Mark Malsick  
 SC State Climate Office

**Date : 9/8/2018 9:48:46 PM**  
**From : "PSOMMERVILLE"**  
**To : tkeaveny@bcgov.net**  
**Subject : Fwd: Hurricane**  
**Attachment : Re: Hurricane;**

— the forwarded message follows —

**From:** Stu Rodman <sturodman@gmail.com>  
**Sent:** Saturday, September 08, 2018 4:32 PM  
**To:** Sommerville, Paul  
**Cc:** Jerry Stewart  
**Subject:** Re: Hurricane

Paul,

1. We have to assume the worst and delaying action until Monday evening when an evacuation might already be underway would be irresponsible in the eyes of the public.
2. This is a golden opportunity to demonstrate the childish foolishness of some on Council that has put us in a dangerous position and then stand up as adults and hire Josh.

Cheers,

Stu

On Sat, Sep 8, 2018 at 4:19 PM PSOMMERVILLE <psommerville@hargray.com> wrote:  
Emergency Management is hosting a conference call this evening. This will give us more direction. Josh will be in the EOC (Emergency Operations center), the same as he would if he still worked for Beaufort County.

On Sat, 8 Sep 2018 15:37:23 -0400

Stu Rodman <sturodman@gmail.com> wrote:

> Paul and Jerry,

>

> The Governor has called a state of emergency.

>

> The only prudent action for Beaufort County Council is to ask the Town of

> Hilton Head Island to temporarily loan Josh to Beaufort County for the

> duration of the emergency to re-assume his duties as intern County

> Administration.

>

> To that end and time being of the essence, I strongly recommend that an

> emergency meeting of County Council or its Executive Committee be called

> for no later than early tomorrow afternoon.

>

> Cheers,

>

> Stu

Date : 10/26/2016 3:31:17 PM  
From : "Keaveny, Thomas"  
To : "Sommerville, Paul" , "'Paul Sommerville'"  
Cc : "Kubic, Gary" , "Gruber, Joshua"

**Thomas J. Keaveny II**  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tel: (843) 255-2025  
Fax: (843) 255-9414



**From:** Keaveny, Thomas  
**Sent:** Tuesday, October 25, 2016 2:54 PM  
**To:** 'Ryan, Elizabeth'

**Thomas J. Keaveny II**  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tel: (843) 255-2025  
Fax: (843) 255-9414



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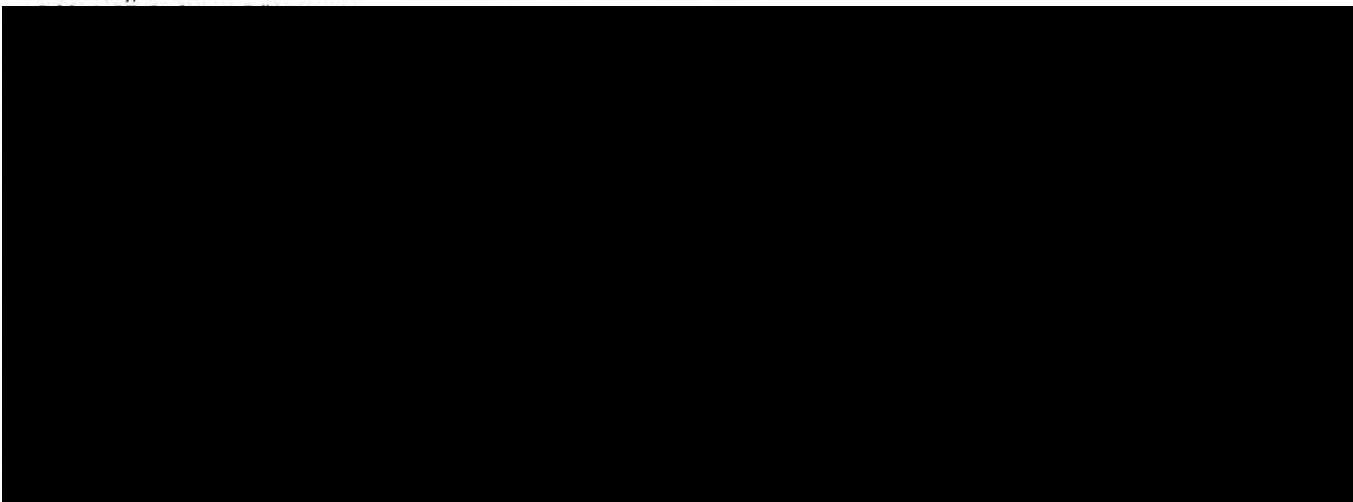
**From:** Keaveny, Thomas  
**Sent:** Tuesday, October 25, 2016 2:50 PM  
**To:** 'Ryan, Elizabeth'  
**Subject:** Beaufort County Ordinance and Proclamation

**Thomas J. Keaveny II**  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tel: (843) 255-2025  
Fax: (843) 255-9414



---

**From:** Ryan, Elizabeth [<mailto:eryan@emd.sc.gov>]  
**Sent:** Tuesday, October 25, 2016 1:36 PM  
**To:** Keaveny, Thomas



**Thomas J. Keaveny II**  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tel: (843) 255-2025

Fax: (843) 255-9414



---

**From:** Ryan, Elizabeth [mailto:eryan@emd.sc.gov]  
**Sent:** Sunday, October 23, 2016 12:43 PM  
**To:** Taylor, Matthew; Keaveny, Thomas; richard.krikava@fema.dhs.gov  
**Subject:** Re: Conference Call tomorrow...

Matthew,  
Thanks for the invitation. I will be happy to be on the call and may ask a few of the state Public Assistance team to join me as well. 10:00 works great for us if that works for you all.  
Thanks,  
Elizabeth

Get [Outlook for iOS](#)

On Sun, Oct 23, 2016 at 12:33 PM -0400, "Taylor, Matthew" <Matthew.Taylor@mail.house.gov> wrote:

Richard, Elizabeth & Tom

I spoke with each of you individually on Friday about facilitating a conference call Monday (tomorrow) morning between the appropriate contacts for Beaufort County, SCEMD, and FEMA. I know I have contributed a lot of confusion over the course of the last week with regards to the waiver request for debris removal on private property and the purpose of the call tomorrow would simply be to make sure that we are all on the same page moving forward.

Additionally, I would like to make sure our office is doing all we can to help Beaufort County's application for FEMA assistance move along as smoothly and quickly as possible.

I think the three of us should most certainly be on the call but I would also ask your suggestions on who else should join as well... Please let me know by replying all to this message and perhaps Richard can help us with a conference call in number.

Also, please advise what time works best... I suggest something between 10-11 AM tomorrow.

Thanks, matthew\*\*\*\*\*

**From:** Keaveny, Thomas <tkeaveny@bcgov.net>  
**Sent:** Tuesday, October 25, 2016 2:50 PM  
**To:** 'Ryan, Elizabeth'

**Thomas J. Keaveny II**  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tel: (843) 255-2025  
Fax: (843) 255-9414



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**From:** Ryan, Elizabeth [mailto:eryan@emd.sc.gov]  
**Sent:** Tuesday, October 25, 2016 1:36 PM  
**To:** Keaveny, Thomas  
**Subject:** RE: Conference Call tomorrow...

Thanks! And feel free to send the documentation you have whenever you are ready!  
Thanks,  
Elizabeth

Elizabeth Ryan  
803-201-3739

---

**From:** Keaveny, Thomas [mailto:tkeaveny@bcgov.net]  
**Sent:** Tuesday, October 25, 2016 1:22 PM  
**To:** Ryan, Elizabeth <eryan@emd.sc.gov>

**Thomas J. Keaveny II**  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tel: (843) 255-2025  
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---

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**Sent:** Sunday, October 23, 2016 12:43 PM  
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CountyFOIA#3\_\_000179

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Thanks, matthew\*\*\*\*\*

### Chapter 22 - CIVIL EMERGENCIES<sup>[1]</sup>

*Footnotes:*

--- (1) ---

*Cross reference— Administration, ch. 2; emergency services, ch. 34; fire prevention and protection, ch. 42.*

#### ARTICLE I. - IN GENERAL

Secs. 22-1—22-25. - Reserved.

#### ARTICLE II. - EMERGENCY MANAGEMENT DEPARTMENT<sup>[2]</sup>

*Footnotes:*

--- (2) ---

*Cross reference— Departments, § 2-136 et seq.*

Sec. 22-26. - Purpose.

This article is adopted by the county council to best establish, develop and coordinate an emergency management department and provide for civil defense and emergency management in the county.

(Code 1982, § 6-35)

Sec. 22-27. - Established; purpose.

- (a) The county emergency management department is created to establish, develop, coordinate and provide for civil defense and emergency management in the county.
- (b) This article will be the instrument through which the county council and other organizations of the county will seek to coordinate their authority under the laws of this state after enemy attack or during natural or man-caused disasters affecting the county.

(Code 1982, § 6-36)

Sec. 22-28. - Responsibilities and duties of county council.

- (a) The chairman of the county council shall have the power to issue proclamations and regulations concerning public safety, disaster relief and related matters which shall have the full force and effect of law during an emergency.
- (b) The chairman of the county council may declare a state of emergency, if the chairman finds a disaster has occurred or that the threat thereof is imminent and emergency measures are deemed necessary to cope with the existing or anticipated situation.

County FOIA #3\_000181

- (c) Once declared, the state of emergency shall continue until terminated by proclamation of the chairman of the county council.
- (d) All proclamations issued pursuant to this article shall indicate the nature of the disaster, the area affected by the proclamation, the conditions which require the proclamation of the disaster emergency and the conditions under which it will be terminated.
- (e) A state of disaster emergency proclamation shall not exist for more than 15 days without approval of the county council.
- (f) In addition to any powers conferred by law, the county council may, under this article, suspend existing ordinances and regulations prescribing the procedures for conduct of county business if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency.
- (g) In the absence of the chairman of the county council, the vice-chairman of the county council shall carry out the duties of the chairman as outlined in this article.

(Code 1982, § 6-37)

Sec. 22-29. - Emergency management director.

- (a) The county administrator shall select and employ the county emergency management director.
- (b) The county emergency management director shall be considered as a county department head.
- (c) The director shall be responsible for executing the instructions of the county administrator under the direction of the county council. The director is, within designated authority, responsible for the administration of the emergency management plan.
- (d) The county emergency operations plan as formulated and approved by the county council and municipalities within the county shall be the document under which coordinated emergency operations are carried out after the declaration of a state of emergency by the chairman of the county council.

(Code 1982, § 6-38)

**Cross reference—** Officers and employees, § 2-56 et seq.

Sec. 22-30. - Violation and penalty.

- (a) It shall be unlawful for any person to violate any of the sections of this article or regulations which may be issued pursuant to the authority contained in this article or to willfully obstruct, hinder, or delay any member of the civil emergency organization in the enforcement of this article or any regulations issued therein.
- (b) Any person violating this article shall be guilty of a misdemeanor and upon conviction thereof shall pay such penalties as the court may decide, not to exceed \$500.00 or not to exceed 30 days' imprisonment for each violation. Each day during which such conduct shall continue shall constitute a separate

CountyFOIA#3\_000182

violation, which shall subject the offender to liability prescribed in this subsection.

(Code 1982, § 6-39)

Secs. 22-31—22-55. - Reserved.

**Proclamation No: 2016 / 14**

**Proclamation Declaring Public Health Emergency/State of Emergency  
As A Result of Hurricane Matthew**

**WHEREAS**, on October 4, 2016 the Governor of the State of South Carolina issued Executive Order No: 2016-26 declaring a State of Emergency in South Carolina due to the threats posed to the state and to Beaufort County by Hurricane Matthew as it approached the state; and

**WHEREAS**, between October 4, 2016 and October 6, 2016 the Governor of the State of South Carolina issued seven more Executive Orders all related to Hurricane Matthew and calling for, among other things, medical evacuations of health care facilities, school closings, and mandatory evacuations of several Counties including Beaufort County, as Hurricane Matthew drew closer to the state; and

**WHEREAS**, on October 11, 2016 the President of the United States of America issued a Major Disaster Declaration for the State of South Carolina due to the effects of Hurricane Matthew on the state which included high storm surges, 10 to 15 inches of rain, 60 to 88 miles per hour wind gusts and major flooding; and

**WHEREAS**, damage from downed trees, other vegetative debris, and flooding has caused damage to residences, to surrounding properties, to bridges and to roads, both public and private; and

**WHEREAS**, there are more private road miles than public road miles in Beaufort County; and

**WHEREAS**, the continued presence of widespread vegetative debris fields from one end of the County to the other (estimated to be approximately half a million cubic yards on public roads and one million cubic yards or more on both public and private roads combined) constitute an immediate threat to the public at large by: (1) preventing and hindering emergency services (for which the County is responsible) including law enforcement, emergency medical services and fire protection; and (2) exposing the population to an increase in the risk of mosquito-borne illnesses. According to Dr. John Vena, Professor and Founding Chair of the Department of Public Health Sciences at the Medical University of South Carolina, "a lack of debris clearance on *private roads* leads to an increased risk of pooling water, which leads to a risk of an increased mosquito population, leading to an increase in the transmission risk of a host of mosquito-borne diseases including the Zika virus" (emphasis added) all of which threaten the life and property of our citizens and communities; and

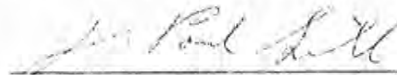
WHEREAS, the Governor of South Carolina recognizes the continuing nature of the threat to the public health of our citizens and on October 18, 2016 issued Executive Order No: 2016-39 declaring an ongoing State of Emergency to support the health, safety and welfare of the public.

NOW, THEREFORE, I proclaim a public health emergency/state of emergency exists in Beaufort County due to the continuing effects of Hurricane Matthew which, include, downed trees and widespread vegetative debris fields on public and private rights-of-way throughout the County which constitute an immediate threat to life, public health and safety.

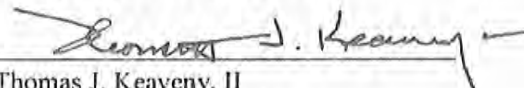
I PROCLAIM THAT immediate debris removal from both public and private rights-of-way is in the public interest because it is necessary to: (1) eliminate immediate threats to life, public health and safety; (2) eliminate immediate threats of significant damage to improved public and private property; and (3) ensure the economic recovery and viability of the County whose economy is based largely on vacation rentals and tourism which is drawn to Beaufort County by the amenities and services offered by private communities.

FURTHER the County Administrator is hereby authorized and required to remove, as quickly and efficiently as possible, debris fields from private rights of way in Beaufort County in order to eliminate the threats to life, public health and safety and which threaten the economic recovery and viability of our tourism dependent communities and the community-at-large.

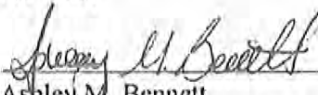
BEAUFORT COUNTY, SOUTH CAROLINA

  
\_\_\_\_\_  
D. Paul Sommerville, Chairman

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Thomas J. Keaveny, II  
Beaufort County Attorney

ATTEST

  
\_\_\_\_\_  
Ashley M. Bennett  
Clerk to County Council

10/24/2016

## Chapter 22 - CIVIL EMERGENCIES<sup>[1]</sup>

*Footnotes:*

--- (1) ---

*Cross reference— Administration, ch. 2; emergency services, ch. 34; fire prevention and protection, ch. 42.*

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(Code 1982, § 6-35)

Sec. 22-27. - Established; purpose.

- (a) The county emergency management department is created to establish, develop, coordinate and provide for civil defense and emergency management in the county.
- (b) This article will be the instrument through which the county council and other organizations of the county will seek to coordinate their authority under the laws of this state after enemy attack or during natural or man-caused disasters affecting the county.

(Code 1982, § 6-36)

Sec. 22-28. - Responsibilities and duties of county council.

- (a) The chairman of the county council shall have the power to issue proclamations and regulations concerning public safety, disaster relief and related matters which shall have the full force and effect of law during an emergency.
- (b) The chairman of the county council may declare a state of emergency, if the chairman finds a disaster has occurred or that the threat thereof is imminent and emergency measures are deemed necessary to cope with the existing or anticipated situation.

- (c) Once declared, the state of emergency shall continue until terminated by proclamation of the chairman of the county council.
- (d) All proclamations issued pursuant to this article shall indicate the nature of the disaster, the area affected by the proclamation, the conditions which require the proclamation of the disaster emergency and the conditions under which it will be terminated.
- (e) A state of disaster emergency proclamation shall not exist for more than 15 days without approval of the county council.
- (f) In addition to any powers conferred by law, the county council may, under this article, suspend existing ordinances and regulations prescribing the procedures for conduct of county business if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency.
- (g) In the absence of the chairman of the county council, the vice-chairman of the county council shall carry out the duties of the chairman as outlined in this article.

(Code 1982, § 6-37)

Sec. 22-29. - Emergency management director.

- (a) The county administrator shall select and employ the county emergency management director.
- (b) The county emergency management director shall be considered as a county department head.
- (c) The director shall be responsible for executing the instructions of the county administrator under the direction of the county council. The director is, within designated authority, responsible for the administration of the emergency management plan.
- (d) The county emergency operations plan as formulated and approved by the county council and municipalities within the county shall be the document under which coordinated emergency operations are carried out after the declaration of a state of emergency by the chairman of the county council.

(Code 1982, § 6-38)

**Cross reference—** Officers and employees, § 2-56 et seq.

Sec. 22-30. - Violation and penalty.

- (a) It shall be unlawful for any person to violate any of the sections of this article or regulations which may be issued pursuant to the authority contained in this article or to willfully obstruct, hinder, or delay any member of the civil emergency organization in the enforcement of this article or any regulations issued therein.
- (b) Any person violating this article shall be guilty of a misdemeanor and upon conviction thereof shall pay such penalties as the court may decide, not to exceed \$500.00 or not to exceed 30 days' imprisonment for each violation. Each day during which such conduct shall continue shall constitute a separate

violation, which shall subject the offender to liability prescribed in this subsection.

(Code 1982, § 6-39)

Secs. 22-31—22-55. - Reserved.

**Proclamation No: 2016 / 14**

**Proclamation Declaring Public Health Emergency/State of Emergency  
As A Result of Hurricane Matthew**

**WHEREAS**, on October 4, 2016 the Governor of the State of South Carolina issued Executive Order No: 2016-26 declaring a State of Emergency in South Carolina due to the threats posed to the state and to Beaufort County by Hurricane Matthew as it approached the state; and

**WHEREAS**, between October 4, 2016 and October 6, 2016 the Governor of the State of South Carolina issued seven more Executive Orders all related to Hurricane Matthew and calling for, among other things, medical evacuations of health care facilities, school closings, and mandatory evacuations of several Counties including Beaufort County, as Hurricane Matthew drew closer to the state; and

**WHEREAS**, on October 11, 2016 the President of the United States of America issued a Major Disaster Declaration for the State of South Carolina due to the effects of Hurricane Matthew on the state which included high storm surges, 10 to 15 inches of rain, 60 to 88 miles per hour wind gusts and major flooding; and

**WHEREAS**, damage from downed trees, other vegetative debris, and flooding has caused damage to residences, to surrounding properties, to bridges and to roads, both public and private; and

**WHEREAS**, there are more private road miles than public road miles in Beaufort County; and

**WHEREAS**, the continued presence of widespread vegetative debris fields from one end of the County to the other (estimated to be approximately half a million cubic yards on public roads and one million cubic yards or more on both public and private roads combined) constitute an immediate threat to the public at large by: (1) preventing and hindering emergency services (for which the County is responsible) including law enforcement, emergency medical services and fire protection; and (2) exposing the population to an increase in the risk of mosquito-borne illnesses. According to Dr. John Vena, Professor and Founding Chair of the Department of Public Health Sciences at the Medical University of South Carolina, "a lack of debris clearance on *private roads* leads to an increased risk of pooling water, which leads to a risk of an increased mosquito population, leading to an increase in the transmission risk of a host of mosquito-borne diseases including the Zika virus" (emphasis added) all of which threaten the life and property of our citizens and communities; and

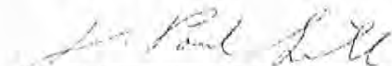
**WHEREAS**, the Governor of South Carolina recognizes the continuing nature of the threat to the public health of our citizens and on October 18, 2016 issued Executive Order No: 2016-39 declaring an ongoing State of Emergency to support the health, safety and welfare of the public.

**NOW, THEREFORE**, I proclaim a public health emergency/state of emergency exists in Beaufort County due to the continuing effects of Hurricane Matthew which, include, downed trees and widespread vegetative debris fields on public and private rights-of-way throughout the County which constitute an immediate threat to life, public health and safety.

**I PROCLAIM THAT** immediate debris removal from both public and private rights-of-way is in the public interest because it is necessary to: (1) eliminate immediate threats to life, public health and safety; (2) eliminate immediate threats of significant damage to improved public and private property; and (3) ensure the economic recovery and viability of the County whose economy is based largely on vacation rentals and tourism which is drawn to Beaufort County by the amenities and services offered by private communities.

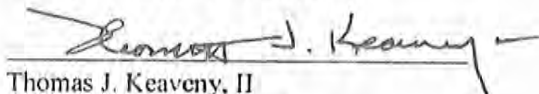
**FURTHER** the County Administrator is hereby authorized and required to remove, as quickly and efficiently as possible, debris fields from private rights of way in Beaufort County in order to eliminate the threats to life, public health and safety and which threaten the economic recovery and viability of our tourism dependent communities and the community-at-large.

BEAUFORT COUNTY, SOUTH CAROLINA



D. Paul Sommerville, Chairman

APPROVED AS TO FORM:



Thomas J. Keaveny, II  
Beaufort County Attorney

ATTEST

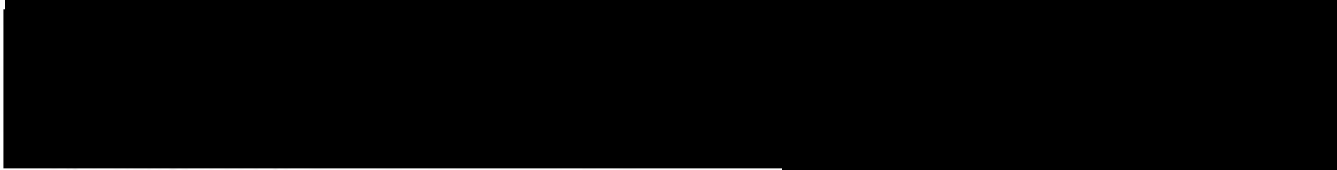


Ashley M. Bennett  
Clerk to County Council

Date : 3/11/2016 5:18:32 PM

From : "Keaveny, Thomas"

To : "Jim Hicks", "Paul Sommerville", "Rembold, Jon", "Gruber, Joshua"



Thomas J. Keaveny II  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tel: (843) 255-2025  
Fax: (843) 255-9414



---

**From:** Jim Hicks [mailto:jbhicks@hargray.com]  
**Sent:** Friday, March 11, 2016 11:59 AM  
**To:** Paul Sommerville; Rembold, Jon; Keaveny, Thomas; Gruber, Joshua  
**Subject:** LIBPA Article Regarding Tree Cutting @ Airport

To All,

As discussed at the Wednesday meeting the attached draft of an article setting forth a public explanation of the tree cutting project presently being planned, along with a bit of history, is provided for your review and comment to ensure I am not passing erroneous information. I fully understand that I did not get into a great deal of detail regarding the exact wording of the law but after reading it a couple of times can understand how a bit of confusion could arise with the average layman (non lawyer).

I would like to have your comments/recommendations not later than March 21 to allow me to meet a publishing deadline for the Lady's Island Business and Professional Association newsletter and submission to the Island News.

Thanks,

Jim

*Outside scope of FOIA-2016-459*

### PRIVATE PROPERTY RIGHTS, AIRPLANES AND TREES

The Lady's Island Airport (officially named the Beaufort County Airport) arrived on Lady's Island in the latter part of the 1950's as a result of being evicted in 1955 from what is today the Marine Corps Air Station. The airport has served the community well for over 50 years. During this time trees on the private property located near the runway grew taller until they reach a height which posed a hazard to the safe operation of the airport. The solution was to either remove the trees or at a minimum reduce their height to a safe elevation. This was not a problem unique to the Lady's Island Airport for many other airports throughout the state and the nation are faced with similar problems. To provide local governments the authority to resolve this challenge to safe operation of airports in South Carolina the legislature passed Title 55- Aeronautics, Chapter 9 commonly known as the South Carolina Airports Act. Without going into great detail this law states that if a tree or trees or anything else pose a hazard to the safe operation of the airport that in the interest of public health and safety the hazard should be prevented (eliminated) and this should be accomplished, to the extent legally possible, by proper exercise of the police power. According to Wikipedia, in United States constitutional law, police power is the capacity of the states to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants. In other words, the local government has a legal right and moral obligation to insure that trees (or buildings) near the airport do not pose a hazard to safe flight operations. Individual property rights do not extend to the right to maintain a safety hazard on your property which poses a public safety threat to flight operations.

In 1998, under the authority of the Airports' Act, those trees in the approach flight path of the Lady's Island Airport which were deemed a hazard were removed. Considering that a pine tree is capable of growing from 1 to 2 feet a year it should surprise no one that many trees which were not a threat in 1998 have reached a dangerous height today. To prepare for another removal of those trees posing a present hazard to the safe operation of the Airport an informational meeting was held by Airport Director Jon Rembold with those property owners on which trees posed a current hazard. The removal of trees on private property by the local government is obviously a touchy and complicated subject. Following the initial meeting the property owners requested District 2 Councilman Paul Sommerville and District 3 Councilman Bill McBride meet with them, listen to their concerns and provide them additional information regarding the proposed tree removal. Following are some of the questions posed to the Councilmen by the property owners and the answers provided at a subsequent meeting:

- Is there an alternative to cutting down my tree(s)?

Yes. They may be reduced to an acceptable height by trimming but as a property owner you must accept all future responsibility and cost to keep such trees at an acceptable height. The government will remove them or trim them one time and all future necessary trimming will be at the cost of the property owner.

- Is an Environmental Impact Study required for the tree removal/reduction project"?

No

- Who pays for the trees to be removed?

The Federal Aviation Administration pays 90% of the cost and the County pays for the remaining 10%

- If I sign an easement allowing the removal of the trees in question will I be reimbursed for the value of the trees?

NEED HELP ON THIS ONE!

- If I sign the proposed easement do I forfeit my right to take legal action if I am the victim of a plane crash.

No

To date there has been four public meetings held and many additional meetings with individual property owners in an effort to insure the safety of airport operations while, to the maximum extent possible, recognizing individual property owner's concerns. The majority of the property owners involved in this project have signed easements granting their approval for the trees in question to be removed. This is not the last time that the subject of tree removal near the Lady's Island Airport will have to be addressed and it will continue to be a challenge to insure public safety while respecting private property rights to the maximum extent possible. Sometimes, there are no easy answers.

PLEASE FEEL FREE TO MAKE ANY CHANGES NEEDED TO IMPROVE THE ACCURACY OR BENIFIT TO THE READER BUT PLEASE REMEMBER I HAVE A SPACE LIMITATION. ALSO PLEASE ADD ANY ADDITIONAL QUESTIONS AND ANSWERS NEEDED.

Date : 3/11/2016 6:00:39 PM

From : "Rembold, Jon"

To : "Keaveny, Thomas" , "Jim Hicks" , "Paul Sommerville" , "Gruber, Joshua"

From: Keaveny, Thomas

Sent: Friday, March 11, 2016 12:19 PM

To: Jim Hicks; Paul Sommerville; Rembold, Jon; Gruber, Joshua

Thomas J. Keaveny II  
Beaufort County Attorney  
P. O. Drawer 1228  
Beaufort, SC 29901-1228  
Tel: (843) 255-2025  
Fax: (843) 255-9414



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Sent: Friday, March 11, 2016 11:59 AM

To: Paul Sommerville; Rembold, Jon; Keaveny, Thomas; Gruber, Joshua

Subject: LIBPA Article Regarding Tree Cutting @ Airport

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Jim

*Outside  
Scope*

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No

- Who pays for the trees to be removed?

The Federal Aviation Administration pays 90% of the cost, the SC Aeronautics Commission pays for 5%, and the County pays for the remaining 5±0%

- If I sign an easement allowing the removal of the trees in question will I be reimbursed for the value of the trees?

NEED HELP ON THIS ONE! Not exactly. A property owner can be paid for the easement through an appraisal process. Keep in mind that it is the AIRSPACE that is being appraised, not the land, so compensation is typically minimal.

- If I sign the proposed easement do I forfeit my right to take legal action if I am the victim of a plane crash.

No

To date there has been ~~four~~three public meetings held and many additional meetings with individual property owners in an effort to insure the safety of airport operations while, to the maximum extent possible, recognizing individual property owner's concerns. The majority of the property owners involved in this project have signed easements granting their approval for the trees in question to be removed from the approach. This is not the last time that the subject of tree removal near the Lady's Island Airport will have to be addressed and it will continue to be a challenge to insure public safety while respecting private property rights to the maximum extent possible. Sometimes, there are no easy answers.

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Date : 3/30/2016 12:45:47 PM  
From : "Gruber, Joshua"  
To : "Billy K" , "Paul sommerville"  
Cc : "William Prokop" , "Lisa Sulka" , "Mayor Murray" , "David Bennett" , "Van Willis" , "Steve Riley" ,  
"morlando@townofbluffton.com"  
Subject : RE: Path Forward  
Attachment : 18.Econo.pdf;20.Econo.pdf;

Mayor,

The Resolutions that were adopted by Council regarding Economic Development are attached.

Please let me know if you require any additional information.

Thanks,

-Josh-

**Joshua A. Gruber**

Deputy County Administrator/Special Counsel  
P.O. Box 1228  
Beaufort, SC 29901  
Phone: 843-255-2059  
Fax: 843-255-9414  
email: jgruber@bcgov.net

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**From:** Billy K [mailto:billyk@islc.net]  
**Sent:** Wednesday, March 30, 2016 8:17 AM  
**To:** Paul sommerville; Gruber, Joshua  
**Cc:** Billy K; William Prokop; Lisa Sulka; Mayor Murray; David Bennett; Van Willis; Steve Riley; morlando@townofbluffton.com  
**Subject:** FW: Path Forward

Is this your memory of the resolution the County Council adopted? I think something is wrong.

Josh, at your convenience, would you mind send the resolution.

Thanks to all. Perhaps this is progress but it continues to focus on an alliance which is premature as all four mayors have indicated.

Best

billyk

---

**From:** Stu Rodman <sturodman@gmail.com>  
**Date:** Wednesday, March 30, 2016 at 6:18 AM  
**To:** Mayor Sulka <lsulka@townofbluffton.com>, David Bennett <dgbennett@icloud.com>, Billy K <billyk@islc.net>  
**Cc:** Gerald Dawson <gdawson@bcgov.net>, Jerry Stewart <jstewart@bcgov.net>, Steve Fobes <sfobes1953@gmail.com>, Paul sommerville <psommerville@hargray.com>  
**Subject:** Re: Path Forward

Mayors,

I have requested that the County Legal Staff finalize the Economic Development Corp documentation including the possibilities that we do or don't join an alliance.

The mechanism that we have in place to work the issues is the Temporary EDC Board which includes the 4 Mayors, 4 from Council, and Gary or Josh. I will circulate the next draft for comment and we can schedule a meeting at your convenience.

At our February retreat, Council approved my recommendation that we:

1. Adopt your Economic Development proposal
2. Allocate \$25,000 for a consultancy to assist in moving forward

I think you envisioned a more comprehensive consulting effort to, given our past history, to get it right. Conversely, many on Council believe we don't need to pay for any more studies. Thus, I believed that \$25,000 might meet everyone's objectives and have the following scope of work:

1. Interview all the interested parties.
2. Analyze the previous consultants' reports and recommendations.
3. Address the alliance related issues.
4. Prove recommendations.

If you believe we need an expanded effort, I have suggested that Don Kirkman might draft a more comprehensive scope of work for your consideration as a recommendation to Council, which I would be pleased to bring forward through my Governmental Committee.

Since Charleston and Jasper have declined to consider an alliance with us, we appear to have two options:

1. Southern
2. Beaufort as a standalone alliance.

Southern appears receptive to give us an extension beyond their March 31st requested for a decision. I have suggested that we use this time to:

1. Reaffirm with Charleston and Jasper, their initial responses.
2. Revisit Beaufort alone to cover all our bases.

With respect to Beaufort alone I will see if any Council members have an interest in developing this option and would welcome your involvement in developing such a proposal, if you prefer this option, which might be the only option if Southern rejects us or we reject them.

I look forward to responses.

Regards,

Stu

On Tue, Mar 29, 2016 at 10:13 PM, Sulka, Lisa <[lsulka@townofbluffton.com](mailto:lsulka@townofbluffton.com)> wrote:

Stu

The three of us (Bennett, Keyserling and myself) met briefly today after the Heritage Tourism meeting and we all feel that we would like to see the county move forward with the corporation first (for lack of a better word), that was voted on in June or July... we will be asking the county to get this started and we are happy to sit with this new committee/board and move forward from there.... I appreciate all of your work, but we believe that we need to take this step first...Will look forward to hearing from Chairman Sommerville on next steps with this newly formed group...

Lisa Sulka

**From:** Stu Rodman [<mailto:sturodman@gmail.com>]

**Sent:** Tuesday, March 29, 2016 5:41 AM

**To:** Sulka, Lisa

**Subject:** Path Forward

Lisa,

A copy of what I passed out last night since you probably didn't get one.

It would be helpful if the Mayors could pick a convenient time to meet.

Cheers,

Stu

RESOLUTION NO. 2015/ 18

A RESOLUTION TO ADOPT AN ECONOMIC DEVELOPMENT POLICY FOR BEAUFORT COUNTY

WHEREAS, economic development and the diversification of the tax base within Beaufort County is a priority of Beaufort County Council; and

WHEREAS, in order to adequately support economic development initiatives, it is appropriate for County Council to establish a strategy on how to approach economic development, recognizing that the individual components require subsequent Council approval; and

WHEREAS, it is conventional wisdom that economic development requires the assemblage of property and associated public infrastructure for that purpose, which are typically called commerce parks; and

WHEREAS, the geographic makeup of Beaufort County is large and diverse and, as such, multiple commerce parks may be is required and

WHEREAS, it is generally agreed that the management of economic development activities should not be part of the County Administration; and

WHEREAS, it is agreed that in order for economic development activities to be successful in Beaufort County, there will need to be cooperative participation between the County and the Municipalities; and


WHEREAS, in order to successfully implement economic development activities, including business retention, public funding will be required until such time as sufficient commercial development and diversification has occurred, which will then foster continued development by private industries.

NOW, THEREFORE, BE IT RESOLVED, that Beaufort County Council hereby adopts an economic development strategy, which, among other things, will include the establishment of the following:

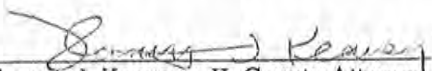
1. A Beaufort County Economic Development Corporation to include participation of the Municipalities and associated public funding.
2. The purchase and / or infrastructure development of properties in Beaufort County.

Adopted this 8<sup>th</sup> day of June, 2015.

COUNTY COUNCIL OF BEAUFORT COUNTY

By:   
D. Paul Sommerville, Chairman

APPROVED AS TO FORM:

  
Thomas J. Keaveny, II, County Attorney

2015 / 20

**A RESOLUTION OF BEAUFORT COUNTY COUNCIL TO AUTHORIZE THE COUNTY ADMINISTRATOR TO PREPARE THE NECESSARY DOCUMENTS TO ESTABLISH A NONPROFIT ECONOMIC CORPORATION TO COORDINATE AND IMPLEMENT ECONOMIC DEVELOPMENT PLANS AND INITIATIVES FOR BEAUFORT COUNTY**

**WHEREAS**, the South Carolina Comprehensive Planning Enabling Act of 1994 requires adoption of a Comprehensive Plan that contains an Economic Development Element; and

**WHEREAS**, in 1997, Beaufort County adopted the "The Beaufort County Comprehensive Plan" which includes an Economic Development Element in accordance with the South Carolina Comprehensive Planning Enabling Act of 1994; and

**WHEREAS**, on June 8, 2015 County Council adopted "A Resolution to Adopt an Economic Development Policy for Beaufort County;" and

**WHEREAS**, Beaufort County Council resolved to establish a Beaufort County Economic Development Corporation and to purchase and/or establish infrastructure development for properties in Beaufort County; and

**WHEREAS**, Beaufort County proposes to create a nonprofit economic corporation controlled by a board; and

**WHEREAS**, the board shall be comprised of four municipal representatives, one county council representative and two representatives appointed by the board.


**NOW, THEREFORE**, be it resolved by the Beaufort County Council that the Council hereby authorizes the County Administrator to prepare the necessary documents to establish a nonprofit economic development corporation to coordinate and implement economic development plans and initiatives within Beaufort County.

DONE this 27<sup>th</sup> day of July, 2015.

COUNTY COUNCIL OF BEAUFORT COUNTY

By:   
D. Paul Sommerville, Chairman

APPROVED AS TO FORM:

  
Thomas J. Keaveny, II, County Attorney

**Date : 11/14/2016 12:41:33 PM**  
**From : "Stu Rodman"**  
**To : "Jerry Stewart"**  
**Cc : "Fobes, Steve", "Josh G", "Sommerville, Paul"**  
**Subject : Comprehensive Financial Plan**  
**Attachment : Comp Fl.xlsx;**

Jerry,

Reflecting on what I need to do for you for Governmental, I laid out the items (attached) that I think fall under the preview of my committee. While I was at it, I included the other committees. I was going from memory on the which items go with which committees, so some may not be in the right column.

My thoughts:

1. Charge Committees with addressing specific Budget line items and Retreat Priorities.
2. Have Committees report back on extraordinary budget adjustments (beyond population growth and inflation) and capital requirements for the next 5 years (I don't disagree with 5 years, but think we would be well served to do 3 years for the first pass)
3. Use the compiled data for the Retreat
4. Adjust for Council & Management Agenda Items coming out of the Retreat.

Just my thoughts,

Happy to proceed with Governmental assigned items,

I don't have any additional Council or Management Agenda items at this time.

Cheers,

Stu

	<u>Gov't</u>	<u>Finance</u>	<u>Community</u>	<u>Public Facilities</u>	<u>Natural Resources</u>
<b><u>Elected Officials &amp; State Appropriations:</u></b>					
Sheriff	30.00	Treasurer 1.09	Corner 0.53		
Magistrate	1.90	Auditor 0.86	Social Services 0.15		
Solicitor	1.25	Council 0.62			
Clerk of Court	1.11	Delegation 0.07			
Probate	0.76				
Defender	0.70				
Master-in-Equity	0.31				
<b><u>County Operations:</u></b>					
EMS	6.80	Benefits 13.71	Comm Services 3.75	Public Works 15.89	Building Codes 1.81
Detention Center	5.84	Administration 9.05	Library 3.72	Mosquito 1.70	Planning 0.61
USCB & TCL	4.00	Assessor 2.14	PALS 3.11	Traffic Engr 0.63	Deeds Reg 0.51
Animal Services	0.87	Employee Services 0.99	Public Health 1.08		Zoning 0.18
Gov't Subsidies	0.55	Voter Reg 0.72			
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	54.07	29.24	12.35	18.22	3.10
	-----	-----	-----	-----	-----
<b><u>Policy Agenda</u></b>					
Economic Devel		CIP Sales Tax		Windmill Harbour	Affordable Hsg
Detention Center		Health Ins		HH Bridges	
QRV's		Retiree Health		Stormwater Mgt	
		Impact Fee Review		Curbside & Recycling	
		3-5 Yr Fin Plan		Ditch Maint	
				County-owned Land	
<b><u>Management Agenda</u></b>					
		IT Report	PALS to HHI	Arthur Horne	Okatie River Plan
		IT Connectivity	Residential Home	Facilities Assessment	May River
		Software Review	Smoke Free		CDC Refinements

637  
0602

Date : 11/28/2016 2:05:55 PM  
From : "Minor, Jim"  
To : "Lamar Taylor (ltaylor@cityofbeaufort.org)" , "William Prokop (wprokop@cityofbeaufort.org)"  
Cc : "Billy Keyserling" , "Paul Sommerville" , "Wilhelm, David" , "Larson, Eric" , "Gruber, Joshua"  
Subject : FW: Storm debris  
Attachment : IMG\_0208.JPG;ATT00001.txt;

Lamar & Bill

Please see attached photo from Mr. Taub that lives at the corner of New and North Streets.  
His phone number is [REDACTED]  
As you can see from the photos the debris he is complaining about consists of leaves.  
While the leaves may have come from his debris, our contractors do not remove leaves.  
I am referring this to you as I am unsure about the City's yard debris pickup policies.  
Please contact him and let him know the proper method for removal of leaves in the City.  
I will contact him as well to let him know I am referring him to you.

Thanks

James S. Minor, Jr.  
Solid Waste Manager  
843-255-2735

—Original Message—

From: David [mailto:davidmtaub@hargray.com]  
Sent: Friday, November 25, 2016 4:17 PM  
To: Minor, Jim  
Cc: Billy Keyserling; Paul sommerville  
Subject: Storm debris

Hello Jim. As you can see the storm debris is in North Street and runs all along the side of my property. It is NOT in my yard. Thanks for assistance. David

**ATT00001**

**Sent from my iPhone**

**Page 1**



CountyFOIA#3\_000335

CountyFOIA#3\_000335

0605

640

Date : 11/18/2013 4:55:56 PM

From : "steve181"

CountyFOIA#3\_\_000336

To : "Paul sommerville"

Cc : "Gerald Dawson", "William McBride", "Laura Von Harten (CTY)", "Flewelling, Brian", "Jerry Stewart", "Rick Caporale CC", "Tabor Vaux", "Cynthia Bensch", "Steve Fobes", "Stu Rodman", "Gary Kubic", "Bryan Hill", "Sue Rainey"

Subject : Library Budget and Hours

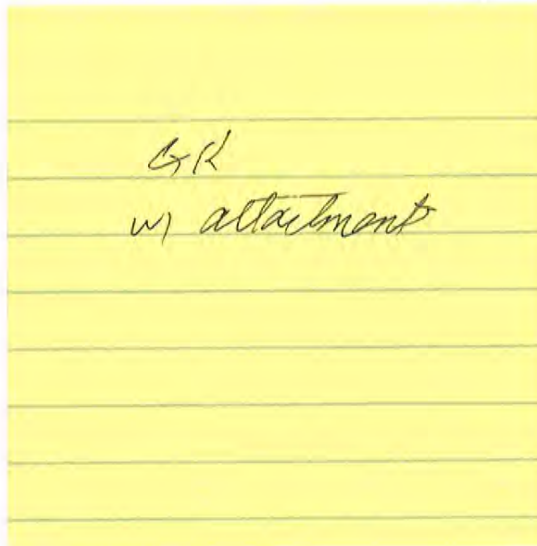
Attachment : Letter t.pdf;

Paul:

Please see attached PDF.

Thanks,

Steve Baer



CountyFOIA#3\_\_000336

0606

641

November 18, 2013

Mr. Paul Sommerville – Chairman, Beaufort County Council

Dear Paul:

I read about the recent statements by the Administrator to try to provide a pathway to extra Library hours sometime in early 2014, within the existing Library budget. It appears to be a noble effort but misses many key points including:

1 – County Council still has no idea of the cost addition (subject to external review) required to fund its original 2013 Retreat goal for Library hours. After almost 5 months, this is a failure of management.

2 – At the June 2013 budget sessions, an error was made in the Finance Committee by stating (and vigorously convincing others) that the budget, after further reductions, would cover the goal of 10 extra hours at 4 branches. That statement was never verified before the vote, despite comments that it was incorrect. As a result, most on County Council thought they were voting for the extra hours when they were not. While a mistake can be understood, failure to acknowledge and correct it is not right. We all make errors in life, but try hard to rectify them before doing damage.

3 – Struggling to provide extra hours from left-over budget at the end of the year ignores the fact that \$590,000 was diverted from the Library budget in the past 2 years, without knowledge or approval by County Council. Use of those funds coupled with a fair computation of costs per Item 1 above would likely fund the extra hours in CY 2013 and 2014.

4 – There are additional extra funds available including \$125,000 not provided to the Solicitor, \$850,000 set aside for Project Robot, and timed repayment (by bonding or other means) of almost \$2 million from the General Fund provided to the 2 airports.

Unless the items above are seriously considered by County Council, I would suggest that the recent statement by the Administrator to the Press is more of a placebo or Public Relations effort than a serious attempt to deal with the issues.

County Council works hard on many things. This issue deserves your equal attention.

Sincerely,

Steven M. Baer  
10 Heather Lane  
Hilton Head Island, SC 29926

(843) 689-5774  
steve181@hargray.com

**Date : 9/10/2015 10:41:24 PM**  
**From : psommerville@hargray.com**  
**To : gkubic@bcgov.net**  
**Subject : Fwd: Graves**  
**Attachment : Graves;**

Gary, Please review and have Tom look at it and let's discuss. Thanks. Paul

— the forwarded message follows —

**From:** Stu Rodman <sturodman@gmail.com>  
**Sent:** Wednesday, September 09, 2015 11:36 AM  
**To:** Sommerville, Paul  
**Subject:** Graves  
**Attachments:** Graves Resolution.docx

Paul being sensitive to your concerns, I reworked it to:

1. Take out those comments and actions that might weaken our position
2. Leave only the action to identify best use, which might strengthen our position.

Let's discuss one more time at your convenience.

Regards,

Stu

### Graves Property Resolution

1. WHEREAS the Property is a unique and well-known landmark located at the crossroads of Beaufort County, and
2. WHEREAS many County citizens would rather see the 278 Frontage preserved rather than developed and the Property remains important for controlling storm water runoff into the Okatie River, and
3. WHEREAS Heritage Tourism is emerging as a significant County opportunity and the Property would be a strong candidate for locating one of the Visitors Centers that will be required to fully capitalize on Heritage Tourism, and
4. WHEREAS developed of the Property could include a Gullah-Geechee Center in that 1) the National Park Service has created the Gullah-Geechee Corridor, 2) the County lies at the Center of the Corridor, 3) the Property lies at the center of the County, and 4) the Beaufort County Gullah-Geechee Consortium has been formed to preserve the culture, educate, and promote commerce, and
5. WHEREAS it is located near USCB & TCL and, as such, may useful as both expand, particularly if the Property were to it become a high tech park.
6. WHEREAS Economic Development is a County priority, the Property is the best site in southern part of the County to undertake such development, and the Property is arguably the best, and perhaps the only, site in the southern part of the County that meets SC Department of Commerce's criteria for providing Economic Development leads, and
7. WHEREAS annexation and less than desirable development remains a significant risk, and
8. WHEREAS the County expended \$500,000 acquiring an Option but declined to exercise the Option, questioning the \$11,500,000 price, and
9. WHEREAS "highest & best" for the Property has not been determined and it would be premature to attempt to value it without such a determination.

**NOW THEREFORE, be it resolved that Beaufort County should:**

***Identify the "highest and best" use of the Property, including but not limited to Preservation, Tourism, Education, Culture, and Economic Development.***

**Date : 10/13/2015 3:22:44 PM**  
**From : psommerville@hargray.com**  
**To : gkubic@bcgov.net**  
**Subject : Fwd: Resolution**  
**Attachment : Resolution;**

— the forwarded message follows —

**From:** Stu Rodman <sturodman@gmail.com>  
**Sent:** Tuesday, October 13, 2015 5:49 AM  
**To:** Sommerville, Paul; Jerry Stewart  
**Subject:** Resolution  
**Attachments:** Graves Resolution.docx

Will give yo a call to discuss.

Cheers,

Stu

**RESOLUTION NO.**

**A RESOLUTION IN SUPPORT OF IDENTIFYING APPROPRIATE  
BENEFICIAL USES FOR THE PEPPER HALL PLANTATION PROPERTY**

**WHEREAS, the Property is a unique and well-known landmark located near the crossroads of US-278 and SC-170 in Beaufort County; and**

**WHEREAS, Heritage Tourism is emerging as a significant County opportunity and the Property could be a strong candidate for locating one of the Visitors Centers that will be required to fully capitalize on Heritage Tourism; and**

**WHEREAS, Exit 8 is the nearest point on I-95 to the Coastal Tourism areas of South Carolina and the Property is ideally located to intercept I-95 drive-by travelers; and**

**WHEREAS, development of the Property could include a Gullah-Geechee Center in that 1) the National Park Service has created the Gullah-Geechee Corridor, 2) the County lies at the Center of the Corridor, 3) the Property lies at the center of the County, and 4) the Beaufort County Gullah-Geechee Consortium has been formed to preserve the culture, educate, and promote commerce; and**

**WHEREAS, Economic Development is a County priority and the Property could be utilized for such development; and**

**WHEREAS, the Property may be one of the only sites in the southern part of the County that could meet the South Carolina Department of Commerce's criteria for providing Economic Development leads; and**

**WHEREAS, it is located near USCB & TCL and, as such, may be useful as both campuses continue to expand, particularly if the Property were to become home to technology based businesses; and**

**WHEREAS, many County citizens would prefer that the US-278 Frontage be preserved rather than developed and the Property remains important for controlling storm water runoff into the Okatie River; and**

**WHEREAS, annexation and less than desirable development remains a significant risk; and**

**WHEREAS, the Future Land use Chapter of the Comprehensive Plan is not inconsistent with the above highlighted possible uses.**

**NOW, THEREFORE, be it resolved that Beaufort County hereby declares its support in identifying the appropriate beneficial uses of the Property and adjacent parcels to include, but not be limited to, Tourism, Education, Culture, Economic Development and Preservation.**

Done this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**BEAUFORT COUNTY COUNIL**

---

**D. Paul Sommerville, Chairman**

**RECEIVED**

**Mar 07 2022**

**SC Court of Appeals**

**CERTIFICATE OF COUNSEL**

I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

March 1, 2022

/s/ Thomas R. Goldstein

Thomas R. Goldstein, S. C. Bar 2186  
Belk, Cobb, Infinger & Goldstein, P.A.  
P. O. Box 71121  
Charleston, S. C. 29415-1121  
(843) 554-4291; (843)

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Erin D. Dean, Special Referee

---

CASE NO.: 2019-CP-07-00818  
APPELLATE TRACKING NO.: 2021-00321

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Mare Baracco,..... Appellant/Respondent,

v.

County of Beaufort,..... Respondent/Appellant.

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APPENDIX  
SUPPLEMENTAL RECORD ON APPEAL  
VOLUME 3

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Thomas R. Goldstein, S. C. Bar No. 2186  
P. O. Box 71121  
N. Charleston, S. C. 29415-1121  
(843) 554 4291; (843) 554 5566 (fax)  
[tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)  
Attorneys for Appellant/Respondent

---

E. Richardson LaBruce, S. C. Bar No. 80106  
P. O. Box 24005  
Hilton Head, S. C. 29925-4005  
(843) 681-7000  
[erlabruce@fingerlaw.com](mailto:erlabruce@fingerlaw.com)  
Attorneys for Respondent/Appellant

## VOLUME 1

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**NOTE:** Un-Redacted documents, County's 1-4, supplied by Respondent/Appellant in separate volume under seal for *in camera* examination.

**From:** [Erin Dean](#)  
**To:** "[tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)"; [Richardson LaBruce](#)  
**Cc:** [Xiomara Ingram](#)  
**Subject:** RE: Baracco v. Beaufort County  
**Date:** Tuesday, August 11, 2020 11:30:30 AM  
**Attachments:** [image001.png](#)  
**Importance:** High

---

Thank you. Mr. LaBruce, I am hopefully that Mr. Keaveny is on the mend and can assist you in responding to my inquiries sent on July 28, 2020. I have copied here for ease of reference:

All:

I have now been through the two sets of documents sent in response to FOIA 2019-459 and FOIA 2019-231. I need clarification on the following:

A) Request #1-February 10, 2019 (FOIA 2019-231):

- 1) Fee of \$124.66 has been paid by Ms. Baracco. Is Plaintiff contesting the reasonableness of this fee?
- 2) There is an allegation in the July 13, 2020 letter indicating that all emails between Josh Gruber and Deborah Regez were deleted. Please provide the basis for this assertion as I am not in possession of any documentation that supports or refutes this assertion.
- 4) Is there documentation that establishes the relationship between the County and Ms. Regez?

B) Request #2-March 10, 2019 (FOIA 2019-385)

- 1) Has this request been abandoned by Request #3 or is this something that still needs to be considered and ruled upon?
- 2) If not abandoned, I will need the reasonable estimate for the fee for Request number 2 as indicated in the LaBruce letter to me dated June 29, 2020.

C) Request #3-March 18, 2019 (FOIA 2019-459)

- 1) This request was an amendment of Request #2 but was again revised at the request of Judge Buckner which lead to the reduction of documents from 667 to 167. I have only reviewed the 167 pages provided. Does Plaintiff believe it necessary for me to receive and review the 500 pages that were removed?
- 2) Fee for the production of the revised scope of Request #3 was \$71.00. Is the Plaintiff contesting the reasonableness of this fee?

D) Request #4 March 31, 2019 (FOIA 2019-575)

- 1) Please provide reasonable estimate for the fee for Request number 2 as indicated in the LaBruce letter to me dated June 29, 2020.

Depending on whether or not I need to review the additional 500 pages removed after the scope limitation for FOIA 2019-459, we can likely go ahead and set up a date to hold a web-ex hearing in August. I am on a family vacation the first week (August 3-7) but have availability each of the following weeks. I do hold Beaufort Multi-Disciplinary Treatment Court (i.e. Drug Court) on Tuesdays and currently have depositions or mediations set for August 13, 20, 25 and 28. If preferred, my paralegal (Xiomara Ingram) can coordinate a mutually agreeable date with your assistants if you let her know best person to contact.

Thank you.

Erin

With regard to the issues raised in Mr. Goldstein's letter of yesterday, I would point out to the language in the Burton case supplied which states:

"Before the Appellant becomes entitled to the report, the trial court **must first examine the report in detail in order to determine whether the report's contents or portions thereof qualify as an exemption under [Section] 30-4-40 (emphasis added).**" The Appellate Court went on to review the sealed documents examined by the trial court in order to determine whether or not the trial court's findings were supported by the documents. Although Mr. Goldstein continues to assert that he has been excluded from the *in camera* process, it is clear from the Order issued by Judge Buckner, as well as the Appellate Court, that the determination as to whether or not the County properly redacted the documents requested pursuant to an exemption listed in [Section] 30-4-40(a) is to be made by me as the Special Referee acting in the place of the trial court.

I would like to set up a conference call with both of you to discuss how we can best eliminate this issue prior to setting the final hearing.

Please confirm your availability for the conference call on the following dates/time: 11:00 am, 2:00 pm, 3:00 pm or 4:00 pm on 8/12 (tomorrow), anytime from Noon-3:00 pm on Friday, 8/13, 10:00 am 8/17, 8/18 or 8/19.

Thank you.

Erin

**ERIN D. DEAN**  
[erindean@tgdcpa.com](mailto:erindean@tgdcpa.com)



TUPPER, GRIMSLEY, DEAN & CANADAY, PA  
611 BAY STREET | PO BOX 2055 | BEAUFORT, SC 29901 T: (843) 524.1116 | F: (843) 524.1463

TGDCPA.COM

*The content of this email is confidential and intended for the recipient specified in message only. It is strictly forbidden to share any part of this message with any third party, without a written consent of the sender. If you received this message by mistake, please reply to this message and follow with its deletion, so*

*that we can ensure such a mistake does not occur in the future.*

IN LIGHT OF COVID-19, TGDC HAS IMPLEMENTED A VOLUNTARY WORK FROM HOME PROTOCOL WHICH PROVIDES OUR ATTORNEYS AND STAFF WITH THE ABILITY TO WORK REMOTELY. PLEASE BE ASSURED THAT ALL SECURITY MEASURES ARE IN PLACE TO PROTECT CLIENT INFORMATION DURING THIS EVENT. DURING THIS PERIOD, RECEIPT OF PHYSICAL MAIL MAY BE DELAYED. THEREFORE, PLEASE SEND ALL WRITTEN COMMUNICATIONS AND DOCUMENTS VIA ELECTRONIC MAIL IN ADDITION TO ANY OTHER METHOD OF DELIVERY. STAY SAFE AND THANK YOU.

---

**From:** tgoldstein@cobblaw.net [mailto:tgoldstein@cobblaw.net]  
**Sent:** Monday, August 10, 2020 6:36 PM  
**To:** Erin Dean <ErinDean@tgdcpa.com>; 'Richardson LaBruce' <erlabruce@Fingerlaw.com>  
**Subject:** Baracco v. Beaufort County

Here is a letter that I mailed out today, so you do not have to print this. Of course, who knows when mail arrives these days? I hope you are both doing well.

Tommy

P.S. Interesting trivia point about the *Burton* case; two of the three Court of Appeals judges are now on the Supreme Court.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BEAUFORT ) IN THE COURT OF COMMON PLEAS  
 FOURTEENTH JUDICIAL CIRCUIT  
 Civil Action No. 2019-CP-07-00818

MARE BARACCO, )  
 )  
 Plaintiff, ) **DEFENDANT BEAUFORT COUNTY’S**  
 ) **REPLY TO PLAINTIFF’S**  
 -vs- ) **MEMORANDUM OF LAW IN OPPOSITION**  
 ) **TO COUNTY’S MOTION FOR**  
 BEAUFORT COUNTY, ) **RECONSIDERATION**  
 )  
 Defendant. )

---

The Defendant, BEAUFORT COUNTY, by and through its undersigned counsel, respectfully submits this Reply in response to the Plaintiff’s *Memorandum of Law in Opposition to County’s Motion for Reconsideration*, dated December 17, 2020 (the “*Memorandum*”).

**A. WHETHER PUBLIC BODY MAY CHARGE FOR REDACTIONS:**

In her *Memorandum*, the Plaintiff offers a unique interpretation of the term “redaction,” albeit one devoid of any statutory support. Under the Plaintiff’s theory of FOIA, the public body may only charge for “the type of redactions routinely expurgated from public documents, such as the names of minors, social security numbers, financial account numbers, etc.” (Pl. Memo., p. 2). In other words, public bodies may only charge for redactions when the law requires that information be redacted, not when exemptions from disclosure are permitted. While such an interpretation is consistent with the Plaintiff’s position, it is directly contradicted by the express language of FOIA:

Each public body, upon written request for records made under this chapter, shall within ten days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of the request, notify the person making the request of its determination and the reasons for it. . . . This determination must constitute the final opinion of the public body as to the public availability of the requested public record, however, the determination is not required to include a final decision or express an opinion as to whether specific portions of the documents or information *may be subject to redaction according to exemptions provided for by Section 30-4-40* or other state or federal laws.

See S.C. Code Ann. § 30-4-30(C). Contrary to the Plaintiff's position, the South Carolina Freedom of Information Act explicitly ties redactions to the exemptions enumerated in Section 30-4-40, including but not limited to the exemptions for attorney-client privileged communications.

The Plaintiff's repeated contention that the County relies solely on "a single sentence" of the Freedom of Information Act in support of the County's position is similarly without merit. As set forth in the County's *Motion to Reconsider*, one of the key additions of the 2017 FOIA amendments was the explicit allowance for the recovery of fees for "redaction." (Def. Mot. to Reconsider, p. 2-3). Although a statute need only express a right once for it to be effective, FOIA codifies a public body's right to charge for redactions twice:

The public body may establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, **and redaction** of records. . . . The fee for the search, retrieval, **or redaction** of records shall not exceed the prorated hourly salary of the lowest paid employee who, in the reasonable discretion of the custodian of the records, has the necessary skill and training to perform the request.

See S.C. Code Ann. § 30-4-30(B)(double emphasis added). Whether a public body has the statutory right to charge for redacting attorney-client privileged information should not be in dispute per the unambiguous terms of the Freedom of Information Act. To the extent the Plaintiff challenges this clearly defined right, the Court must rely on the language of the statute and find in favor of the County.

The Plaintiff also attempts to discredit the County's position on the costs of redaction by arguing that the County "shifted its position and its rationale to invoking 'attorney-client privilege'" after the Plaintiff filed suit. (Pl. Memo., p. 2). Once again, the Plaintiff's position is without merit as evidenced by the Plaintiff's own pleadings. The Plaintiff appears to conflate two separate issues: (a) whether certain documents were exempt from disclosure pursuant to the attorney-client privilege, and (b) whether a public body may incorporate the anticipated costs of redactions in calculating a reasonable estimate of fees for production pursuant to a FOIA request. One issue presents itself after production of documents, the other before. There was no shifting of rationale; rather, the County's position has been consistent from the outset. Public bodies may redact attorney-client privileged material and they may incorporate the anticipated costs of redactions in calculating a reasonable estimate of fees for production pursuant to a FOIA request. Once again, Beaufort County's position on both of these issues is supported by the unambiguous text of the Freedom of Information Act.

Despite the ever ballooning scope of this action, the primary issue regarding the fee estimates has remained narrow: How can FOIA’s prohibition against charging fees for “examination and review to determine if the documents are subject to disclosure” be reconciled with the public body’s right to charge fees for redacting exempt information given the inherent obligation to analyze and review records as part of the redaction process? If an irreconcilable conflict exists within FOIA regarding whether fees may be charged for redaction review, then the “last legislative expression” rule of statutory construction would require a court to presume that the legislature intended to confer upon public bodies this power. In the County’s opinion, there is only one reasonable interpretation of these two provisions that avoids an irreconcilable conflict – the interpretation espoused in the Defendant’s *Motion to Reconsider*. The Plaintiff’s *Memorandum* fails to provide a single reasonable reconciliation of these two sections that does not falter upon the review of the express terms of the statute.

**B. WHETHER DEBRA REGE CZ WAS AN AGENT OF THE COUNTY FOR PURPOSES OF THE ATTORNEY-CLIENT PRIVILEGE:**

The Plaintiff claims that the “extension of the reach of attorney-client privilege to a ‘privileged third party’ would come as a shock to any court” and “[i]f there is a case anywhere in America establishing third party beneficiaries of attorney-client privilege, the plaintiff is unable to discover it.” (Pl. Memo., p. 7). There are such cases. Many of them. Federal and state courts across the United States have recognized different exceptions to the general rule that communications with non-employees can defeat an organization’s claims of privilege.

Perhaps the earliest exception is the “*Kovel* doctrine,” which derives its name from a 1961 opinion of the United States Court of Appeals for the Second Circuit. *See United States v. Kovel*, 296 F.2d 918, 921-22 (2d. Cir. 1961). The *Kovel* doctrine makes clear that where a non-employee is someone whose involvement is needed to enable effective communication between the lawyer and the client or plays a role as a necessary agent of the attorney or the client, the privilege is not waived merely due to their inclusion in the communication. *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980); *AVX Corp. v. Horry Land Co.*, No. 4:07-CV-3299-TLW-TER, 2010 WL 4884903, at 7-8 (D.S.C. Nov. 24, 2010) (acknowledging the *Kovel* doctrine).

In the years that have followed since *Kovel*, courts across the country have similarly adopted the “functional equivalent doctrine,” which protects communications between organizations and contractors who are the functional equivalent of employees. *In re Bieter Company*, 16 F.3d 929 (8<sup>th</sup> Cir. 1994). Pertinent to the case at hand, *Bieter* found that a real estate consultant was intimately involved on a daily basis in the organization’s business and, therefore, “was in all relevant respects the functional equivalent of an employee.” *Id.*

In deciding to adopt the functional equivalent doctrine, the Eight Circuit explained its reasoning using the following hypothetical:

A literalistic extension of the privilege only to persons on the corporation’s payroll would invariably prevent a corporation’s attorney from engaging in a confidential discussion with a corporation’s regular independent accountant, no matter how important the accountant’s information would be to the attorney. . . . Such information will, in the vast majority of cases, be available from the client or the client’s employees, but there undoubtedly are situations . . . in which too narrow a definition of “representative of the client” will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely.

*Id.* at 937-38 (internal citations omitted). In a similar case to the one before the Court, the Massachusetts Land Court ruled that the inclusion of a real estate broker, who was not an employee of the company, on emails with the organization’s lawyer did not waive the attorney-client privilege:

Given Mr. Batchelder’s central and important role as the real estate counselor guiding Hobbs Brook in much of its land dealings, his presence on the distribution list of transaction emails to and from the company’s law firm ought not, by itself, strip away any otherwise applicable privilege. The court concludes that the Supreme Judicial Court, if it were to consider this question, would decide that Mr. Batchelder’s unique role made him a necessary partner in the provision of legal advice to Hobbs Brook about how the transaction, which the lawyers were helping shape with that advice, ought have been structured. Without Mr. Batchelder’s involvement, the lawyers’ advice may have been deficient, and based on less than the best input from the client. This conclusion holds even though the disputed emails appear to be those from the lawyers to Mr. Batchelder, and not any flowing in the opposite direction.

*One Ledgemont LLC v. Town of Lexington Zoning Bd. Of Appeals*, Misc. 13-PS-477585, 2014 Mass. LCR LEXIS 92 (Ma. Land Ct. 2014).

Derivative attorney-client privilege is not nearly the creature of fiction that the Plaintiff claims. It has been accepted by courts throughout the United States and has become more common

place as organizations and industries have become more complex and specialized. For these reasons, the Special Referee should reconsider her *Order* and find that privilege was not waived by copying a third party real estate broker on an organization's communications with legal counsel.

**Respectfully submitted,**

Hilton Head Island, South Carolina.  
January 15, 2021.

*s/ E. Richardson LaBruce*  
E. Richardson LaBruce, S.C. Bar No. 80106  
FINGER, MELNICK, BROOKS & LABRUCE, P.A.  
Post Office Box 24005  
Hilton Head Island, SC 29925-4005  
Telephone: (843) 681-7000  
Email: [erlabruce@fingerlaw.com](mailto:erlabruce@fingerlaw.com)  
ATTORNEYS FOR DEFENDANT

**From:** bcfoia <[bcfoia@bcgov.net](mailto:bcfoia@bcgov.net)>  
**Date:** February 20, 2019 at 10:01:48 AM EST  
**To:** "maremailmmm@yahoo.com" <[maremailmmm@yahoo.com](mailto:maremailmmm@yahoo.com)>  
**Subject:** Beaufort County FOIA Request 2019-000231

Dear Requester,

Thank you for submitting your Freedom of Information Act (FOIA) Request. Beaufort County is in receipt of your request for records pursuant to the South Carolina Freedom of Information Act. Your Case Number is 2019-000231.

Pursuant to Section 30-4-30 (b) of the South Carolina Code of Laws, Beaufort County is entitled to charge a fee for the actual costs incurred in producing public records pursuant to a South Carolina Freedom of Information Act request which is inclusive of both staff time and required materials/media.

The **estimated total** for this request is \$124.66.

4 hours estimated for I.T. to search and compile emails @ \$25.00/hour = \$100.00

1 hour estimated for Records Management to compile @ \$14.00/hour = \$14.00  
1 flash drive = \$7.00

Mailing= \$3.66

Beaufort County requires a **deposit of 25%** of the estimated total to be collected before work will continue on this FOIA. Upon receipt of your check or money order in the amount of **\$31.17**, we will resume gathering your requested information and will subsequently forward to you a new fee response indicating the remaining balance once that process is complete. Upon Records Management receiving the full amount due, we will provide you with the information found in response to your request.

Please make check or money order payable to **Beaufort County Treasurer** mail to:

Beaufort County FOIA Services  
c/o Records Management  
Post Office Drawer 1228  
Beaufort, SC 29901-1228

To expedite this process, ***please include your case number on the check or money order.***

Please contact me if you have any questions.

PO Drawer 1228

Beaufort, SC 29901

843-255-7200

[bcfoia@bcgov.net](mailto:bcfoia@bcgov.net)

<image004.jpg>

***p*URSUANT TO S.C. CODE §30-2-50**

***(A) A person or private entity shall not knowingly obtain or use Personal information obtained from a state agency, a local government, or other political subdivision of the State for commercial solicitation directed to any person in this State.***

***(D) A person knowingly violating the provisions of subsection (A) is guilty of a misdemeanor and, upon conviction, must be fined an amount not to exceed five hundred dollars or imprisoned for a term not to exceed one year, or both."***

---

**From:** Mare Baracco <[maremailmmm@yahoo.com](mailto:maremailmmm@yahoo.com)>  
**Sent:** Tuesday, April 30, 2019 1:52 PM  
**To:** bcfoia <[bcfoia@bcgov.net](mailto:bcfoia@bcgov.net)>  
**Subject:** Fwd: Beaufort County FOIA Request 2019-000231

Hello,

It was this FOIA I was referring to. The emails from 2# and #3 pwere all redacted (it was about 76 pages).

Also, I requested the emails between Gruber and Regecz, and they were not included.

There was no valid exception provided for the redactions so I would appreciate receiving them in their entirety, un-redacted.

Thanks, Mare B.

Sent from my iPhone

Begin forwarded message:

Assistant County Administrator  
Beaufort County Government, SC  
843-255-2354 (Office)

[<image001.png>](#)[<image002.png>](#) [<image003.png>](#)

To sign up for news from Beaufort County Administration, click [here](#).

[Watch and Listen](#) | [Email Us](#) | [Call Us](#) | [Meet County Council](#) | [Get Involved](#)

Beaufort County | Post Office Drawer 1228 | Beaufort, SC 29901

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**From:** Mare Deckard <[maremailmmm@yahoo.com](mailto:maremailmmm@yahoo.com)>  
**Sent:** Thursday, May 2, 2019 12:50 PM  
**To:** bcfoia <[bcfoia@bcgov.net](mailto:bcfoia@bcgov.net)>; Keough, MaryEllen <[maryellenk@bcgov.net](mailto:maryellenk@bcgov.net)>; Spells, Monica <[mspells@bcgov.net](mailto:mspells@bcgov.net)>  
**Subject:** Re: Beaufort County FOIA Request 2019-000231

Dear Ms. Keough and Ms. Spells,

Please see the reply, below, from BCFOIA May 1st, re my question as to FOIA 2019-000231, specifically #2 and #3, and the redactions (attached). In an effort to amiably resolve my concern, what is the County claiming as their rationale under FOIA and the SC Records and Retention Act for the redactions? I look forward to your reply, Mare B.

On Wednesday, May 1, 2019, 9:06:54 AM CDT, bcfoia <[bcfoia@bcgov.net](mailto:bcfoia@bcgov.net)> wrote:

Dear Requester,

Beaufort County has responded to your FOIA request in full and in accordance with South Carolina's Freedom of Information Act. If no documents were produced in response to a portion of your request, either no documents exist or, if documents do exist and/or they were redacted, they are exempted from production pursuant to the act.

Sincerely,

Bill Lisbon, FOIA Specialist

Mary Ellen Keough, Director

Beaufort County Records Management

Hi Ms. Baracco,

Good morning. No, ma'am and we do not have an employee with that title.

Thank you,

**Monica N. Spells, ICMA-CM**

Assistant County Administrator

Beaufort County Government, SC

843-255-2354 (Office)

---

**From:** Mare Baracco <[maremailmmm@yahoo.com](mailto:maremailmmm@yahoo.com)>

**Sent:** Thursday, May 2, 2019 5:11 PM

**To:** Spells, Monica <[mspells@bcgov.net](mailto:mspells@bcgov.net)>

**Cc:** bcfoia <[bcfoia@bcgov.net](mailto:bcfoia@bcgov.net)>; Keough, MaryEllen <[maryellenk@bcgov.net](mailto:maryellenk@bcgov.net)>

**Subject:** Re: Beaufort County FOIA Request 2019-000231

Thank you.

Ms. Spells, are you the County's FOIA Officer?

If not, please tell me who is -

Mare B.

Sent from my iPhone

On May 2, 2019, at 5:01 PM, Spells, Monica <[mspells@bcgov.net](mailto:mspells@bcgov.net)> wrote:

Hi Mrs. Baracco,

Good afternoon. I just forwarded your correspondence to our Legal Department (843-255-2055) for follow up. My office was not involved in the redactions.

Thank you,

**Monica N. Spells, ICMA-CM**

## Re: Beaufort County FOIA Request 2019-000231

From: Mare Baracco (maremailmmm@yahoo.com)  
To: mspells@bcgov.net  
Cc: bcfoia@bcgov.net; maryellenk@bcgov.net  
Date: Tuesday, June 4, 2019, 05:52 PM EDT

Ms. Spells,  
I appreciate your reply, however, the obligation to provide the reason for redacting my FOIA is on Beaufort County, not me. Therefore, I would appreciate an answer, in writing, as to the reason for these redactions. Thank you, Mare B.

Sent from my iPhone

On Jun 4, 2019, at 3:25 PM, Spells, Monica <[mspells@bcgov.net](mailto:mspells@bcgov.net)> wrote:

|

Good Afternoon, Ms. Baracco.

I have submitted your follow up inquiry to the Legal Department. Generally speaking, my understanding is that the Legal Department redacts those portions of documents which contain information which the public records act exempts from production. The Legal Department (843-255-2055) falls under the County Administrator (843-255-2026), so I recommend contacting either of those offices directly with any further inquiries about this item.

Thank you,

Monica Spells

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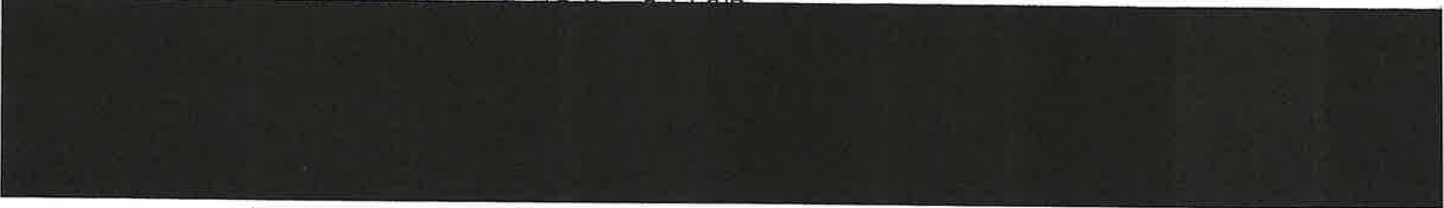
**From:** Mare Deckard <[maremailmmm@yahoo.com](mailto:maremailmmm@yahoo.com)>  
**Sent:** Tuesday, June 4, 2019 1:41 PM  
**To:** Spells, Monica <[mspells@bcgov.net](mailto:mspells@bcgov.net)>  
**Cc:** bcfoia <[bcfoia@bcgov.net](mailto:bcfoia@bcgov.net)>; Keough, MaryEllen <[maryellenk@bcgov.net](mailto:maryellenk@bcgov.net)>  
**Subject:** Re: Beaufort County FOIA Request 2019-000231

Dear Ms. Spells,  
Re your reply of May 2, I have still not heard from the legal department as to their reason for the redaction of FOIA 2019-000231. May I have a response please? Thank you, Mare Baracco

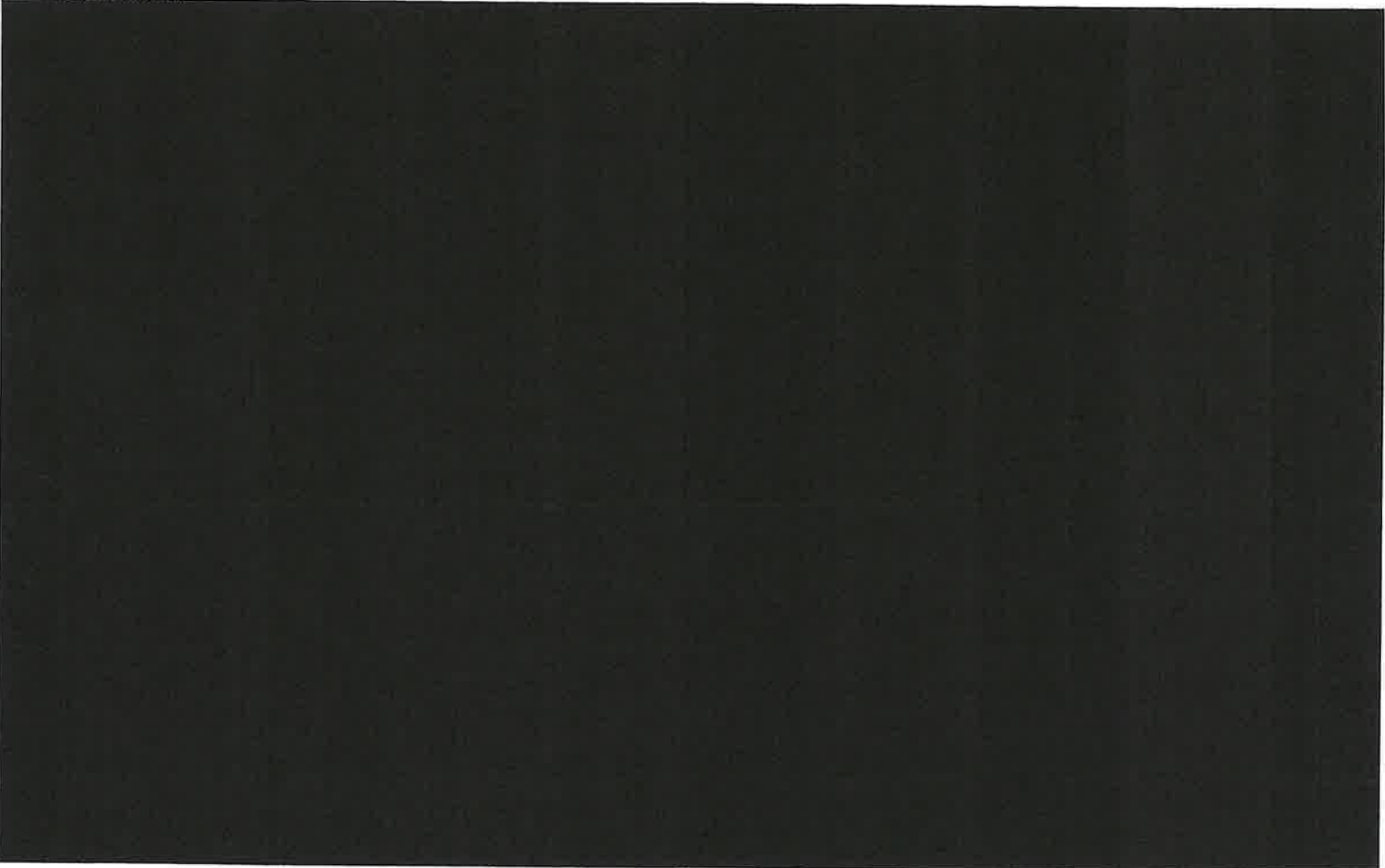
On Friday, May 3, 2019, 8:46:58 AM EDT, Spells, Monica <[mspells@bcgov.net](mailto:mspells@bcgov.net)> wrote:

(843) 255-2296 office  
(843) 255-9422 fax


**From:** Love, William  
**Sent:** Monday, February 05, 2018 7:50 AM  
**To:** Keaveny, Thomas  
**Cc:** Debra Regecz ([deb@redhatteam.com](mailto:deb@redhatteam.com)); Spells, Monica; Cody, Beth; Brown, Gail; Holland, Alicia



**From:** Keaveny, Thomas  
**Sent:** Sunday, February 04, 2018 3:06 PM  
**To:** Debra Regecz; 'Thomas A. Bendle, Jr.'; Spells, Monica; Love, William; Sutton, Mark; Mayse, Wanda  
**Cc:** Holland, Alicia

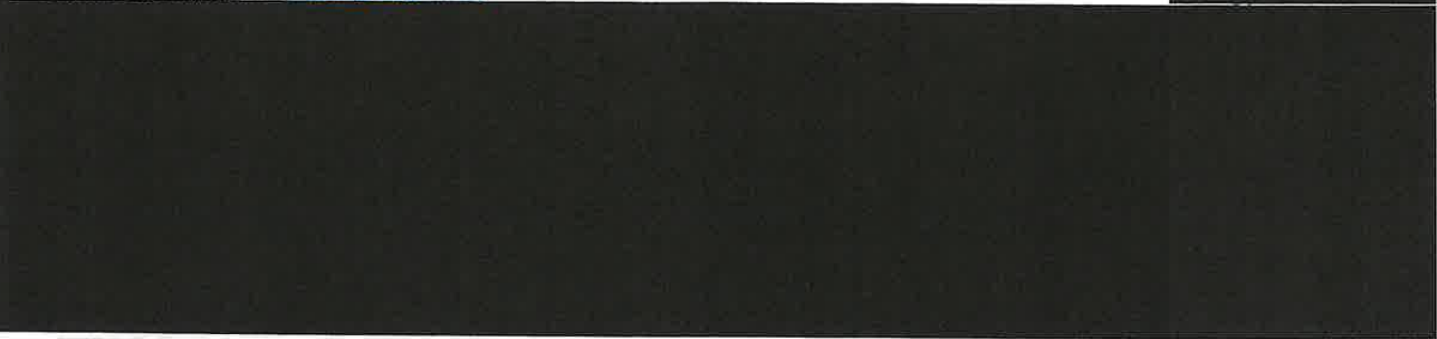


**From:** Debra Regecz [<mailto:deb@redhatteam.com>]  
**Sent:** Saturday, February 3, 2018 3:08 PM  
**To:** 'Thomas A. Bendle, Jr.'; Spells, Monica; Keaveny, Thomas; Love, William; Sutton, Mark; Gruber, Joshua; Mayse, Wanda  
**Cc:** Roseneau, Mark





**From:** Thomas A. Bendle, Jr. [<mailto:TBendle@hghpa.com>]  
**Sent:** Monday, January 29, 2018 3:28 PM  
**To:** Spells, Monica <[m spells@bcgov.net](mailto:m spells@bcgov.net)>; Keaveny, Thomas <[tkeaveny@bcgov.net](mailto:tkeaveny@bcgov.net)>; Debra Regecz <[deb@redhatteam.com](mailto:deb@redhatteam.com)>; Love, William <[wlove@bcgov.net](mailto:wlove@bcgov.net)>; Sutton, Mark <[msutton@bcgov.net](mailto:msutton@bcgov.net)>; Gruber, Joshua <[jgruber@bcgov.net](mailto:jgruber@bcgov.net)>; Mayse, Wanda <[wmayse@bcgov.net](mailto:wmayse@bcgov.net)>  
**Cc:** Roseneau, Mark <[markr@bcgov.net](mailto:markr@bcgov.net)>



**From:** Spells, Monica [<mailto:m spells@bcgov.net>]  
**Sent:** Monday, January 29, 2018 2:02 PM  
**To:** Keaveny, Thomas; Debra Regecz; Love, William; Sutton, Mark; Gruber, Joshua; Mayse, Wanda  
**Cc:** Thomas A. Bendle, Jr.; Roseneau, Mark



**From:** Keaveny, Thomas  
**Sent:** Monday, January 29, 2018 1:23 PM  
**To:** Debra Regecz <[deb@redhatteam.com](mailto:deb@redhatteam.com)>; Love, William <[wlove@bcgov.net](mailto:wlove@bcgov.net)>; Sutton, Mark <[msutton@bcgov.net](mailto:msutton@bcgov.net)>  
**Cc:** Tab Bendle ([tab@hghpa.com](mailto:tab@hghpa.com)) <[tab@hghpa.com](mailto:tab@hghpa.com)>; Roseneau, Mark <[markr@bcgov.net](mailto:markr@bcgov.net)>; Spells, Monica <[m spells@bcgov.net](mailto:m spells@bcgov.net)>



To: Debra Regecz <[deb@redhatteam.com](mailto:deb@redhatteam.com)>

Subject: RE: 1 Bostick Circle / Baker to Cty / Battery Point S/D

Hi Deb,

I have been working through permitting with the Waddell Rd site and would like to verify on the new site, Bostic, that a slab home is acceptable vrs one over a crawl space.

I ask because you have owned there and I don't want to go to a slab if they are prohibited or otherwise contrary to the others homes.

Please let me know.

Once we have the all clear to proceed, I will need to have the foundation designed and don't want to make a mistake.

Thanks

Mark W. Sutton, AIA

Deputy Director

Beaufort County Facility Management

120 shanklin Road

Beaufort, SC 29906

o (843) 255-2738

c (843)-473-5892

[msutton@bcgov.net](mailto:msutton@bcgov.net)

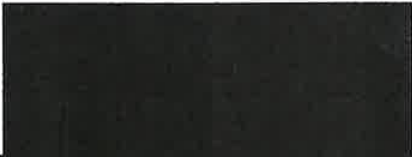


From: Debra Regecz [<mailto:deb@redhatteam.com>]

Sent: Tuesday, February 06, 2018 12:49 PM

To: 'Thomas A. Bendle, Jr.'

Cc: Love, William; Sutton, Mark



From: Thomas A. Bendle, Jr. [<mailto:TBendle@ghpa.com>]

Sent: Tuesday, February 6, 2018 12:27 PM

To: Debra Regecz <[deb@redhatteam.com](mailto:deb@redhatteam.com)>





**OFFICE OF THE STAFF ATTORNEY**

Post Office Drawer 1228  
Beaufort, SC 29901  
(843) 255-2059 (O)  
(843) 255-9414 (F)

RECEIVED

MAR 24 2017

Beaufort County Staff Attorney

New

Renewal

**DOCUMENT REVIEW REQUEST FORM**

**TO BE COMPLETED BY THE REQUESTING DIVISION**

Document Title: RFP 030217 Real Estate Broker Services for Beaufort County

Description: contact w/ Challenge Realty to serve as listing agent for Beaufort County from time to time has the need to sell real estate property to meet the needs of the County. property (429 Broad River Blvd, Beaufort, SC 29902) which County wants to sell.

Specific Concerns About Document: NONE

Sent to Legal for Review On: 3.24.2017 (Insert Date) Need By: \_\_\_\_\_ (Insert Date)

Requesting Division /Department: Purchasing

Contact Information: Marlene Myers - Contracts Manager -Purchasing Number: x52295  
(Name and Title)

Email Address: tmyers@bcgov.net

**LEGAL DEPARTMENT USE ONLY**

Legal Office Received On: 3-24-17 (Insert Date) Received By: Kathy Carter (Name of Legal Staff Member)

**LEGAL REVIEW FINDINGS**

Reviewed By: [Signature] (Signature of Legal Staff) APPROVED:  YES or NO \_\_\_\_\_

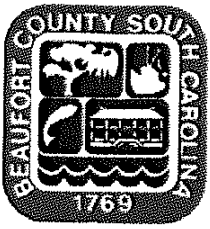
Additional Comments to Approval or Rejection: NONE

**DEPUTY COUNTY ADMINISTRATOR APPROVAL**

[Signature]  
Josh Gruber, Deputy County Administrator

RECEIVED  
MAR 27 2017  
COUNTY ADMINISTRATOR

3-24-16  
(Date)



## CONTRACT FOR SERVICES FOR BEAUFORT COUNTY

**THIS AGREEMENT** (the "Agreement") is made this 7<sup>th</sup> day of March 2017, by and between Beaufort County, a political subdivision of the State of South Carolina (hereinafter referred to as "County") and Ballenger Realty (hereinafter referred to as "Contractor"). This Agreement shall consist of all the terms, conditions, specifications and provisions contained in RFP # 030217 dated March 2, 2017 Exhibit "A", the Contractor's Proposal dated February 27, 2017 and attached as Exhibit "B", Exhibit "C" Listing Agreement, Exhibit "D" Agency Brochure, Exhibit "E" Property Condition Form, Exhibit "F" Residential Property Condition Disclosure Statement and Exhibit "G" Disclosure of Real Estate Brokerage Relationships and Statement of Independent Contractor Exhibit "H".

### WITNESSETH:

**WHEREAS**, the Contractor and the County desire to enter into an agreement relating to Real Estate Broker Services for Beaufort County, subject to the terms, specifications, conditions and provisions of the request for proposal as heretofore mentioned.

**NOW, THEREFORE**, the Contractor and the County agree to all of these terms, conditions, specifications, provisions and the special provisions as listed below:

- A. This Agreement is deemed to be under and shall be governed by and construed according to the laws of the State of South Carolina.
- B. Any litigation arising out of the Agreement shall be held only in a Circuit Court of Beaufort County, Beaufort, South Carolina, in the Fourteenth Judicial Circuit.
- C. The Contractor shall not sublet, assign, nor by means of a stock transfer sale of its business, assign or transfer this Agreement without the written consent of the County.
- D. This Agreement, including the terms, conditions, specifications and provisions listed herein makes up the entire contract between the Contractor and County. No other agreement, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or bind either party hereto.
- E. It is understood that this Agreement shall be considered exclusive between the parties.
- F. Any provisions of this Agreement found to be prohibited by law shall be ineffective, to the extent of such prohibition, without invalidating the remainder of the Agreement.

**NOW, THEREFORE**, in consideration of mutual covenants contained herein, the parties agree as follows:

**ARTICLE 1  
DESCRIPTION**

The Contractor does hereby offer to the County services for the purpose of providing Real Estate Services and Consultation as contained and described in RFP #030217. The Contractor will provide Professional Real Estate Services to the County, including consultation with County Staff, Commissioners and other County Elected Officials, relating to real estate needs of the County as required. Scope of services may include market analysis, develop pro forma analysis and reports, develop strategies for sale of properties, negotiate with buyers on behalf of the County, coordinate with Real Estate Appraisers hired by the County, coordinate real estate transaction closings and handling all other customary activities and services associated with real estate transactions.

**ARTICLE 2  
LIABILITY**

The County and Contractor shall not be responsible to each other for any incidental, indirect or consequential damages incurred by either Contractor or County or for which either party may be liable to any third party which damages have been or are occasioned by services performed or reports prepared or other work performed hereunder. Further, Contractor's liability to the County and any other party for any losses, injury or damages to persons or properties or work performed arising out of/in connection with this Agreement and for any other claim, whether the claim arises in contract, tort, statute or otherwise, shall be limited to the amount of the total fees due to the Contractor from the County hereunder.

**ARTICLE 3  
INDEMNIFICATION AND HOLD HARMLESS**

The Contractor does hereby agree to indemnify and save harmless the County, its officers, agents and employees from and against any and all liability, claims, demands, damages, fines, fees, expenses, penalties, suits, proceedings, actions and cost of actions, including attorney's fees for trial and on appeal of any kind and nature to the extent arising or growing out of or in any way connected with the negligent performance of the Agreement, by Contractor, its agents, servants or employees.

**ARTICLE 4  
ASSIGNMENT**

Contractor shall not assign or subcontract any rights or duties of this Agreement, except to an affiliated company, without the expressed written consent of the County, which consent shall not be unreasonably withheld, conditioned or delayed. Any assignment or subcontract without the written consent of County shall be void and this Agreement shall terminate at the option of the County.

**ARTICLE 5  
TERM**

The initial term of this Agreement shall be for one (1) year beginning March 7, 2017 and ending June 30, 2018. The contract may be renewed for four (4) additional one-year terms upon satisfactory performance by the broker/firm and at a negotiated rate agreed to in writing prior to June 30 of each renewal year.

**ARTICLE 6  
COMPENSATION**

Compensation is based on Contractor's proposed fee as outlined in their proposed Commission Fee Schedule submitted on February 27, 2017 which are incorporated herein and made a part hereof. Commissions are typically paid out of closing fees by the seller. Commission Fee Schedule: Six Percent (6%) for residential Home Listings (3% to Listing Agency and 3% to Buyers Agency), Ten Percent (10%) for Land Listings (5% to Listing Agency and 5% to Buyers Agency), Ten Percent (10%) for Commercial Properties (5% to Listing Agency and 5% to Buyers Agency). The final fee for each sale must be agreed upon by both parties before the services are rendered.

The County and the Contractor agree that the Contractor will track the overall cost of each task and will advise the County in writing PRIOR TO exceeding the maximum cost delineated in this Article. This Scope of Work may be modified in the future by mutual agreement of the County if needed to re-allocate fees among these tasks or to adjust the maximum cost not to exceed.

Work performed on this Contract will be accounted for separately by the Contractor and the County will be invoiced on a monthly basis for work performed under this Contract. Payments will be made as outlined in Article 18.

**ARTICLE 7  
INSURANCE**

Contractor does hereby covenant, agree and hereby represent to the County that it has obtained general liability and automobile liability insurance, as well as providing coverage against potential liability arising from and in any manner relating to the Contractor's use or occupation of the premises during the course of performing the contracted services, all in accordance with and as described in the County's RFP # 030217.

**INSURANCE REQUIREMENTS:** Prior to commencing work hereunder, Contractor, at his expense, shall furnish insurance certificate showing the certificate holder as Beaufort County, P.O. Drawer 1228, Beaufort, SC 29901-1228, Attention: Purchasing Director and Risk Management and with a special notation naming Beaufort County as an Additional

Insured on the liability coverages. If not otherwise specified, the minimum coverage shall be as follows:

1. Commercial General Liability Insurance - Contractor shall have and maintain, during the life of this contract, Commercial General Liability Insurance. Said Commercial General Liability Policy shall contain Contractual Liability and Products/Completed Operations Liability subject to the following minimum limits: BODILY INJURY of at least \$1,000,000 PER PERSON, \$1,000,000 PER OCCURRENCE; PROPERTY DAMAGE of at least \$1,000,000 PER OCCURRENCE; or BODILY INJURY/PROPERTY DAMAGE of at least \$2,000,000 COMBINED SINGLE LIMIT.
2. Comprehensive Automobile Liability Insurance - The Contractor shall have and maintain, during the life of this contract, Comprehensive Automobile Liability, including non-owned and hired vehicle, of at least \$1,000,000 PER PERSON, \$1,000,000 PER OCCURRENCE; PROPERTY DAMAGE of at least \$1,000,000 PER OCCURRENCE, or BODILY INJURY/PROPERTY DAMAGE of at least \$2,000,000 COMBINED SINGLE LIMIT.
3. The required insurance policy at the time of issue must be written by a company licensed to do business in the State of South Carolina and be acceptable to the County.
4. The Contractor shall not cause any insurance to be canceled or permit any insurance to lapse. All insurance policies shall contain a clause to the effect that the policy shall not be canceled or reduced, restricted or limited until fifteen (15) days after the County has received written notice, as evidenced by return receipt of registered or certified letter. Certificates of Insurance shall contain transcript from the proper office of the insurer, the location, and the operations to which the insurance applies, the expiration date, and the above-mentioned notice of cancellation clause.
5. The Independent Contractor Form (Exhibit "H") shall be used for the basis of any Worker's Compensation insurance coverage that Beaufort County requires.

#### **ARTICLE 8 DEFAULT**

In the event of default or breach of any condition of this Agreement resulting in litigation, the prevailing party would be entitled to reasonable attorneys' fees fixed by the Court. The remedies herein given to County shall be cumulative, and the exercise of any one remedy by the County shall not be to the exclusion of any other remedy.

#### **ARTICLE 9 TERMINATION**

In the event that Contractor fails to perform (or fails to commence the cure of any breach, which shall be diligently prosecuted in good faith) the services described within five (5) business days of

its receipt of a written demand from the County, County may terminate the Agreement immediately upon notice provided such notice is at least five (5) business days following the County's notice of non-performance. In the event that the County breaches any of the terms of this Agreement including, but not limited to, non-payment, and fails to cure such breach within fifteen (15) business days of its receipt of a written demand from the Contractor, Contractor may terminate the Agreement immediately upon notice, provided such notice is at least fifteen (15) business days following the Contractor's notice of breach. Upon such termination, the County has the right to award a Contract to an alternate contractor and seek damages as allowed by law.

**ARTICLE 10  
COUNTY RESPONSIBILITIES**

The County will be responsible to provide the Contractor reasonable access to County locations when necessary, ensure cooperation of County employees in activities reasonable and appropriate under the project, and obtain authorization for access to third party sites, if required.

**ARTICLE 11  
FORCE MAJEURE**

Should performance of Contractor services be materially affected by causes beyond its reasonable control, a Force Majeure results. Force Majeure includes, but is not restricted to, acts of God, acts of a legislative, administrative or judicial entity, acts of contractors other than subcontractors of Contractor, fires, floods, labor disturbances, and unusually severe weather. Contractor will be granted a time extension and the parties will negotiate an adjustment to the fee, where appropriate, based upon the effect of the Force Majeure upon Contractor's performance.

**ARTICLE 12  
SEVERABILITY**

Every term or provision of this Agreement is severable from others. Notwithstanding any possible future finding by a duly constituted authority that a particular term or provision is invalid, void, or unenforceable, this Agreement has been made with the clear intention that the validity and enforceability of the remaining parts, terms and provisions shall not be affected thereby.

**ARTICLE 13  
INDEPENDENT CONTRACTOR**

The Contractor shall be fully independent in performing the services and shall not act as an agent or employee of the County. As such, the Contractor shall be solely responsible for its employees, subcontractors, and agents and for their compensation, benefits, contributions and taxes, if any.

**ARTICLE 14  
NOTICE**

The Contractor and the County shall notify each other of service of any notice of violation of any law, regulation, permit or license relating to the services; initiation of any proceedings to revoke any permits or licenses which relate to such services; revocation of any permits, licenses or other governmental authorizations relating to such services; or commencement of any litigation that could affect such services. Such notice shall be delivered by U. S. mail with proper postage affixed thereto and addressed as follows:

County:	Beaufort County Administrator Attn: Mr. Gary Kubic P. O. Drawer 1228 Beaufort, SC 29901-1228
	Beaufort County Attn: Beaufort County Purchasing Director P. O. Drawer 1228 Beaufort, SC 29901-1228
Contractor:	Ballenger Realty, Inc. Attn: Everett Ballenger 613 Carteret Street Beaufort, SC 29902

**ARTICLE 15  
CHANGE ORDERS**

Should the Scope of Work as noted in Article 1 of this Agreement change as a result of:

- a) County requested changes to the approved Scope of Work, or
- b) Increase in work needed to complete any approved Change Order as a result of unexpected occurrence outside of the control of the Contractor, or
- c) The County requests additional Change Orders from the Contractor,

Then the Contractor will prepare and submit to the County an amendment to the applicable Change Order, or where no Change Order is in place of such additional services, the Contractor will prepare

a Change Order for the County's review. No additional services will be undertaken by the Contactor without the approval of a Change Order or Change Order Amendment by the County.

**ARTICLE 16  
AUDITING**

The Contractor shall make available to the County if requested, true and complete records, which support billing statements, reports, performance indices, and all other related documentation. The County's authorized representatives shall have access during reasonable hours to all records, which are deemed appropriate to auditing billing statements, reports, performance indices, and all other related documentation. The Contractor agrees that it will keep and preserve for at least seven years all documents related to the Agreement, which are routinely prepared, collected or compiled by the Contractor during the performance of this Agreement.

**ARTICLE 17  
GRATUITIES**

The right of the Contractor to proceed or otherwise perform this Agreement, and this Agreement may be terminated if the County Administrator or his appointed designee determine, in their sole discretion, that the Contractor or any officer, employee, agent, or other representative whatsoever, of the Contractor offered or gave a gift or hospitality to a County officer, employee, agent or Contractor for the purpose of influencing any decision to grant a County Contract or to obtain favorable treatment under any County Contract.

**ARTICLE 18  
INVOICES**

All invoices for work done under this Agreement should be directed to the County Representative, David Thomas, Purchasing Director

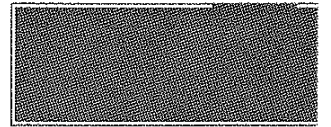
Located at:           Beaufort County Purchasing Department  
                          106 Industrial Village Road, Bldg. #2  
                          Beaufort, S.C. 29906

The broker and agent fees may be paid at the time of closing of the property.

**ARTICLE 19  
PURCHASE ORDERS**

The County will issue Purchase Orders from properly executed requisitions for this Agreement and each approved Change Order. The County shall not be responsible for invoices of \$500 or more that do not have a purchase order covering them.





# EXHIBIT A



COUNTY COUNCIL OF BEAUFORT COUNTY  
PURCHASING DEPARTMENT  
POST OFFICE DRAWER 1228 ♦ BEAUFORT, SOUTH CAROLINA 29901-1228  
TELEPHONE: (843) 255-2350 FAX: (843) 255-9437

PROPOSAL NOTICE NO. 030217

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CLOSING DATE AND TIME: **March 2, 2017, 3:00 p.m.**

PROPOSAL TITLE: Real Estate Broker Services for Beaufort County

You are invited to submit proposals in accordance with the requirements of this solicitation which are contained herein.

**There will be a Pre-Proposal meeting on February 9, 2017 at 2:00 p.m. at the Finance conference room located at 106 Industrial Village Road, Building #2, Beaufort, SC 29906. All vendors are encouraged to attend.**

In order for your proposal to be considered, it must be submitted to the Purchasing Office no later than the date and time as listed above, at which time respondents to this request will be recorded in the presence of one or more witnesses. Proposals received by the Purchasing Office after the time specified will be returned to the offeror unopened. Due to the possibility of negotiation with all offerors, the identity of any offeror or the contents of any proposal shall not be public information until after the contract award is made; therefore, the public is not invited to the proposal closing.

The proposals must be signed by an official authorized to bind the Offeror, and it shall contain a statement to the effect that the proposal is firm for a period of at least 90 days from the closing date for submission of proposals. **Proposals must be submitted in a sealed opaque envelope/container showing the above proposal number, closing date, and title.**

All submittals (see Part VII, Submission Requirements) received in response to this Request for Proposals will be rated by County Selection Committee, based upon the Evaluation Criteria as listed in Part IV. If the best offeror is clearly identified from the point summary, there will not be a need for oral presentations. If not, then an oral presentation from a minimum of the top two rated firms shall be required.

This solicitation does not commit Beaufort County to award a contract, to pay any costs incurred in the preparation of a proposal, or to procure or contract for the articles of goods or services. The County reserves the right to accept or reject any or all proposals received as a result of this request, to negotiate with all qualified offerors, or to cancel in part or in its entirety this proposal, if it is in the best interests of the County to do so.

BEAUFORT COUNTY

"Original Signed"

David L. Thomas, CPPO  
Purchasing Director  
(843) 255-2350

## PART I

### GENERAL INFORMATION

1. Proposals will be considered as specified herein or attached hereto under the terms and conditions of this proposal.
2. Proposals must be made in the official name of the firm or individual under which business is conducted (showing official business address) and must be signed in ink by a person duly authorized to legally bind the person, partnership, company, or corporation submitting the proposal.
3. Offerors are to include all applicable requested information and are encouraged to include any additional information they wish to be considered.
4. **One (1) clearly identified original and four (4) copies of your proposal are required.**
5. Qualification Statements will be received by the Beaufort County Purchasing Department until 3:00 p.m. on the closing date shown.

Qualification Statements are to be mailed to:

Beaufort County Purchasing Department  
P. O. Drawer 1228  
Beaufort, SC 29901-1228

Hand deliver and/or Express mail to:

Beaufort County Purchasing Department  
106 Industrial Village Road, Building # 2  
Beaufort, SC 29906-4291

The submitting offeror is required to have printed on the envelope or wrapping containing his proposal the RFP number, closing date, and title.

Offerors who desire to receive a copy of the Statement of Award must include a self-addressed stamped envelope.

6. **Prohibition of Gratuities:** It shall be unethical for any person to offer, or give, or agree to give any County employee or former County employee, or for any County employee or former County employee to solicit, demand, accept, or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, or preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal therefore.
7. **Questions**

Fax or e-mail (e-mail questions are preferred) any questions you have, at least ten (10) calendar days prior to proposal closing date to:

Dave Thomas, Beaufort County Purchasing Department, (843) 255-9437. Confirm receipt of fax by calling Dave Thomas at 843-255-2350.

E-Mail Dave Thomas at [dthomas@bcgov.net](mailto:dthomas@bcgov.net)

Answers to questions received that would change and/or clarify this solicitation will be provided in writing to all firms that have received the original Request for Proposal.

## **PART II**

### **INTRODUCTION**

#### **1. INTRODUCTION**

Beaufort County is seeking proposals from qualified local real estate brokers/firms to provide real estate brokerage services for the County. It is the intent of this RFP to have the successful broker/firm enter into a professional services contract with the County to supply real estate services as outlined herein for the remainder of the 2017 fiscal year and expire on June 30, 2018. After the first contract term upon mutual agreement the County will have the option to renew the contract each year, not to exceed three one year contract renewals.

#### **2. BACKGROUND**

Beaufort County from time to time has the need to sell real estate property to meet the needs of the County. Currently Beaufort County has a need to sell the following property as listed below:

429 Broad River Blvd, Beaufort, SC 29902  
(3 Bedroom/2 Bath Brick Ranch – approx. 1315 sq.ft.& 0.35 acres)

**Note: There will be a site visit immediately after the Pre-Proposal Conference scheduled for February 9, 2017.**

## **PART III**

### **SCOPE OF WORK**

#### **A. SCOPE OF SERVICES**

The successful firm shall agree to contract with the County to provide the following:

- Services required involve performing market analysis,
- Developing pro forma analysis and reports,
- Developing strategies for sale of properties,
- Negotiating with buyers on behalf of the County,
- Coordinating with Real Estate Appraisers hired by the County,

- Coordinating real estate transaction closings, and
- Handling all other customary activities and services associated with real estate transactions.

Services will include consultation with County staff, County Commissioners, and other County Elected Officials, relating to real estate needs of the County if required. Presentations at executive sessions and public meetings may be required.

The use of Real Estate Broker Services for the County will be coordinated through the Beaufort County Purchasing Department. The provider will be expected to work directly with representatives of various County departments when providing services.

#### **A. BROKER'S QUALIFICATIONS**

Respondents to this RFP shall have the following qualifications:

- Must be licensed and in good standing with the South Carolina Real Estate Commission for a minimum of two years.
- Must have an excellent reputation in the real estate community.
- Must be knowledgeable in the local real estate market and have experience with small and large commercial properties, unimproved land, and right-of way acquisition.
- Must be knowledgeable in the use of all public real estate records maintained by the County Assessor and County Clerk & Recorder.
- Knowledge of the Beaufort County real estate is desired.
- Knowledge and experience in the acquisition and sale of government owned property is desired.
- Knowledge in acquisition and sale of public land and right-of-way is desired.

#### **A. INSURANCE REQUIREMENTS**

For proposal purposes, broker/firm must submit copies of certificates of insurance as referenced on the Response Checklist. The successful broker/firm must provide original certificates prior to commencing work, at the broker's/firm's expense and maintain such coverage for the duration of the contract.

#### **B. FEE SCHEDULE**

The fee schedule must be submitted in a separate envelope, one original and five (5) copies, and clearly marked with the **RFP No. 030217, FEE SCHEDULE**.

The proposed fee schedule shall include the following items:

- State your commission rate for listing and selling of properties.
- State your proposed method of compensation for representing the County in negotiations for purchasing properties.

- State any other costs the County may anticipate relating to the real estate services to be provided.

Payments to the successful contractor will be based on actual services received.

**C. TERM OF CONTRACT**

The contract period for the successful broker/firm will be from date of award through June 30, 2018. The contract may be renewed for three (3) additional one-year terms upon satisfactory performance by the broker/firm and at a negotiated rate agreed to in writing prior to June 30 of each renewal year. Any contract awarded between Beaufort County and the broker/firm will consist of an Independent Contractor Services Contract (a copy is included in this RFP package for review), this RFP, the submitted proposal, negotiations, the resulting purchase order and original certificates of insurance. Please Note: Any current projects that are presently on going will be completed by the current contractor and will not be considered part of the new contract.

**D. EVALUATION AND AWARD PROCESS**

Issuance of this RFP and receipt of proposals does not commit the County to award a contract. The County reserves the right to postpone receipt date, accepting or rejecting any or all proposals received in response to this RFP, or to negotiate with other than the highest ranked offeror should negotiations with the highest ranked offeror be terminated, or to cancel all or part of this RFP.

The Evaluation Committee will evaluate all proposals received for completeness and the broker's/firm's ability to meet all specifications as outlined in this RFP.(See "RFP SUBMITTAL REQUIREMENTS, Section, Section 'M'.) The committee may then short list to specific firms whose proposals best meet all criteria required. The negotiations and award process will follow the procedures as stated above.

**E. RFP SCHEDULE**

RFP MAILED	January 27, 2017
PRE-PROPOSAL CONFERENCE	February 9, 2017
RFP DUE DATE	March 2, 2017
EVALUATION OF PROPOSALS	March 9, 2017
INTERVIEWS	March 16, 2017
SUBMIT FOR APPROVAL	March 20, 2017

NOTE: THE DATES SHOWN ABOVE ARE APPROXIMATE, ARE NOT BINDING AND MAY BE SUBJECT TO CHANGE.

#### F. PROPOSAL PREPARATION AND SUBMISSION

Proposal responses **must be received in the Beaufort County Purchasing Department, 102 Industrial Village Road, Building # 2, Beaufort, SC 29906-4291 no later than 3:00 P.M., March 2, 2017.** Responses must be mailed, delivered or faxed in a sealed envelope to the above stated address and identified as **RFP NO.: 030217 REAL ESTATE BROKER SERVICES in the bottom left-hand corner of each envelope.**

#### G. INSURANCE REQUIREMENTS

For proposal purposes, proposer must submit copies of certificates of insurance for general liability and workers compensation. The successful contractor must provide original certificates prior to commencing services, at its own expense, ***namimg Beaufort County as additional insured***, with a thirty (30) day cancellation notice, and maintain such coverage for the duration of the contract.

#### H. PROPOSAL PRESENTATION

An authorized representative of the proposer shall sign proposals. Failure to submit all information requested may result in the Beaufort County Purchasing Department requiring prompt submission of missing information and/or giving a lower evaluation of the proposal. The Purchasing Department may reject proposals that are substantially incomplete or lack key information.

#### I. ORAL PRESENTATION/INTERVIEWS

Firms submitting a proposal in response to this RFP may be required to give an oral presentation of their proposal in an interview session with the Evaluation Committee. Additional technical and/or cost information may be requested from any firm by the Evaluation committee prior, during or after the interview for clarification purposes, but in no way will change the original proposal submitted. Interviews are at the option of the Evaluation Committee and may or may not be conducted.

#### J. SELECTION CRITERIA

**The Evaluation Committee will base their selection on the following criteria:**

1. Ability of the contractor(s) to meet or exceed the requirements defined in the RFP including the range of services offered,
2. Experience, qualifications and references,
3. Local real estate market, public land and right of way, and government real estate knowledge,

4. Local reputation,
5. Fee schedule, and
6. Completeness of response to RFP as outlined in this solicitation package (See Section M, "RFP Submittal Requirements").

#### **K. RFP SUBMITTAL REQUIREMENTS**

By submitting a proposal, you represent that you have (1) thoroughly examined and become familiar with the scope of services outlined in this RFP and (2) are capable of performing quality work to achieve the County's objectives.

**The following information must accompany your proposal:**

1. List years in business, previous names of the firm, if any.
2. Description of your firm including size of firm, location, number and nature of the professional staff to be assigned to the County; staff experience and training, including a brief resume for each key person listed.
3. Describe experience (minimum five years previous experience with proven effectiveness) your firm or organization has in pertinent real estate experience.
4. Experience in assisting similar size entities, including any and all services for government agencies.
5. List of at least three references where and when your firm provided similar services. Please provide names and telephone numbers of contact persons for each reference.
6. Additional services offered through your firm.
7. Listing of current litigation, outstanding judgments and liens.
8. Fee schedule (in a separate envelope) per Section D.
  - State your commission rate for listing and selling of properties
  - State your proposed method of compensation for representing the County in negotiations for purchasing properties
  - State any other costs the County may anticipate relating to the real estate services to be provided.

Any questions regarding this RFP should be directed to David L. Thomas, CPPO, Purchasing Director, Beaufort County Purchasing Department, (843) 255-2350, or emailed to [dthomas@bcgov.net](mailto:dthomas@bcgov.net).

**PART IV**

**EVALUATION CRITERIA**

EVALUATOR: \_\_\_\_\_ DATE: \_\_\_\_\_

RFP#: \_\_\_\_\_ TITLE: \_\_\_\_\_

OFFEROR: \_\_\_\_\_

	<u>POINT RANGE</u>	<u>POINTS ASSIGNED</u>
1.0 Demonstrated understanding of the problems and needs presented by the project.	_____ Points	_____
2.0 Soundness of offeror's approach to the problems and needs presented by the project, including offeror's methodology for achieving specific tasks and objectives.	_____ Points	_____
3.0 Experience and capacity of offeror, including recent and related experience.	_____ Points	_____
4.0 Qualifications of project personnel and offeror's ability to commit a capable staff and support for a project of this size under the time constraints as listed in the RFP.	_____ Points	_____
5.0* Cost effectiveness and reasonableness of offeror's proposed fee.	_____ Points	_____
TOTAL POINTS:	<u>100 Points</u>	<u>_____</u>

**PART V**  
**CONTRACTUAL REQUIREMENTS**

- 1.0 **EXCUSABLE DELAY:** The Contractor shall not be liable for any excess costs, if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and the subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.
- 2.0 **S.C. LAW CLAUSE:** Upon award of a contract under this proposal, the person, partnership, association, or corporation to whom the award is made must comply with local and State laws which require such person or entity to be authorized and/or licensed to do business in Beaufort County. Notwithstanding the fact that applicable statutes may exempt or exclude the successful offeror from requirements that it be authorized and/or licensed to do business in Beaufort County, by submission of this signed proposal the offeror agrees to subject itself to the jurisdiction and process of the Fourteenth Judicial Circuit Court of Beaufort County, as to all matters and disputes arising or to arise under the contract and the performance thereof including any questions as to the liability for taxes, licenses, or fees levied by State or local government.
- 3.0 **OFFEROR'S QUALIFICATIONS:** Offeror must, upon request of the County, furnish satisfactory evidence of their ability to furnish products or services in accordance with the terms and conditions of this proposal. The Purchasing Department reserves the right to make the final determination as to the offeror's ability to provide the services requested herein, before entering into any contract.
- 4.0 **OFFEROR RESPONSIBILITY:** Each offeror shall fully acquaint himself with conditions relating to the scope and restrictions attending the execution of the work under the conditions of this proposal. It is expected that this will sometimes require on-site observation. The failure or omission of an offeror to acquaint himself with existing conditions shall in no way relieve him of any obligation with respect to this proposal or to the contract.
- 5.0 **AFFIRMATIVE ACTION:** The Contractor will take affirmative action in complying with all Federal and State requirements concerning fair employment and employment of the handicapped and concerning the treatment of all employees, without regard or discrimination by reason of race, religion, sex, national origin, or physical handicap.
- 6.0 **PRIME CONTRACTOR RESPONSIBILITIES:** The Contractor will be required to assume sole responsibility for the complete effort, as required by this RFP. The County will consider the Contractor to be the sole point of contact with regard to contractual matters.

- 7.0 **SUBCONTRACTING**: If any part of the work covered by this RFP is to be subcontracted, the Contractor shall identify the subcontracting organization and the contractual arrangements made with same. All subcontractors must be approved, in writing by the County, or when applicable a political subdivision within the County with the County's concurrence. The successful offeror will also furnish the corporate or company name and the names of the officers of any subcontractors engaged by the vendor. The County reserves the right to reject any or all subcontractors and require substitution of a firm qualified to participate in the work as specified herein.
- 8.0 **OWNERSHIP OF MATERIAL**: Ownership of all data, material, and documentation originated and prepared for the County pursuant to this contract shall belong exclusively to the County.
- 9.0 **PAYMENT AND PERFORMANCE BOND**: The successful Contractor shall furnish, within ten (10) days after written notice of acceptance of proposal, a Payment and Performance Bond. Contractor shall provide and pay the cost of a Payment and Performance Bond. The Bond shall be in the amount of one-hundred percent (100%) the annual contract cost, issued by a Surety Company licensed in South Carolina with an "A" minimum rating of performance as stated in the most current publication of "Best's Key Rating Guide, Property Liability" which shall show a financial strength rating of at least five (5) times the Contract Price. The Bond shall be accompanied by a "Power of Attorney" authorizing the attorney-in-fact to bind the surety and certified to include the date of the bond.
- 10.0 **NONRESIDENT TAXPAYERS**: If the offeror is a South Carolina nonresident taxpayer and the contract amount is \$10,000.00 or more, the offeror acknowledges and understands that in the event he is awarded a contract offeror shall submit a Nonresident Taxpayer Registration Affidavit (State form #1-312-6/94), before a contract can be signed. Affidavit must certify that the nonresident taxpayer is registered with the S.C. Department of Revenue or the S.C. Secretary of State's Office, in accordance with Section 12-9-310(A)(2)(3) of S.C. Code of Laws (1976) as amended.
- 11.0 **BUSINESS LICENSE**: In accordance with the *Beaufort County Business License Ordinance, 99-36, Article III*, as enacted November 22, 1999, any business or individual generating income in the unincorporated area of Beaufort County is required to pay an annual license fee and obtain a business license. The ordinance referenced is available on the Beaufort County website at [www.bcgov.net](http://www.bcgov.net) or by calling the Business License Administrator at (843) 255-2270 for a list of schedules.
- 12.0 **ADDITIONAL ELIGIBILITY**: Other Beaufort County Public Procurement units shall, at their option, be eligible for use of any contracts awarded pursuant to this Invitation.
- 13.0 **INSURANCE REQUIREMENTS**: Prior to commencing work hereunder, Contractor, at his expense, shall furnish insurance certificate showing the certificate holder as Beaufort County, P.O. Drawer 1228, Beaufort, SC 29901-1228, Attention: Purchasing Director and with a special notation naming Beaufort County as an Additional Insured on the liability coverages. If not otherwise specified, the minimum coverage shall be as follows:
- 13.1 Worker's Compensation Insurance - Contractor shall have and maintain, during the life of this contract, Worker's Compensation Insurance for his employees connected to the work/delivery, in accordance with the Statutes of the State of South Carolina and any applicable laws.

- 13.2 Commercial General Liability Insurance - Contractor shall have and maintain, during the life of this contract, Commercial General Liability Insurance. Said Commercial General Liability Policy shall contain Contractual Liability and Products/Completed Operations Liability subject to the following minimum limits: BODILY INJURY of at least \$1,000,000 PER PERSON, \$1,000,000 PER OCCURRENCE; PROPERTY DAMAGE of at least \$1,000,000 PER OCCURRENCE; or BODILY INJURY/PROPERTY DAMAGE of at least \$2,000,000 COMBINED SINGLE LIMIT.
- 13.3 Comprehensive Automobile Liability Insurance - The Contractor shall have and maintain, during the life of this contract, Comprehensive Automobile Liability, including non-owned and hired vehicle, of at least \$1,000,000 PER PERSON, \$1,000,000 PER OCCURRENCE; PROPERTY DAMAGE of at least \$1,000,000 PER OCCURRENCE, or BODILY INJURY/PROPERTY DAMAGE of at least \$2,000,000 COMBINED SINGLE LIMIT.
- 13.4 The required insurance policy at the time of issue must be written by a company licensed to do business in the State of South Carolina and be acceptable to the County.
- 13.5 The Contractor/vendor shall not cause any insurance to be canceled or permit any insurance to lapse. All insurance policies shall contain a clause to the effect that the policy shall not be canceled or reduced, restricted or limited until fifteen (15) days after the County has received written notice, as evidenced by return receipt of registered or certified letter. Certificates of Insurance shall contain transcript from the proper office of the insurer, the location, and the operations to which the insurance applies, the expiration date, and the above-mentioned notice of cancellation clause.
- 13.6 The information described above sets forth minimum amounts and coverages and is not to be construed in any way as a limitation on the Contractor's liability.
- 14.0 **INDEMNITY:** The Contractor hereby agrees to indemnify and save harmless the County, its officers, agents, and employees from and against any and all liability, claims, demands, damages, fines, fees, expenses, penalties, suits, proceedings, actions and cost of actions, including attorney's fees for trial and on appeal of any kind and nature arising or growing out of or in any way connected with the performance of the Agreement, whether by act of omissions of the Contractor, its agents, servants, employees or others, or because of or due to the mere existence of the Agreement between the parties.
- 15.0 **TERMINATION FOR DEFAULT:**
  - 15.1 The performance of Work under the Agreement may be terminated by the Purchasing Director, in accordance with this clause, in whole or in part, in writing, whenever the Director of Purchasing shall determine that the Contractor has failed to meet the performance requirements of this Agreement.
  - 15.2 The Purchasing Director has the right to terminate for default, if the Contractor fails to make delivery of the supplies or perform the Work, or if the Contractor fails to perform the Work within the time specified in the Agreement, or if the Contractor fails to perform any other provisions of the Agreement.

- 16.0 TERMINATION FOR CONVENIENCE: The County may without cause terminate this contract in whole or in part at any time for its convenience. In such instance, an adjustment shall be made to the Contractor, for the reasonable costs of the work performed through the date of termination. Termination costs do not include lost profits, consequential damages, delay damages, unabsorbed or under absorbed overhead of the Contractor or its subcontractors, and/or failure to include termination for convenience clause into its subcontracts and material purchase orders shall not expose the County to liability for lost profits in conjunction with a termination for convenience settlement or equitable adjustment. Contractor expressly waives any claims for lost profit or consequential damages, delay damages, or indirect costs which may arise from the County's election to terminate this contract in whole or in part for its convenience.

## **PART VI**

### **SPECIAL INSTRUCTIONS**

- 1.0 INTENT TO PERFORM: It is the intent and purpose of Beaufort County that this request permits competition. It shall be the offeror's responsibility to advise the Purchasing Department if any language, requirements, etc., or any combinations thereof inadvertently restricts or limits the requirements stated in this RFP to a single source. Such notification must be submitted in writing and must be received by the Purchasing Department not later than ten (10) days prior to the proposal opening date. A review of such notifications will be made.
- 2.0 RECEIPT OF PROPOSAL: Proposals, amendments thereto, or withdrawal requests received after the time advertised for proposal opening will be void, regardless of when they were mailed.
- 3.0 PREPARATION OF PROPOSAL
- 3.1 All proposals should be complete and carefully worded and must convey all of the information requested by the County. If significant errors are found in the offeror's proposal, or if the proposal fails to conform to the essential requirements of the RFP, the County and the County alone will be the judge as to whether that variance is significant enough to reject the proposal.
- 3.2 Proposals should be prepared simply and economically, providing a straightforward, concise description of offeror's capabilities to satisfy the requirements of the RFP. Emphasis should be on completeness and clarity of content.
- 3.3 Each copy of the proposal should be bound in a single volume where practical. All documentation submitted with the proposal should be bound in that single volume.
- 3.4 If your proposal includes any comment over and above the specific information requested in our Request for Proposal (RFP), you are to include this information as a separate appendix to your proposal.
- 4.0 AMENDMENTS: If it becomes necessary to revise any part of the RFP, an amendment will be provided to all offerors who received the original Request for Proposal. The County shall not be legally bound by an amendment or interpretation that is not in writing.

5.0 ADDITIONAL INFORMATION: Offerors requiring additional information may submit their questions, in writing to the Purchasing Department. Answers to questions received that should change and/or clarify this solicitation will be provided in writing to all offerors via an amendment.

6.0 ORAL PRESENTATION/DISCUSSIONS: Any offeror or all offerors may be requested to make an oral presentation of their proposal to the County, after the proposal opening. Discussions may be conducted with responsible offerors, who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirement.

Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revision of proposals, and such revisions may be permitted after submissions and prior to award, for the purpose of obtaining best and final offers. The purpose of these presentations/discussions will be to:

6.1 Determine in greater detail such offeror's qualifications.

6.2 Explore with the offeror the scope and nature of the project, the offeror's proposed method of performance, and the relative utility of alternative methods of approach.

6.3 Determine that the offeror will make available the necessary personnel and facilities to perform within the required time.

6.4 Agree upon fair and reasonable compensation, taking into account the estimated value of the required services/equipment, the scope and complexity of proposed project, and nature of such services/equipment.

7.0 FUNDING: The offeror shall agree that funds expended for the purposes of the contract must be appropriated by the County Council for each fiscal year included within the contract period. Therefore, the contract shall automatically terminate without penalty or termination costs if such funds are not appropriated. In the event that funds are not appropriated for the contract, the offeror shall not prohibit or otherwise limit the County's right to pursue and contract for alternate solutions and remedies, as deemed necessary by the County for the conduct of its affairs. The requirements stated in this paragraph shall apply to any amendment or the execution of any option to extend the contract.

8.0 AWARD: An award resulting from this request shall be awarded to the responsive and responsible offeror whose proposal is determined to be most advantageous to the County, taking into consideration price and the evaluation factors set forth herein; however, the right is reserved to reject any and all proposals received, and in all cases the County will be the sole judge as to whether an offeror's proposal has or has not satisfactorily met the requirements of this RFP.

9.0 PUBLIC ACCESS TO PROCUREMENT INFORMATION: No such documents or other documents relating to this procurement will be presented or made otherwise available to any other person, agency, or organization until after award. Commercial or financial information obtained in response to this RFP, which is privileged and confidential, will not be disclosed. Such privileged and confidential information includes information which, if disclosed, might cause harm to the competitive position of the offeror supplying the information. All offerors,

therefore, must visibly mark as "Confidential" each part of their proposal, which they consider to contain proprietary information.

- 10.0 DEVIATIONS: Any deviations from the requirements of this RFP must be listed separately and identified as such in the table of contents.
- 11.0 ALTERNATES: Innovative alternative proposals are encouraged, provided however, that they are clearly identified as such and all deviations from the primary proposal are listed.
- 12.0 GRATUITIES: It shall be unethical for any person to offer, or give, or agree to give any County employee or former County employee; or for any County employee or former County employee to solicit, demand, accept, or agree to accept from another person a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, or preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter pertaining to any program requirement, or a contract or subcontract, or to any solicitation or proposal therefore.
- 13.0 KICKBACKS: It shall be unethical for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor, or any person associated therewith, as an inducement for the award of a subcontractor order.
- 14.0 PROTEST PROCEDURES
  - 14.1 Right to Protest: Any actual or prospective bidder, offeror, or contractor who is aggrieved, in connection with the solicitation or award of a contract, may protest to the Purchasing Director. The protest shall be submitted in writing fourteen (14) days after such aggrieved person knows or should have known of the facts giving rise thereto. The protest must be accompanied by a detailed statement, indicating the reasons for such protest.
  - 14.2 Authority to Resolve Protest: The Purchasing Director shall have authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offeror, or contractor; actual or prospective, concerning the solicitation or award of a contract.
  - 14.2 Decision: If the protest is not resolved by mutual agreement, the Purchasing Director shall issue a decision, in writing within ten (10) days. The decision shall,
    - 14.2.1 State the reasons for the action taken; and
    - 14.2.2 Inform the protestant of its right to administrative review as provided in this Section.
  - 14.4 Notice of Decision: A decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.
  - 14.5 Finality of Decision: A decision under Subsection (3) of this Section shall be final

and conclusive, unless fraudulent, or

- 14.5.1 Any person adversely affected by the decision appeals administratively, within ten (10) days after receipt of decision under Subsection (3) to the County Council in accordance with this Section.
- 14.5.2 Any protest taken to the County Council or court shall be subject to the protestant paying all administrative costs, attorney fees, and court costs when it is determined that the protest is without standing.

**PART VII**

**SUBMISSION REQUIREMENTS**

To achieve a uniform review process and allow for adequate comparability, the proposals must be organized in the manner specified below:

- 1.0 Letter of Transmittal - limit to four printed pages.
  - 1.1 Briefly state your firm's understanding of the work to be done, and make positive commitment to perform the work.
  - 1.2 Identify your proposal's principal strengths.
  - 1.3 Give the names of the persons who will be authorized to make representations for your firm, their titles, addresses, and telephone numbers.
  - 1.4 State whether or not your firm has been involved in any litigation within the past five (5) years, arising out of your performance. Explain fully if it has been involved in any litigation.
  - 1.5 Indicate the number and dates of amendments that you have received.
- 2.0 Table of Contents - clearly identify the material, by section and page number.
- 3.0 Proposed construction details. **NA**
- 4.0 List any exceptions to this RFP.
- 5.0 Other information and materials which the proposer wishes to submit in support of his proposal, qualifications, etc.  
\_\_\_\_\_ To \_\_\_\_\_

## PART VI

### SPECIAL INSTRUCTIONS

- 1.0 INTENT TO PERFORM: It is the intent and purpose of Beaufort County that this request permits competition. It shall be the offeror's responsibility to advise the Purchasing Department if any language, requirements, etc., or any combinations thereof inadvertently restricts or limits the requirements stated in this RFP to a single source. Such notification must be submitted in writing and must be received by the Purchasing Department not later than ten (10) days prior to the proposal closing date. A review of such notifications will be made.
- 2.0 RECEIPT OF PROPOSAL: Proposals, amendments thereto, or withdrawal requests received after the time advertised for proposal closing will be void, regardless of when they were mailed.
- 3.0 PREPARATION OF PROPOSAL
  - 3.1 All proposals should be complete and carefully worded and must convey all of the information requested by the County. If significant errors are found in the offeror's proposal, or if the proposal fails to conform to the essential requirements of the RFP, the County and the County alone will be the judge as to whether that variance is significant enough to reject the proposal.
  - 3.2 Proposals should be prepared simply and economically, providing a straightforward, concise description of offeror's capabilities to satisfy the requirements of the RFP. Emphasis should be on completeness and clarity of content.
  - 3.3 Each copy of the proposal should be bound in a single volume where practical. All documentation submitted with the proposal should be bound in that single volume.
  - 3.4 If your proposal includes any comment over and above the specific information requested in our Request for Proposal (RFP), you are to include this information as a separate appendix to your proposal.
- 4.0 AMENDMENTS: If it becomes necessary to revise any part of the RFP, an amendment will be provided to all offerors who received the original Request for Proposal. The County shall not be legally bound by an amendment or interpretation that is not in writing.
- 5.0 ADDITIONAL INFORMATION: Offerors requiring additional information may submit their questions, in writing to the Purchasing Department. Answers to questions received that should change and/or clarify this solicitation will be provided in writing to all offerors via an amendment.
- 6.0 ORAL PRESENTATION/DISCUSSIONS: Any offeror or all offerors may be requested to make an oral presentation of their proposal to the County, after the proposal opening. Discussions may be conducted with responsible offerors, who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirement.

Offerors shall be accorded fair and equal treatment with respect to any opportunity for

discussions and revision of proposals, and such revisions may be permitted after submissions and prior to award, for the purpose of obtaining best and final offers. The purpose of these presentations/discussions will be to:

- 6.1 Determine in greater detail such offeror's qualifications.
  - 6.2 Explore with the offeror the scope and nature of the project, the offeror's proposed method of performance, and the relative utility of alternative methods of approach.
  - 6.3 Determine that the offeror will make available the necessary personnel and facilities to perform within the required time.
  - 6.4 Agree upon fair and reasonable compensation, taking into account the estimated value of the required services/equipment, the scope and complexity of proposed project, and nature of such services/equipment.
- 7.0 FUNDING: The offeror shall agree that funds expended for the purposes of the contact must be appropriated by the County Council for each fiscal year included within the contract period. Therefore, the contract shall automatically terminate without penalty or termination costs if such funds are not appropriated. In the event that funds are not appropriated for the contract, the offeror shall not prohibit or otherwise limit the County's right to pursue and contract for alternate solutions and remedies, as deemed necessary by the County for the conduct of its affairs. The requirements stated in this paragraph shall apply to any amendment or the execution of any option to extend the contract.
- 8.0 AWARD: An award resulting from this request shall be awarded to the responsive and responsible offeror whose proposal is determined to be most advantageous to the County, taking into consideration price and the evaluation factors set forth herein; however, the right is reserved to reject any and all proposals received, and in all cases the County will be the sole judge as to whether an offeror's proposal has or has not satisfactorily met the requirements of this RFP.
- 9.0 PUBLIC ACCESS TO PROCUREMENT INFORMATION: No such documents or other documents relating to this procurement will be presented or made otherwise available to any other person, agency, or organization until after award. Commercial or financial information obtained in response to this RFP, which is privileged and confidential, will not be disclosed. Such privileged and confidential information includes information which, if disclosed, might cause harm to the competitive position of the offeror supplying the information. All offerors, therefore, must visibly mark as "Confidential" each part of their proposal, which they consider to contain proprietary information.
- 10.0 DEVIATIONS: Any deviations from the requirements of this RFP must be listed separately and identified as such in the table of contents.
- 11.0 ALTERNATES: Innovative alternative proposals are encouraged, provided however, that they are clearly identified as such and all deviations from the primary proposal are listed.

12.0 GRATUITIES: It shall be unethical for any person to offer, or give, or agree to give any County employee or former County employee; or for any County employee or former County employee to solicit, demand, accept, or agree to accept from another person a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, or preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter pertaining to any program requirement, or a contract or subcontract, or to any solicitation or proposal therefore.

13.0 KICKBACKS: It shall be unethical for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor, or any person associated therewith, as an inducement for the award of a subcontractor order.

#### 14.0 PROTEST PROCEDURES

14.1 Right to Protest: Any actual or prospective proposer, offeror, or contractor who is aggrieved, in connection with the solicitation or award of a contract, may protest to the Purchasing Director. The protest shall be submitted in writing fourteen (14) days after such aggrieved person knows or should have known of the facts giving rise thereto. The protest must be accompanied by a detailed statement, indicating the reasons for such protest.

14.2 Authority to Resolve Protest: The Purchasing Director shall have authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved proposer, offeror, or contractor; actual or prospective, concerning the solicitation or award of a contract.

14.2 Decision: If the protest is not resolved by mutual agreement, the Purchasing Director shall issue a decision, in writing within ten (10) days. The decision shall,

14.2.1 State the reasons for the action taken; and

14.2.2 Inform the protestant of its right to administrative review as provided in this Section.

14.4 Notice of Decision: A decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.

14.5 Finality of Decision: A decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or

14.5.1 Any person adversely affected by the decision appeals administratively, within ten (10) days after receipt of decision under Subsection (3) to the County Council in accordance with this Section.

14.5.2 Any protest taken to the County Council or court shall be subject to the protestant paying all administrative costs, attorney fees, and court costs when it is determined that the protest is without standing.

15.0 **CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY, AND VOLUNTARY EXCLUSION**: The contractor certifies, by submission of this document or acceptance of a contract, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any State, Federal department or agency. It further agrees by submitting this qualification statement that it will include this clause without modification in all lower tier transactions, solicitations, proposals, contracts, and subcontracts. Where the bidder/contractor or any lower tier participant is unable to certify this statement, it shall attach an explanation to this solicitation/bid.

**State whether or not your company has been involved in any litigation within the past five (5) years arising out of your performance by circling YES or NO.**

**LOCAL VENDOR PREFERENCE – PARTICIPATION AFFIDAVIT**

**SECTION 2.537.1**

A competitive procurement made by Beaufort County shall be made from responsive and responsible resident vendors in the County for procurement, if such bid does not exceed the lowest qualified bid from a non-county vendor by more than five (5%) percent or Ten Thousand (\$10,000.00) Dollars, whichever is less, of the lowest non-county bidder. The resident vendor has the discretion to match the bid submitted by the non-county vendor and receive the contract award.

A vendor shall be deemed to be a "local vendor" if such vendor is an individual, partnership, association or corporation that is authorized to transact business within the state, maintains an office in Beaufort County, has a business license of Beaufort County or one of the municipalities within Beaufort County, and maintains a representative inventory of commodities within Beaufort County or one of the municipalities on which the bid is submitted and has paid all taxes duly assessed.

If no bids are received from a Beaufort County Local Vendor a vendor shall be deemed to be a "local vendor" if such vendor is an individual, partnership, association or corporation that is authorized to transact business within the state, maintains an office in Jasper, Hampton, and Colleton Counties (local preference only applies if Jasper, Hampton and Colleton Counties offer reciprocity to Beaufort County). A competitive procurement made by the county shall be made from responsive and responsible resident vendors in the respective counties for procurement, if such bid does not exceed the lowest qualified bid from a non-local vendor by more than five (5%) percent or \$10,000.00, whichever is less, local vendor has the discretion to match the bid submitted by the non-local vendor and receive the contract award.

If the procurement is to be made pursuant to state or federal guidelines which prohibit or restrict a local or state preference, there shall be no local or state preference unless a more restricted variation is allowed under the guidelines. Local/state preference shall not be applied to the procurement of construction services.

The undersigned hereby attests that the criteria of the "RESIDENT VENDOR PREFERENCE, SECTION 2.537.1" are met for the purposes of bid document \_\_\_\_\_, dated \_\_\_\_\_.

Company Name: \_\_\_\_\_ Principal Name: \_\_\_\_\_

Company Address: \_\_\_\_\_  
\_\_\_\_\_

Secretary of State Designation: (Corporation, Individual, Partnership, other) \_\_\_\_\_

Beaufort County Business License/Classification: \_\_\_\_\_

Tax Obligation Current: \_\_\_\_\_

Signature of Principal/Date: \_\_\_\_\_

Witness/Date: \_\_\_\_\_

Form 2.537.1

**NON-DISCRIMINATION STATEMENT (SEC 2.537.2.1)**

The offeror certifies that:

- (1) No person shall be excluded from participation in, denied the benefit of, or otherwise discriminated against on the basis of race, color, national origin, or gender in connection with any RFP submitted to Beaufort County or the performance of any contract resulting there from;
- (2) That it is and shall be the policy of this Company to provide equal opportunity to all business persons seeking to contract or otherwise interested in contracting with this Company, including those companies owned and controlled by racial minorities, cultural minorities, and women;
- (3) In connection herewith, We acknowledge and warrant that this Company has been made aware of, understands and agrees to take affirmative action to provide such companies with the maximum practicable opportunities to do business with this Company;
- (4) That this promise of non-discrimination as made and set forth herein shall be continuing in nature and shall remain in full force and effect without interruption;
- (5) That the promises of non-discrimination as made and set forth herein shall be and are hereby deemed to be made as part of and incorporated by reference into any contract or portion thereof which this Company may hereafter obtain and;
- (6) That the failure of this Company to satisfactorily discharge any of the promises of non-discrimination as made and set forth herein shall constitute a material breach of contract entitling the Beaufort County to declare the contract in default and to exercise any and all applicable rights and remedies including but not limited to cancellation of the contract, termination of the contract, suspension and debarment from future contracting opportunities, and withholding and or forfeiture of compensation due and owing on a contract.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Title

RFP NO. \_\_\_\_\_  
PAGE \_\_\_\_\_ of \_\_\_\_\_

EXHIBIT A

**NARRATIVE ON THE APPROACH TO THE SCOPE OF WORK**

(Proposals should respond to the Scope of Work point by point by numeric reference.)

RFP NO. \_\_\_\_\_

EXHIBIT   B  

PAGE \_\_\_\_\_ of \_\_\_\_\_

**SCHEDULE OF EVENTS**

The Offeror should briefly describe each step of the schedule of events in his proposed plan of action to accomplish the scope of work in a sequential manner, identifying the specific assignment of key personnel and the time required to complete each step.

Step #            Schedule of Events    Time Required            Person Assignment

RFP NO. \_\_\_\_\_

EXHIBIT  C

PAGE \_\_\_\_\_ of \_\_\_\_\_

**OFFEROR'S EXPERIENCE**

1. Contract Title: \_\_\_\_\_
2. Contract Period: From \_\_\_\_\_ To \_\_\_\_\_
3. Geographic Area Serviced: \_\_\_\_\_
4. Scope of Work \_\_\_\_\_

References: Contracting Office \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
City: \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_  
Telephone #(s): \_\_\_\_\_

**OFFEROR'S EXPERIENCE**

1. Contract Title: \_\_\_\_\_
2. Contract Period: From \_\_\_\_\_ To \_\_\_\_\_
3. Geographic Area Serviced: \_\_\_\_\_
4. Scope of Work \_\_\_\_\_

References: Contracting Office \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
City: \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_  
Telephone #(s): \_\_\_\_\_



RFP NO. \_\_\_\_\_

EXHIBIT  E

PAGE  1  of  3

**PRICE PROPOSAL AND CERTIFICATION**

The undersigned \_\_\_\_\_, having carefully examined the information

(Name of Offeror)

contained in the Beaufort County RFP Number # \_\_\_\_\_ dated \_\_\_\_\_, 2017, proposes to provide \_\_\_\_\_ services to Beaufort County Government, as outlined in this proposal, at the prices specified below:

**Vendor must complete the attached pricing sheet.**

In compliance with the Request for Proposal # \_\_\_\_\_, and subject to all conditions thereof, the undersigned agrees:

- ( a ) This proposal, as stated, is open for acceptance for a period of 90 calendar days from the date of opening; and
- ( b ) To furnish all services, materials, and equipment necessary and incidental to perform the subject audits.

**CERTIFICATION**

CONTRACTOR

HAS A FEDERAL AGENCY OR A FEDERALLY CERTIFIED STATE OR LOCAL AGENCY PERFORMED ANY REVIEW OF YOUR ACCOUNTS OR RECORDS IN CONNECTION WITH ANY GRANT OR CONTRACT WITHIN ANY GRANT OR CONTRACT WITHIN THE PAST TWELVE MONTHS?

YES

NO

(IF "YES" GIVE NAME, ADDRESS, AND TELEPHONE NUMBER OF REVIEWING OFFICE.)

RFP NO. \_\_\_\_\_

EXHIBIT  E

PAGE  2  of  3

This proposal is submitted for use in connection with and in response to Beaufort County RFP # \_\_\_\_\_ . This is to certify, to the best of my knowledge and belief, that the cost and pricing data summarized herein are complete, current, and accurate as of \_\_\_\_\_, 2017, and that a financial accounting capability exists to fully and accurately account for the financial transactions under this project. I further certify that I understand that the sub-agreement price may be subject to downward renegotiation and/or recoupment where the above cost and pricing data have been determined, as a result of audit, not to have been complete, current, and accurate as of the date above.

This cost proposal is made without prior understanding, agreement, or connections with any corporation, firm, or person submitting a proposal for the same service and is in all respect fair and without collusion or fraud. I agree to abide by all conditions of this proposal and certify that I am authorized to sign this proposal.

Signature of Offeror's Representative authorized to enter into contract with Beaufort County Council:

FIRM NAME: \_\_\_\_\_

BY: \_\_\_\_\_ DATE: \_\_\_\_\_  
(Signature)

TYPE/PRINT: \_\_\_\_\_  
(Name) (Title)

ADDRESS: \_\_\_\_\_  
(Street Address and/or P. O. Box Number)

\_\_\_\_\_  
(City) (State) (Zip Code)

PHONE: ( ) \_\_\_\_\_ FAX: ( ) \_\_\_\_\_  
(Area Code) Phone Number (Area Code) Fax Number

EMAIL: \_\_\_\_\_

FEDERAL ID#: \_\_\_\_\_ S.C. TAX #: \_\_\_\_\_

RFP NO. \_\_\_\_\_

EXHIBIT   E  

PAGE   3   of   3  

IS YOUR FIRM:

1.	SOLE PROPRIETORSHIP	_____ YES	_____ NO
2.	PARTNERSHIP	_____ YES	_____ NO
3.	CORPORATION	_____ YES	_____ NO

IF COMPANY IS A SOLE PROPRIETORSHIP, LIST THE OWNER'S FULL LEGAL NAME:

IF COMPANY IS A PARTNERSHIP, LIST THE PARTNERS' FULL LEGAL NAMES:

IF COMPANY IS A CORPORATION, LIST THE FULL LEGAL NAME, AS LISTED ON THE CORPORATE CHARTER:

IS THIS FIRM A MINORITY, OR WOMAN-OWNED BUSINESS ENTERPRISE?

\_\_\_\_\_ YES    \_\_\_\_\_ NO            IF YES, SPECIFY: \_\_\_\_\_ MBE \_\_\_\_\_ WBE

HAS THIS FIRM BEEN CERTIFIED AS A MINORITY/WOMAN-OWNED BUSINESS ENTERPRISE BY ANY GOVERNMENTAL AGENCY? \_\_\_\_\_ YES    \_\_\_\_\_ NO

IF YES, SPECIFY GOVERNMENTAL AGENCY: \_\_\_\_\_

DATE OF CERTIFICATION: \_\_\_\_\_

**COUNTY COUNCIL OF BEAUFORT COUNTY**  
**Title VI Statement to Contractors and Subcontractors**



It is the policy of the County Council of Beaufort County, South Carolina, hereafter referred to as "Beaufort County" or "the County", to comply with Title VI of the 1964 Civil Rights Act (Title VI) and its related statutes. To this end, Beaufort County gives notice to all Prime Contractors, Subcontractors, Architects, Engineers, and Consultants that the County assures full compliance with Title VI and its related statutes in all programs, activities, and contracts. It is the policy of Beaufort County that no person shall be excluded from participation in, denied the benefit of, or subjected to discrimination under any of its programs, activities, or contracts on the basis of race, color, national origin, age, sex, disability, religion, or language regardless of whether those programs and activities are Federally funded or not.

Pursuant to Title VI requirements, any entity that enters into a contract with Beaufort County including, but not limited to Prime Contractors, Subcontractors, Architects, Engineers, and Consultants, may not discriminate on the basis of race, color, national origin, age, sex, disability, religion, or language in their selection and retention of first-tier subcontractors, and first-tier subcontractors may not discriminate in their election and retention of second-tier subcontractors, including those who supply materials and/or lease equipment. Further, Contractors may not discriminate in their employment practices in connection with highway construction projects or other projects assisted by the U.S. Department of Transportation (USDOT) and/or the Federal Highway Administration (FHWA).

**In all solicitations either by competitive bidding or negotiation made by the Contractor for work to Beaufort County to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by the Contractor of the Contractor's obligations under the contract and the Title VI regulations relative to nondiscrimination on the basis of race, color, national origin, age, sex, disability, religion, or language by providing such a statement in its bidding and contract documents.**

Upon request, the Contractor shall provide all information and reports required by Title VI requirements issued pursuant thereto, and shall permit access to its books, records, accounts and other sources of information, and its facilities as may be determined by Beaufort County, USDOT, and/or FHWA to be pertinent to ascertain compliance with such regulations, orders, and instructions. Where any information required of a Contractor is in the exclusive possession of another who fails or refuses to furnish this information, the Contractor shall so certify to USDOT or FHWA, as appropriate and via Beaufort County, and shall set forth what efforts it has made to obtain the information. In the event of the Contractor's non-compliance with nondiscrimination provisions of this contract, USDOT may impose such contract sanctions as it or FHWA may determine to be appropriate, including, but not limited to:

- Withholding of payments to the Contractor under the contract until the Contractor complies, and/or
- Cancellation, termination, or suspension of the contract, in whole or in part.

In the event a Contractor becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of this direction to comply with Title VI, the Contractor may request USDOT to enter into such litigation to protect the interests of USDOT and FHWA. Additionally, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

Any person or Subcontractor who believes that they have been subjected to an unlawful discriminatory practice under Title VI has a right to file a formal complaint within one hundred eighty (180) days following the alleged discriminatory action. Any such complaint must be filed in writing or in person:



intent to renew this agreement under the same terms and provisions provided herein.

### **SECTION THREE**

#### **SPECIFIC DUTIES OF THE CONTRACTOR**

(The attached Statement of Services is here by incorporated)

### **SECTION FOUR**

#### **INSURANCE AND INDEMNIFICATION**

Insurance Requirement. The said Company shall, throughout the performance of its services pursuant to this Agreement, maintain:

- (a) Comprehensive general liability insurance (including broad form contractual coverage) and automobile liability insurance, with a combined minimum limit of \$1,000,000.00 per occurrence, protecting itself and the County from all claims and \$500,000.00 for bodily injury (including death) and property damage which may arise from or in connection with the performance of the necessary services herein or from or out of any act or omission of the contractor, its officers, directors, agents and employees; and,
- (b) Workers' Compensation and Employer's Liability. Workers' Compensation Insurance for itself, its partners, and employees employed directly or indirectly by the contractor shall be provided with statutory limits. Employer's Liability insurance with limits of liability in the amount of one million (\$1,000,000.00) dollars shall be provided.
- (c) All such insurance shall be with companies and on forms acceptable to the County and shall provide that the coverage thereunder may not be reduced or canceled unless thirty (30) days prior notice thereof is furnished to the County. Certificates of insurance (and copies of policies, if required by the County) shall be furnished to the County.

Before commencement of any term of this Agreement, the contractor, at its own cost and expense, shall obtain, carry and maintain insurance as provided herein for the duration of this agreement. The contract shall, before beginning any services provided herein provide the County with proof of insurance that is acceptable to the County.

The insurance policy provided herein shall be endorsed to provide that no policy shall be cancelled, changed or reduced in coverage, until after thirty (30) days prior written notice has been delivered to the County through certified mail.

Proof of Insurance shall be filed with the County prior to execution of the contract meeting the requirements of the County as set forth herein and as may be required hereafter. Failure of the contractor to fully comply with the requirements set forth herein regarding insurance may be considered a material breach of this agreement and may be cause for immediate termination of this agreement and of any and all obligations regarding the same.

The contractor shall not begin work under this Contract until all required insurance has been obtained and until such insurance has been approved by the County.

Approval of the insurance by the County shall not relieve or decrease the liability of the contractor for any damages arising from contractor's performance of the services provided herein.

### **SECTION FIVE**

## **INDEMNIFICATION**

The contractor shall indemnify, defend, and hold County, its officers, employees, agents, and volunteers harmless from and against any and all liability, claims, suits, actions, damages, and causes of action arising during the term of this agreement out of any personal injury, bodily injury, loss of life, or damage to property, or any violation of any federal, state, or local law or ordinance, or other cause in connection with the negligent or intentional acts or omissions of Contractors, its employees, subcontractors, or agents, or on account of the performance or character of this work, except for any such claim arising solely out of the active negligence, sole negligence, or willful misconduct of the County, its officers, employees, agents, or volunteers.

## **SECTION SIX**

### **EQUIPMENT, LICENSES, PERMITS AND SUPPLIES**

The Contractor will provide all its own equipment, licenses, permits, and supplies.

If a license or permit of any kind, which term is intended to include evidence of registration, is required of the contractor, its employees, agents, or subcontractors, by federal or state law; the contractor warrants that such license or permit has been obtained, is valid and in good standing, and that any applicable bond has been posted in accordance with all applicable laws and regulations.

## **SECTION SEVEN**

### **DEFAULT**

A. Non-excusable acts of default by the contractor are as follows: The County shall have the right to terminate this agreement in its entirety in the event that the contractor shall not immediately cure, or commence to cure and then pursue curative action with diligence, any of the following events of default:

1. In carrying out the services provided herein, the failure of contractor or itself in a fashion that is generally acceptable with the community;

2. Failure to correct or revise, without additional compensation, any errors or deficiencies upon written or verbal notice to the official.

## **SECTION EIGHT**

### **ASSIGNMENT AND SUBLETTING**

Neither this agreement nor any interest herein may be assigned by the contractor without the prior written approval of the County.

**SECTION NINE**

**TERMINATION OF AGREEMENT FOR CONVENIENCE**

In addition to the grounds of default provided herein; this agreement may be terminated for convenience upon thirty (30) days notice to contractor by the County.

**SECTION TEN**

**NON-APPROPRIATION**

See Section Fourteen Notices

**SECTION ELEVEN**

**ACKNOWLEDGMENT AS INDEPENDENT, NOT EMPLOYEE**

By signing this contract, the contractor agrees and confirms that:

1. The contractor is acting in the capacity of an independent party and is not an employee of Beaufort County.
2. The contractor is responsible for all benefits and for complying with all payment and reporting obligations that relate to the taxes imposed on payment provided under the terms of this agreement.
3. The contractor is voluntarily waiving rights for any of its employees to any benefits, including health benefits, to which they might otherwise be entitled were they an employee of Beaufort County.
4. The contractor is acknowledging that Beaufort County is not providing any vacation time, sick pay, or other welfare or retirement benefits to its employees normally associated with an employee-employer relationship. The contractor is excluded from any participation in County health and welfare benefits plans, including vacation, sick leave, severance, life, accident, health and disability insurance, deferred compensation, retirement and grievance rights or privileges.
5. The contractor has had sufficient time to review this Acknowledgment and fully understands its contents.

**SECTION TWELVE**

Contractor agrees that \_\_\_\_\_ the direct supervision of all persons providing services hereunder through contractor designated representatives. The designated representative is: \_\_\_\_\_.

**SECTION THIRTEEN**

**EMPLOYEES OF:**

Any person performing services provided hereunder is the \_\_\_\_\_ employee, and \_\_\_\_\_ will exercise complete control over their conduct and will pay all

wages, expenses, social security taxes, federal and state unemployment insurance, and any similar taxes relating to the employees.

\_\_\_\_\_ and County intend that the relationship created between them by this agreement is that of independent \_\_\_\_\_. An agent, employee, or servant of \_\_\_\_\_ shall never be or deemed to be the employee, agent, or servant of owner.

## SECTION FOURTEEN

### NOTICES

Notices. Notices required by this agreement shall be personally delivered or mailed, postage prepaid, as follows:

To Independent : Name:

To the County: County Administrator  
Post Office Box 1228  
Beaufort, South Carolina 29901-1228

with a copy to: County Attorney  
Post Office Box 1228  
Beaufort, SC 29901-1228

Each party shall provide the other party with telephone and written notice of any change in address as soon as practicable. Notices given by personal delivery shall be effective immediately. Notices given by mail shall be deemed to have been delivered forty-eight hours after having been deposited in the United States mail.

#### *Force Majeure*

Should performance of Consultant's services be materially affected by causes beyond its reasonable control, a Force Majeure results. Force Majeure includes, but is not restricted to, acts of God, acts of a legislative, administrative or judicial entity, acts of contractors other than subcontractors of Consultant, fires, floods, labor disturbances, and unusually severe weather. Consultant will be granted a time extension and the parties will negotiate an adjustment to the fee, where appropriate, based upon the effect of the Force Majeure upon Consultant's performance.

#### *Termination for Convenience*

Either party may terminate this Agreement upon thirty (30) days written notice to the other party. Upon such termination, the County shall pay the Consultant for all services performed hereunder up through the date of such termination.

#### *Non-Appropriation Clause*

Contract duration is governed by the annual appropriation of funds issued by Beaufort County Council for contracted services. Contract may be terminated for lack of budget funding in any phase. Upon such termination, the County shall pay the Consultant for all services performed hereunder up through the date of such termination.

**SECTION FIFTEEN**

**MISCELLANEOUS**

**Amendments.** This agreement is not subject to modification or amendment, except by a writing executed by both Independent \_\_\_\_\_, which writing shall expressly state that it is intended by the parties to amend the terms and conditions of this agreement. This agreement integrates all of the terms and conditions mentioned herein or incidental hereto and supersedes all negotiations or previous agreements between the parties with respect to all or any part of the subject matter hereof.

**Waiver.** The waiver by either party of a breach by the other of any provision of this agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this agreement.

**Severability.** Should any part of this agreement be declared by a final decision by a court or tribunal of competent jurisdiction to be unconstitutional, invalid, or beyond the authority of either party to enter into or carry out, such decision shall not affect the validity of the remainder of this agreement, which shall continue in full force and effect, provided that the remainder of this agreement, absent the unexcused portion, can be reasonably interpreted to give effect to the intentions of the parties.

**Governing Law.** This agreement shall be governed by, and construed in accordance with, the laws of the state of South Carolina. This agreement is for the benefit of and may be enforced directly by either party.

**Conflict of Interest.** \_\_\_\_\_ warrants and covenants that \_\_\_\_\_ currently has no interest in, nor shall any interest be hereinafter acquired in, any matter that will render the services required under the provisions of this agreement a violation of any applicable state, local, or federal law. In the event that any conflict of interest should nevertheless hereinafter arise, \_\_\_\_\_ shall promptly notify County of the existence of such conflict of interest so that the County may determine whether to terminate this agreement.

**Time is of the Essence.** Independent \_\_\_\_\_ agrees to diligently prosecute the services to be provided under this agreement to completion and in accordance with any schedules specified herein. In the performance of this agreement, time is of the essence.

**Multiple Copies of Agreement.** Multiple copies of this agreement may be executed but the parties agree that the agreement on file in the office of County Administrator is the version of the agreement that shall take precedence should any differences exist among counterparts of the document.

IN WITNESS WHEREOF, \_\_\_\_\_ has executed this agreement, and the County, by and through its County Administrator, duly authorized to act, has executed this agreement.

By: \_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Street Address

\_\_\_\_\_  
Mailing address if different from above

\_\_\_\_\_  
Telephone Number

\_\_\_\_\_  
Fax Number

\_\_\_\_\_  
FEIN or Social Security Number  
(required information)

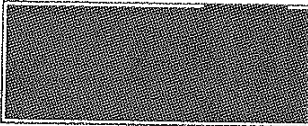
By: \_\_\_\_\_  
Witnesses Signature

\_\_\_\_\_  
Printed Name  
For Beaufort County

By: \_\_\_\_\_  
County Administrator  
Post Office Box 1228  
Beaufort, South Carolina 29901-1228  
Tel: 843-470-2501

For:

By: \_\_\_\_\_  
President  
address



# EXHIBIT B

Original

Commission Fee Schedule:

6% for Residential Home Listings: 3% to Listing Agency & 3% to Buyers Agency

10% for Land Listings: 5% to Listing Agency & 5% to Buyers Agency

10% for Commercial Properties: 5% to Listing Agency & 5% to Buyers Agency

Commissions are typically paid out of closing fees by the seller  
(Attached: Agency Brochure, Agency Agreement, Listing Agreement)

Other Fees:

Attorney Fees

Deed Stamps, pro-rated taxes

Misc. Closing fees determined by attorney

Possible repairs: Unknown at this time, or sell as is

Possible CL100 report- If a VA Loan, approx. \$150

I do not believe there are any appliances in the home at 429 Broad River Blvd. This will affect the value as it will limit Lender options for potential Buyers. Used appliances might be an option.



COMMON POLICY DECLARATIONS (continued)

POLICY NUMBER: BRL0013464

<b>The Named Insured is:</b>	
<input type="checkbox"/> Individual	<input type="checkbox"/> Partnership
<input type="checkbox"/> Limited Liability Company	<input checked="" type="checkbox"/> Organization/Corporation
<input type="checkbox"/> Other	<input type="checkbox"/> Trust
Location of Business: 613 Carteret Street BEAUFORT SC 29902	Business Description: REAL ESTATE AGENT-BROKER (MEO)


THESE DECLARATIONS TOGETHER WITH THE COVERAGE PART DECLARATIONS, THE COMMON POLICY CONDITIONS COVERAGE FORM(S), AND FORMS AND ENDORSEMENTS, IF ANY COMPLETE THE ABOVE NUMBERED POLICY.

**WESTERN WORLD INSURANCE GROUP**

Western World Insurance Company  
Tudor Insurance Company  
Stratford Insurance Company

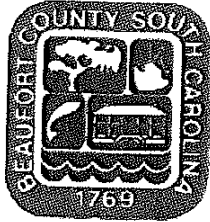
Administrative Office  
400 Parson's Pond Drive  
Franklin Lakes, New Jersey 07417-2600

We will provide the insurance described in this policy in return for the premium and compliance with all applicable provisions of this policy. If required by state law, this policy shall not be valid unless countersigned by our authorized representative

  
Secretary

  
President

Countersigned:	
01/05/2017 JIWON SU	By  Authorized Representative



COUNTY COUNCIL OF BEAUFORT COUNTY  
PURCHASING DEPARTMENT  
POST OFFICE DRAWER 1228 ♦ BEAUFORT, SOUTH CAROLINA 29901-1228  
TELEPHONE: (843) 255-2350 FAX: (843) 255-9437

PROPOSAL NOTICE NO. 030217

Page 1 of 36

CLOSING DATE AND TIME: **March 2, 2017, 3:00 p.m.**

PROPOSAL TITLE: Real Estate Broker Services for Beaufort County

You are invited to submit proposals in accordance with the requirements of this solicitation which are contained herein.

**There will be a Pre-Proposal meeting on February 9, 2017 at 2:00 p.m. at the Finance conference room located at 106 Industrial Village Road, Building #2, Beaufort, SC 29906. All vendors are encouraged to attend.**

In order for your proposal to be considered, it must be submitted to the Purchasing Office no later than the date and time as listed above, at which time respondents to this request will be recorded in the presence of one or more witnesses. Proposals received by the Purchasing Office after the time specified will be returned to the offeror unopened. Due to the possibility of negotiation with all offerors, the identity of any offeror or the contents of any proposal shall not be public information until after the contract award is made; therefore, the public is not invited to the proposal closing.

The proposals must be signed by an official authorized to bind the Offeror, and it shall contain a statement to the effect that the proposal is firm for a period of at least 90 days from the closing date for submission of proposals. **Proposals must be submitted in a sealed opaque envelope/container showing the above proposal number, closing date, and title.**

All submittals (see Part VII, Submission Requirements) received in response to this Request for Proposals will be rated by County Selection Committee, based upon the Evaluation Criteria as listed in Part IV. If the best offeror is clearly identified from the point summary, there will not be a need for oral presentations. If not, then an oral presentation from a minimum of the top two rated firms shall be required.

This solicitation does not commit Beaufort County to award a contract, to pay any costs incurred in the preparation of a proposal, or to procure or contract for the articles of goods or services. The County reserves the right to accept or reject any or all proposals received as a result of this request, to negotiate with all qualified offerors, or to cancel in part or in its entirety this proposal, if it is in the best interests of the County to do so.

BEAUFORT COUNTY

"Original Signed"

David L. Thomas, CPPO  
Purchasing Director  
(843) 255-2350

## PART I

### GENERAL INFORMATION

1. Proposals will be considered as specified herein or attached hereto under the terms and conditions of this proposal.
2. Proposals must be made in the official name of the firm or individual under which business is conducted (showing official business address) and must be signed in ink by a person duly authorized to legally bind the person, partnership, company, or corporation submitting the proposal.
3. Offerors are to include all applicable requested information and are encouraged to include any additional information they wish to be considered.
4. **One (1) clearly identified original and four (4) copies of your proposal are required.**
5. Qualification Statements will be received by the Beaufort County Purchasing Department until 3:00 p.m. on the closing date shown.

Qualification Statements are to be mailed to:

Beaufort County Purchasing Department  
P. O. Drawer 1228  
Beaufort, SC 29901-1228

Hand deliver and/or Express mail to:

Beaufort County Purchasing Department  
106 Industrial Village Road, Building # 2  
Beaufort, SC 29906-4291

The submitting offeror is required to have printed on the envelope or wrapping containing his proposal the RFP number, closing date, and title.

Offerors who desire to receive a copy of the Statement of Award must include a self-addressed stamped envelope.

6. **Prohibition of Gratuities:** It shall be unethical for any person to offer, or give, or agree to give any County employee or former County employee, or for any County employee or former County employee to solicit, demand, accept, or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, or preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal therefore.
7. Questions

Fax or e-mail (e-mail questions are preferred) any questions you have, at least ten (10) calendar days prior to proposal closing date to:

Dave Thomas, Beaufort County Purchasing Department, (843) 255-9437. Confirm receipt of fax by calling Dave Thomas at 843-255-2350.

E-Mail Dave Thomas at [dthomas@bcgov.net](mailto:dthomas@bcgov.net)

Answers to questions received that would change and/or clarify this solicitation will be provided in writing to all firms that have received the original Request for Proposal.

## **PART II**

### **INTRODUCTION**

#### **1. INTRODUCTION**

Beaufort County is seeking proposals from qualified local real estate brokers/firms to provide real estate brokerage services for the County. It is the intent of this RFP to have the successful broker/firm enter into a professional services contract with the County to supply real estate services as outlined herein for the remainder of the 2017 fiscal year and expire on June 30, 2018. After the first contract term upon mutual agreement the County will have the option to renew the contract each year, not to exceed three one year contract renewals.

#### **2. BACKGROUND**

Beaufort County from time to time has the need to sell real estate property to meet the needs of the County. Currently Beaufort County has a need to sell the following property as listed below:

429 Broad River Blvd, Beaufort, SC 29902  
3 Bedroom/2 Bath Brick Ranch – approx. 1315 sq.ft. & 0.35 acres)

**Note: There will be a site visit immediately after the Pre-Proposal Conference scheduled for February 9, 2017.**

## **PART III**

### **SCOPE OF WORK**

#### **A. SCOPE OF SERVICES**

The successful firm shall agree to contract with the County to provide the following:

- Services required involve performing market analysis,
- Developing pro forma analysis and reports,
- Developing strategies for sale of properties,
- Negotiating with buyers on behalf of the County,
- Coordinating with Real Estate Appraisers hired by the County,

- Coordinating real estate transaction closings, and
- Handling all other customary activities and services associated with real estate transactions.

Services will include consultation with County staff, County Commissioners, and other County Elected Officials, relating to real estate needs of the County if required. Presentations at executive sessions and public meetings may be required.

The use of Real Estate Broker Services for the County will be coordinated through the Beaufort County Purchasing Department. The provider will be expected to work directly with representatives of various County departments when providing services.

#### **A. BROKER'S QUALIFICATIONS**

Respondents to this RFP shall have the following qualifications:

- Must be licensed and in good standing with the South Carolina Real Estate Commission for a minimum of two years.
- Must have an excellent reputation in the real estate community.
- Must be knowledgeable in the local real estate market and have experience with small and large commercial properties, unimproved land, and right-of way acquisition.
- Must be knowledgeable in the use of all public real estate records maintained by the County Assessor and County Clerk & Recorder.
- Knowledge of the Beaufort County real estate is desired.
- Knowledge and experience in the acquisition and sale of government owned property is desired.
- Knowledge in acquisition and sale of public land and right-of-way is desired.

#### **A. INSURANCE REQUIREMENTS**

For proposal purposes, broker/firm must submit copies of certificates of insurance as referenced on the Response Checklist. The successful broker/firm must provide original certificates prior to commencing work, at the broker's/firm's expense and maintain such coverage for the duration of the contract.

#### **B. FEE SCHEDULE**

The fee schedule must be submitted in a separate envelope, one original and five (5) copies, and clearly marked with the **RFP No. 030217, FEE SCHEDULE**.

The proposed fee schedule shall include the following items:

- State your commission rate for listing and selling of properties.
- State your proposed method of compensation for representing the County in negotiations for purchasing properties.

- State any other costs the County may anticipate relating to the real estate services to be provided.

Payments to the successful contractor will be based on actual services received.

**C. TERM OF CONTRACT**

The contract period for the successful broker/firm will be from date of award through June 30, 2018. The contract may be renewed for three (3) additional one-year terms upon satisfactory performance by the broker/firm and at a negotiated rate agreed to in writing prior to June 30 of each renewal year. Any contract awarded between Beaufort County and the broker/firm will consist of an Independent Contractor Services Contract (a copy is included in this RFP package for review), this RFP, the submitted proposal, negotiations, the resulting purchase order and original certificates of insurance. Please Note: Any current projects that are presently on going will be completed by the current contractor and will not be considered part of the new contract.

**D. EVALUATION AND AWARD PROCESS**

Issuance of this RFP and receipt of proposals does not commit the County to award a contract. The County reserves the right to postpone receipt date, accepting or rejecting any or all proposals received in response to this RFP, or to negotiate with other than the highest ranked offeror should negotiations with the highest ranked offeror be terminated, or to cancel all or part of this RFP.

The Evaluation Committee will evaluate all proposals received for completeness and the broker's/firm's ability to meet all specifications as outlined in this RFP. (See "RFP SUBMITTAL REQUIREMENTS, Section, Section 'M'.) The committee may then short list to specific firms whose proposals best meet all criteria required. The negotiations and award process will follow the procedures as stated above.

**E. RFP SCHEDULE**

RFP MAILED	January 27, 2017
PRE-PROPOSAL CONFERENCE	February 9, 2017
RFP DUE DATE	March 2, 2017
EVALUATION OF PROPOSALS	March 9, 2017
INTERVIEWS	March 16, 2017
SUBMIT FOR APPROVAL	March 20, 2017

NOTE: THE DATES SHOWN ABOVE ARE APPROXIMATE, ARE NOT BINDING AND MAY BE SUBJECT TO CHANGE.

#### F. PROPOSAL PREPARATION AND SUBMISSION

Proposal responses **must be received in the Beaufort County Purchasing Department, 102 Industrial Village Road, Building # 2, Beaufort, SC 29906-4291 no later than 3:00 P.M., March 2, 2017.** Responses must be mailed, delivered or faxed in a sealed envelope to the above stated address and identified as **RFP NO.: 030217 REAL ESTATE BROKER SERVICES** in the bottom left-hand corner of each envelope.

#### G. INSURANCE REQUIREMENTS

For proposal purposes, proposer must submit copies of certificates of insurance for general liability and workers compensation. The successful contractor must provide original certificates prior to commencing services, at its own expense, ***namimg Beaufort County as additional insured***, with a thirty (30) day cancellation notice, and maintain such coverage for the duration of the contract.

#### H. PROPOSAL PRESENTATION

An authorized representative of the proposer shall sign proposals. Failure to submit all information requested may result in the Beaufort County Purchasing Department requiring prompt submission of missing information and/or giving a lower evaluation of the proposal. The Purchasing Department may reject proposals that are substantially incomplete or lack key information.

#### I. ORAL PRESENTATION/INTERVIEWS

Firms submitting a proposal in response to this RFP may be required to give an oral presentation of their proposal in an interview session with the Evaluation Committee. Additional technical and/or cost information may be requested from any firm by the Evaluation committee prior, during or after the interview for clarification purposes, but in no way will change the original proposal submitted. Interviews are at the option of the Evaluation Committee and may or may not be conducted.

#### J. SELECTION CRITERIA

**The Evaluation Committee will base their selection on the following criteria:**

1. Ability of the contractor(s) to meet or exceed the requirements defined in the RFP including the range of services offered,
2. Experience, qualifications and references,
3. Local real estate market, public land and right of way, and government real estate knowledge,

4. Local reputation,
5. Fee schedule, and
6. Completeness of response to RFP as outlined in this solicitation package (See Section M, "RFP Submittal Requirements").

#### **K. RFP SUBMITTAL REQUIREMENTS**

By submitting a proposal, you represent that you have (1) thoroughly examined and become familiar with the scope of services outlined in this RFP and (2) are capable of performing quality work to achieve the County's objectives.

**The following information must accompany your proposal:**

1. List years in business, previous names of the firm, if any.
2. Description of your firm including size of firm, location, number and nature of the professional staff to be assigned to the County; staff experience and training, including a brief resume for each key person listed.
3. Describe experience (minimum five years previous experience with proven effectiveness) your firm or organization has in pertinent real estate experience.
4. Experience in assisting similar size entities, including any and all services for government agencies.
5. List of at least three references where and when your firm provided similar services. Please provide names and telephone numbers of contact persons for each reference.
6. Additional services offered through your firm.
7. Listing of current litigation, outstanding judgments and liens.
8. Fee schedule (in a separate envelope) per Section D.
  - State your commission rate for listing and selling of properties
  - State your proposed method of compensation for representing the County in negotiations for purchasing properties
  - State any other costs the County may anticipate relating to the real estate services to be provided.

Any questions regarding this RFP should be directed to David L. Thomas, CPPO, Purchasing Director, Beaufort County Purchasing Department, (843) 255-2350, or emailed to [dthomas@bcgov.net](mailto:dthomas@bcgov.net).

PART IV

EVALUATION CRITERIA

EVALUATOR: \_\_\_\_\_ DATE: \_\_\_\_\_  
 RFP#: \_\_\_\_\_ TITLE: \_\_\_\_\_  
 OFFEROR: \_\_\_\_\_

	<u>POINT RANGE</u>	<u>POINTS ASSIGNED</u>
1.0 Demonstrated understanding of the problems and needs presented by the project.	_____ Points	_____
2.0 Soundness of offeror's approach to the problems and needs presented by the project, including offeror's methodology for achieving specific tasks and objectives.	_____ Points	_____
3.0 Experience and capacity of offeror, including recent and related experience.	_____ Points	_____
4.0 Qualifications of project personnel and offeror's ability to commit a capable staff and support for a project of this size under the time constraints as listed in the RFP.	_____ Points	_____
5.0* Cost effectiveness and reasonableness of offeror's proposed fee.	_____ Points	_____
TOTAL POINTS:	_____ <u>100 Points</u>	_____ _____

**PART V**  
**CONTRACTUAL REQUIREMENTS**

- 1.0 **EXCUSABLE DELAY**: The Contractor shall not be liable for any excess costs, if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and the subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.
- 2.0 **S.C. LAW CLAUSE**: Upon award of a contract under this proposal, the person, partnership, association, or corporation to whom the award is made must comply with local and State laws which require such person or entity to be authorized and/or licensed to do business in Beaufort County. Notwithstanding the fact that applicable statutes may exempt or exclude the successful offeror from requirements that it be authorized and/or licensed to do business in Beaufort County, by submission of this signed proposal the offeror agrees to subject itself to the jurisdiction and process of the Fourteenth Judicial Circuit Court of Beaufort County, as to all matters and disputes arising or to arise under the contract and the performance thereof including any questions as to the liability for taxes, licenses, or fees levied by State or local government.
- 3.0 **OFFEROR'S QUALIFICATIONS**: Offeror must, upon request of the County, furnish satisfactory evidence of their ability to furnish products or services in accordance with the terms and conditions of this proposal. The Purchasing Department reserves the right to make the final determination as to the offeror's ability to provide the services requested herein, before entering into any contract.
- 4.0 **OFFEROR RESPONSIBILITY**: Each offeror shall fully acquaint himself with conditions relating to the scope and restrictions attending the execution of the work under the conditions of this proposal. It is expected that this will sometimes require on-site observation. The failure or omission of an offeror to acquaint himself with existing conditions shall in no way relieve him of any obligation with respect to this proposal or to the contract.
- 5.0 **AFFIRMATIVE ACTION**: The Contractor will take affirmative action in complying with all Federal and State requirements concerning fair employment and employment of the handicapped and concerning the treatment of all employees, without regard or discrimination by reason of race, religion, sex, national origin, or physical handicap.
- 6.0 **PRIME CONTRACTOR RESPONSIBILITIES**: The Contractor will be required to assume sole responsibility for the complete effort, as required by this RFP. The County will consider the Contractor to be the sole point of contact with regard to contractual matters.

- 7.0 **SUBCONTRACTING:** If any part of the work covered by this RFP is to be subcontracted, the Contractor shall identify the subcontracting organization and the contractual arrangements made with same. All subcontractors must be approved, in writing by the County, or when applicable a political subdivision within the County with the County's concurrence. The successful offeror will also furnish the corporate or company name and the names of the officers of any subcontractors engaged by the vendor. The County reserves the right to reject any or all subcontractors and require substitution of a firm qualified to participate in the work as specified herein.
- 8.0 **OWNERSHIP OF MATERIAL:** Ownership of all data, material, and documentation originated and prepared for the County pursuant to this contract shall belong exclusively to the County.
- 9.0 **PAYMENT AND PERFORMANCE BOND:** The successful Contractor shall furnish, within ten (10) days after written notice of acceptance of proposal, a Payment and Performance Bond. Contractor shall provide and pay the cost of a Payment and Performance Bond. The Bond shall be in the amount of one-hundred percent (100%) the annual contract cost, issued by a Surety Company licensed in South Carolina with an "A" minimum rating of performance as stated in the most current publication of "Best's Key Rating Guide, Property Liability" which shall show a financial strength rating of at least five (5) times the Contract Price. The Bond shall be accompanied by a "Power of Attorney" authorizing the attorney-in-fact to bind the surety and certified to include the date of the bond.
- 10.0 **NONRESIDENT TAXPAYERS:** If the offeror is a South Carolina nonresident taxpayer and the contract amount is \$10,000.00 or more, the offeror acknowledges and understands that in the event he is awarded a contract offeror shall submit a Nonresident Taxpayer Registration Affidavit (State form #1-312-6/94), before a contract can be signed. Affidavit must certify that the nonresident taxpayer is registered with the S.C. Department of Revenue or the S.C. Secretary of State's Office, in accordance with Section 12-9-310(A)(2)(3) of S.C. Code of Laws (1976) as amended.
- 11.0 **BUSINESS LICENSE:** In accordance with the *Beaufort County Business License Ordinance, 99-36, Article III*, as enacted November 22, 1999, any business or individual generating income in the unincorporated area of Beaufort County is required to pay an annual license fee and obtain a business license. The ordinance referenced is available on the Beaufort County website at [www.bcgov.net](http://www.bcgov.net) or by calling the Business License Administrator at (843) 255-2270 for a list of schedules.
- 12.0 **ADDITIONAL ELIGIBILITY:** Other Beaufort County Public Procurement units shall, at their option, be eligible for use of any contracts awarded pursuant to this Invitation.
- 13.0 **INSURANCE REQUIREMENTS:** Prior to commencing work hereunder, Contractor, at his expense, shall furnish insurance certificate showing the certificate holder as Beaufort County, P.O. Drawer 1228, Beaufort, SC 29901-1228, Attention: Purchasing Director and with a special notation naming Beaufort County as an Additional Insured on the liability coverages. If not otherwise specified, the minimum coverage shall be as follows:
- 13.1 Worker's Compensation Insurance - Contractor shall have and maintain, during the life of this contract, Worker's Compensation Insurance for his employees connected to the work/delivery, in accordance with the Statutes of the State of South Carolina and any applicable laws.

- 13.2 Commercial General Liability Insurance - Contractor shall have and maintain, during the life of this contract, Commercial General Liability Insurance. Said Commercial General Liability Policy shall contain Contractual Liability and Products/Completed Operations Liability subject to the following minimum limits: BODILY INJURY of at least \$1,000,000 PER PERSON, \$1,000,000 PER OCCURRENCE; PROPERTY DAMAGE of at least \$1,000,000 PER OCCURRENCE; or BODILY INJURY/PROPERTY DAMAGE of at least \$2,000,000 COMBINED SINGLE LIMIT.
- 13.3 Comprehensive Automobile Liability Insurance - The Contractor shall have and maintain, during the life of this contract, Comprehensive Automobile Liability, including non-owned and hired vehicle, of at least \$1,000,000 PER PERSON, \$1,000,000 PER OCCURRENCE; PROPERTY DAMAGE of at least \$1,000,000 PER OCCURRENCE, or BODILY INJURY/PROPERTY DAMAGE of at least \$2,000,000 COMBINED SINGLE LIMIT.
- 13.4 The required insurance policy at the time of issue must be written by a company licensed to do business in the State of South Carolina and be acceptable to the County.
- 13.5 The Contractor/vendor shall not cause any insurance to be canceled or permit any insurance to lapse. All insurance policies shall contain a clause to the effect that the policy shall not be canceled or reduced, restricted or limited until fifteen (15) days after the County has received written notice, as evidenced by return receipt of registered or certified letter. Certificates of Insurance shall contain transcript from the proper office of the insurer, the location, and the operations to which the insurance applies, the expiration date, and the above-mentioned notice of cancellation clause.
- 13.6 The information described above sets forth minimum amounts and coverages and is not to be construed in any way as a limitation on the Contractor's liability.
- 14.0 **INDEMNITY:** The Contractor hereby agrees to indemnify and save harmless the County, its officers, agents, and employees from and against any and all liability, claims, demands, damages, fines, fees, expenses, penalties, suits, proceedings, actions and cost of actions, including attorney's fees for trial and on appeal of any kind and nature arising or growing out of or in any way connected with the performance of the Agreement, whether by act of omissions of the Contractor, its agents, servants, employees or others, or because of or due to the mere existence of the Agreement between the parties.
- 15.0 **TERMINATION FOR DEFAULT:**
- 15.1 The performance of Work under the Agreement may be terminated by the Purchasing Director, in accordance with this clause, in whole or in part, in writing, whenever the Director of Purchasing shall determine that the Contractor has failed to meet the performance requirements of this Agreement.
- 15.2 The Purchasing Director has the right to terminate for default, if the Contractor fails to make delivery of the supplies or perform the Work, or if the Contractor fails to perform the Work within the time specified in the Agreement, or if the Contractor fails to perform any other provisions of the Agreement.

- 16.0 TERMINATION FOR CONVENIENCE: The County may without cause terminate this contract in whole or in part at any time for its convenience. In such instance, an adjustment shall be made to the Contractor, for the reasonable costs of the work performed through the date of termination. Termination costs do not include lost profits, consequential damages, delay damages, unabsorbed or under absorbed overhead of the Contractor or its subcontractors, and/or failure to include termination for convenience clause into its subcontracts and material purchase orders shall not expose the County to liability for lost profits in conjunction with a termination for convenience settlement or equitable adjustment. Contractor expressly waives any claims for lost profit or consequential damages, delay damages, or indirect costs which may arise from the County's election to terminate this contract in whole or in part for its convenience.

## PART VI

### SPECIAL INSTRUCTIONS

- 1.0 INTENT TO PERFORM: It is the intent and purpose of Beaufort County that this request permits competition. It shall be the offeror's responsibility to advise the Purchasing Department if any language, requirements, etc., or any combinations thereof inadvertently restricts or limits the requirements stated in this RFP to a single source. Such notification must be submitted in writing and must be received by the Purchasing Department not later than ten (10) days prior to the proposal opening date. A review of such notifications will be made.
- 2.0 RECEIPT OF PROPOSAL: Proposals, amendments thereto, or withdrawal requests received after the time advertised for proposal opening will be void, regardless of when they were mailed.
- 3.0 PREPARATION OF PROPOSAL
- 3.1 All proposals should be complete and carefully worded and must convey all of the information requested by the County. If significant errors are found in the offeror's proposal, or if the proposal fails to conform to the essential requirements of the RFP, the County and the County alone will be the judge as to whether that variance is significant enough to reject the proposal.
- 3.2 Proposals should be prepared simply and economically, providing a straightforward, concise description of offeror's capabilities to satisfy the requirements of the RFP. Emphasis should be on completeness and clarity of content.
- 3.3 Each copy of the proposal should be bound in a single volume where practical. All documentation submitted with the proposal should be bound in that single volume.
- 3.4 If your proposal includes any comment over and above the specific information requested in our Request for Proposal (RFP), you are to include this information as a separate appendix to your proposal.
- 4.0 AMENDMENTS: If it becomes necessary to revise any part of the RFP, an amendment will be provided to all offerors who received the original Request for Proposal. The County shall not be legally bound by an amendment or interpretation that is not in writing.

- 5.0 ADDITIONAL INFORMATION: Offerors requiring additional information may submit their questions, in writing to the Purchasing Department. Answers to questions received that should change and/or clarify this solicitation will be provided in writing to all offerors via an amendment.
- 6.0 ORAL PRESENTATION/DISCUSSIONS: Any offeror or all offerors may be requested to make an oral presentation of their proposal to the County, after the proposal opening. Discussions may be conducted with responsible offerors, who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirement.
- Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revision of proposals, and such revisions may be permitted after submissions and prior to award, for the purpose of obtaining best and final offers. The purpose of these presentations/discussions will be to:
- 6.1 Determine in greater detail such offeror's qualifications.
  - 6.2 Explore with the offeror the scope and nature of the project, the offeror's proposed method of performance, and the relative utility of alternative methods of approach.
  - 6.3 Determine that the offeror will make available the necessary personnel and facilities to perform within the required time.
  - 6.4 Agree upon fair and reasonable compensation, taking into account the estimated value of the required services/equipment, the scope and complexity of proposed project, and nature of such services/equipment.
- 7.0 FUNDING: The offeror shall agree that funds expended for the purposes of the contact must be appropriated by the County Council for each fiscal year included within the contract period. Therefore, the contract shall automatically terminate without penalty or termination costs if such funds are not appropriated. In the event that funds are not appropriated for the contract, the offeror shall not prohibit or otherwise limit the County's right to pursue and contract for alternate solutions and remedies, as deemed necessary by the County for the conduct of its affairs. The requirements stated in this paragraph shall apply to any amendment or the execution of any option to extend the contract.
- 8.0 AWARD: An award resulting from this request shall be awarded to the responsive and responsible offeror whose proposal is determined to be most advantageous to the County, taking into consideration price and the evaluation factors set forth herein; however, the right is reserved to reject any and all proposals received, and in all cases the County will be the sole judge as to whether an offeror's proposal has or has not satisfactorily met the requirements of this RFP.
- 9.0 PUBLIC ACCESS TO PROCUREMENT INFORMATION: No such documents or other documents relating to this procurement will be presented or made otherwise available to any other person, agency, or organization until after award. Commercial or financial information obtained in response to this RFP, which is privileged and confidential, will not be disclosed. Such privileged and confidential information includes information which, if disclosed, might cause harm to the competitive position of the offeror supplying the information. All offerors,

therefore, must visibly mark as "Confidential" each part of their proposal, which they consider to contain proprietary information.

- 10.0 DEVIATIONS: Any deviations from the requirements of this RFP must be listed separately and identified as such in the table of contents.
- 11.0 ALTERNATES: Innovative alternative proposals are encouraged, provided however, that they are clearly identified as such and all deviations from the primary proposal are listed.
- 12.0 GRATUITIES: It shall be unethical for any person to offer, or give, or agree to give any County employee or former County employee; or for any County employee or former County employee to solicit, demand, accept, or agree to accept from another person a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, or preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter pertaining to any program requirement, or a contract or subcontract, or to any solicitation or proposal therefore.
- 13.0 KICKBACKS: It shall be unethical for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor, or any person associated therewith, as an inducement for the award of a subcontractor order.
- 14.0 PROTEST PROCEDURES
  - 14.1 Right to Protest: Any actual or prospective bidder, offeror, or contractor who is aggrieved, in connection with the solicitation or award of a contract, may protest to the Purchasing Director. The protest shall be submitted in writing fourteen (14) days after such aggrieved person knows or should have known of the facts giving rise thereto. The protest must be accompanied by a detailed statement, indicating the reasons for such protest.
  - 14.2 Authority to Resolve Protest: The Purchasing Director shall have authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offeror, or contractor; actual or prospective, concerning the solicitation or award of a contract.
  - 14.2 Decision: If the protest is not resolved by mutual agreement, the Purchasing Director shall issue a decision, in writing within ten (10) days. The decision shall,
    - 14.2.1 State the reasons for the action taken; and
    - 14.2.2 Inform the protestant of its right to administrative review as provided in this Section.
  - 14.4 Notice of Decision: A decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.
  - 14.5 Finality of Decision: A decision under Subsection (3) of this Section shall be final

and conclusive, unless fraudulent, or

- 14.5.1 Any person adversely affected by the decision appeals administratively, within ten (10) days after receipt of decision under Subsection (3) to the County Council in accordance with this Section.
- 14.5.2 Any protest taken to the County Council or court shall be subject to the protestant paying all administrative costs, attorney fees, and court costs when it is determined that the protest is without standing.

## **PART VII**

### **SUBMISSION REQUIREMENTS**

To achieve a uniform review process and allow for adequate comparability, the proposals must be organized in the manner specified below:

- 1.0 Letter of Transmittal - limit to four printed pages.
  - 1.1 Briefly state your firm's understanding of the work to be done, and make positive commitment to perform the work.
  - 1.2 Identify your proposal's principal strengths.
  - 1.3 Give the names of the persons who will be authorized to make representations for your firm, their titles, addresses, and telephone numbers.
  - 1.4 State whether or not your firm has been involved in any litigation within the past five (5) years, arising out of your performance. Explain fully if it has been involved in any litigation.
  - 1.5 Indicate the number and dates of amendments that you have received.
- 2.0 Table of Contents - clearly identify the material, by section and page number.
- 3.0 Proposed construction details. **NA**
- 4.0 List any exceptions to this RFP.
- 5.0 Other information and materials which the proposer wishes to submit in support of his proposal, qualifications, etc.  
\_\_\_\_\_ To \_\_\_\_\_

**PART VI**

**SPECIAL INSTRUCTIONS**

- 1.0 **INTENT TO PERFORM**: It is the intent and purpose of Beaufort County that this request permits competition. It shall be the offeror's responsibility to advise the Purchasing Department if any language, requirements, etc., or any combinations thereof inadvertently restricts or limits the requirements stated in this RFP to a single source. Such notification must be submitted in writing and must be received by the Purchasing Department not later than ten (10) days prior to the proposal closing date. A review of such notifications will be made.
- 2.0 **RECEIPT OF PROPOSAL**: Proposals, amendments thereto, or withdrawal requests received after the time advertised for proposal closing will be void, regardless of when they were mailed.
- 3.0 **PREPARATION OF PROPOSAL**
  - 3.1 All proposals should be complete and carefully worded and must convey all of the information requested by the County. If significant errors are found in the offeror's proposal, or if the proposal fails to conform to the essential requirements of the RFP, the County and the County alone will be the judge as to whether that variance is significant enough to reject the proposal.
  - 3.2 Proposals should be prepared simply and economically, providing a straightforward, concise description of offeror's capabilities to satisfy the requirements of the RFP. Emphasis should be on completeness and clarity of content.
  - 3.3 Each copy of the proposal should be bound in a single volume where practical. All documentation submitted with the proposal should be bound in that single volume.
  - 3.4 If your proposal includes any comment over and above the specific information requested in our Request for Proposal (RFP), you are to include this information as a separate appendix to your proposal.
- 4.0 **AMENDMENTS**: If it becomes necessary to revise any part of the RFP, an amendment will be provided to all offerors who received the original Request for Proposal. The County shall not be legally bound by an amendment or interpretation that is not in writing.
- 5.0 **ADDITIONAL INFORMATION**: Offerors requiring additional information may submit their questions, in writing to the Purchasing Department. Answers to questions received that should change and/or clarify this solicitation will be provided in writing to all offerors via an amendment.
- 6.0 **ORAL PRESENTATION/DISCUSSIONS**: Any offeror or all offerors may be requested to make an oral presentation of their proposal to the County, after the proposal opening. Discussions may be conducted with responsible offerors, who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of and responsiveness to the solicitation requirement.

Offerors shall be accorded fair and equal treatment with respect to any opportunity for

discussions and revision of proposals, and such revisions may be permitted after submissions and prior to award, for the purpose of obtaining best and final offers. The purpose of these presentations/discussions will be to:

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- 7.0 **FUNDING:** The offeror shall agree that funds expended for the purposes of the contact must be appropriated by the County Council for each fiscal year included within the contract period. Therefore, the contract shall automatically terminate without penalty or termination costs if such funds are not appropriated. In the event that funds are not appropriated for the contract, the offeror shall not prohibit or otherwise limit the County's right to pursue and contract for alternate solutions and remedies, as deemed necessary by the County for the conduct of its affairs. The requirements stated in this paragraph shall apply to any amendment or the execution of any option to extend the contract.
- 8.0 **AWARD:** An award resulting from this request shall be awarded to the responsive and responsible offeror whose proposal is determined to be most advantageous to the County, taking into consideration price and the evaluation factors set forth herein; however, the right is reserved to reject any and all proposals received, and in all cases the County will be the sole judge as to whether an offeror's proposal has or has not satisfactorily met the requirements of this RFP.
- 9.0 **PUBLIC ACCESS TO PROCUREMENT INFORMATION:** No such documents or other documents relating to this procurement will be presented or made otherwise available to any other person, agency, or organization until after award. Commercial or financial information obtained in response to this RFP, which is privileged and confidential, will not be disclosed. Such privileged and confidential information includes information which, if disclosed, might cause harm to the competitive position of the offeror supplying the information. All offerors, therefore, must visibly mark as "Confidential" each part of their proposal, which they consider to contain proprietary information.
- 10.0 **DEVIATIONS:** Any deviations from the requirements of this RFP must be listed separately and identified as such in the table of contents.
- 11.0 **ALTERNATES:** Innovative alternative proposals are encouraged, provided however, that they are clearly identified as such and all deviations from the primary proposal are listed.

- 12.0 GRATUITIES: It shall be unethical for any person to offer, or give, or agree to give any County employee or former County employee; or for any County employee or former County employee to solicit, demand, accept, or agree to accept from another person a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, or preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter pertaining to any program requirement, or a contract or subcontract, or to any solicitation or proposal therefore.
- 13.0 KICKBACKS: It shall be unethical for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor, or any person associated therewith, as an inducement for the award of a subcontractor order.
- 14.0 PROTEST PROCEDURES
- 14.1 Right to Protest: Any actual or prospective proposer, offeror, or contractor who is aggrieved, in connection with the solicitation or award of a contract, may protest to the Purchasing Director. The protest shall be submitted in writing fourteen (14) days after such aggrieved person knows or should have known of the facts giving rise thereto. The protest must be accompanied by a detailed statement, indicating the reasons for such protest.
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- 14.2.1 State the reasons for the action taken; and
- 14.2.2 Inform the protestant of its right to administrative review as provided in this Section.
- 14.4 Notice of Decision: A decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.
- 14.5 Finality of Decision: A decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or
- 14.5.1 Any person adversely affected by the decision appeals administratively, within ten (10) days after receipt of decision under Subsection (3) to the County Council in accordance with this Section.
- 14.5.2 Any protest taken to the County Council or court shall be subject to the protestant paying all administrative costs, attorney fees, and court costs when it is determined that the protest is without standing.

15.0 **CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY, AND VOLUNTARY EXCLUSION:** The contractor certifies, by submission of this document or acceptance of a contract, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any State, Federal department or agency. It further agrees by submitting this qualification statement that it will include this clause without modification in all lower tier transactions, solicitations, proposals, contracts, and subcontracts. Where the bidder/contractor or any lower tier participant is unable to certify this statement, it shall attach an explanation to this solicitation/bid.

**State whether or not your company has been involved in any litigation within the past five (5) years arising out of your performance by circling YES or NO.**

**LOCAL VENDOR PREFERENCE – PARTICIPATION AFFIDAVIT**

**SECTION 2.537.1**

A competitive procurement made by Beaufort County shall be made from responsive and responsible resident vendors in the County for procurement, if such bid does not exceed the lowest qualified bid from a non-county vendor by more than five (5%) percent or Ten Thousand (\$10,000.00) Dollars, whichever is less, of the lowest non-county bidder. The resident vendor has the discretion to match the bid submitted by the non-county vendor and receive the contract award.

A vendor shall be deemed to be a "local vendor" if such vendor is an individual, partnership, association or corporation that is authorized to transact business within the state, maintains an office in Beaufort County, has a business license of Beaufort County or one of the municipalities within Beaufort County, and maintains a representative inventory of commodities within Beaufort County or one of the municipalities on which the bid is submitted and has paid all taxes duly assessed.

If no bids are received from a Beaufort County Local Vendor a vendor shall be deemed to be a "local vendor" if such vendor is an individual, partnership, association or corporation that is authorized to transact business within the state, maintains an office in Jasper, Hampton, and Colleton Counties (local preference only applies if Jasper, Hampton and Colleton Counties offer reciprocity to Beaufort County). A competitive procurement made by the county shall be made from responsive and responsible resident vendors in the respective counties for procurement, if such bid does not exceed the lowest qualified bid from a non-local vendor by more than five (5%) percent or \$10,000.00, whichever is less, local vendor has the discretion to match the bid submitted by the non-local vendor and receive the contract award.

If the procurement is to be made pursuant to state or federal guidelines which prohibit or restrict a local or state preference, there shall be no local or state preference unless a more restricted variation is allowed under the guidelines. Local/state preference shall not be applied to the procurement of construction services.

The undersigned hereby attests that the criteria of the "RESIDENT VENDOR PREFERENCE, SECTION 2.537.1" are met for the purposes of bid document 030217, dated \_\_\_\_\_.

Company Name: Ballenger Realty, Inc Principal Name: Everett Ballenger

Company Address: 613 Carteret St. Beaufort, SC 29902

Secretary of State Designation: (Corporation, Individual, Partnership, other) Inc.  
Beaufort County Business License/Classification: Beaufort County #10158, City of Beaufort #22733, Town of Port Royal, #7610

Tax Obligation Current: \_\_\_\_\_  
Signature of Principal/Date: Everett Ballenger 2/27/17

Witness/Date: LA 58 2/27/17

**NON-DISCRIMINATION STATEMENT (SEC 2.537.2.1)**

The offeror certifies that:

- (1) No person shall be excluded from participation in, denied the benefit of, or otherwise discriminated against on the basis of race, color, national origin, or gender in connection with any RFP submitted to Beaufort County or the performance of any contract resulting there from;
- (2) That it is and shall be the policy of this Company to provide equal opportunity to all business persons seeking to contract or otherwise interested in contracting with this Company, including those companies owned and controlled by racial minorities, cultural minorities, and women;
- (3) In connection herewith, We acknowledge and warrant that this Company has been made aware of, understands and agrees to take affirmative action to provide such companies with the maximum practicable opportunities to do business with this Company;
- (4) That this promise of non-discrimination as made and set forth herein shall be continuing in nature and shall remain in full force and effect without interruption;
- (5) That the promises of non-discrimination as made and set forth herein shall be and are hereby deemed to be made as part of and incorporated by reference into any contract or portion thereof which this Company may hereafter obtain and;
- (6) That the failure of this Company to satisfactorily discharge any of the promises of non-discrimination as made and set forth herein shall constitute a material breach of contract entitling the Beaufort County to declare the contract in default and to exercise any and all applicable rights and remedies including but not limited to cancellation of the contract, termination of the contract, suspension and debarment from future contracting opportunities, and withholding and or forfeiture of compensation due and owing on a contract.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Title

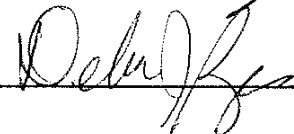

**NON-DISCRIMINATION STATEMENT (SEC 2.537.2.1)**

The offeror certifies that:

- (1) No person shall be excluded from participation in, denied the benefit of, or otherwise discriminated against on the basis of race, color, national origin, or gender in connection with any RFP submitted to Beaufort County or the performance of any contract resulting there from;
- (2) That it is and shall be the policy of this Company to provide equal opportunity to all business persons seeking to contract or otherwise interested in contracting with this Company, including those companies owned and controlled by racial minorities, cultural minorities, and women;
- (3) In connection herewith, We acknowledge and warrant that this Company has been made aware of, understands and agrees to take affirmative action to provide such companies with the maximum practicable opportunities to do business with this Company;
- (4) That this promise of non-discrimination as made and set forth herein shall be continuing in nature and shall remain in full force and effect without interruption;
- (5) That the promises of non-discrimination as made and set forth herein shall be and are hereby deemed to be made as part of and incorporated by reference into any contract or portion thereof which this Company may hereafter obtain and;
- (6) That the failure of this Company to satisfactorily discharge any of the promises of non-discrimination as made and set forth herein shall constitute a material breach of contract entitling the Beaufort County to declare the contract in default and to exercise any and all applicable rights and remedies including but not limited to cancellation of the contract, termination of the contract, suspension and debarment from future contracting opportunities, and withholding and or forfeiture of compensation due and owing on a contract.

  
Signature      Everett Ballenger

\_\_\_\_\_  
Title Owner

   
\_\_\_\_\_  
Debra Regecz      Salesman

**NARRATIVE ON THE APPROACH TO THE SCOPE OF WORK**

(Proposals should respond to the Scope of Work point by point by numeric reference.)

Real Estate Broker Services  
Listing & Selling: Residential homes,  
Land and/or commercial property.

RFP NO. 030217

EXHIBIT B

PAGE \_\_\_\_\_ of \_\_\_\_\_

**SCHEDULE OF EVENTS**

The Offeror should briefly describe each step of the schedule of events in his proposed plan of action to accomplish the scope of work in a sequential manner, identifying the specific assignment of key personnel and the time required to complete each step.

Step #                      Schedule of Events   Time Required                      Person Assignment

1. Listing property                      - Debra Regecz

RFP NO. 030217

EXHIBIT C

PAGE \_\_\_\_\_ of \_\_\_\_\_

**OFFEROR'S EXPERIENCE**

1. Contract Title: Real Estate Broker Services
2. Contract Period: From 5/2005 To present
3. Geographic Area Serviced: Beaufort County
4. Scope of Work: Provide Broker services for Residential, Commercial and Land Listings/Sales

References: Contracting Office Ballenger Realty, Inc.  
Title: Everett Ballenger  
Address: 613 Carteret St  
City: Beaufort State SC Zip 29902  
Telephone #(s): 843-379-1400

**OFFEROR'S EXPERIENCE**

1. Contract Title: See Attached Resume
2. Contract Period: From \_\_\_\_\_ To \_\_\_\_\_
3. Geographic Area Serviced: \_\_\_\_\_
4. Scope of Work \_\_\_\_\_

References: Contracting Office \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
City: \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_  
Telephone #(s): \_\_\_\_\_

RFP NO. 030217

EXHIBIT D

PAGE \_\_\_\_\_ of \_\_\_\_\_

**PERSONNEL STAFFING**

STAFF MEMBER BACKGROUND AND EXPERTISE OF PERSONNEL

1. Melanie Bradham  
(Name)  
Office Manager  
(Title)
  
2. \_\_\_\_\_  
(Name)  
\_\_\_\_\_  
(Title)
  
3. \_\_\_\_\_  
(Name)  
\_\_\_\_\_  
(Title)
  
4. \_\_\_\_\_  
(Name)  
\_\_\_\_\_  
(Title)
  
5. \_\_\_\_\_  
(Name)  
\_\_\_\_\_  
(Title)

RFP NO. 030217

EXHIBIT E

PAGE 1 of 3

**PRICE PROPOSAL AND CERTIFICATION**

The undersigned *[Signature]*, having carefully examined the information *[Signature]*  
(Name of Offeror)

contained in the Beaufort County RFP Number # 030217 dated 2/27/2016, 2017, proposes to provide Real Estate Broker        services to Beaufort County Government, as outlined in this proposal, at the prices specified below:

**Vendor must complete the attached pricing sheet.**

In compliance with the Request for Proposal # 030217, and subject to all conditions thereof, the undersigned agrees:

- ( a ) This proposal, as stated, is open for acceptance for a period of 90 calendar days from the date of opening; and
- ( b ) To furnish all services, materials, and equipment necessary and incidental to perform the subject audits.

**CERTIFICATION**

**CONTRACTOR**

HAS A FEDERAL AGENCY OR A FEDERALLY CERTIFIED STATE OR LOCAL AGENCY PERFORMED ANY REVIEW OF YOUR ACCOUNTS OR RECORDS IN CONNECTION WITH ANY GRANT OR CONTRACT WITHIN ANY GRANT OR CONTRACT WITHIN THE PAST TWELVE MONTHS?

YES

*[Signature]* NO

(IF "YES" GIVE NAME, ADDRESS, AND TELEPHONE NUMBER OF REVIEWING OFFICE.)

RFP NO. 030217

EXHIBIT E

PAGE 2 of 3

This proposal is submitted for use in connection with and in response to Beaufort County RFP # 030217. This is to certify, to the best of my knowledge and belief, that the cost and pricing data summarized herein are complete, current, and accurate as of Feb 27, 2017, and that a financial accounting capability exists to fully and accurately account for the financial transactions under this project. I further certify that I understand the sub-agreement price may be subject to downward renegotiation and/or recoupment where the above cost and pricing data have been determined, as a result of audit, not to have been complete, current, and accurate as of the date above.

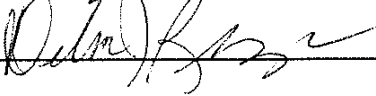
This cost proposal is made without prior understanding, agreement, or connections with any corporation, firm, or person submitting a proposal for the same service and is in all respect fair and without collusion or fraud. I agree to abide by all conditions of this proposal and certify that I am authorized to sign this proposal.

Signature of Offeror's Representative authorized to enter into contract with Beaufort County Council:

FIRM NAME: Ballenger Realty, Inc.

BY:  DATE: 2/27/17  
(Signature)

TYPE/PRINT: Everett Ballenger Owner

Signature:  2-27-2017  
Debra J Regecz Real Estate Agent/Salesman  
(Name) (Title)

ADDRESS: 613 Carteret St  
(Street Address and/or P. O. Box Number)

Beaufort SC 29902  
(City) (State) (Zip Code)

PHONE: ( 843 ) 379-1400 FAX: ( 843 ) 379-1401  
(Area Code) Phone Number (Area Code) Fax Number

EMAIL: deb@redhatteam.com Cell: 843-263-7010

FEDERAL ID#: 57-1105508 S.C. TAX #: 25409697-2



COUNTY COUNCIL OF BEAUFORT COUNTY  
Title VI Statement to Contractors and Subcontractors



It is the policy of the County Council of Beaufort County, South Carolina, hereafter referred to as "Beaufort County" or "the County", to comply with Title VI of the 1964 Civil Rights Act (Title VI) and its related statutes. To this end, Beaufort County gives notice to all Prime Contractors, Subcontractors, Architects, Engineers, and Consultants that the County assures full compliance with Title VI and its related statutes in all programs, activities, and contracts. It is the policy of Beaufort County that no person shall be excluded from participation in, denied the benefit of, or subjected to discrimination under any of its programs, activities, or contracts on the basis of race, color, national origin, age, sex, disability, religion, or language regardless of whether those programs and activities are Federally funded or not.

Pursuant to Title VI requirements, any entity that enters into a contract with Beaufort County including, but not limited to Prime Contractors, Subcontractors, Architects, Engineers, and Consultants, may not discriminate on the basis of race, color, national origin, age, sex, disability, religion, or language in their selection and retention of first-tier subcontractors, and first-tier subcontractors may not discriminate in their election and retention of second-tier subcontractors, including those who supply materials and/or lease equipment. Further, Contractors may not discriminate in their employment practices in connection with highway construction projects or other projects assisted by the U.S. Department of Transportation (USDOT) and/or the Federal Highway Administration (FHWA).

**In all solicitations either by competitive bidding or negotiation made by the Contractor for work to Beaufort County to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by the Contractor of the Contractor's obligations under the contract and the Title VI regulations relative to nondiscrimination on the basis of race, color, national origin, age, sex, disability, religion, or language by providing such a statement in its bidding and contract documents.**

Upon request, the Contractor shall provide all information and reports required by Title VI requirements issued pursuant thereto, and shall permit access to its books, records, accounts and other sources of information, and its facilities as may be determined by Beaufort County, USDOT, and/or FHWA to be pertinent to ascertain compliance with such regulations, orders, and instructions. Where any information required of a Contractor is in the exclusive possession of another who fails or refuses to furnish this information, the Contractor shall so certify to USDOT or FHWA, as appropriate and via Beaufort County, and shall set forth what efforts it has made to obtain the information. In the event of the Contractor's non-compliance with nondiscrimination provisions of this contract, USDOT may impose such contract sanctions as it or FHWA may determine to be appropriate, including, but not limited to:

- Withholding of payments to the Contractor under the contract until the Contractor complies, and/or
- Cancellation, termination, or suspension of the contract, in whole or in part.

In the event a Contractor becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of this direction to comply with Title VI, the Contractor may request USDOT to enter into such litigation to protect the interests of USDOT and FHWA. Additionally, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

Any person or Subcontractor who believes that they have been subjected to an unlawful discriminatory practice under Title VI has a right to file a formal complaint within one hundred eighty (180) days following the alleged discriminatory action. Any such complaint must be filed in writing or in person:



intent to renew this agreement under the same terms and provisions provided herein.

### **SECTION THREE**

#### **SPECIFIC DUTIES OF THE CONTRACTOR**

(The attached Statement of Services is here by incorporated)

### **SECTION FOUR**

#### **INSURANCE AND INDEMNIFICATION**

Insurance Requirement. The said Company shall, throughout the performance of its services pursuant to this Agreement, maintain:

(a) Comprehensive general liability insurance (including broad form contractual coverage) and automobile liability insurance, with a combined minimum limit of \$1,000,000.00 per occurrence, protecting itself and the County from all claims and \$500,000.00 for bodily injury (including death) and property damage which may arise from or in connection with the performance of the necessary services herein or from or out of any act or omission of the contractor, its officers, directors, agents and employees; and,

(b) Workers' Compensation and Employer's Liability. Workers' Compensation Insurance for itself, its partners, and employees employed directly or indirectly by the contractor shall be provided with statutory limits. Employer's Liability insurance with limits of liability in the amount of one million (\$1,000,000.00) dollars shall be provided.

(c) All such insurance shall be with companies and on forms acceptable to the County and shall provide that the coverage thereunder may not be reduced or canceled unless thirty (30) days prior notice thereof is furnished to the County. Certificates of insurance (and copies of policies, if required by the County) shall be furnished to the County.

Before commencement of any term of this Agreement, the contractor, at its own cost and expense, shall obtain, carry and maintain insurance as provided herein for the duration of this agreement. The contract shall, before beginning any services provided herein provide the County with proof of insurance that is acceptable to the County.

The insurance policy provided herein shall be endorsed to provide that no policy shall be cancelled, changed or reduced in coverage, until after thirty (30) days prior written notice has been delivered to the County through certified mail.

Proof of Insurance shall be filed with the County prior to execution of the contract meeting the requirements of the County as set forth herein and as may be required hereafter. Failure of the contractor to fully comply with the requirements set forth herein regarding insurance may be considered a material breach of this agreement and may be cause for immediate termination of this agreement and of any and all obligations regarding the same.

The contractor shall not begin work under this Contract until all required insurance has been obtained and until such insurance has been approved by the County.

Approval of the insurance by the County shall not relieve or decrease the liability of the contractor for any damages arising from contractor's performance of the services provided herein.

### **SECTION FIVE**

## **INDEMNIFICATION**

The contractor shall indemnify, defend, and hold County, its officers, employees, agents, and volunteers harmless from and against any and all liability, claims, suits, actions, damages, and causes of action arising during the term of this agreement out of any personal injury, bodily injury, loss of life, or damage to property, or any violation of any federal, state, or local law or ordinance, or other cause in connection with the negligent or intentional acts or omissions of Contractors, its employees, subcontractors, or agents, or on account of the performance or character of this work, except for any such claim arising solely out of the active negligence, sole negligence, or willful misconduct of the County, its officers, employees, agents, or volunteers.

## **SECTION SIX**

### **EQUIPMENT, LICENSES, PERMITS AND SUPPLIES**

The Contractor will provide all its own equipment, licenses, permits, and supplies.

If a license or permit of any kind, which term is intended to include evidence of registration, is required of the contractor, its employees, agents, or subcontractors, by federal or state law; the contractor warrants that such license or permit has been obtained, is valid and in good standing, and that any applicable bond has been posted in accordance with all applicable laws and regulations.

## **SECTION SEVEN**

### **DEFAULT**

A. Non-excusable acts of default by the contractor are as follows: The County shall have the right to terminate this agreement in its entirety in the event that the contractor shall not immediately cure, or commence to cure and then pursue curative action with diligence, any of the following events of default:

1. In carrying out the services provided herein, the failure of contractor or itself in a fashion that is generally acceptable with the community;
2. Failure to correct or revise, without additional compensation, any errors or deficiencies upon written or verbal notice to the official.

## **SECTION EIGHT**

### **ASSIGNMENT AND SUBLETTING**

Neither this agreement nor any interest herein may be assigned by the contractor without the prior written approval of the County.

**SECTION NINE**

**TERMINATION OF AGREEMENT FOR CONVENIENCE**

In addition to the grounds of default provided herein; this agreement may be terminated for convenience upon thirty (30) days notice to contractor by the County.

**SECTION TEN**

**NON-APPROPRIATION**

See Section Fourteen Notices

**SECTION ELEVEN**

**ACKNOWLEDGMENT AS INDEPENDENT, NOT EMPLOYEE**

By signing this contract, the contractor agrees and confirms that:

1. The contractor is acting in the capacity of an independent party and is not an employee of Beaufort County.
2. The contractor is responsible for all benefits and for complying with all payment and reporting obligations that relate to the taxes imposed on payment provided under the terms of this agreement.
3. The contractor is voluntarily waiving rights for any of its employees to any benefits, including health benefits, to which they might otherwise be entitled were they an employee of Beaufort County.
4. The contractor is acknowledging that Beaufort County is not providing any vacation time, sick pay, or other welfare or retirement benefits to its employees normally associated with an employee-employer relationship. The contractor is excluded from any participation in County health and welfare benefits plans, including vacation, sick leave, severance, life, accident, health and disability insurance, deferred compensation, retirement and grievance rights or privileges.
5. The contractor has had sufficient time to review this Acknowledgment and fully understands its contents.

**SECTION TWELVE**

Contractor agrees that \_\_\_\_\_ the direct supervision of all persons providing services hereunder through contractor designated representatives. The designated representative is: \_\_\_\_\_

**SECTION THIRTEEN**

**EMPLOYEES OF:**

Any person performing services provided hereunder is the \_\_\_\_\_ employee, and \_\_\_\_\_ will exercise complete control over their conduct and will pay all

wages, expenses, social security taxes, federal and state unemployment insurance, and any similar taxes relating to the employees.

\_\_\_\_\_ and County intend that the relationship created between them by this agreement is that of independent \_\_\_\_\_. An agent, employee, or servant of \_\_\_\_\_ shall never be or deemed to be the employee, agent, or servant of owner.

## SECTION FOURTEEN

### NOTICES

Notices. Notices required by this agreement shall be personally delivered or mailed, postage prepaid, as follows:

To Independent : Name:

To the County: County Administrator  
Post Office Box 1228  
Beaufort, South Carolina 29901-1228

with a copy to: County Attorney  
Post Office Box 1228  
Beaufort, SC 29901-1228

Each party shall provide the other party with telephone and written notice of any change in address as soon as practicable. Notices given by personal delivery shall be effective immediately. Notices given by mail shall be deemed to have been delivered forty-eight hours after having been deposited in the United States mail.

#### *Force Majeure*

Should performance of Consultant's services be materially affected by causes beyond its reasonable control, a Force Majeure results. Force Majeure includes, but is not restricted to, acts of God, acts of a legislative, administrative or judicial entity, acts of contractors other than subcontractors of Consultant, fires, floods, labor disturbances, and unusually severe weather. Consultant will be granted a time extension and the parties will negotiate an adjustment to the fee, where appropriate, based upon the effect of the Force Majeure upon Consultant's performance.

#### *Termination for Convenience*

Either party may terminate this Agreement upon thirty (30) days written notice to the other party. Upon such termination, the County shall pay the Consultant for all services performed hereunder up through the date of such termination.

#### *Non-Appropriation Clause*

Contract duration is governed by the annual appropriation of funds issued by Beaufort County Council for contracted services. Contract may be terminated for lack of budget funding in any phase. Upon such termination, the County shall pay the Consultant for all services performed hereunder up through the date of such termination.

**SECTION FIFTEEN**

**MISCELLANEOUS**

**Amendments.** This agreement is not subject to modification or amendment, except by a writing executed by both Independent \_\_\_\_\_, which writing shall expressly state that it is intended by the parties to amend the terms and conditions of this agreement. This agreement integrates all of the terms and conditions mentioned herein or incidental hereto and supersedes all negotiations or previous agreements between the parties with respect to all or any part of the subject matter hereof.

**Waiver.** The waiver by either party of a breach by the other of any provision of this agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this agreement.

**Severability.** Should any part of this agreement be declared by a final decision by a court or tribunal of competent jurisdiction to be unconstitutional, invalid, or beyond the authority of either party to enter into or carry out, such decision shall not affect the validity of the remainder of this agreement, which shall continue in full force and effect, provided that the remainder of this agreement, absent the unexcused portion, can be reasonably interpreted to give effect to the intentions of the parties.

**Governing Law.** This agreement shall be governed by, and construed in accordance with, the laws of the state of South Carolina. This agreement is for the benefit of and may be enforced directly by either party.

**Conflict of Interest.** \_\_\_\_\_ warrants and covenants that \_\_\_\_\_ currently has no interest in, nor shall any interest be hereinafter acquired in, any matter that will render the services required under the provisions of this agreement a violation of any applicable state, local, or federal law. In the event that any conflict of interest should nevertheless hereinafter arise, \_\_\_\_\_ shall promptly notify County of the existence of such conflict of interest so that the County may determine whether to terminate this agreement.

**Time is of the Essence.** Independent \_\_\_\_\_ agrees to diligently prosecute the services to be provided under this agreement to completion and in accordance with any schedules specified herein. In the performance of this agreement, time is of the essence.

**Multiple Copies of Agreement.** Multiple copies of this agreement may be executed but the parties agree that the agreement on file in the office of County Administrator is the version of the agreement that shall take precedence should any differences exist among counterparts of the document.

IN WITNESS WHEREOF, \_\_\_\_\_ has executed this agreement, and the County, by and through its County Administrator, duly authorized to act, has executed this agreement.

By: \_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Street Address

\_\_\_\_\_  
Mailing address if different from above

\_\_\_\_\_  
Telephone Number

\_\_\_\_\_  
Fax Number

\_\_\_\_\_  
FEIN or Social Security Number  
(required information)

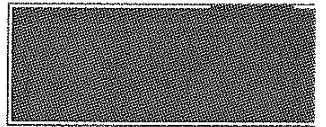
By: \_\_\_\_\_  
Witnesses Signature

\_\_\_\_\_  
Printed Name  
For Beaufort County

By: \_\_\_\_\_  
County Administrator  
Post Office Box 1228  
Beaufort, South Carolina 29901-1228  
Tel: 843-470-2501

For:

By: \_\_\_\_\_  
President  
address



# EXHIBIT C



EXCLUSIVE RIGHT TO SELL AGREEMENT
LISTING AGREEMENT

In consideration of the covenants herein contained, Beaufort County, Sole Property Owner(s) (hereinafter called "OWNER") and Ballenger Realty, Inc, Real Estate Company (hereinafter called "BROKER"), agree as follows:

For the period of time beginning on \_\_\_\_\_, \_\_\_\_\_, and ending at midnight on \_\_\_\_\_, Owner hereby grants to Broker the sole and exclusive right to sell the real property known as:

Lot 12 Block \_\_\_\_\_ Section \_\_\_\_\_ Subdivision Colonial Terrace

Address 429 Broad River Blvd

Tax Map # R100 028 00A 0252 0000 City Beaufort Zip 29906-9447

County of Beaufort, State of South Carolina.

The real estate described herein includes all improvements, fixtures, appurtenances, and the additional property, if any, described here. Dishwasher

1. CONSENT TO DISCLOSED DUAL AGENCY/DESIGNATED AGENCY: (INITIAL APPLICABLE CHOICES)

Seller acknowledges receiving an explanation of the types of agency relationships that are offered by the brokerage and a South Carolina Disclosure of Real Estate Brokerage Relationships form at the first practical opportunity at which substantive contact occurred between the agent and the seller.

Owner acknowledges that after entering into this written agency contract, Broker might request a modification in order to act as a dual agent or a designated agent in a specific transaction.

If asked:

- Permission to act as a dual agent will not be considered.
Permission to act as a dual agent may be considered at the time I am provided with information about the other party to a transaction. If Owner agrees, Owner will execute a separate written Dual Agency Agreement.
Permission to act as a designated agent will not be considered.
Permission to act as a designated agent may be considered at the time I am provided with information about the other party to a transaction. If Owner agrees, Owner will execute a separate written Designated Agency Agreement.

2. COMPENSATION TO OTHER BROKERAGES:

Owner acknowledges Broker has advised Owner of Broker's general company policy regarding cooperating with and compensating other Brokerages. Owner authorizes listing Broker to compensate other Brokerages as legally required in the following amounts of U.S. dollars and or percentage of gross sales price:

Buyer Agency % and or \$; Transaction Brokerage (Non Agency) % and or \$; Sub Agency % and or \$; Other

3. TERMS: As follows:

A. Broker agrees to employ Broker's best efforts to sell or to secure a contract for the sale of the property for a price of One Hundred Twenty-Nine thousand Nine Hundred (\$ 129,900) and in return Owner agrees to pay Broker a fee of \$ or a commission of 6% of gross sales price if Broker, Owner, another broker, or any other person or company produces a Buyer who is ready, willing, and able to purchase the property on the terms described above or on any terms acceptable to Owner. Owner understands that Broker shall pay cooperating brokers a fee of \$ or a commission of 3% of gross sales price. Owner and Broker agree that there shall be no variation or exception in the amount of the fee or commission to be paid, unless specified under Paragraph 27. The brokerage fee shall be earned, due and payable when an agreement to purchase, option, exchange, lease or trade is signed by Owner. However, if Owner shall fail or refuse to sell the described property for the price and terms set forth herein, or if Owner shall fail or refuse to complete the sale of such property under any written Agreement to Buy and Sell Real Estate to which Owner has agreed, Broker's full fee shall be due and payable by Owner.

[ ] OWNER, [ ] OWNER, AND [X] BROKER HAVE READ THIS PAGE.

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PAGE 1 OF 5



- F. To allow closing attorney to pay Broker's compensation in an amount equal to the compensation provided above from Owner's proceeds at time of closing; and
- G. To grant to Broker the authority and approval to list and publish all sales data pertaining to the sale and closing of the hereinabove described property. Owner understands and acknowledges that sales data are published for the use and information of the members of all the Boards/Associations of REALTORS® and the Multiple Listing Services (MLS) of which Broker is a member; for their use of same in marketing and selling of all properties listed in said publication; and
- H. To permit Broker to take photographs of the Owner's property described herein for advertising and marketing purposes in any advertising medium of the Broker's choice. Owner understands and acknowledges that all marketing materials, including but not limited to photographs, brochures, and websites, developed for the sale of the subject property shall remain the property of the Broker; and
- I. To convey marketable title to the buyer in fee simple free from all liens except those stipulated herein, subject to existing zoning and government restrictions, applicable owner's association assessments and restrictive conditions and covenants of record which do not materially affect the present use of the property; and
- J. To authorize Owner's attorneys and the settlement agent to furnish to Broker copies of the final HUD-1 settlement statement for the transaction prior to the closing date; and
- K. Not to deal directly with prospective buyers of this property during the period of this agency and shall refer any inquiries received directly and immediately to the Broker; and
- L. To authorize the Broker, in response to inquiries from buyers or cooperating brokers, to divulge the existence of offers on the property; and
- M. To furnish Broker with written instructions regarding the confidentiality of information upon termination or completion of this Agreement which was received during the course of this Agreement in accordance with South Carolina law.

**9. PROPERTY INFORMATION/SELLER'S PROPERTY DISCLOSURE STATEMENT:** Owner warrants that, to Owner's knowledge, there are no material defects, hidden or obvious, in or on the property, which have not been disclosed to Broker in writing. Owner further warrants that Owner has reviewed and completed a Seller's Property Disclosure Statement, as required by South Carolina Code of Laws, as amended, Section 27-50-10, et.seq., attached to and made a part of this Agreement, and that all such information is accurate to the best of Owner's knowledge. If the Owner discovers, after his delivery of a disclosure statement to a Buyer, a material inaccuracy in the disclosure statement or the disclosure is rendered inaccurate in a material way by the occurrence of some event or circumstance, the owner shall correct promptly the inaccuracy by delivering a corrected disclosure statement to the Buyer or make reasonable repairs necessitated by the occurrence before closing. An owner who knowingly violates or fails to perform any duty prescribed by any provision of this article or who discloses any material information on the disclosure statement that he knows to be false, incomplete, or misleading is liable for actual damages proximately caused to the Buyer and court costs. Owner agrees to defend, indemnify, and hold harmless the Broker, Broker's agents, or subagents, including indemnification for attorney's fees and court costs, from any and all claims arising out of any information or omission of information presented to Broker by Owner. Owner agrees to disclose to the Broker any known latent defects of the herein described property which are not readily ascertainable upon view including land, improvements, and personal property to be conveyed, and to hold said Broker harmless for any liabilities or damages arising from such defects. Owner will not hold Broker liable for the Owner's refusal or failure to provide a prospective purchaser with a disclosure statement. Owner agrees to allow Broker to provide copies of the disclosure statement to prospective buyers. The Owner understands and agrees that Broker has fully met the requirements of Section 27-50-70 of the South Carolina Code of Laws, as amended.

**10. DISCLOSURE:** Owner authorizes Broker to disclose information about the property to Broker's agents, subagents, prospective buyers, and all inquiring parties. Such disclosure shall be in accordance with Broker's company policy. Owner hereby authorizes anyone having a lien against the property including the mortgage holder, to disclose complete information about the lien to Broker and Closing Attorney or Agent.

**11. TAXES:** Owner covenants and agrees to comply with the provisions of the South Carolina Code Section 12-8-580 (as amended) regarding withholding requirements of owners who are not residents of South Carolina as defined in the said statute. The payment of rollback taxes, if applicable, and past personal property taxes, if applicable, shall be negotiated between the Owner and any prospective buyer.

**12. COASTAL TIDELANDS & WETLANDS ACT:** In the event the property is affected by the provisions of the South Carolina Coastal Tidelands & Wetlands Act (Section 48-39-10, et. seq., South Carolina Code of Laws), an addendum will be attached to the sales agreement incorporating the required disclosures. The payment of any necessary surveys shall be negotiated between the Owner and any prospective buyer.

**13. MULTIPLE LISTING SERVICE:** The property  shall be  shall not be entered into the Multiple Listing Services of which Broker is a member, which shall constitute an offer of cooperating brokerage to all members of the listing service. Owner agrees that Broker may compensate an agent representing the buyer from the fee described above.

**14. LOCKBOX:** Owner  agrees  does not agree for a MLS lock box to be installed on the property to facilitate showing and inspection of the property. Owner acknowledges and agrees that neither Broker, nor Broker's agents, subagents, or anyone showing the property through the MLS, shall be responsible for any damage to, or loss of personal property, or to the realty, except such damage or loss as may be caused by the negligence of such party.

OWNER,  OWNER, AND  BROKER HAVE READ THIS PAGE.

Owner further acknowledges that Broker nor MLS is an insurer against the loss of personal property and agrees to release Broker and MLS from any responsibility therefore.

15. **INTERNET MARKETING:** Owner  agrees  does not agree that the listing may be placed in electronic marketing mediums including, but not limited to, the internet, MLS Internet Data Exchange (IDX) program or other similar on-line computer services and to share listing data, including the property address, with other members of MLS for marketing and advertising purposes only. Owner further agrees to permit other real estate firms who belong to any listing service of which Broker is a member to advertise the listing on the internet in accordance with the listing service rules and regulations.

16. **OTHER OFFERS:** Owner understands that the Broker's responsibility to present offers to purchase to the Owner for Owner's consideration terminates at the closing of the subject property or expiration of this Agreement, whichever occurs first.

17. **MARKETING THE PROPERTY:** The Broker shall not continue marketing the property after an offer has been accepted, unless requested in writing by the Owner to do so.

18. **NO CONTROL OF COMMISSION RATES OR FEES:** The Broker's compensation for services rendered in respect to any listing is solely a matter of negotiation between the Broker and the Owner and is not fixed, controlled, suggested, recommended, or maintained by the board/association, the MLS, or by any persons not a party to the listing agreement. The subagency compensation paid by the Listing Broker to a Cooperating Broker or Buyer's Broker in respect to any listing is established by the Listing Broker in Broker's offer of subagency, and is not fixed, controlled, suggested, recommended or maintained by the board/association, the MLS or by any persons other than the Listing Broker.

19. **MAINTENANCE:** Owner agrees to maintain the property, including lawn, shrubbery, and grounds until the day of closing or possession, whichever occurs first. Owner also warrants that all heating, air conditioning, electrical, and plumbing systems as well as built-in or appurtenant equipment or appliances shall be in operative condition on the day of closing or possession, whichever occurs first. Unless otherwise agreed herein, Owner shall deliver the premises to the Buyer with no broken panes; no torn or missing door screens or window screens; and with no missing or broken hardware, lighting, or plumbing fixtures.

20. **AGREEMENT TO SELL:** When a Buyer is found for said property, the Owner shall enter into a written sales agreement which will contain the terms and conditions of sale, the customary provisions as to the examination of the title, the curing of any defects in title, the prorations of taxes, rents, and applicable property expenses.

21. **LEAD-BASED PAINT:** For dwellings built before 1978, and as required by applicable law, a Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards (the "Disclosure" must be signed by Owner and attached to this Agreement. Owner represents that either (1) the improvements on the property were all constructed after December 31, 1977, or (2) the Disclosure has been fully completed and is attached to this Agreement. Owner agrees to provide Broker with any such additional information or reports as may come to Owner's possession during the term of this Agreement. Owner acknowledges that Broker has informed Owner of the Owner's obligations to provide a buyer of the property with the pamphlet "Protect Your Family from Lead in Your Home," to provide information to a buyer of the property with copies of available records and reports with respect to the property and lead-based paint and lead-based paint hazards, all pursuant to 42USC4582(d), as amended.

22. **MEDIATION CLAUSE:** Any dispute or claim arising out of or relating to this Agreement, the breach of this Agreement or the services provided in relation to this Agreement, shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System of the NATIONAL ASSOCIATION OF REALTORS®. Disputes shall include representations made by Owner or Broker in connection with the services to which this Agreement pertains, including without limitation, allegations of concealment, misrepresentation, negligence and/or fraud. Any agreement signed by the parties pursuant to the mediation conference shall be binding. This mediation clause shall survive for a period of 120 days after the date of the closing.

23. **FAIR HOUSING:** Owner and Broker agree that this property is offered without regard to race, color, religion, sex, handicap, familial status, or national origin and is listed in full compliance with local, state, and federal fair housing laws.

24. **FACSIMILE:** The parties agree that this Agreement may be communicated by use of a fax, or other secure electronic means, including but not limited to the internet, and the signatures, initials and handwritten or typewritten modifications to any of the foregoing shall be deemed to be valid and binding upon the parties as if the original signatures, initials and handwritten or typewritten modifications were present on the documents in the handwriting of each party.

25. **ENFORCEMENT:** The parties agree that Broker may take action to enforce this Agreement or collect any associated costs, fees, and damages. Owner agrees to reimburse or indemnify or pay all Broker costs in enforcing this Agreement or collecting costs, fees, and damages including any incidental expenses or attorneys fees.

OWNER,  OWNER, AND  BROKER HAVE READ THIS PAGE.

26. **SEX OFFENDER/CRIMINAL INFORMATION:** Seller agrees that Broker is not responsible for obtaining or disclosing information in the SC Sex Offender Registry and no course of action may be brought against the Broker for failure to obtain or disclose sex offender or criminal information. Seller agrees that they have sole responsibility to obtain their own sex offender, death, psychological stigma, clandestine laboratory, and crime information from sources (e.g. law enforcement, P.I., web). The Seller may obtain information about the Sex Offender Registry and persons registered with the Registry by contacting the local county Sheriff or other appropriate law enforcement officials.

27. **OTHER TERMS AND CONDITIONS:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**THE UNDERSIGNED HEREBY WARRANT THAT THEY OWN THE PROPERTY AND/OR HAVE THE AUTHORITY TO EXECUTE THIS AGREEMENT. THIS IS A LEGALLY BINDING AGREEMENT. OWNER SHALL SEEK FURTHER ASSISTANCE IF THE CONTENTS ARE NOT UNDERSTOOD. OWNER ACKNOWLEDGES RECEIPT OF A COPY OF THIS AGREEMENT AND COPY OF THE SC DISCLOSURE OF REAL ESTATE BROKERAGE RELATIONSHIPS FORM. OWNER AGREES TO RECEIVE COMMUNICATIONS FROM BROKER AT THE EMAIL ADDRESS, PHONE AND FAX NUMBER LISTED BELOW.**

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties.

**Owner:** \_\_\_\_\_ **Date:** \_\_\_\_\_ **Time:** \_\_\_\_\_  
Beaufort County

**Email:** \_\_\_\_\_ **Phone:** \_\_\_\_\_ **Fax:** \_\_\_\_\_

**Witness:** \_\_\_\_\_ **Date:** \_\_\_\_\_ **Time:** \_\_\_\_\_

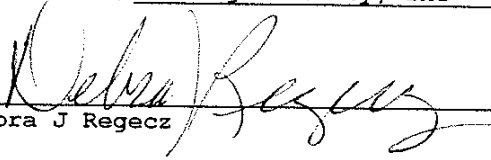
**Owner:** \_\_\_\_\_ **Date:** \_\_\_\_\_ **Time:** \_\_\_\_\_

**Email:** \_\_\_\_\_ **Phone:** \_\_\_\_\_ **Fax:** \_\_\_\_\_

**Witness:** \_\_\_\_\_ **Date:** \_\_\_\_\_ **Time:** \_\_\_\_\_

**Owner's Mailing Address:** \_\_\_\_\_

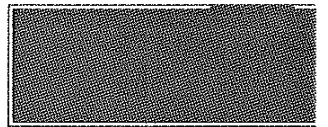
**Real Estate Firm:** Ballenger Realty, Inc **Phone:** 843-379-1400

**By:**  **Date:** 3-24-2017 **Time:** \_\_\_\_\_  
Debra J Regecz C-843-263-7010

The foregoing form is available for use by the entire real estate industry. The use of the form is not intended to identify the user as a REALTOR®. REALTOR® is the registered collective membership mark which may be used only by real estate licensees who are members of the NATIONAL ASSOCIATION OF REALTORS® and who subscribe to its Code of Ethics. Expressly prohibited is the duplication or reproduction of such form or the use of the name "South Carolina Association of REALTORS®" in connection with any written form without the prior written consent of the South Carolina Association of REALTORS®. The foregoing form may not be edited, revised, or changed without the prior written consent of the South Carolina Association of REALTORS®.

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# EXHIBIT D

1. Ballenger Realty, Inc. 17 Years in business
2. Located at 613 Carteret St. Beaufort, SC 29902 Approx. 30 agents and 1 agent Debra Regecz to be assigned to the proposed County Real Estate Broker Agent. Resume attached.
3. Firm has consistently ranked in the top 2 or 3<sup>rd</sup> position the past 5 years. Firm handles residential, land & commercial listings & sales.
4. Ballenger Realty, Inc. had been the Buyers agency for the Beaufort Housing Authority (Approx. 2008-2010)
5. References:
  - a. Beaufort County Board of Realtors, Janet Gresham 843-525-6435
  - b. Gilbert Law Firm, Derek Gilbert 843-524-4000
  - c. Eversole Law Firm, Debbie Rodgers 843-379-3333
6. BPO's Broker Price Opinions. Clear Capital, Protk, Emortgage Logic
7. None

*Resume of Qualifications*

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**Debra Regecz**  
1002 Mustelidae Rd  
Beaufort, SC 29902

debregecz@gmail.com  
Cell: (843) 263-7010

**Realtor- Ballenger Realty, Inc.**

05/05-present

Realtor, and also BPO agent for Clear Capital, Mark to Market, emortgagelogic and Protk.com

**Financial Planner Assistant - Hand & Tanner Financial Group, Inc.**

03/26/09 – 01/2017

Part-time- assisting with marketing, managing database (Redtail CRM), strategic planning, seminars, scheduling, compliance and implementing plans to increase client base and revenue.

**Account Executive- FDMS**

09/05-04/06

Responsible for signing merchants for bankcard, including gift card programs. Finding the best POS solution for the merchant, pricing them competitively and profitably.

**PROFESSIONAL EXPERIENCE, Discover Business Services**

06/89-11/04

**Salem Staffing/Discover**

Summer Service Representative Coordinator

06/04-11/04

**Regional Relationship Manager, National Accounts**

12/01-11/03

Managed a \$400m portfolio of 85 merchants in the Chicagoland/Northwest Indiana area.

Increased revenue by 3.22% by implementing rate increases, transaction fees and the placement of custom signage with Ultra Diamonds, Century Tile, ABT and Rural King.

Worked with operations and legal to resolve merchant issues and prevent bankruptcy losses.

Marketing programs with JC Whitney, Bally Fitness, Ultra Diamonds, ABT and Fannie May.

**Territory Manager**

04/00 – 11/01

Managed the performance of five Sales/Service Executives (SSE) in the Chicagoland area.

Developed strategies for the SSE's to increase Bankcard sales, sign Mid-Tier accounts, Target accounts, Merchant activation and maximize revenue. Worked closely with marketing to promote Discover Card Awareness and test new marketing programs. Communicated with team on a weekly basis via phone and personally riding with the members on my team.

**Account Executive/Service Representative**

06/89 – 03/00

Worked as Service Representative 06/89 to 01/91, Assistant Account Rep 1/91 to 6/91, Account Rep 7/91 to 8/93, Senior Account Rep 9/93 to 6/95 and Account Executive from 7/95 to 3/00.

Successfully managed territories in the Chicagoland area, consistently exceeding all goals.

Merchant acquisition and bankcard sales to new and existing merchants. Signings included Allied Van Lines, Ameriking (Burger King Franchise of 100 outlets), Dollar Bills and Ty Beanie Babies. Increased charge volume and profitability of portfolio, mentored new employees and College Interns. Presented and trained bankcard (POS) training for large groups (Ameriking & Skelgas).

**EDUCATION**

Elgin Community College, Elgin, Illinois

BCD 1139521

State of South Carolina  
Department of Labor, Licensing and Regulations  
**Real Estate Commission**

OFFICE CODE: LICENSE NO:  
REG.13296 OFC 51688

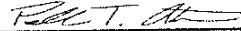
THIS PERSON LISTED BELOW HAS BEEN DULY LICENSED BY THE  
SOUTH CAROLINA REAL ESTATE COMMISSION

AS A SALESMAN

**DEBRA J REGE CZ**

BALLENGER REALTY  
613 A CARTERET STREET  
BEAUFORT SC 29902

Expires 06/30/2018  
POCKET CARD

  
\_\_\_\_\_  
Administrator

**DO NOT PEEL CARD FROM A CORNER**

To remove card from backing

- Bend form back from the outside edge
- Pull card off backing

19

\*  
MERGEFORMA

727

766

Request for Taxpayer  
Identification Number and Certification

Give Form to the  
requester. Do not  
send to the IRS.

Name (as shown on your income tax return) **Ballenger Realty, Inc.**

Business name/disregarded entity name, if different from above

Check appropriate box for federal tax classification:  
 Individual/sole proprietor     C Corporation     S Corporation     Partnership     Trust/estate  
 Limited liability company. Enter the tax classification (C=C corporation, S=S corporation, P=partnership) ▶ \_\_\_\_\_  
 Other (see instructions) ▶ \_\_\_\_\_

Address (number, street, and apt. or suite no.)  
**613 A. Carteret St.**

City, state, and ZIP code  
**Beaufort, SC 29902**

List account number(s) here (optional)

Requester's name and address (optional)

Print or type  
See Specific Instructions on page 2.

**Part I** Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on the "Name" line to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

Note: If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

Social security number

--	--	--	--	--	--	--	--	--	--

Employer identification number

[Redacted]

**Part II** Certification

Under penalties of perjury, I certify that:

- The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
- I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and
- I am a U.S. citizen or other U.S. person (defined below).

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the certification, but you must provide your correct TIN. See the instructions on page 4.

Sign Here    Signature of U.S. person ▶ *[Signature]*    Date ▶ **1-22-2017**

**General Instructions**

Section references are to the Internal Revenue Code unless otherwise noted.

**Purpose of Form**

A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

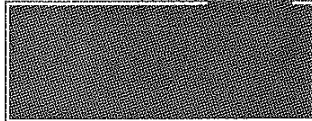
- Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
- Certify that you are not subject to backup withholding, or
- Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

Note: If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

**Definition of a U.S. person.** For federal tax purposes, you are considered a U.S. person if you are:

- An individual who is a U.S. citizen or U.S. resident alien.
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States.
- An estate (other than a foreign estate), or
- A domestic trust (as defined in Regulations section 301.7701-7)

**Special rules for partnerships.** Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.



# EXHIBIT E

Apply this question below and the three answer choices to the numbered issues (1-14) on this disclosure.

As owner, do you have any actual knowledge of any problem(s)\* concerning?

\*Problem includes present defects, malfunctions, damages, conditions, or characteristics.

**I. WATER SUPPLY AND SANITARY SEWAGE DISPOSAL SYSTEM**

	Yes	No	No Representation
1. Water supply .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Water quality .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Water pressure .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Sanitary sewage disposal system for any waste water .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

A. Describe water supply  County  City  Private  Corporate  Community  Well  Other \_\_\_\_\_

B. Describe water disposal  Septic  Sewer  Private  Corporate  Government  Other \_\_\_\_\_

C. Describe water pipes  PEX  Copper  PVC/CPVC  Polybutylene  Steel  Other/Unknown \_\_\_\_\_

**II. ROOF, CHIMNEYS, FLOORS, FOUNDATION, BASEMENT, AND OTHER STRUCTURAL COMPONENTS AND MODIFICATIONS OF THESE STRUCTURAL COMPONENTS**

	Yes	No	No Representation
5. Roof system .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. Gutter system .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Foundation, slab, fireplaces, chimneys, wood stoves, floors, basement, windows, driveway, storm windows/screens, doors, ceilings, interior walls, exterior walls, sheds, attached garage, carport, patio, deck, walkways, fencing, or other structural components including modifications .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

A. Approximate year that current roof covering was installed or modified: \_\_\_\_\_ . Approximate year structure was built: \_\_\_\_\_

B. During your ownership, describe any known roof system leaks and repairs: \_\_\_\_\_

**III. PLUMBING, ELECTRICAL, HEATING, COOLING, AND OTHER MECHANICAL SYSTEMS**

	Yes	No	No Representation
8. Plumbing system (pipes, fixtures, water heater, disposal, softener, plumbing components) .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. Electrical system (wiring, panel, fixtures, A/V wiring, outlets, switches, electrical components) .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10. Appliances (range, stove, ovens, dishwasher, refrigerator, washer, dryer, other appliances) .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11. Built-in systems and fixtures (fans, irrigation, pool, security, lighting, A/V, other) .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12. Mechanical systems (pumps, garage door opener, filtration, energy equipment, safety, other) .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13. Heating system(s) (HVAC components) .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
14. Cooling system(s) (HVAC components) .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Owner: ( \_\_\_\_\_ ) ( \_\_\_\_\_ ) Purchaser: ( \_\_\_\_\_ ) ( \_\_\_\_\_ ) acknowledge receipt of a copy of this page which is page 2 of 5.

- A. Describe Cooling System     Central     Ductless     Heat Pump     Window     Other \_\_\_\_\_
- B. Describe Heating System     Central     Ductless     Heat Pump     Furnace     Other \_\_\_\_\_
- C. Describe HVAC Power     Oil     Gas     Electric     Solar     Other \_\_\_\_\_
- D. Describe HVAC system approximate age and any other HVAC system(s): \_\_\_\_\_

**IV. PRESENT OR PAST INFESTATION OF WOOD DESTROYING INSECTS OR ORGANISMS OR DRY ROT OR FUNGUS, THE DAMAGE FROM WHICH HAS NOT BEEN REPAIRED**

- A. Describe any known present wood problems caused by termites, insects, wood destroying organisms, dry rot or fungus: \_\_\_\_\_
- B. Describe any termite/pest treatment, coverage to property, name of provider, and termite bond (if any): \_\_\_\_\_
- C. Describe any known present pest infestations: \_\_\_\_\_

**V. THE ZONING LAWS, RESTRICTIVE COVENANTS, BUILDING CODES, AND OTHER LAND USE RESTRICTIONS AFFECTING THE REAL PROPERTY, ANY ENCROACHMENTS OF THE REAL PROPERTY FROM OR TO ADJACENT REAL PROPERTY, AND NOTICE FROM A GOVERNMENTAL AGENCY AFFECTING THIS REAL PROPERTY**

Apply this question below and the three answer choices to the numbered issues (15-23) on this disclosure.  
 As owner, do you have any actual knowledge or notice concerning the following:

	Yes	No	No Representation
15. Violations or variances of the following: zoning laws, restrictive covenants, building codes, permits or other land use restrictions affecting the real property _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
16. Easements (access, conservation, utility, other), party walls, shared private driveway, private roads, released mineral rights, or encroachments from or to adjacent real property _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
17. Legal actions, claims, foreclosures, bankruptcies, tenancies, judgments, tax liens, other liens, insurance issues, or governmental actions that could affect title to the property _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
18. Room additions or structural changes to the property during your ownership _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
19. Problems caused by fire, smoke, or water to the property during your ownership _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
20. Drainage, soil stability, atmosphere, or underground problems affecting the property _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
21. Erosion or erosion control affecting the property _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
22. Flood hazards, wetlands, or flood hazard designations affecting the property _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
23. Flood insurance covering the property _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

- A. Describe any green energy, recycling, sustainability or disability features for the property: \_\_\_\_\_
- B. Describe any Department of Motor Vehicles titled manufactured housing on the property: \_\_\_\_\_

Owner: ( \_\_\_\_\_ ) ( \_\_\_\_\_ ) Purchaser: ( \_\_\_\_\_ ) ( \_\_\_\_\_ ) acknowledge receipt of a copy of this page which is page 3 of 5.

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**VI. BURIED, UNBURIED, OR COVERED PRESENCE OF THE FOLLOWING: LEAD BASED PAINT, LEAD HAZARDS, ASBESTOS, RADON GAS, METHANE GAS, STORAGE TANKS, HAZARDOUS MATERIALS, TOXIC MATERIALS, OR ENVIRONMENTAL CONTAMINATION**

A. Describe any known property environmental contamination problems from construction, repair, cleaning, furnishing, intrusion, operating, toxic mold, methamphetamine production, lead based paint, lead hazards, asbestos, radon gas, methane gas, formaldehyde, corrosion-causing sheetrock, storage tanks, hazardous materials, toxic materials, environmental contamination, or other: \_\_\_\_\_

\_\_\_\_\_

---

**VII. EXISTENCE OF A RENTAL, RENTAL MANAGEMENT, VACATION RENTAL, OR OTHER LEASE CONTRACT ANTICIPATED TO BE IN PLACE ON THE PROPERTY AT THE TIME OF CLOSING**

A. Describe the lease terms and any leasing problems, if any: \_\_\_\_\_

\_\_\_\_\_

B. State the name and contact information for any property management company involved (if any): \_\_\_\_\_

\_\_\_\_\_

C. Describe known outstanding charges owed by tenant for gas, electric, water, sewer, and garbage: \_\_\_\_\_

\_\_\_\_\_

---

**VIII. THE EXISTENCE OF A METER CONSERVATION CHARGE, AS PERMITTED BY SECTION 58-37-50 THAT APPLIES TO ELECTRICITY OR NATURAL GAS SERVICE TO THE PROPERTY**

A. Describe any utility company financed or leased property on the real property: \_\_\_\_\_

B. Describe known delinquent charges for real property's gas, electric, water, sewer, and garbage: \_\_\_\_\_

---

**IX. PLEASE USE THE SPACE BELOW FOR "YES" ANSWER EXPLANATIONS AND ATTACH ANY ADDITIONAL SHEETS OR RELEVANT DOCUMENTS AS NEEDED**

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Owner: ( \_\_\_\_\_ ) ( \_\_\_\_\_ ) Purchaser: ( \_\_\_\_\_ ) ( \_\_\_\_\_ ) acknowledge receipt of a copy of this page which is page 4 of 5.

This disclosure does not limit the obligation of the purchaser to inspect the property and improvements which are the subject of the real estate contract. Purchaser is solely responsible for conducting their own off site conditions and psychologically affected property inspections prior to entering into a real estate contract. The real estate licensees (acting as listing or selling agents, or other) have no duty to inspect the on site or off site conditions of the property and improvements. Purchasers should review all applicable documents (covenants, conditions, restrictions, bylaws, deeds, and similar documents) prior to entering into any legal agreements including any contract. The South Carolina Code of Laws describes the Residential Property Condition Disclosure Statement requirements and exemptions at § 27-50-10 (and following) which can be read online ([www.scstatehouse.gov](http://www.scstatehouse.gov) or other websites).

**Current status of property or factors which may affect the closing:**

- |   |                                      |                                     |  |
|---|--------------------------------------|-------------------------------------|--|
| <input type="checkbox"/> Owner occupied | <input type="checkbox"/> Short sale  | <input type="checkbox"/> Bankruptcy | <input type="checkbox"/> Vacant (How long vacant?) _____ |
| <input type="checkbox"/> Leased         | <input type="checkbox"/> Foreclosure | <input type="checkbox"/> Estate     | <input type="checkbox"/> Other: _____                    |

A Residential Property Condition Disclosure Statement Addendum  is  is not completed and attached. This addendum should be attached if the property is subject to covenants, conditions, restrictions, bylaws, rules, or is a condominium.

**Owner acknowledges having read, completed, and received a copy of this Residential Property Condition Disclosure Statement before signing and that all information is true and correct as of the date signed.**

Owner Signature: \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_

Owner Printed Name: Beaufort County

Owner Signature: \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_

Owner Printed Name: \_\_\_\_\_

**Purchaser acknowledges prior to signing this disclosure:**

- Receipt of a copy of this disclosure
- Purchaser has examined disclosure
- Purchaser had time and opportunity for legal counsel
- This disclosure is not a warranty by the real estate licensees
- This disclosure is not a substitute for obtaining inspections of on site and off site conditions
- This disclosure is not a warranty by the owner
- Representations are made by the owner and not by the owner's agents or subagents
- Purchasers have sole responsibility for obtaining inspection reports from licensed home inspectors, surveyors, engineers, or other qualified professionals

Purchaser Signature: \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_

Purchaser Printed Name: \_\_\_\_\_

Purchaser Signature: \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_

Purchaser Printed Name: \_\_\_\_\_

6-4-2

Overview



Street Address  
1 of 1

Records

Overview

Bird's Eye View

Parcel

Land

Improvements

Sales Disclosure

Pay Taxes

Value History

GIS / Mapping

Search by

Property ID (PIN)

Street Address

Alternate ID (AIN)

Legal Description

Sales

Owner Name

Functions

County Home →

Welcome

Real Property

Personal Property

Vehicle Tax

Shopping Cart

Help

Feedback

County Login

Property ID (PIN) R100 028 00A 0252 0000  
 Alternate ID (AIN) 00160328  
 Parcel Address 429 BROAD RIVER BLVD,  
 Data refreshed as of 2/4/2017

Current Parcel Information  
 Owner BEAUFORT COUNTY  
 Property Class Code ResImp SingleFamily  
 Owner Address PO BOX 1228  
 Acreage .0000  
 BEAUFORT SC 29901-1228  
 Legal Description LOT 12 COL TERRACE #BKM611

347

Historic Information						
Tax Year	Land	Building	Market	Taxes	Payment	
2016	\$18,900	\$114,900	\$133,800	\$87.00	\$0.00	
2015	\$18,900	\$114,900	\$133,800	\$87.00	\$89.61	
2014	\$18,900	\$114,900	\$133,800	\$50.00	\$50.00	
2013	\$18,900	\$114,900	\$133,800	\$50.00	\$50.00	
2012	\$29,000	\$117,862	\$146,862	\$50.00	\$50.00	
2011	\$29,000	\$117,352	\$146,352	\$50.00	\$50.00	
2010	\$29,000	\$117,862	\$146,862	\$50.00	\$50.00	
2009	\$29,000	\$117,862	\$146,862	\$50.00	\$50.00	
2008	\$15,000	\$90,800	\$105,800	\$50.00	\$50.00	
2007	\$15,000	\$90,800	\$105,800	\$44.43	\$44.43	

Sales Disclosure						
Grantor	Book & Page	Date	Deed	Vacant	Sale Price	
RABER WILLIAM E ROSA A	681 1365	1/28/1994	Fu		\$54,700	
RABER WILLIAM E ROSA A	323 1307	5/1/1981	Fu		\$9,595	
HONEA JERRY W	323 1307	5/1/1981	Fu		\$41,500	
HONEA JERRY W	265 1391	6/1/1978	Fu		\$32,550	
		12/31/1776	Or		\$0	

1,375

Improvements							
Building	Type	Use Code Description	Constructed Year	Stories	Rooms	Square Footage	Improvement Size
R01	DWELL	Dwelling	1978	1.0	03	1,315	
R01	UTILROOM	Residential Utility/Stg Room	1978	0	0		60

Features & Exterior Features						
Building	Type	Feature Code	Description	No. / Sq.Ft.	Value	
R01	DWELL	COOLING	Central air	1	\$2,880	
R01	DWELL	EXT. COVER	Brick veneer	1	\$0	
R01	DWELL	FOUNDATION	Full Slab	1	\$0	
R01	DWELL	HEATING	Heat pump	1	\$3,950	

Beaufort County makes every effort to produce the most accurate information possible. No warranties, expressed or implied are provided for the data herein, its use or interpretation. All data is subject to change.



<b>3</b>	<b>1,315</b>	<b>15,118</b>	<b>\$54,700</b>
<b>Beds</b>	<b>Bldg Sq Ft</b>	<b>Lot Sq Ft</b>	<b>Sale Price</b>
<b>1</b>	<b>1978</b>	<b>SFR</b>	<b>01/28/1994</b>
<b>Baths</b>	<b>Yr Built</b>	<b>Type</b>	<b>Sale Date</b>

**Owner Information**

Owner Name:	<b>Beaufort County</b>	Tax Billing Zip:	<b>29901</b>
Tax Billing Address:	<b>Po Box 1228</b>	Tax Billing Zip+4:	<b>1228</b>
Tax Billing City & State:	<b>Beaufort, SC</b>		

**Location Information**

Subdivision:	<b>Colonial Heights &amp; Terrace Area</b>	Carrier Route:	<b>R011</b>
Neighborhood Code:	<b>86-86</b>	PCA - Property Class Assessment:	<b>6111</b>
Census Tract:	<b>5.02</b>		

**Tax Information**

Tax ID:	<b>R100-028-00A-0252-0000</b>	% Improved:	<b>86%</b>
Tax Key #:	<b>00160328</b>	Lot:	<b>12</b>
Legal Description:	<b>LOT 12 COL TERRACE #BKM611</b>		

**Assessment & Tax**

Assessment Year	2016	2015	2014
Assessed Value - Land			\$18,900
Assessed Value - Improved			\$114,900
Assessed Value - Total	\$8,030	\$8,030	\$133,800
YOY Assessed Change (\$)	\$0	-\$125,770	
YOY Assessed Change (%)	0%	-94%	

Tax Year	Total Tax	Change (\$)	Change (%)
2014	\$50		
2015	\$87	\$37	74%
2016	\$87	\$0	0%

**Characteristics**

Land Use - CoreLogic:	<b>SFR</b>	Bedrooms:	<b>3</b>
Lot Acres:	<b>0.3471</b>	Total Baths:	<b>1</b>
Lot Area:	<b>15,118</b>	Full Baths:	<b>1</b>
Building Sq Ft:	<b>1,315</b>	Heat Type:	<b>Heat Pump</b>
Ground Floor Area:	<b>1,315</b>	Year Built:	<b>1978</b>
Total Sq Ft:	<b>1,375</b>	Effective Year Built:	<b>1978</b>
Stories:	<b>1</b>	# of Buildings:	<b>1</b>
Total Rooms:	<b>5</b>	Floor Cover:	<b>Carpet/Vinyl</b>

**Features**

Building Description	Building Size
Base	1,315
Utility	60

**Estimated Value**

Courtesy of Debra Regecz, Beaufort County Association of REALTORS

The data within this report is compiled by CoreLogic from public and private sources. If desired, the accuracy of the data contained herein can be independently verified by the recipient of this report with the applicable county or municipality

**Property Detail**

Generated on: 02/09/2017

Page 1 of 2

RealAVM™ (1): **\$133,515**  
 RealAVM™ Range: **\$101,471 - \$165,559**  
 Value As Of: **01/27/2017**

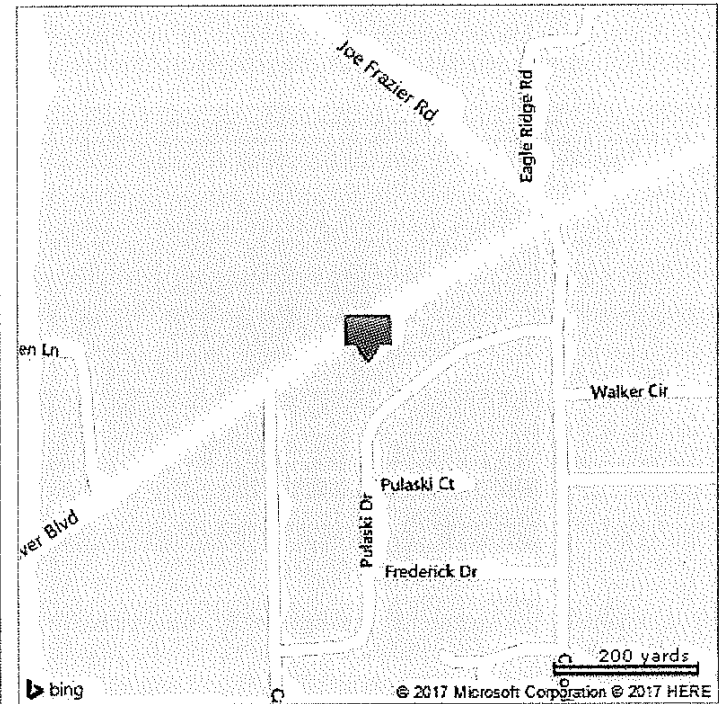
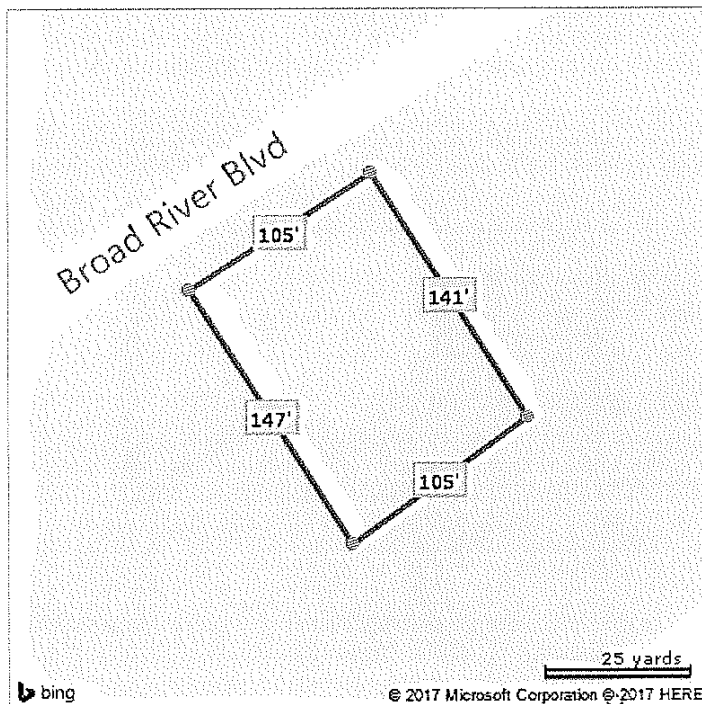
Confidence Score (2): **65**  
 Forecast Standard Deviation (3): **24**

- (1) RealAVM™ is a CoreLogic® derived value and should not be used in lieu of an appraisal.
- (2) The Confidence Score is a measure of the extent to which sales data, property information, and comparable sales support the property valuation analysis process. The confidence score range is 60 - 100. Clear and consistent quality and quantity of data drive higher confidence scores while lower confidence scores indicate diversity in data, lower quality and quantity of data, and/or limited similarity of the subject property to comparable sales.
- (3) The FSD denotes confidence in an AVM estimate and uses a consistent scale and meaning to generate a standardized confidence metric. The FSD is a statistic that measures the likely range or dispersion an AVM estimate will fall within, based on the consistency of the information available to the AVM at the time of estimation. The FSD can be used to create confidence that the true value has a statistical degree of certainty.

### Last Market Sale & Sales History

Settle Date:	<b>01/28/1994</b>	Deed Type:	<b>Warranty Deed</b>
Sale Price:	<b>\$54,700</b>	Owner Name:	<b>Beaufort County</b>
Document Number:	<b>681-1365</b>		
<b>Sale/Settlement Date</b>	01/28/1994	05/01/1981	06/01/1978
<b>Sale Price</b>	\$54,700	\$41,500	\$32,550
<b>Buyer Name</b>	Beaufort County	Raber William	Honea Jerry W
<b>Document Number</b>	681-1365	323-1307	265-1391
<b>Document Type</b>	Warranty Deed	Warranty Deed	Warranty Deed

### Property Map



\*Lot Dimensions are Estimated

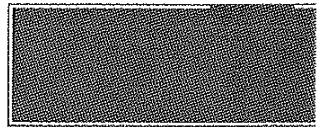
Courtesy of Debra Regecz, Beaufort County Association of REALTORS

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### Property Detail

Generated on: 02/09/2017

Page 2 of 2



# EXHIBIT F



STATE OF SOUTH CAROLINA  
RESIDENTIAL PROPERTY CONDITION  
DISCLOSURE STATEMENT



The South Carolina Code of Laws (Title 27, Chapter 50, Article I) requires that an owner of residential real property (single family dwelling unit or a single transaction involving transfer of four dwelling units or less) shall provide to a purchaser this completed and signed disclosure statement prior to forming a real estate contract. This disclosure must be provided in connection with any sale, exchange, installment land sale, and lease with an option to purchase contract. This disclosure statement is not required in connection with transactions listed and exempted by South Carolina Code Section § 27-50-30.

Owners should answer the questions fully, honestly, and appropriately by attaching documents, checking a box for each check box question, and writing in the blanks on this disclosure statement.

If a question is answered "yes" or asks for a description, then owner must explain or describe the issue or attach a descriptive report from an engineer, contractor, pest control operator, expert, or public agency. If owner attaches a report, owner shall not be liable for inaccurate or incomplete information in the report unless owner was grossly negligent in obtaining or transmitting the information. If owner fails to check "yes" or make a disclosure and owner knows there is a problem, owner may be liable for making an intentional or negligent misrepresentation and may owe the purchaser actual damages, court costs, and attorney fees. If a question is answered "no" for any question, the owner is stating that owner has no actual knowledge of any problem.

If a question is answered "no representation" for any question, owner is stating that owner is making no representation regarding the conditions or characteristics of the property, but owner still may have a duty to disclose information that is known or should have been known.

If a question is answered and subsequently new information is obtained or something changes to render the owner's answer incorrect, inaccurate, or misleading (example: roof begins to leak), owner must promptly correct the disclosure. In some situations, the owner may notify the purchaser of the correction. In some situations, the owner may correct or repair the issue.

If owner is assisted in the sale of property by a real estate licensee, owner remains solely responsible for completing and delivering this disclosure statement to the purchaser. The real estate licensee must disclose material facts about the property if the real estate licensee knows or reasonably should have known about the issue, regardless of owner responses on this disclosure. Owner is solely responsible to complete this disclosure as truthfully and fully as possible. Owner and purchasers are solely responsible to consult with their attorneys regarding any disclosure issues. By signing below, owners acknowledge their duties and that failure to disclose known material information about the property may result in owner liability.

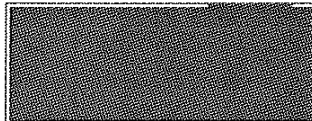
Owner must provide the completed disclosure statement to the purchaser prior to the time the owner and purchaser sign a real estate contract unless the real estate contract states otherwise. Owner should provide a signed copy to the purchaser and keep a copy signed by the purchaser.

A real estate contract, not this disclosure, controls what property transfers from owner to purchaser.

Property Address (including unit # or identifier) 429 Broad River Blvd, Beaufort, 29906-9447

Owner: ( \_\_\_\_\_ ) ( \_\_\_\_\_ ) Purchaser: ( \_\_\_\_\_ ) ( \_\_\_\_\_ ) acknowledge receipt of a copy of this page which is page 1 of 5.

REV: 7/2013



# EXHIBIT G

# SOUTH CAROLINA DISCLOSURE OF REAL ESTATE BROKERAGE RELATIONSHIPS



South Carolina Real Estate Commission  
PO BOX 11847, Columbia, S.C. 29211-1847  
Telephone: (803) 896-4400 Fax: (803) 896-4427  
<http://llr.sc.gov/POL/REC/>

Pursuant to South Carolina Real Estate License Law in S.C. Code of Laws Section 40-57-370, a real estate licensee is required to provide you a meaningful explanation of agency relationships offered by the licensee's brokerage firm. This must be done at the first practical opportunity when you and the licensee have substantive contact.

Before you begin to work with a real estate licensee, it is important for you to know the difference between a broker-in-charge and associated licensees. The broker-in-charge is the person in charge of a real estate brokerage firm. Associated licensees may work only through a broker-in-charge. **In other words, when you choose to work with any real estate licensee, your business relationship is legally with the brokerage firm and not with the associated licensee.**

A real estate brokerage firm and its associated licensees can provide buyers and sellers valuable real estate services, whether in the form of basic **customer** services, or through **client**-level agency representation. The services you can expect will depend upon the legal relationship you establish with the brokerage firm. It is important for you to discuss the following information with the real estate licensee and agree on whether in your business relationship you will be a **customer** or a **client**.

## **You Are a Customer of the Brokerage Firm**

South Carolina license law defines customers as buyers or sellers who choose NOT to establish an agency relationship. The law requires real estate licensees to perform the following **basic duties** when dealing with **any** real estate buyer or seller as customers: **present all offers in a timely manner, account for money or other property received on your behalf, provide an explanation of the scope of services to be provided, be fair and honest and provide accurate information, provide limited confidentiality, and disclose "material adverse facts" about the property or the transaction which are within the licensee's knowledge.**

***Unless or until you enter into a written agreement with the brokerage firm for agency representation, you are considered a "customer" of the brokerage firm, and the brokerage firm will not act as your agent. As a customer, you should not expect the brokerage firm or its licensees to promote your best interest.***

Customer service does not require a written agreement; therefore, you are not committed to the brokerage firm in any way unless a transaction broker agreement or compensation agreement obligates you otherwise.

## **Transaction Brokerage**

A real estate brokerage firm may offer transaction brokerage in accordance with S.C. Code of Laws Section 40-57-350. Transaction broker means a real estate brokerage firm that provides customer service to a buyer, a seller, or both in a real estate transaction. A transaction broker may be a single agent of a party in a transaction giving the other party customer service. A transaction broker also may facilitate a transaction without representing either party. The duties of a brokerage firm offering transaction brokerage relationship to a customer can be found in S.C. Code of Laws Section 40-57-350(L)(2).

## **You Can Become a Client of the Brokerage Firm**

Clients receive more services than customers. If client status is offered by the real estate brokerage firm, you can become a client by entering into a written agency agreement requiring the brokerage firm and its associated licensees to act as an agent on your behalf and promote your best interests. If you choose to become a client, you will be asked to confirm in your written representation agreement that you received this agency relationships disclosure document in a timely manner.

**A seller becomes a client** of a real estate brokerage firm by signing a formal listing agreement with the brokerage firm. For a seller to become a client, this agreement must be in writing and must clearly establish the terms of the agreement and the obligations of both the seller and the brokerage firm which becomes the agent for the seller.

**A buyer becomes a client** of a real estate brokerage firm by signing a formal buyer agency agreement with the brokerage firm. For a buyer to become a client, this agreement must be in writing and must clearly establish the terms of the agreement and the obligations of both the buyer and the brokerage firm which becomes the agent for the buyer.

(Rev 1/17) Page 1 of 2

# SOUTH CAROLINA DISCLOSURE OF REAL ESTATE BROKERAGE RELATIONSHIPS



South Carolina Real Estate Commission  
PO BOX 11847, Columbia, S.C. 29211-1847  
Telephone: (803) 896-4400 Fax: (803) 896-4427  
<http://llr.sc.gov/POL/REC/>

If you enter into a written agency agreement, as a client, the real estate brokerage has the following **client-level duties: obedience, loyalty, disclosure, confidentiality, accounting, and reasonable skill and care.** Client-level services also include advice, counsel and assistance in negotiations.

## Single Agency

When the brokerage firm represents only one client in the same transaction (the seller or the buyer), it is called single agency.

## Dual Agency

Dual agency exists when the real estate brokerage firm has two clients in one transaction -- a seller client and a buyer client. At the time you sign an agency agreement, you may be asked to acknowledge whether you would consider giving written consent allowing the brokerage firm to represent both you and the other client in a disclosed dual agency relationship.

## Disclosed Dual Agency

In a disclosed dual agency, the brokerage firm's representation duties are limited because the buyer and seller have recognized conflicts of interest. Both clients' interests are represented by the brokerage firm. As a disclosed dual agent, the brokerage firm and its associated licensees cannot advocate on behalf of one client over the other, and cannot disclose confidential client information concerning the price negotiations, terms, or factors motivating the buyer/client to buy or the seller/client to sell. Each Dual Agency Agreement contains the names of both the seller client(s) and the buyer client(s) and identifies the property.

## Designated Agency

In designated agency, a broker-in-charge may designate individual associated licensees to act solely on behalf of each client. Designated agents are not limited by the brokerage firm's agency relationship with the other client, but instead have a duty to promote the best interest of their clients, including negotiating a price. The broker-in-charge remains a disclosed dual agent for both clients, and ensures the assigned agents fulfill their duties to their respective clients. At the time you sign an agency agreement, you may be asked to acknowledge whether you would consider giving written consent allowing the brokerage firm to designate a representative for you and one for the other client in a designated agency. Each Designated Agency Agreement contains the names of both the seller client(s) and the buyer client(s) and identifies the property.

## It's Your Choice

As a real estate consumer in South Carolina, it is your choice as to the type and nature of services you receive.

- You can choose to remain a customer and represent yourself, with or without a transaction broker agreement.
- You can choose to hire the brokerage firm for representation through a written agency agreement.
- If represented by the brokerage firm, you can decide whether to go forward under the shared services of dual agency or designated agency or to remain in single agency.

If you plan to become a client of a brokerage firm, the licensee will explain the agreement to you fully and answer questions you may have about the agreement. Remember, however that until you enter into a representation agreement with the brokerage firm, you are considered a customer and the brokerage firm cannot be your advocate, cannot advise you on price or terms, and only provides limited confidentiality unless a transaction broker agreement obligates the brokerage firm otherwise.

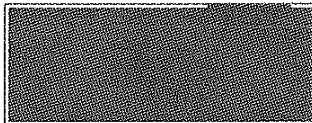
The choice of services belongs to you – the South Carolina real estate consumer.

### Acknowledgement of Receipt by Consumer:

Signature \_\_\_\_\_ Date \_\_\_\_\_

Signature \_\_\_\_\_ Date \_\_\_\_\_

**THIS DOCUMENT IS NOT A CONTRACT.**  
This brochure has been approved by South Carolina Real Estate Commission for use in explaining representation issues in real estate transactions and consumer rights as a buyer or seller. Reprinting without permission is permitted provided no changes or modifications are made.



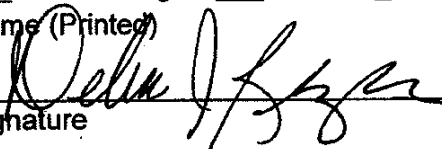
# EXHIBIT H



## Statement of Independent Contractor

I, Debra J Regecz, Self employed and SC, Licensed under Ballenger Realty, Inc. hereby make the following voluntary statement about my relationship with Beaufort County:

1. I employ three or fewer people, and I understand that I am not required by state law to carry Workers' Compensation insurance.
2. I have agreed to perform certain contract work for Beaufort County. That work is \_\_\_\_\_ Real Estate Broker Services \_\_\_\_\_. When I complete the work, I will then expect to be paid \_\_\_\_\_ Per contract. Neither I, nor my employees, will be paid by Beaufort County on an hourly or salary basis.
3. To the extent that I need equipment or supplies to perform the work that I have contracted to do, I have my own equipment and supplies that I will use to perform the work. I will not use any equipment or supplies owned by Beaufort County.
4. I will start and stop work and perform the work according to my own methods, means, plans and desires. I will not be supervised or instructed on how or when to perform the work. As long as I complete the work in a workman-like manner and to the satisfaction of Beaufort County by the agreed time, I can and will do the work when I desire and in the manner that I desire. I also understand that if I do not perform to the level of expectation or in a timely manner, that failure will be a breach of contract. I cannot be "fired" because I am not an employee.
5. I do not expect Beaufort County to withhold any amount that is due to me to pay for state or federal income taxes, social security contributions or employment security or Workers' Compensation premiums. I expect to receive a 1099 from Beaufort County at the end of the year showing the amount I receive this year for my contract work.
6. When I complete the work that I have agreed to do and receive the payment to which I am entitled, according to the contract my working relationship with Beaufort County will be terminated on this contract.
7. My employees and I are not entitled to Workers' Compensation benefits under Beaufort County Workers' Compensation coverage.

Debra J Regecz                      1002 Mustelidae Rd. Beaufort, 29902  
Name (Printed)                      Address  
                      3-8-17                      843-263-7010  
Signature                      Date                      Phone #

Return to Beaufort County Council, Risk Management, PO Drawer 1228, Beaufort SC 29901  
You may to Fax No. 843.255.9440; or email [kjackson@bcgov.net](mailto:kjackson@bcgov.net)



# CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)  
3/8/2017

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

<b>PRODUCER</b> Lowcountry Insurance Services LLC PO Box 789 80 Lady's Island Dr Beaufort SC 29901-0789		<b>CONTACT NAME:</b> Rhonda Conner <b>PHONE (A/C No. Ex):</b> (843) 522-2020 <b>FAX (A/C. No):</b> (843) 525-6660 <b>E-MAIL ADDRESS:</b>	
<b>INSURED</b> Ballenger Realty, Inc. 613 A Carteret Street Beaufort SC 29902		<b>INSURER(S) AFFORDING COVERAGE</b> <b>NAIC #</b> INSURER A: Western World Insurance Compan INSURER B : INSURER C : INSURER D : INSURER E : INSURER F :	

**COVERAGES      CERTIFICATE NUMBER      MASTER CERTIFICATE      REVISION NUMBER:**

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
	<b>COMMERCIAL GENERAL LIABILITY</b> <input type="checkbox"/> CLAIMS-MADE <input type="checkbox"/> OCCUR  GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC OTHER:						EACH OCCURRENCE \$ DAMAGE TO RENTED PREMISES (Ea occurrence) \$ MED EXP (Any one person) \$ PERSONAL & ADV INJURY \$ GENERAL AGGREGATE \$ PRODUCTS - COMP/OP AGG \$ \$
	<b>AUTOMOBILE LIABILITY</b> <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON-OWNED AUTOS						COMBINED SINGLE LIMIT (Ea accident) \$ BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ \$
	<input type="checkbox"/> UMBRELLA LIAB <input type="checkbox"/> OCCUR <input type="checkbox"/> EXCESS LIAB <input type="checkbox"/> CLAIMS-MADE DED    RETENTION \$						EACH OCCURRENCE \$ AGGREGATE \$ \$
	<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b> ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	Y/N	N/A				<input type="checkbox"/> PER STATUTE <input type="checkbox"/> OTH-ER E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYEE \$ E.L. DISEASE - POLICY LIMIT \$
A	<b>ERRORS &amp; OMISSIONS</b> DEDUCTIBLE \$5,000 PER CLAIM			BRL0010744 BRL0013464	1/15/2016 1/15/2017	1/15/2017 1/15/2018	EACH CLAIM \$1,000,000 AGGREGATE \$1,000,000

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)  
RETROACTIVE DATE: 11/28/2007

<b>CERTIFICATE HOLDER</b> deb@redhatteam.com  Beaufort County Attention: Purchasing Director and Risk M P.O. Drawer 1228 Beaufort, SC 29901-1228	<b>CANCELLATION</b>  SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.  AUTHORIZED REPRESENTATIVE Rhonda Conner/CONNRH
--	--

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ACORD 25 (2014/01)  
INS025 (2014/01)

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STOCK COMPANY

**COMMERCIAL LINES POLICY**



**POLICY NUMBER: BRL0013464**

**Prior Policy Number: BRL0010744**

WESTERN WORLD INSURANCE COMPANY     TUDOR INSURANCE COMPANY     STRATFORD INSURANCE COMPANY

**COMMON POLICY DECLARATIONS**

**Agent/Broker #00445**

**Named Insured and Mailing Address:**

Ballenger Realty, Inc.

DBA Ballenger Realty  
613 Carteret Street

BEAUFORT, SC 29902

This company has been approved by the director or his designee of the South Carolina Department of Insurance to write business in this state as an eligible surplus line insurer, but is not afforded guaranty fund protection

**Producer:**

Johnson & Johnson, Inc.  
200 Wingo Way  
P.O.#: 241228  
Mt. Pleasant, SC 29464

*Francis G. Johnson*

**Policy Period: (Mo./Day/Yr.)**

From: 01/15/2017

To: 01/15/2018

12:01 AM, standard time at your mailing address shown above.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

<b>THIS POLICY CONSISTS OF THE FOLLOWING COVERAGES FOR WHICH A PREMIUM IS INDICATED.</b>		
<b>THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.</b>		
Commercial Property Coverage Part		<b>\$ NOT COVERED</b>
Commercial General Liability Coverage Part		<b>\$ NOT COVERED</b>
Commercial Auto Coverage Part		<b>\$ NOT COVERED</b>
Errors and Omissions Coverage Part		<b>\$ 6,306.00</b>
		<b>\$</b>
		<b>\$</b>
Other Coverages: Terrorism Risk Insurance Act		<b>\$ NOT COVERED</b>
		<b>\$</b>
		<b>\$</b>
		<b>\$</b>
	<b>TOTAL ADVANCE PREMIUM</b>	<b>\$ 6,306.00</b>
	Base premium: \$ 6306	<b>\$</b>
	Tax: \$ 387.36	<b>\$</b>
	Policy fee: \$ 150	<b>\$</b>
	Total premium: \$ 6843.36	<b>\$</b>
		<b>\$</b>
		<b>\$</b>
<b>Forms and endorsements applying to this policy and attached at time of issue:</b>		
<b>See Applicable Schedule Of Forms And Endorsements</b>		
	<b>GRAND TOTAL</b>	<b>\$ 6,306.00</b>



Purchasing advertised an RFP 030217 for Real Estate Broker Services which closed on March 2, 2017 in order to help us with the sale of DSN property on Broad River Blvd and to assist us in the future with finding/buying DSN homes/property. We had a pre-proposal meeting on February 9, at 2 pm. One realtor attended the meeting along with staff. On March 2, 2017 we received one response from Ballenger Realty; Mrs. Deb Regecz. The contract was for one year with four one year renewals and not estimated to go over \$50,000. Contract was signed by Gary Kubic, and staff estimated the contract would not to exceed \$50K.

The Broad River Home sold for \$90,000 which included a 6% commission of \$5,400.

Contract was renewed on April 20, 2018 and good till June 30, 2019. Broker services included finding homes/lots for DSN. Possibility of four homes.

Currently working on three homes: 608 Center Drive, 1604 Dean Drive, and Waddell Street.

6% realtor fee for each home when ready for closing. Each contract/purchase includes the 6% realtor fee which may be worth an estimated 19K or less per home.

So far in 2019 we have contracted to purchase three homes and one lot with the following prices/realtor fees:

1. Two homes from Saltline Builders:

a .608 Center Drive, Beaufort, selling price \$317,100, fee \$19,026,

b. 2700 Waddell Road, Beaufort, selling price \$288,875, fee \$16,350

2. One home from Hutter construction: 1604 Deanne Lane, Beaufort, selling price \$347,568, fee \$19,674

The lot cost and prep where, \$39,530, \$50,400, \$53,000.

1 Bostic Circle lot for the fourth house was \$34K. May need site work up to \$20K.



COUNTY COUNCIL OF BEAUFORT  
Beaufort County Purchasing Department  
Post Office Drawer 1228  
Beaufort, South Carolina 29901-1228  
Telephone (843) 255-2353 ♦ FAX (843) 255-9437

Dave Thomas, CPPO, CPPB  
Purchasing Director  
E-Mail: dthomas@bcgov.net

20 April 2018

Ballenger Realty, Inc.  
Attn: Everett Ballenger  
613 Carteret Street  
Beaufort, SC 29902

Re: Contract for Real Estate Broker Services for Beaufort County  
Contract Number: RFP 030217

It is a great pleasure to inform you that Beaufort County wishes to renew the above mentioned contract with you in accordance with the original contract dated March 7, 2017. The contract renewal period will commence on July 1, 2018 and extend through June 30, 2019.

Please sign below and return it to my attention at your earliest convenience.

We look forward to your continued success during the contract period ahead. Please contact Marlene Myers at 843-255-2295 or [tmyers@bcgov.net](mailto:tmyers@bcgov.net) if you have any questions.

FOR BEAUFORT COUNTY

*Dave Thomas*

Dave Thomas, CPPO, CPPB  
Purchasing Director, Beaufort County

*The signature below authorizes the renewal of the aforementioned Contract for an additional one (1) year term pursuant to amendments, original contract, and Terms and Conditions found in the original solicitation.*

*Everett Ballenger* *Delta Force* *4/20/18*  
\_\_\_\_\_  
Authorized Name and Title to bind company Date

cc: Mark Roseneau, Bill Love

*4/20/18*

**CERTIFICATE OF COUNSEL**

I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

March 22, 2022

/s/ Thomas R. Goldstein  
Thomas R. Goldstein, S. C. Bar 2186  
Belk, Cobb, Infinger & Goldstein, P.A.  
P. O. Box 71121  
Charleston, S. C. 29415-1121  
(843) 554-4291; (843)

**RECEIVED**

**Apr 12 2022**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Erin D. Dean, Special Referee

---

CASE NO.: 2019-CP-07-00818  
APPELLATE TRACKING NO.: 2021-00321

---

Mare Baracco,.....Appellant,

v.

County of Beaufort,.....Respondent.

---

FINAL BRIEF OF APPELLANT/RESPONDENT

---

April 12, 2022

---

Thomas R. Goldstein, S. C. Bar No. 2186  
P. O. Box 71121  
N. Charleston, S. C. 29415-1121  
(843) 554 4291; (843) 554 5566 (fax)  
[tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)  
Attorneys for Appellant

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§ 30-4-70, S. C. Code, ann., <i>passim</i>	
§ 30-4-70(c), S. C. Code, ann., <i>passim</i>	
§ 30-4-100, S. C. Code, ann., <i>passim</i>	
Rule 407, Rule 1.6 <i>South Carolina Appellate Court Rules</i>	24

### OTHER AUTHORITIES

South Carolina Attorney General Opinion February 18, 2021	21, 23
7 <i>Am. Jur.2d</i> , “Attorneys at Law,” § 194	30
William Shakespeare, <i>Romeo and Juliet</i> , Act II, Sc. ii, lines 43-44	18

## STATEMENT OF ISSUES ON APPEAL

1. DID THE SPECIAL REFEREE ERR IN FINDING GOVERNMENT OFFICIALS CONDUCTING GOVERNMENT BUSINESS ON PRIVATE E-MAIL ACCOUNTS, CAN CLAIM “PRIVILEGE” FROM DISCLOSURE UNDER THE *FREEDOM OF INFORMATION ACT*?
2. DID THE SPECIAL CIRCUIT COURT JUDGE ERR IN HOLDING THAT THE APPLICANT’S F.O.I.A. CLAIM WAS MOOT BECAUSE SHE DID NOT SUFFER “DAMAGES”?
3. DID THE SPECIAL CIRCUIT COURT JUDGE ERR BY REFUSING TO AWARD THE PLAINTIFF/APPELLANT ATTORNEY’S FEES AND COSTS WHEN SHE WAS A PREVAILING PARTY UNDER THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT?

## STATEMENT OF THE CASE

This matter is before the Court under the *South Carolina Freedom of Information Act*, §§ 30-4-10, *et. seq.* On June 29, 2019, the Appellant filed an amended complaint, R.O.A. Vol. 1, page 30, alleging that she made four requests for government documents under § 30-4-40, S. C. Code, ann. The Appellant’s amended complaint sets out how she requested to inspect County documents relating to the County’s purchase of two parcels of real estate commonly referred to as 1 Bostwick Circle and 429 Broad River. In addition to the sales documents, the Appellant also asked for e-mail communications of County officials connected with these and other transactions. For the Court’s convenience, the four requests—and the dates for each—are summarized as follows (R.O.A. Vol 1, page 37[Exhibit 1 to Amended Complaint]):

February 10, 2019	Case Number 2019-000231 (request for documents related to real estate purchases)	[Exhibit 2]
March 10, 2019	Case Number 2019-000385 (request for county officials’ correspondence)	[Exhibit 3]
March 18, 2019	Case Number 2019-000459 (revised request for a county official’s correspondence from four specified addresses)	[Exhibit 4]

March 31, 2019

Case Number 2019-00575  
(request for emails from a private account)  
from Councilmember Alice Howard

[Exhibit 5]  
(R.O.A. Vol. 1  
37)

The County acknowledged each of these requests and assigned each one the individual case number set forth in the preceding summary table on February 11<sup>th</sup>, March 11<sup>th</sup>, March 18<sup>th</sup> and April 1<sup>st</sup> (R.O.A. Vol. 1, pages 313-322 [Exhibits 2, 3, 4, and 5 to amended complaint]) After acknowledging receipt of the requests, the County informed the plaintiff that it required a 25% deposit to cover the cost for supplying the documents. The County asserted the costs were approximately \$14,432.06 and required a 25% deposit (\$3,608.02) as a condition of fulfilling the request.

The appellant wrote checks to the County for \$124.66 and 144.66. (R.O.A. Vol. 1, page 9 [Order page 3]); however, when the County furnished its responses, it redacted most of the documents it produced, including even the identity of the correspondents. (It also provided multiple copies of the same documents for which it charged the plaintiff.) When the plaintiff inquired as to the reason for the excessive charges, the reason for the extensive redactions and the absence of certain specified documents, the County refused to communicate with her in good faith. Instead, it responded in bad faith by avoiding her questions, directing her to contact the legal department, and provided non-answers as follows:

April 30, 2019

. . . The emails from [request] #2 and #3 were all redacted (it was about 76 pages). Also, I requested the emails between Gruber and Regecz, and they were not included.

/s/ Mare Baracco

[May 1, 2019]

Beaufort County has responded to your FOIA request in full and in accordance with South Carolina's Freedom of Information Act. If no documents were produced in response to a portion of your request, either no documents exist, or, if documents do exist and/or they were redacted, they are exempted from production pursuant to the act.

/s/ Bill Lisbon, FOIA Specialist

Not satisfied with the County's response, the appellant followed up with an e-mail on May 2, 2018 as follows:

. . . In an effort to amicably resolve my concern, what is the County claiming as their rationale under FOIA and the SC Records and retention act for the redactions?

/s/ Mare Baracco

May 2, 2019

Good afternoon. I just forwarded your correspondence to our Legal Department . . . for follow up. My office was not involved in the redactions.

/s/ Monica N. Spells, ICMA-CM

May 2, 2019

. . . Ms. Spells, are you the County's FOIA Officer? If not, please tell me who is—

/s/ Mare Baracco

May 3, 2019

Good morning. No, ma'am and we do not have an employee with that title.

/s/ Monica N. Spells, ICMA-CM<sup>1</sup>

After a month passed without further response, the appellant followed up on June 4, 2019:

June 4, 2019

Re your reply of May 2, I have still not heard from the legal department as to their reason for the redaction of FOIA 2019-000231. May I have a response please? Thank you.

/s/ Mare Baracco

June 4, 2019

I have submitted your follow up inquiry to the Legal Department. Generally speaking, my understanding is that the Legal Department redacts those portions of documents which contain information which the public records act exempts from production. . . . I recommend contacting either of those offices directly with any further inquiries about this item.

/s/ Monica Spells

R.O.A. Vol. 3, pages 623-627 [Exhibits 3 and 6]

When the appellant did not receive readable documents she requested and could not get anyone at the County to respond to her as demonstrated by the unsatisfactory explanations from the

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<sup>1</sup> "ICMA-CM" is an acronym for "International City Managers Association—City Manager."

County quoted above, she filed her initial summons and complaint on April 10, 2019, and an amended summons and complaint on June 29, 2019, seeking a court order to enjoin the County from violating the *Freedom of Information Act*, for an Order compelling the County to make the records available and stop charging excessive fees as prohibited by the Act, for attorney's fees for the prosecution of the action and for such other and further relief as the Court found proper. The County timely answered on August 14, 2019, setting up four defenses: general denial, immunity, a motion to dismiss, and reserving all defenses (R.O.A. Vol. 1, page 38)

On May 28, 2020, the Chief administrative Judge for Beaufort County *sua sponte* assigned the case to the Honorable Perry Buckner to conduct a hearing in accordance with § 30-4-100, S. C. Code, Ann. (R.O.A. Vol 1, page 1 [Order])<sup>2</sup> Thereafter, the matter came before Judge Buckner on June 2, 2020, and the Court, again *sua sponte*, assigned the case to Erin Dean as Special Referee by Order filed that same day, June 2, 2020. (R.O.A. Vol. 1, page 4 [Order]) After Erin Dean set a briefing schedule, the parties appeared before her for the merits hearing of the case by video conference on September 25, 2020. After taking testimony, considering written briefing and arguments of counsel, the Special Referee issued an Order on November 13, 2020. (R.O.A. Vol. 1, page 7) On November 19, 2020, the appellant filed a motion for reconsideration (R.O.A. Vol. 1, page 152), and on November 23, 2020, the County filed its motion for reconsideration. (R.O.A. Vol. 1, page 162) By Order dated March 2, 2021, the Special Referee denied both motions (R.O.A. Vol. 1, page 23, and this appeal followed on March 22, 2021. The County filed its cross appeal on March 23, 2021. (R.O.A. Vol. 1, pages 199 and 201) On May 18, 2021, the Special Referee billed \$7,280.00 for her service in the case, which required each party to pay the sum of \$3,640.00 for the Special

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<sup>2</sup> The reviewing Court will notice the delay from filing to resolution. This delay occurred because appellant's counsel suffered a heart attack on April 20, 2019, which led to open heart surgery on August 20, 2019, which required a lengthy rehabilitative period.

Referee's time, which each party paid.

### STANDARD OF REVIEW

“The standard of review in a declaratory action is determined by the underlying issues.” *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398, 728 S.E.2d 477, 479 (2012) (citing *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991) ). “The interpretation of a statute is a question of law.” *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (citing *CFRE, L.L.C. v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ). This Court may interpret statutes, and therefore resolve this case, “without any deference to the court below.” *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 (citing *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011) ).

Moreover, “The essential purpose of FOIA is to protect the public from secret government activity.” *Lambries*, 409 S.C. at 8–9, 760 S.E.2d at 789 (citing *Wiedemann v. Town of Hilton Head Island*, 330 S.C. 532, 535 n. 4, 500 S.E.2d 783, 785 n. 4 (1998) ). In declaring FOIA's purpose, the General Assembly has found “that it is vital in a democratic society that public business be performed in an open and public manner so that [415 S.C. 629] citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy.” *Id.* at 9, 760 S.E.2d at 789 (quoting S. C. Code Ann. § 30–4–15 (2007) ). “ ‘Toward this end, [FOIA's] provisions . . . must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.’ ” *Id.* at 9, 760 S.E.2d at 789 (alterations in original) (quoting S. C. Code, Ann. § 30–4–15 ).

*Brock v. Town of Mount Pleasant*, 415 S.C. 625, 785 S.E.2d 198 (S.C. 2016) (affirmed Court of Appeals' Opinion as modified where Court of Appeals ordered Mt. Pleasant to stop conducting executive sessions without proper notice and stop deleting e-mails instead of preserving them as

required by the *South Carolina Records Retention Act*. See Court of Appeals' Opinion at 411 S.C. 106, 767 S.E.2d 203 (S.C. App. 2014) The Court also remanded to the trial court for a redetermination of attorney's fees owed to the plaintiff.)

See also *Ballard v. Newberry County*, 432 S.C. 526, 854 S.E.2d 848 (S. C. App. 2021):

This case requires us to construe the Public Records Act and FOIA. "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law *de novo*." *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)). (Court affirmed trial court that the Records Retention Act does not create a private cause of action and affirmed award of attorney's fees to plaintiff.)

### STATEMENT OF FACTS

In February and March of 2019, the plaintiff sent the four requests for documents to Beaufort County summarized above on page 4. The four requests involved two subjects: the first was the County's acquisition of two parcels of real estate, and the second involved a request to review e-mail correspondence from three members of County Council who use their private e-mail accounts to conduct County business out of the public's view in violation of § 30-4-70, S. C. Code, ann. This section says: "No chance meeting, social meeting, **or electronic communication** may be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power." (emphasis added) The three members of the Council were:

Paul Sommerville, Chair

Alice Howard, Councilmember

Stu Rodman, Councilmember

In the hearing before the Special Referee on September 23, 2020, the appellant explained why she was interested in these communications, particularly her Council representative, Alice Howard:

Q. So what we've described as FOIA request number two and FOIA request number three and FOIA request number four in this action, those were all FOIA requests related to personal e-mails from a six-year period as to different things? . . .

A. That [Alice Howard e-mails] was a previous FOIA request for personal e-mails, correct [Exhibit 11]. If I might just speak to the Court about these Alice Howard ones. Alice Howard is my representative regarding Port Royal. And I couldn't get any help from Alice Howard, and I never understood why until I got some of these e-mails. And I didn't know about the e-mails from her to the town manager about doing intel. And again, one of the reasons I'm asking for the e-mails was I just was alarmed that there was like an active investigation of me by council members. I couldn't understand that.

R.O.A. Vol. 1, page 274-275 [tr. page 59, line 19—page 60, line 13] (Councilmember Alice Howard actually uses the word "intel" when sending information about the appellant to the Town Manager of Port Royal, appellant's home. See e-mail from Alice Howard to Van Willis, dated March 12, 2015 at R.O.A. Vol.1, page 342 [Exhibit 16] "Van, you might find this interesting for your intel." /s/ Alice Howard)

In addition to seeking the communications of these three councilmembers' private account email exchanges, the plaintiff also wanted to review the correspondence of the two County Administrators, Josh Gruber and Tom Keaveny. Beaufort County provides each Councilmember and each staff member with an official Beaufort County e-mail address for use in conducting government business. There are many reasons for this, but one is to preserve such communications for archives as required by the State Records Retention Act § 30-1-10, *et. seq.* When the plaintiff discovered these three Council members using private addresses to conduct County business, she requested additionally the correspondence related to County business submitted from their private e-mail accounts.

As set forth above, the County acknowledged receipt of the four requests, giving each one a case number, and informed the plaintiff that the cost to retrieve the documents would be \$14,432.06, including a charge for \$72.00 an hour for the legal department to review the e-mails for "redaction." The County's charge for Request No. 1 was \$124.66, which required a deposit of \$124.66 as a condition of fulfilling the request. For request number 2, the County estimated the charges at \$12,079.00 and demanded a deposit of \$3,019.75. The County explained to the appellant that it

arrived at these charges by estimating 167 hours at \$72.00 per hour, 3 hours to redact and compile at \$16.00 an hour, and \$7.00 for a flash drive. R.O.A. Vol. 1, page 319 [Exhibit 4]. After much back and forth, including the plaintiff's agreement to narrow the scope of her requests (the plaintiff limited her 2<sup>nd</sup> request, which then became her 3<sup>rd</sup> request), the County reduced the charges and demanded a deposit of \$152.82 as a condition of fulfilling the request. Finally, on April 2, 2019, the County demanded a deposit of \$1,617.14 as a condition of fulfilling the 4<sup>th</sup> request. (R.O.A. Vol. 1, page 327 and 9 [Exhibit 8, Nov. 13, 2020 Order, page 3]) When negotiations to resolve the impasse failed, the plaintiff filed suit on April 10, 2019, and later amended her complaint on June 27, 2019. Prior to filing suit, the County produced 276 pages of documents in response to F.O.I.A. request #1 on March 21, 2019, but it was a meaningless production because the documents were largely redacted, including blocking out the correspondents' identities and addresses so that the plaintiff could not tell who was included in each e-mail chain. When the appellant objected that she could not see who was included in the e-mail chains, the Special Referee responded by ordering the County to produce the redacted e-mails with the correspondents' identities disclosed: "Prior to the Merits Hearing, the Court instructed counsel for the Defendant to remove the redactions relative to the "to/from" lines on the e-mails produced so that the distribution list would be available to Plaintiff." (R.O.A. Vol. 1, page 8 [Nov. 13, 2020 Order page 2]) To this day, the County has never produced any e-mails relative to the F.O.I.A. request for e-mails from Stu Rodman and Alice Howard on their private e-mail address. To plant an exclamation mark upon the County's ferociousness in thwarting the plaintiff, the plaintiff discovered in the preparation of this brief for the Court, that the documents the Special Referee ordered County to turn over—the redacted e-mails revealing the names of the correspondents in the e-mail chains—were turned over in a digital time sensitive file that caused them to evaporate after a certain period, thereby forcing the plaintiff to request the County to resend the documents the Court previously ordered turned over.

Such subterfuge<sup>3</sup> is a pattern with the County and illuminates how Beaufort County repeatedly deployed a policy of bad faith toward the appellant, willing to circumvent court Orders to mistreat her. The reason this happens is because there is usually no consequence for government officials disobeying the law except to require a government to pay the opposing party's attorney's fees with taxpayer money, which is no deterrent at all. (The General Assembly removed criminal penalties when it amended the *F.O.I.A.* in 2017.)

After filing suit on April 10<sup>th</sup>, the disposition of the case stalled because, as set forth above, fewer than two weeks later, plaintiff's counsel suffered a heart attack, which required several hospitalizations, open heart surgery on August 20, 2019, and one post-surgical hospitalization. As a result, the case was not resolved quickly as required by § 30-4-100, S. C. Code, ann.: "Upon filing of the request for declaratory judgment or injunctive relief related to the provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties."

After the Chief Administrative Judge assigned the case to Judge Buckner on May 28, 2020 (R.O.A. Vol. 1, page 1 [order], the Clerk of Court called the case on June 2, 2020, and the parties appeared before Judge Buckner, who, *sua sponte*, ordered the case referred to Erin Dean to review the documents and make a ruling, appealable to this Court. As set forth above in the Statement of the Case, the Special Referee entered a final Order on November 13, 2020, and an Order denying reconsideration on March 2, 2021, and this appeal followed on March 23, 2021, and the County' cross appeal on March 24, 2021. (R.O.A. Vol. 1, pages 7, 23, 199 and 201 [Orders and Notices of Appeal]

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<sup>3</sup> This subterfuge does not involve opposing counsel. Rather, it is a pattern of bad faith with the County to employ computer trickery to thwart appellant's access. See R.O.A. page 237 [Sept. 23, 2020 transcript page 22] regarding the County's response to discovery requests: "So all of the discovery was encrypted. It's interesting, in the same Citrix ShareFile that we all have . . . mine were all encrypted." Appellant testified she paid "almost \$6,000.00" to get them unencrypted and printed. R.O.A. Vol. 1, page 237 [tr. page 22, line 24]

## ARGUMENTS

1. DID THE SPECIAL REFEREE ERR IN FINDING GOVERNMENT OFFICIALS CONDUCTING GOVERNMENT BUSINESS ON PRIVATE E-MAIL ACCOUNTS, CAN CLAIM “PRIVILEGE” FROM DISCLOSURE UNDER THE *FREEDOM OF INFORMATION ACT*?

The appellant sets forth this broadly worded question before the Court, which appellant follows with a more detailed discussion breaking down the argument into four separate sub-sections below. Broadly stated, the Special Referee failed to apprehend that when Councilmembers resort to their private e-mail addresses in order to conduct County business, the Councilmembers surrender any expectation of privacy or “privilege” to shield their private e-mails about public business from an open records law. Likewise, the Councilmembers cannot invoke privilege by copying the County Administrator and the County Attorney in order to avoid disclosure. This is especially true here when from June 2018 until October 2018, the same person acted as County Attorney and County Administrator. As discussed more fully below, the County never identified attorney-client privilege as the reason for its redactions until after the appellant filed her action.

The County Attorney’s duties do not include an obligation to render private legal advice to citizens who happen to be on Council. More importantly, using private e-mail communications to conduct County business is precisely the activity the General Assembly prohibited by enacting § 30-4-70(c). When the legal question is distilled down to the remaining solute, all that remains is an illogical proposition: we do not have to turn over private e-mails because they are private, but it is illegal to conduct business this way, and, as discussed in detail below, there is no attorney-client privilege in an unlawful act. There is not a lot of well-developed case law in South Carolina on government officials’ reliance on private e-mail addresses to conduct government business, although this issue occupied America’s attention in the run-up to the 2016 Presidential election when reporters disclosed a private server utilized to conduct government business. While our Supreme Court has not addressed this precise issue, it did address the opposite of the issue in 1988, when the Supreme Court

issued a public reprimand to a circuit court judge for, among other things, using official judicial stationary to advance a civil claim, or, as the Court put it: “[lending] the prestige of his office go advance the interests of another.” See *In the Matter of Peebles*, 297 S.C. 36, 374 S.E.2d 674 (1988) (circuit court judge wrote letter on judicial stationary demanding payment of an alleged debt) Here, the County officials claim the opposite privilege; the right to lend the privacy of their personal communications to advance the political interests of the County. If judges cannot utilize their position of authority to advance private interests, neither can government officials hide behind their claims of privacy to advance public interests.

On July 19, 2018, the South Carolina Ethics Commission issued Advisory Opinion Number AO2018-004 on a related issue (Council member expressing personal opinion on referendum question as part of duties). R.O.A. page \_\_\_\_ There, the Commission noted that an elected official is never really off duty: “. . . the Governor does not stop being the Governor at 5:00 P.M. He is Governor twenty-four hours a day and must respond to the duties of his office whenever they arise.” (quoting S. C. Attorney General Opinion Dec. 23, 2013). The State Ethics Commission held that while Councilmembers do not surrender their freedom to be private citizens, any time they utilize public resources or are expressing a public opinion in their capacity as government officials, then they are acting as officials of the government. See R.O.A. Vol. 1, pages 328-334 [Exhibits 9—13]<sup>4</sup> in which four members of Council work together to script the outcome of an upcoming Council meeting. (This precise issue is discussed more fully below on page 23 because the Richland County Court of Common Pleas recently addressed this scripting phenomenon.) And when Councilmembers use their private e-mail addresses to communicate with one another about public matters, they are acting as government officials, and their communications are public. The same exemption requirements apply

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<sup>4</sup> The County redacted these e-mails in response to the appellant’s *F.O.I.A.* request but provided some of them to her without redaction earlier.

to these private account e-mails as those exchanged on the County's server whether using a government provided e-mail account or a private account, the requirement for open access is the same, and circumventing F.O.I.A.'s open meeting requirement by use of e-mail communications is either a willful effort to break the law or ignorance of how government works. Reaching consensus by e-mail among Councilmembers is akin to holding an unannounced executive session, a clear violation of F.O.I.A. The whole purpose of § 30-4-70 is to prevent these secret Council meetings. This statute instructs office holders not to use e-mail or texts to circumvent their obligation to be transparent in government business, and the stratagem of including the County Attorney in the e-mail chain is a stratagem rejected by the Supreme Court as discussed more fully below. (As discussed below in detail in a separate analysis devoted to this one topic, the Supreme Court already declared that including the County Attorney in an e-mail chain does not invoke attorney/client privilege. See *Evening Post Publishing Company v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011) )

At its core, the Beaufort County legal position is both circular and contradictory:

Private e-mails are private and do not have to be disclosed under the *F.O.I.A.*

↑     ↓

Private e-mails which copy the County Attorney in the chain are privileged and do not have to be disclosed because the County Attorney represents the County and dispenses legal advice to the Government.

These two legal positions are contradictory. If the e-mails are private communications between private citizens and discuss private matters unrelated to public business, then appellant cannot and would not demand them. On the other and, if the Councilmembers are using private e-mails to conduct public business while circumventing governmental transparency, then they cannot be privileged because (1) they are related to the core function of government officials, (2) the County Attorney represents the County, not private citizens who happen to hold political office, and (3) there

is no privilege for an unlawful act. (See § 30-4-70(c): “No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has subversion control, jurisdiction, or advisory power.”) E-mails exchanged between Councilmembers, the County Attorney, and third parties, cannot be “privileged,” a legal position already determined by the Supreme Court in *Evening Post Publishing v. Berkeley County School District, op.cit.* Each of these issues is discussed in more detail below.

A. THE SPECIAL REFEREE ERRED IN FAILING TO APPLY THE GENERAL ASSEMBLY’S DECLARATION THAT THE COUNTY’S DEMAND FOR EXHORBITANT AND UNJUSTIFIED FEES AS A CONDITION OF RESPONDING TO A F.O.I.A. REQUEST IS AN “IRREPARABLE HARM” UNDER *F.O.I.A.* AND A VIOLATION THAT DOES NOT REQUIRE A CITIZEN TO PAY AND CLAIM “DAMAGES” AS A CONDITION TO SEEKING INJUNCTIVE AND DECLARATORY RELIEF UNDER THE *FREEDOM OF INFORMATION ACT*.

At the time the plaintiff made her application for public documents, the County maintained a published fee schedule on its home page, which identified the allowable charges as set by the General Assembly. However, in response to the plaintiff’s request for documents, the County demanded over fourteen thousand dollars as a precondition to supplying electronic communications that can be gathered and transferred in seconds to a flash drive, which costs the requestor \$7.00 according to the County’s published charges. When the plaintiff questioned these charges, the County responded by informing her that the County Attorney’s office was reviewing the documents prior to their release, a charge that is statutorily prohibited. See Record on Appeal Vol. 1, page 319 [Exhibit 4, County’s March 18, 2019 correspondence] for its charges: “167 hours estimated for I.T. to search and compile emails @ \$72.00/hour = \$12,024.00.” When the plaintiff questioned the County about its exorbitant fees (R.O.A. Vol. 1, page 323 [Ex. 6]), the then acting County Administrator, John Weaver, replied to her on March 27<sup>th</sup>, and offered the following explanation as to why the charges are so high:

Ms. Baracco—As you may/may not know, Beaufort County perhaps has the most sophisticated FOIA system of any count or municipality in South Carolina, including both manpower

and electronic capabilities. I have complete confidence in that department and in the management oversight provided by Ms. Spells. I provide you with a response as to your inquiry of last Monday and find it to be satisfactory. Certainly you are free to contact Council with your concern, which you have done; although I tell you that neither Council nor county staff nor I have any significant impact on what can and cannot be done with FOIA inasmuch as the requirements are dictated by South Carolina statutory law.

/s/ John Weaver R.O.A. Vol. 1, page 341 [Ex. 15]

It is revealing to compare the County's response to Ms. Baracco with the response provided to Councilmember Mike Covert:

As part of recommendations from SLED to tighten all controls over all of our information technology systems, especially those that tie to criminal justice information, the County has restricted the email search permission to only the IT Director and another senior manager in that department. A previous staff member no longer employed with the County previously searched emails at an hourly rate of \$25. Staff did not update this information on their end. I have handled that botch from a managerial standpoint. The current hourly rate of the IT Director is \$49.07 and the hourly rate of the other manager is \$30.74. the primary email searcher is the senior manager and the IT Director is the secondary email searcher. Their availability coupled with FOIA response deadlines determines who conducts the search.

If requested emails involve elected and appointed officials, historically, the Legal Department/County Attorney review these emails prior to release to ensure that privileged information is not released inadvertently.

Staff currently uses an estimated minimum time of one minute per email for the County attorney to review these emails. The current hourly rate of the County Attorney is \$72.

The Legal Department/County Attorney determines redactions and will have to address this question. **My understanding is that some elected officials use a combination of personal email accounts and an account provided by Beaufort County in the course of conducting business with other individuals using Beaufort County accounts.**

/s/ John Weaver  
March 27, 2019 ( R.O.A. Vol. 1, page 347 [correspondence to the plaintiff on the same subject, Exhibit 20]) (emphasis added)

The above explanation is entirely bogus and further highlights the County's animus for Ms. Baracco. First, the *South Carolina Freedom of Information Act* requires that the government's imposition of charges be at the lowest possible rate and cannot include assessing attorney's fees against a requestor. § 30-4-30, S. C. Code, ann. states: "The records must be furnished at the lowest possible cost to the person requesting the records." Furthermore, the County cannot charge for

“redactions.” “Fees may not be charged for examination and review to determine if the documents are subject to disclosure.” § 30-4-30(B) Here, the excessiveness of these charges, especially considering that they are specifically prohibited by statute and considering the County’s demonstrated bad faith toward the appellant (discussed more fully below), is *res ipsa loquitur*. (The great South Carolina jurist, Professor Kemmerlin, quoted Shakespeare to legions of students and lawyers for the proposition that while South Carolina may not have *res ipsa loquitur* by name, it has the same principle by a different name, circumstantial evidence: “What’s in a name? That which we call a rose/By any other word would smell as sweet.” *Romeo and Juliet*, Act II, Sc. 2, lines 43-44) Moreover, the County further gives away the game in a June 11, 2014, e-mail circulated between the lawyers for the County, Allison Coppage, the City of Beaufort, William Harvey, and the Town of Bluffton, Terry Finger:

I am writing in reference to the attached FOIA request from Mare Barraco. It is my understanding that each of your respective municipalities has received a similar request. We currently have our PIO looking at what is readily available online and what will take staff time & resources to gather. Based on the extensive nature of the request we are considering requiring a 50% deposit before processing the entire response. What I would like to know is whether the municipalities may be thinking about taking a similar approach. The County would like to respond similarly to the other parties so that there can be no issues later on about us not providing an adequate response.

**For anyone that is not familiar with this matter or the requestor feel free to call me or send questions my direction.**

/s/ Allison C. Coppage, Assistant County Attorney (R.O.A. page 343 [Exhibit 17] “PIO” = Public Information Officer) (emphasis added)

If this Court grants oral argument in this case, the Court may inquire of the County what difference the identity of a requestor makes to the County’s obligation to adhere to the *Freedom of Information Act* or why the County believes it is important for different governmental bodies to coordinate their responses to a request from a specific requestor. The June 11, 2014 solicitation not only violates both the letter and the spirit of the public policy of the *Freedom of Information Act*, but also the County’s invitation to assess unlawful charges, and the manufacture of pretexts to justify them should shock the conscience of the Court. One municipal attorney, William B. Harvey, initially

did not accept the County's offer to conspire against Baracco. Writing on behalf of the City of Beaufort at 10:59 a.m., Mr. Harvey's response was ideal: "I don't see anything in this letter directed to the City of Beaufort that would require a response." (R.O.A. Vol. 1, page 343 [Exhibit 17]) However, later that afternoon, after the County Attorney wrote back and advised the City that they were contemplating billing Ms. Baracco \$35,000.00, Mr. Harvey reconsidered, writing back at 3:42 p.m.:

You are correct. The city manager sent me the letter directed to the City. Generally, we charge \$35 per hour for staff research time. I have no idea how much staff time it would take to compile the information requested, but we generally estimate the amount and ask of an advance check before responding to a request like this. **Let me know how the County is proceeding.** (emphasis added) R.O.A. Vol. 1, page 344 [Ex. 17]

In analyzing either the issue of the amount of fees or the attempted coordination, the Special Referee avoided the issue, concluding, erroneously, that because the appellant never paid the fees, she has no claim under the *F.O.I.A.* because she suffered no "damages." See Order under Review at pages 7-8 (R.O.A. Vol. 1, pages 13-14):

Although it appears that the estimated fee schedules originally provided to the Plaintiff in response to her four FOIA requests may not have complied with the mandates of S. C. Code Ann. Section 30-4-30(B), because the Plaintiff did not pay the requested deposits for FOIA No. 2 (now moot), 3 or 4, nor is she contesting the reasonableness of the fee she paid relative to FOIA No. 1, I find that the plaintiff has suffered no damages as a result of the Defendant's estimated fee calculations. Further, since the Defendant has removed the charges for the Legal Department relative to FOIA No.'s 3 and 4 prior to the Plaintiff paying either the deposit or the estimated fees, I find there has been no violation of the Act relative to the fees.

The Special Referee's conclusions are palpable errors and gut the limited relief afforded by the *Freedom of Information Act*. The Special Referee violated her own reasoning, concluding on one hand, that the appellant proved the County was violating the Act, but concluding on the other that because the County did not collect the unlawful fees it proposed, the appellant is not entitled to relief. This action is not a suit for breach of contract or tort in which the plaintiff is required to prove "damages" as a condition of recovery. The *South Carolina Freedom of Information Act* is remedial legislation, and any violation is deemed to be an irreparable harm under § 30-4-100:

(A) A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive

relief, or both, to enforce the provisions of this chapter in appropriate cases is the application is made no later than one year after the date of the alleged violation or one year after public vote in public session, which comes later. Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties. If the hearing court is unable to make a final ruling at the initial hearing, the court shall establish a scheduling order to conclude actions brought pursuant to this chapter within six months of initial filing. The court may extend this time period upon a showing of good cause. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy of law exists.

While the plaintiff was testifying, the Special Referee asked her this question:

Q. . . . If I understand your testimony, the only payment that's part of Exhibit 22 that is for documents received in this litigation is a portion of receipt number 27; is that correct?

A. Yes. That's the one I paid for, and they just charged me for the two at the same time.

R.O.A. Vol. 1, page 279 [tr. page 64, lines 10—20]

The Special Referee misapplied the *South Carolina Freedom of Information Act* to the County's demand for unlawful fees by holding that the *Act* provides no relief without "damages." The General Assembly makes clear that the *Act* is remedial and any violation is an "irreparable harm" for which the remedy of injunction lies: "The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists." § 30-4-100, S. C. Code, ann. "Injunctive relief; costs and attorney's fees" Moreover, the fact that the County withheld (redacted) some of the same e-mails from the appellant that it had previously provided in response to a similar inquiry demonstrates the County's shifting criteria and bad faith. Whether the appellant suffered "damages" or not is of no consequence in analyzing the County's duties under the *F.O.I.A.* or the appellant's right to relief, and the Special Referee erred in holding otherwise.

The County's responses to the appellant's when she questioned its excessive charges illuminates its general recalcitrance to the obligations placed upon it by the *F.O.I.A.* as well as the County's policy of bad faith toward the appellant. The County's tin ear on the cost issue is illustrated by its summing up before the Special Referee:

They [appellant] didn't question the fact that the attorneys [County attorneys] would have the necessary skill and question [sic] to be able to review these documents to determine whether they were subject to disclosure and whether that \$72 an hour fee was reasonable." (R.O.A. Vol. 1, page 284 [tr. page 69, lines 2-6])

That the County can so widely miss the point is astonishing in the face of the General Assembly's specific prohibition against these charges: "Fees may not be charged for examination and review to determine if the documents are subject to disclosure." § 30-4-30(B), S. C. Code, ann. In the run-up to the merits hearing and during the merits hearing, the County stood its ground that it could impose these unlawful charges and that the appellant waived any right to challenge them because she refused to pay. Neither position is correct as numerous cases have held: because the *Freedom of Information Act* is remedial legislation, a plaintiff is not required to pay unlawful fees as a pre-condition of challenging a F.O.I.A. violation, which the law considers an "irreparable harm." See *Burton v. York County Sheriff's Department*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004)

The essential purpose of the FOIA is to protect the public from secret government activity. *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003); see also *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 163, 547 S.E.2d 862, 865 (2001) (FOIA was enacted to prevent the government from acting in secret.); *Wiedemann v. Town of Hilton Head Island*, 330 S.C. 532, 535 n.4, 500 S.E.2d 783, 785 n.4 (1998) (noting that [t]he purpose of the FOIA is to protect the public from secret government activity). The FOIA meets the demand for open government while preserving workable confidentiality in governmental decision-making. *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219 (1991); *Campbell*, 354 S.C. at 281, 580 S.E.2d at 166.

South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government. *Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). The FOIA creates an affirmative duty on the part of public bodies to disclose information. *Bellamy*, 305 S.C. at 295, 408 S.E.2d at 221; *Campbell*, 354 S.C. at 281, 580 S.E.2d at 166. The purpose of the FOIA is to protect the public by providing for the disclosure of information. *Id.* The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. *Campbell*, 354 S.C. at 281, 580 S.E.2d at 166.

The Court might be hard pressed to find a case with as much "secret government activity" as exposed so far in this case. Throughout, the County remains defiant about government officials using

their private (and government) e-mails to conduct what turns out to be a government intelligence gathering operation on the appellant. As quoted above on page 17, the tone-deaf County Administrator explained to a sitting County Councilman that government officials routinely use a combination of their public and private e-mail accounts as a matter of course to conduct government business. For a more detailed analysis of how government officials can use private e-mail communication to circumvent F.O.I.A., see the South Carolina Attorney General Opinion dated February 18, 2021, to Emily Farr, Director of South Carolina L.L.R. To be fair, the Attorney General addressed a slightly different question; to wit, use of electronic communication with a quorum of Council members. Here, the question is more focused on the plain meaning of § 30-4-70(c), which prohibits electronic communication being used “in circumvention of the spirit of requirements of this chapter.” It is an implausible inference to suggest that government officials can violate the *F.O.I.A.* at will so long as they keep their misconduct below a quorum, which is exactly like saying robbing a bank is not unlawful so long as one does not take too much. In fact, this Court can draw its own inference from the fact that in response to the Appellant’s initial *F.O.I.A.* request, the County never claimed that a requested e-mail is protected by “attorney-client” privilege until she filed suit and even though it provided some of the same e-mails it now claims are protected by attorney-client privilege to appellant as part of its discovery responses in an unrelated lawsuit. Without having seen the body of all the redacted e-mails, other than the ones provided to appellant in a separate case, it seems clear that the e-mails do not request the kind of legal advice that triggers attorney-client protection. As our Supreme Court said in 2019:

Despite the importance of confidential communications between an attorney and his client, we, like other jurisdictions, must understand and examine the tension that is created by competing policy goals. See *Doster*, 276 S.C. at 651, 284 S.E.2d at 220 (“The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice.”). Thus, while South Carolina bestows significant weight to the attorney-client privilege, the privilege is not absolute. See *Ross v. Med. Univ. of S.C.*, 317 S.C. 377, 384, 453 S.E.2d 880, 884 (1994). For example, the attorney-client privilege does not extend to communications made in furtherance of criminal, tortious, or fraudulent conduct. *Doster*, 276 S.C. at 651, 284 S.E.2d at 220. Likewise, information—in and of itself—does not become privileged merely because it was communicated to an attorney. *Booker*, 260 S.C. at 256, 195 S.E.2d at 621.

*In re: Mt. Hawley Insurance Company*, 427 S.C. 159, 829 S.E.2d 707 (2019) (This issue is discussed in more detail in Argument 1-C below.)

Here, the County convinced the Special Referee to withhold many e-mails originating from Council members' private e-mails. Yet, almost simultaneously the County provided similar **unredacted** e-mails, from these same Councilmembers' private accounts, including one dated July 18, 2018, from Councilmember Stu Rodman (R.O.A. page 328 [Ex. 9]). This July 18<sup>th</sup> e-mail peels back the curtain from government misbehavior because it reveals that Stu Rodman, then Chair of County Council, scripted out an upcoming meeting to Council members Paul Sommerville, Jerry Stewart, Alice Howard, and then acting County Administrator Tom Keaveny who was also County Attorney. In this e-mail, Councilmember Rodman drafted a script for an upcoming County Council meeting to lay out the strategy, "parliamentary maneuvering," to re-hire Josh Gruber as County Administrator. This is precisely the activity condemned by Attorney General Wilson in his February 18, 2021 Opinion, and it is specifically prohibited by § 30-4-70(c), S. C. Code, ann. By coincidence, the Richland County Court of Common Pleas recently took up the identical issue in a case called *Poole v. S. C. Department of Disabilities and Special Needs*, 2021-CP-40-03103. There, Judge McIntosh entered an Order on August 18, 2021, describing the effort undertaken by a quorum of 4 of seven members "shared information . . . using personal email addresses." After analyzing the facts, Judge McIntosh ruled:

FOIA prohibits any "chance" meeting stating, "No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power." S.C. Code Ann. § 30-4-70(c) (2007).

Based on the facts in this case and the law, I find that the attachment to the February 16, 2021, email from Rawlinson to the three other commissioners, was a chance meeting under the language of the statute as it constituted a quorum of the Commission over which the DDSN had supervision, control, etc., thereby requiring notice under the FOIA statute."

The question raised in *Poole* was a broader question than the question raised here. Here, the narrower question is whether the appellant is or is not entitled to see the written exchange of information by government officials related to government action. Leaving aside the obvious observation that attorney-client privilege is waived by the voluntary disclosure to appellant in a prior

request, there is a more important consideration to this case: whether the County can deploy alleged attorney-client privilege to cover *Freedom of Information Act* violations. The Rules governing the conduct of lawyers do not permit this. See *South Carolina Appellate Court Rules*, Rule 407, Rule 1.6, and the comments thereunder:

[9] Paragraph (b)(3) does not limit the breadth of Paragraph (b)(1) but describes one specific example of a situation in which disclosure is permitted to prevent a criminal act by the client. Paragraph (b)(3) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(e), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(3) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

Engaging in a deliberate F.O.I.A. violation is not protected by attorney-client privilege, and, as demonstrated by the analysis of the Supreme Court in the *Evening Post Publishing Company v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011) case, communications with a government lawyer do not become protected attorney-client privileged material by the simple expedient of including an attorney in an e-mail chain. Moreover, the voluntary disclosure of some of the e-mails in the companion case demonstrates the County's claim of "attorney-client privilege" is spurious. Even though the fact that the government officials conducted secret Council meetings to script the outcome of public business in secret, this is not the gravamen of the plaintiff's complaint—as it was in the *Poole* case. Here, the appellant put forth evidence demonstrating the County's disobedience to the requirements of public disclosure and demonstrated how the County's efforts to prevent disclosure by imposing excessive fees and invoking attorney-client privilege to shield unlawful acts and how, when the appellant asked legitimate questions, the County doubled down on its animus for her and erected dilatory barriers and pretextual reasons. In short, the County deployed maximum bad faith, even labeling her "harassing" because she sought access to documents that

should be public. This is why an exhibit such as the plaintiff's Exhibit 9 (R.O.A. Vol. 1, page 328 [July 18, 2018 e-mail] from Stu Rodman to Paul Sommerville, Jerry Steward, Alice Howard, and Thomas Keaveny, who was acting County Administrator at the time, is shocking. There Councilmember Stu Rodman maps out the strategy for the upcoming Council meeting to lay the groundwork for the re-hiring of their preferred candidate for County Administrator, Josh Gruber, laying out a scheme which he terms "parliamentary maneuvering." The inclusion of this evidence, and other evidence like it, is not offered to demonstrate that the County imposed excessive fees on the appellant or improperly redacted public information. Rather, it is offered to demonstrate the County's pattern of willfulness and the depth of its contempt for the *F.O.I.A.* The entire purpose of the *South Carolina Freedom of Information Act* is to deter such conduct but unless citizens such as the appellant are willing to step up and challenge unlawful government conduct, the entire carefully calibrated system of checks and balances will dissolve into something different than a constitutional republic, and this is, precisely, the type of "irreparable harm," for which the General Assembly provided F.O.I.A. as a remedy.

**B. THE SPECIAL REFEREE ERRED IN FAILING TO RECOGNIZE THAT CONDUCTING GOVERNMENT BUSINESS ON PRIVATE E-MAIL COMMUNICATIONS IS A VIOLATION OF THE PROHIBITION OF § 30-4-70, S. C. CODE, ANN., AND ARE NOT COMMUNICATIONS SHIELDED FROM PUBLIC INSPECTION.**

During the trial on the merits and in its various court filings, the County advanced, as set forth above, a straw man argument that the plaintiff was attempting to bring an action under § 30-4-70(c), S. C. Code, ann. and failed to prove that the County was holding secret meetings. While discussed briefly in the preceding paragraph, § 30-4-70(c) prohibits officials from conducting government meetings in secret by resorting to e-mails, texts, *etc.* The County's mischaracterization of the plaintiff's claims is a red herring seeking to sow confusion where there is none. First, there is no doubt the plaintiff filed her action for essentially a single purpose; to wit, to gain access to public documents surrounding the Councilmembers' discussions about the acquisition of two parcels of real estate as well as their private communications with one another and with staff about government business. In short, a Councilmember cannot utilize private e-mail communications about government

business as a shield from the *F.O.I.A.*

In California, a taxpayer sought disclosure of government officials' private e-mail communications, and the trial court ordered that they be produced. The California Court of Appeal reversed for the same ground relied upon by the Special Referee here. The Supreme Court of California reversed the Court of Appeal and obliterated the artificial distinction the County is attempting to draw here:

The City's interpretation would allow evasion of CPRA simply by the use of a personal account. We are aware of no California law requiring that public officials or employees use only government accounts to conduct public business. If communications sent through personal accounts were categorically excluded from CPRA, government officials could hide their most sensitive, and potentially damning, discussions in such accounts. The City's interpretation "would not only put an increasing amount of information beyond the public's grasp but also encourage government officials to conduct the public's business in private." (Senat, *Whose Business Is It: Is Public Business Conducted on Officials' Personal Electronic Devices Subject to State Open Records Laws?* (2014) 19 Comm. L. & Pol'y 293, 322.)

*City of San Jose v. Superior Court of Santa Clara County*, 214 Cal. Rpt.3d 274, 2 Cal. 5<sup>th</sup> 608, 389 P.3d 848 (2017)

The impetus for the plaintiff's interest in governmental activities arose out of her discovery of behind-the-scenes political interference in her municipal criminal charge of having a dog at large. After a jury in municipal court acquitted her of a municipal charge, she sought to understand why the County was continuing to prosecute her in a County court for the same municipal charge on which a jury acquitted her. Her investigation revealed political manipulations calling for multiple prosecutions for an allegation of violating a municipal ordinance for which she was tried and acquitted. She sought to understand why the County became involved and why the County required her to appear at multiple Court appearances before a Beaufort County Magistrate. What the appellant discovered was an astonishing political interference in local court process, that included both an associate Magistrate Judge and the Chief Magistrate Judge of the Beaufort County Summary Court. After the County Administrator e-mailed his assessment of the appellant in response to Councilmember Rick Caporale's questions about the multiple prosecutions, the Beaufort County

assistant magistrate, Rod Sproatt, wrote to the Chief Judge, Lawrence McElynn, questioning Caporale's concerns about multiple prosecutions for the same offense. The Chief Judge responded by mocking Councilmember Caporale's questions and agreed with his judicial colleague that Caporale was misinformed and should "check the credibility of his source," *i.e.* the appellant. See R.O.A. Vol. 1, pages 333 and 346 [Exhibits 13 and 19: "RC" [Rick Caporale] The appellant's investigation also revealed private County Council pre-meetings in which Councilmembers hashed out the issues out of public view so that the public meeting was nothing more than a *pro forma* implementation of the plan of action formed in private. Since councilmembers were using their private e-mail addresses to conduct "intel" on her, she naturally asked for disclosure, which led to further questions and demonstrates why the County has adopted a policy of bad faith toward her when she asked for public documents.

**C. THE SPECIAL REFEREE ERRED IN FINDING THAT INCLUDING THE COUNTY ATTORNEY IN AN E-MAIL CHAIN DOES NOT SHIELD THE COMMUNICATIONS FROM PUBLIC INSPECTION AND THAT COMMUNICATIONS TO THIRD PARTIES WAIVES ANY CLAIM TO PRIVILEGE.**

When the County originally provided appellant with the e-mails she requested, they were mostly blacked out. The County not only blacked out the information contained in the e-mails, but also obliterated the addresses so the plaintiff could not see who was participating in the e-mail chain. Prior to filing suit, the County never explained the reason for the redactions, but after the plaintiff filed her suit, the explanation became that the e-mails were protected by attorney-client privilege even though the County never provided a privilege log until the Special Referee required it. The County's shifting explanation from cost to privilege smacks of pretext, a stratagem made clear when the Special Referee ordered the County to provide both a privilege log and to remove the block of the County's correspondents on the address chains, and, for the first time, the appellant could see who was included in the communications. Once the list of correspondents were revealed, the plaintiff could see that a claim of attorney-client privilege is pretext because lawyers do not deliver legal advice in chain e-

mails to groups of correspondents. The appellant is, obviously, at some disadvantage because she cannot speak to the discussions in the e-mails, and the respondent will have to furnish them to this Court because the appellant has only blacked out copies (except for the unredacted ones provided in a separate suit). As set forth above, the County originally blacked out the entire e-mail to prevent the appellant from seeing who was included in the e-mail chain, but the Special Referee ordered the County to remove the redaction to reveal the addressees. Once the County did this, its disclosure obliterated its claim of attorney-client privilege because the e-mails reveal numerous correspondents who cannot be covered by such a privilege. Because the appellant has nothing but blacked out copies, she can do nothing further than list here a typical summary of correspondents from e-mails such as the County's correspondence. Here are typical e-mails from January through February 2018, which included the following correspondents:

Thomas A. Bendle, Closing Attorney  
Gail Brown, Employee of Disabilities of Disabilities and Special Needs  
Beth Cody, Employee of Disabilities of and Special Needs  
Joshua Gruber, County Administrator  
Alicia Holland, Director of Finance  
Thomas Keaveny, County Attorney/County Administrator (July 2018—October 24, 2018)  
William Love, Director of Disabilities and Special Needs  
Wanda Myse, Employee Disabilities and Special Needs  
Debra Regecz, local real estate agent  
Mark Rosenau, Director of Facilities Management  
Monica Spells County Assistant Administrator  
Mark Sutton, Deputy Director Facility Management  
(R.O.A. Vol. 3, pages 628-630 [County Bate Stamped production 221, 220, and 255])

These e-mails—despite being entirely blacked out—demonstrate that there are numerous correspondents who cannot possibly be construed as clients of the County Attorney. The inclusion of Debra Regecz deserves special mention. Ms. Regecz was the real estate agent who handled the sale of Bostick Drive and Broad River Road to the County to serve as sites for its Department of Disabilities and Special Needs. The County has cross-appealed the Special Referee's Order requiring the County to furnish the e-mail communications with her, so appellant will have to wait

to see what the County's argument is on her being protected by attorney-client privilege. It is noteworthy, however, that § 30-4-40(5)(a) and (b), S. C. Code, ann. specifically makes these communications public information.

The County takes a very broad view of attorney-client privilege, essentially asserting that anything going across a lawyer's desk is automatically protected by attorney-client privilege, and the Special Referee erred in adopting this expansive view of attorney-client privilege instead of applying the narrow construction required by the Act and by the caselaw construing the Act.

Attorney-client privilege is a narrow exception. There is no such thing as "privileged information" when government officials communicate with third parties or one another about government business. § 30-4-40, S. C. Code, ann. provides a specific list of matters exempt from disclosure, but none of these exemptions are either (1) mandatory or (2) implicated in this case. Despite dying a thousand deaths in a thousand cases, the non-lawyer's faith in the myth that the act of copying a lawyer on a communication makes it "privileged" persists as a zombie canard despite the Supreme Court's rejection of it every time it has risen from the dead. In *Evening Post Publishing Company v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011) the Supreme Court reversed a grant of summary judgment when the School District argued that a questionnaire developed by its lawyer for the School Superintendent was covered by the privilege:

FOIA's basic premise is to give "any person has a right to inspect or copy any public record of a public body." Id. § 30-4-30(a). This right is not without some exceptions, enumerated under section 30-4-40, the following being the one at issue in this case: Correspondence or work products of a legal counsel for a public body and any other material that would violate attorney-client relationships." Id. § 30-4-40(a)(7). The determination of whether documents or portions thereof are exempt from FOIA must be made on a case-by-case basis, and the exempt and non-exempt material shall be separated and nonexempt material disclosed. *City of Columbia v. ACLU*, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996); see also *Beattie v. Aiken County Dep't. of Social Servs.*, 319 S.C. 449, 453, 462 S.E.2d 276, 279 (1995); *Newberry Publ'g Co., Inc. v. Newberry County Commn on Alcohol & Drug Abuse*, 308 S.C. 352, 354; 417 S.E.2d 870, 872 (1992). However, the exemptions should be narrowly construed to not provide a blanket prohibition of disclosure in order to "guarantee the public reasonable access to certain activities of the government." See *Fowler v. Beasley*, , 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996); see also S.C.Code Ann. § 30-4-15 (2007). The burden of proving

that an exemption exists lies with the government. *Evening Post Publ'g Co. v. City of North Charleston*, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005).

The e-mails in the present case include the plaintiff's effort to discover the "certain activities of the government" directed at her! Moreover, as demonstrated above, the redacted e-mails involve numerous members of the Beaufort County Council and staff, and even if the County could plausibly argue that such email chains invoke attorney/client privilege, the Councilmembers waive that argument when they seek legal advice (if that is really what they were doing) through their private e-mail accounts. The County Attorney does not exist to furnish legal services for anyone who happens to hold political office; the County Attorney represents the County, and the attorney-client privilege should be construed narrowly. Just because a putative privilege exists, does not mean the County is required to assert it, and as the Supreme Court has pointed out time and again, these questions must be settled on a "case by case basis." "That a record is exempt does not mean that the government has a duty of non-disclosure. Rather, an exemption provides the government with discretion to either withhold the record or release it." [internal citations omitted] *Evening Post Publishing Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (2005) (Supreme Court ordered North Charleston to release recorded conversation capturing North Charleston Police officers killing a crime victim inside a convenience store. The City argued the tape was exempt from disclosure because releasing it could result in a change of venue for a criminal trial.)

Government officials routinely communicate with one another and just as routinely automatically include the County Attorney in the chain of correspondence. This fact does not invoke the privilege of attorney-client. See *Marshall v. Marshall*, 282 S. C. 534, 320 S.E.2d 44 (Ct. App. 1984): "The attorney client privilege, though, does not protect communications with non-clients." Councilmembers communicating in their private capacities are not "clients."

An attorney may not represent both a governmental body and a private client in the same matter even when full disclosure is made and they consent to the representation, nor may a lawyer accept private employment in a matter in which he or she had personal and substantial responsibility

while a public employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

*7 Am.Jur2d*, Attorneys at Law § 194 Matters involving public interest, Rule 1.11(a)(2) ABA Model Rules, See also *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005)

As these and many other cases hold, attorney-client privilege only applies when a client is seeking legal advice based on the transmission of confidential information without third person being present. Nothing sought by the plaintiff in this case involves either seeking legal advice or confidential information; she sought only documents related to the County's purchase of two parcels of real estate, which are by statute public information, and communications from Councilmembers utilizing their private e-mail accounts who cannot possibly be clients of the County Attorney. Under the County's legal theory, every email copied to a lawyer makes it "privileged." When Berkeley County resisted turning over superintendent evaluation questionnaires on the ground that they were protected by attorney-client privilege for the same reason, the Supreme Court disagreed, holding: "The interest in confidentiality expressed through the attorney-client privilege should not trump the public's right to know at this juncture." *Evening Post Publishing Company v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011) (Court reversed grant of summary judgment to the School District.) Interestingly, the Order under review recites the correct standard at page 10 (R.O.A. Vol. 1, page 16) but never explains how non-County correspondents were seeking legal advice from the County Attorney. The Special Referee reaches an erroneous conclusion on page 11 of her Order (R.O.A. Vol. 1, page 17) without any evidentiary support: "I find the remaining redactions appropriate and subject to exemption pursuant to S. C. Code Ann. 30-4-40(a)(4)."

Third, the County's reliance on alleged SLED policies (quoted above on page 15) not only has nothing to do with the responsibilities of local governments' creation, retention, and dissemination of public documents, but also demonstrates how far the County is willing to go to erect pretextual barriers. The County's duties to preserve and disclose public records arise under the *State Records*

*Retention Act* and the *South Carolina Freedom of Information Act*, and neither legislative authority grants to SLED any oversight, let alone veto, authority. The County's justification as expressed through the County's statement is made of whole cloth.

Finally, both the South Carolina General Assembly and the South Carolina Supreme Court have been clear that a citizen's right to public records is "vital" to keeping government honest and preventing dishonest conduct that would otherwise flourish in the dark. "The Freedom of Information Act (FOIA) serves the important governmental interests of providing transparency in governmental decision making, preventing fraud and corruption, and fostering trust in government." *Disabao v. South Carolina Ass'n. of School Adm's.*, 404 S.C. 433, 746 S.E.2d 329 (2013) As the Supreme Court said in *Evening Post Publishing Company v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011): "It is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials **at a minimum cost or delay to the persons seeking access to public documents or meetings.** S. C. Code, Ann. § 30-4-15 (2007)." (emphasis added) Here, the e-mails and other documents disclosed so far reveal local government officials discussing ways to control the outcome of public meetings, to thwart the plaintiff, and to find a way around her acquittal in Municipal Court in order to persecute her. The only reason such conduct occurs is because it is done out of the public's view, which is why the Councilmembers selected their private e-mail communications to conduct government business. They mistakenly thought they could escape detection.

The assertion that the private email communications of government officials are "privileged" is nonsense, and such an assertion, when viewed alongside the evidence of the County's hostility to

the plaintiff is exactly why the General Assembly adopted the *Freedom of Information Act* as a bulwark against governmental secrecy and why the General Assembly originally made willful violations subject to criminal penalties. See § 30-4-110, “Penalties”: Prior to May, 2017, the statute read: Any person or group of persons who willfully violates the provisions of this chapter shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not more than one hundred dollars or imprisoned not more than thirty days for the first offense . . .” However, in May 2017, the General Assembly deleted the criminal penalties but broadened the potential for recovery to a prevailing plaintiff by including not only attorney’s fees, but also “compensatory damages” as follows:

- (C) If a person or entity seeking relief under this section prevails, the court may order:
  - (1) Equitable relief as he [*sic.*] considers appropriate;
  - (2) Actual or compensatory damages; or
  - (3) A reasonable attorney’s fees and other costs of litigation specific to the request, unless there is a finding of good faith. The finding of good faith is a bar to the award of attorney’s fees and costs.

After the County refused to provide the documents without the plaintiff paying prohibitive fees, the plaintiff sued on April 10, 2019, under the *Act*, alleging that the County was in violation of its duties to supply unredacted material and for imposing retaliatory fees instead of “fees not to exceed the actual cost of searching for or making copies of such records.” § 30-3-30(b). The plaintiff also alleged that the County specifically and willfully directed these actions against the plaintiff.

In its Answer the County raised three defenses: a general denial, a motion to dismiss, and an assertion that the County is exempt from suit under the *State Tort Claims Act*. (See Answer filed August 14, 2019 at R.O.A. Vol. 1, page 38.) As discussed in more detail below, in May 2017, the General Assembly amended the *Freedom of Information Act* to provide the County the option to allege a “good faith” defense. The County adroitly avoided this defense because while lawyers are zealous advocates for clients, zealousness has a limit, and that limit is usually the front door to the Courthouse.

Before the Special Referee, the County asserted that the plaintiff failed to raise a colorable claim, but clearly, the plaintiff has alleged a proper cause of action because the General Assembly created the cause of action in § 30-4-100:

A) A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases if the application is made no later than one year after the date of the alleged violation or one year after a public vote in public session, whichever comes later. Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties.<sup>5</sup> If the hearing court is unable to make a final ruling at the initial hearing, the court shall establish a scheduling order to conclude actions brought pursuant to this chapter within six months of initial filing. The court may extend this time period upon a showing of good cause. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.

(B) If a person or entity seeking relief under this section prevails, he may be awarded reasonable attorney's fees and other costs of litigation specific to the request. If the person or entity prevails in part, the court may in its discretion award him reasonable attorney's fees or an appropriate portion of those attorney's fees.

HISTORY: 1978 Act No. 593, Section 11; 1987 Act No. 118, Section 8; 2017 Act No. 67 (H.3352), Section 4, eff. May 19, 2017.

There is nothing in the *State Tort Claims Act* that abrogates the *Freedom of Information Act*, and the universal rule of statutory construction requires that the two Acts of the General Assembly be harmonized.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

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<sup>5</sup> The Court could not hold a hearing within ten days because shortly after filing suit, plaintiff's counsel entered M.U.S.C. for what turned out to be an extended stay. During the extended recuperation period, both opposing counsel and the Clerk of Court's office were not only understanding but also generous beyond my capacity to repay.

The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd. *Ray Bell Constr. Co. v. School Dist. of Greenville Co.*, 331 S.C. 19, 501 S.E.2d 725 (1998).

*Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000)

It is a hard sell to convince this Court that the General Assembly did not mean what it said in the *Freedom of Information Act*, since the General Assembly took pains to declare violations to be an irreparable harm and to provide for expedited hearings and attorney's fees for citizens who bring such actions. § 30-4-100(a) says: "The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists." Second, the purpose of the *State Tort Claims Act* is to abolish sovereign immunity and set out the rules for suing the State, so the two Acts are harmonized and do not address the same subject. While the *State Tort Claims Act* provides limited immunity in specific instances, it does not relieve the County from adhering to its responsibilities under the *Freedom of Information Act*, and in reaching her decision, the Special Referee gave the County's assertion no weight. More importantly, in its Answer, the County does not dispute that it is subject to the *Act*, nor does it offer a reasonable explanation as to why its charges were originally in excess of fourteen thousand dollars when the requested information can be produced as electronically stored material that is easily retrievable and easily loaded on a flash drive or burned to a C.D. disc and which are materially at variance from its published fee schedule. See R.O.A. Vol. 1, page 341 [Exhibit No. 15, March 27, 2019, correspondence from Acting County Administrator, John Weaver]: "Ms. Baracco As you may not know, Beaufort County perhaps has the most sophisticated FOIA system of any county or municipality in South Carolina, including both manpower and electronic capabilities." The County's original attempt to saddle her with exorbitant fees is a clear example of bad faith deployed to try to scare her off her effort to obtain public documents.

D. THE SPECIAL REFEREE ERRED IN FAILING TO ACKNOWLEDGE THAT ONCE THE COUNTY CONSUMMATES A REAL ESTATE PURCHASE AND THE TRANSACTION IS COMPLETE, THERE IS NO LONGER A VALID EXEMPTION TO PUBLIC INSPECTION.

The final barrier erected by the County was the spurious claim that a completed real estate transaction is exempt from disclosure. The first F.O.I.A. request sent by the plaintiff on February 10, 2019, sought information about County's real estate acquisition of two parcels, a transaction previously completed, so the material is obviously public and just as obviously not subject to any exemption or redaction. While the *Act* provides defined statutory exemptions that allow the County to redact information, such as ongoing negotiations for a proposed sale, none of those exemptions apply to a real estate transaction that has closed. For the convenience of the Court, the statutory exemptions are: (1) trade secrets, (2) information of a personal nature, (3) confidential informants, *etc.*, (4) matters specifically exempted, (5) documents related to a **proposed** sale, (6) salaries less than \$50,000.00, (7) lawyers' work product and confidential communications, (8) working papers of the General Assembly, (9) trade negotiations, (10) Department of Revenue audit criteria, (11) anonymous gifts, (12) investment information in the State Retirement System, (13) certain employment application information, (14) scientific and educational proprietary information, (15) identity of certain complainants, (16) investment decisions of endowed funds, (17) structural plans, (18) autopsy photos, and (19) financial data of the Venture Capital Authority. (emphasis added) If a governmental body asserts a right to redact, the burden is on the government asserting the exemption to prove it, and such exemptions are to be narrowly construed. *Evening Post Publ. Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (2005), § 30-4-40, "Matters exempt from disclosure" Here, despite that none of plaintiff's requests are subject to any exemption, the County furnished no explanation as to why it was redacting the information it did produce until the Special Referee compelled it.

In summary, the Court must evaluate the County's conduct in total. In evaluating whether either the County's charges or the County's redactions are reasonable, *i.e.* authorized by a statutory exemption, the Court need only look at the redacted e-mails and the County's putative justification to see that they fit none of the exemptions. The Special Referee ignored the plaintiff's evidence of the County's expressed hostility for the plaintiff even though this evidence further demonstrates that the County's claim of privilege is pretext. See R.O.A. Vol. 1, page 343, [Exhibit 17] discussed in detail above on page 18. A selection of these Exhibits, collected in Exhibit 17, demonstrate that the County has gone to considerable pains to investigate her background, distribute information about her to both County and Municipal officials, even going so far as to collect a list of her public statements. The idea that Appellant's representative on county Council took it upon herself to disseminate what she thought was impeaching evidence to the Town Manager is shocking. The most disturbing evidence, discussed in more detail above, was the County Attorney's effort to coordinate with other municipal governments to stand united against her to erect financial barriers to her F.O.I.A. requests. (See Plaintiff's Exhibit No. 17 at R.O.A. Vol. 1, page 323.) **After** the plaintiff made routine *F.O.I.A.* requests, the County undertook to investigate her, and its efforts demonstrate the County's willfulness in harassing her only because she made lawful requests for documents. For example, in a June 10, 2014, email from the Town Manager of Bluffton to the Bluffton Police Chief and the Bluffton City Attorney, regarding an earlier F.O.I.A. request, the Town Manager wrote:

Chief: This is the F.O.I.A. request I was speaking of. Anyone we may have arrested?<sup>6</sup>  
/s/ Anthony Barrett (R.O.A. Vol. 1, page 345 [Exhibit 18])

This is one example of numerous examples of animus and bad faith collected and attached as Exhibits 17-21 in R.O.A. Vol 1, pps. 343-349. The County may attempt to persuade this Court that

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<sup>6</sup> Appellant concedes this remark is ambiguous. It could be a question as to whether the appellant has an arrest record, or it could be a query as to the propriety of arresting her. Neither is reassuring, and both are improper.

the Town’s Manager’s comment is innocuous, but if it does, the Court should be aware of the context of the statement. In 2012, the Town of Port Royal issued a 2012, municipal violation against the plaintiff for an alleged animal at large. After a jury acquitted her of the charge on November 8, 2012, Beaufort County inserted itself in a municipal event and issued to appellant an unlawful “Magistrate’s Summons” for the same offense. In another example of animus, the County Attorney circulated an email among government officials, Exhibit 17, dated June 11, 2014 (R.O.A. Vol. 1, page 343), to urge other municipal governments to get on board with a “similar approach” with the County’s decision to require a 50% deposit for plaintiff’s requests. On June 23<sup>rd</sup>, the County Attorney estimates charging the plaintiff \$35,000.00 for her requests even though the plaintiff’s requests are electronically stored and can be recaptured in seconds. The County’s imposition of excessive charges and efforts at redaction when the subject matter is not covered by any exception to disclosure is evidence of willfulness. This willfulness is conduct which the *Freedom of Information Act* addresses. In the pre-2017 version of the *Freedom of Information Act*, amended May 2017, the General Assembly labeled such conduct criminal. See § 30-4-110, S. C. Code, ann.: “Any person or group of persons who willfully violates the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or imprisoned not more than thirty days for the first offense . . .” The amendment to this section in 2017, quoted below, deleted the criminal penalties and substituted compensatory damages.

At no time, either before or after the plaintiff filed this action—until the Special Referee compelled it—has the County offered an explanation or justification as to (A) why the County Attorney must review e-mails generated by Councilmembers from their private e-mail accounts and (B) why the appellant has to pay for it. As further evidence of the County’s bad faith, it never provided a privilege log until the Special Referee required it. Whether the private e-mails are protected by privilege or not, either way, the statute clearly prohibits these charges, and they are, therefore

excessive as a matter of law. Since plaintiff filed her suit, the County never offered any justification for expenses in excess of fourteen thousand dollars associated with the routine retrieval of information the County is required to archive under the state's *Records Retention Act*, and such unexplained charges are at variance with the Administrator's statement that "Beaufort County perhaps has the most sophisticated FOIA system of any county or municipality in South Carolina." (quoted above page 9) See §30-1-20, S. C. Code, ann.: "The chief administrative officer of any agency or any subdivision or any public body in charge of public records . . . is responsible for carrying out the duties and responsibilities of this chapter . . .". The responsibilities of Chapter 1 require the County to maintain, archive, and make available the public records of the County, and these include the electronic correspondence of the members of County Council and their agents. When government officials communicate with third parties or with one another, there is no attorney/client privilege implicated, and even communications to the County Attorney may not be covered by privilege if others are included in the communication. The plaintiff is confident that not one of the redacted e-mails represents a request for legal advice. The plaintiff reaches this conclusion on two grounds: First, the County previously provided the plaintiff with the some of the same e-mails that it now claims are covered by attorney-client privilege. Second, when the Special Referee required the County to un-redact the correspondents in the e-mail chains so the plaintiff could see who was included in them, the plaintiff discovered non-County personnel whose participation in such exchanges waives any alleged attorney-client privilege. Moreover, if the County is going to withhold information from the plaintiff, then it must at least provide her with a log of material it is refusing to turn over with an explanation. If the County chooses to pay its attorney to review every *F.O.I.A.* disclosure it makes, that is not a charge that passes through to the requestor. In essence, the County now argues that because the County has a lawyer, that every communication by a government official is subject to attorney/client privilege, a tacit assertion that is not supported by any case law, statute,

regulation, or policy governing the conduct of lawyers.

In conclusion, the evidence in this case is overwhelming that the County singled out appellant for special adverse treatment, denied her reasonable access to specific documents, redacted documents for no reason other than to thwart the plaintiff, and imposed excessive and unlawful charges for the collection of information and documents, which are easily retrieved, and forced her to file an application with the Court to address an irreparable harm by refusing to communicate with her. This is overwhelming evidence of bad faith. Appellant is entitled to a declaration that the County must turn over the documents in electronic form, unredacted, immediately and should be enjoined from further violations of the *Act*. In addition, the Court should require the County to reimburse the Plaintiff for the attorney's fees and for the compensatory damages she has incurred in compelling the County to conform to South Carolina law. Finally, the Court should impose the punishment it finds to be just and proper for a willful violation in order to deter the County from such unlawful conduct in the future. This last prayer for relief is not fanciful. The Courts of this state are clogged with *F.O.I.A.* cases because when local governments ignore their statutory duties to requestors, there is no personal penalty for disobedience. Government officials have no skin in the game and enjoy free representation by counsel paid for by taxpayers. Even their penalties are paid by taxpayers, and they never experience a consequence for breaking the law. If the Court could require a governmental official to report to jail for a weekend because of an intentional *F.O.I.A.* violation, only then would local governments pay attention to their statutory duties. However, in May 2017, the General Assembly amended § 110 to delete the criminal penalties. Instead, under the revised statute, the Court's power is limited to an award of attorney's fees, compensatory damages, and/or a "civil fine" of up to \$500.00 per occurrence. As this case demonstrates, until a Court punishes local governments for disobedience of their statutory duty to be transparent, local governments will continue to violate *F.O.I.A.* with impunity because officials who are charged with a duty to provide documents are never

called upon to answer for their violations.

2. THE SPECIAL CIRCUIT COURT JUDGE ERRED IN FAILING TO REQUIRE THE COUNTY TO PAY THE PLAINTIFF/APPELLANT ATTORNEY'S FEES AS A PREVAILING PARTY.

The Special Referee erred in failing to award the plaintiff fees and costs as a “prevailing party” under the statute. First, it is indisputable that the only reason the plaintiff received access to the requested material ordered by this Court is because she filed suit, and that makes her a “prevailing party.” After she filed suit, the County produced 276 documents she had not previously received although they were half redacted. R.O.A. Vol. 1, pages 242-245 [tr. page 27, line 4; page 30, line 12] Moreover, the only reason the County rethought its charges in this case is because: A) the plaintiff filed this action, and B) the parties appeared before Judge Buckner on June 2, 2020, during which hearing Judge Buckner telegraphed skepticism about both the fees proposed by the County and the reasons for nonproduction. The County never identified “attorney/client” privilege as the reason e-mails had to be redacted until matter was before the Court under the *South Carolina Freedom of Information Act*, §§ 30-4-10, *et. seq.* Prior to filing suit, the County made no mention of attorney/client privilege. Instead it sought to thwart the plaintiff’s request by demanding she pay \$12,000.00 to fulfill it. In her amended complaint, the plaintiff alleges that she made four straightforward requests under § 30-4-40, S. C. Code, ann. for County documents related to the sale and purchase of parcels of real estate commonly referred to as 1 Bostwick Circle and 429 Broad River Road and for e-mail communications of County officials—**from their private e-mail addresses**—connected with these and other transactions. See summary of requests, Exhibit 1 to the Amended Complaint. R.O.A. Vol. 1, page 37. The County’s Answer made no mention of attorney/client privilege, alleging only that matters were “exempt.” Even if the Court declines to amend or alter the Referee’s findings for the reasons set forth above, it is indisputable that the plaintiff would have received nothing but for her filing this action, and the fact that she had to file an action to force the County to respond entitles her to fees and costs, and it is an abuse of discretion to deny such. The Supreme Court addressed this issue in *Sloan v. Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011), including a discussion of the discretionary standard to be applied by courts:

“The decision to award or deny attorneys’ fees under a state statute will not be disturbed on appeal absent an abuse of discretion.” *Kiriakides v. Sch. Dist. Of Greenville County*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (citing *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)). “An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.” *Id.* 675 S.E.2d at 445 (quoting *Layman*, 376 S.C. at 444, 658 S.E.2d at 325). The issue before the Court presents a series of legal questions in terms of determining (1) whether Sloan may be considered a prevailing party under the FOIA statute; (2) if Sloan is a prevailing party, whether his entitlement to fees may extend beyond the production of the requested documents; and (3) whether the law of the case from *Sloan I* affects the time period for the attorney fee award.

The Supreme Court analyzed Sloan’s request under the same principle adopted by this Court in that the trial court found plaintiff prevailed in part but not in total and based on that finding, declined to award the plaintiff any fees or costs. The Supreme Court reversed, and under *Sloan II*, the refusal to award fees was an abuse of discretion because the Supreme Court found that in order to be a prevailing party, a plaintiff does not have to win 100 to 0 but is a prevailing party if she “successfully prosecutes an action . . . prevailing on the main issue, even though not to the extent of the contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.” *Sloan* at page 897, quoting *Heath v. County of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990). Moreover, the Court is required to construe the *Act* liberally in favor of the plaintiff as the citizen taking upon herself the responsibility for making government officials act in accordance with the law. “The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. *Campbell*, 354 S.C. at 281, 580 S.E.2d at 166.” *Burton v. York County Sheriff’s Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004) (Trial Court’s Order requiring disclosure of records affirmed and case remanded for determination of attorney’s fees under the six factors listed by the Court.) (An interesting footnote to the *Burton* case is that two of the three Court of Appeals’ authors are now on the Supreme Court.)

In *Sloan II*, the public body argued that Sloan was not a “prevailing party” because it handed over the documents before the Court ordered them to, a position rejected by the Supreme Court, and this holding demonstrates that the Court’s refusal to award fees and costs is an abuse of discretion:

Friends argues that Sloan was not a prevailing party under this definition “because

Sloan did not receive any of the relief he requested in his complaint. . . .” We reject Friends’ position and agree with the trial court that Sloan was a prevailing party for purposes of the FOIA attorney’s fees provision. We find persuasive the decision of the Montana Supreme Court in *Havre Daily News, LLC v. City of Havre*, 333 Mont. 331, 142 P.3d 864 (2006). The *Havre* court addressed whether the post-complaint voluntary production of disputed documents precludes prevailing party status to a plaintiff.

When a public body frustrates a citizens FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed. See *Litchfield Plantation Co. v. Georgetown County Water & Sewer Dist.*, 314 S.C. 30, 34, 443 S.E.2d 574, 576 (1994) (Toal, J., concurring in part, dissenting in part) (“A government agency should not be allowed to stonewall an FOIA request without some penalty for its actions.”); see also *Wildlands CPR v. U.S. Forest Serv.*, 558 F.Supp.2d 1096, 1098 (D.Mont. 2008) (finding that if a complainant receives relief “via unilateral change in position by the agency,” he is entitled to fees under the federal FOIA statute); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wash.2d 89, 1117, 1125 (2005) (*en banc*) (“[P]ermitting an agency to avoid attorney fees by disclosing the documents after the plaintiff has been forced to file a lawsuit . . . would undercut the policy behind the act.” (alteration in original) (quoting *Coal. On Gov’t Spying v. King County Dep’t. of Publ. Safety*, 59 Wash.App. 856, 801 P.2d 1009, 1013 (1990))).

The Supreme Court went on to hold that “by awarding attorney’s fees in these circumstances may serve as an impetus for public bodies to comply with a FOIA request and thus avoid the imposition of an attorney’s fee award. See *Soc’y of Prof’l Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984) (finding attorney’s fees may be awarded to encourage agencies to comply with FOIA requests.)” *Sloan v. Friends of the Hunley* at page 898. Here it is unmistakable that the plaintiff would have achieved nothing, not even the putative privilege log, but for filing her suit. It was Beaufort County who dictated the litigation path; at any time, either before or after litigation commenced, Beaufort County was free to cooperate with the plaintiff to assist her in getting public documents. Instead it chose the path of maximum resistance even going so far as to label the plaintiff’s search for public documents “harassment,” a spurious allegation reinforced by Councilmember Caparole’s March 29, 2015 e-mail to Senator Davis asking for help locating legal authority that might justify the “persecution” of the appellant and characterizing the County’s treatment of appellant as “abuse of power.” R.O.A. Vol. 1, page 346 [Ex. 19]) Thus the plaintiff is much more of a “prevailing party” as was Sloan in his suit for documents against Friends of the Hunley. Unlike *Sloan*, the public body here gave the plaintiff nothing until the Court required it to

do so. As the preamble to the *South Carolina Freedom of Information Act* makes clear, the purpose of the Act is to facilitate a citizen's access to documents, and the Court's refusal to award the plaintiff fees and costs not only represents an abuse of discretion under the Act, but also promotes Beaufort County's unlawfulness and provides a shield for illegal acts. It also acts as a chill on any other citizen who may think twice before attempting to hold the government accountable for its violations of F.O.I.A.

Before the plaintiff got counsel involved, the County wanted to charge her over \$12,000.00 for public records in violation of the *Freedom of Information Act* and its own ordinances. It wanted to charge her \$72.00 an hour for its legal department to review all the e-mails—and remember, these are e-mails from Councilmembers from their private e-mail accounts—to determine if they were subject to release, a charge specifically prohibited by statute: “Fees may not be charged for examination and review to determine if the documents are subject to disclosure.” § 30-4-30(B), S. C. Code, Ann. This record demonstrates that Beaufort County employed every dilatory and obstructionist tactic at hand, which when combined with the evidence of open hostility for the plaintiff, demonstrates she was a substantially prevailing party. As the Supreme Court said in *Sloan v. Friends of the Hunley (Hunley II)*, 393 S.C. 152, 711 S.E.2d 895 (2011):

When a public body frustrates a citizen's FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed. See *Litchfield Plantation Co. v. Georgetown County Water & Sewer Dist.*, 314 S.C. 30, 34, 443 S.E.2d 574, 576 (1994) (Toal, J., concurring in part, dissenting in part) (“A governmental agency should not be allowed to stonewall an FOIA request without some penalty for its actions.”); see also *Wildlands CPR v. U.S. Forest Serv.*, 558 F. Supp. 2d 1096, 1098 (D. Mont. 2008) (finding that if a complainant receives relief “via . . . unilateral change in position by the agency,” he is entitled to fees under the federal FOIA statute); *Spokane Research & Def. Fund v. City of Spokane*, 117 P.3d 1117, 1125 (Wash. 2005) (*en banc*) (“[P]ermitting an agency to avoid attorney fees by disclosing the documents after the plaintiff has been forced to file a lawsuit . . . would undercut the policy behind the act.” (alteration in original) (quoting *Coal. on Gov't Spying v. King County Dep't of Pub. Safety*, 801 P.2d 1009, 1013 (Wash. Ct. App. 1990))).

Once again, the importance of plaintiff's animus evidence comes into play because it demonstrates why the County adopted its harsh posture with her. Therefore, for the reasons set forth in her original motion for reconsideration, the plaintiff submits that the Court abused its discretion in

refusing to award fees.

## CONCLUSION

As the length of appellant's brief demonstrates, it is an easy thing to get lost in the weeds of any legal issue, and the *S. C. Freedom of Information Act* is no exception. No fair minded person can examine the procedural history of this case and fail to apprehend two important points: 1) How important it is for ordinary citizens to keep their eyes on local governments, and 2) how easy it is for local government officials to thwart both the spirit and letter of the *Freedom of Information Act*. Local governments resist operating in daylight, and as the editorial board of the *Post & Courier* opined as recently as Sunday, September 5, 2021:

Our changing media landscape—specifically the continuation and even disappearance of local newspapers in South Carolina's smaller communities—has led some elected official to operate with less public oversight than ever, with often predictable and discouraging results.

This vacuum has been filled partly by public-minded citizens who invest their time to learn about what's going on—and then spread the news through their social circles and social media.

Here, the appellant became interested in her local government after it forced her to endure multiple court appearances following a jury acquittal on a municipal court offense, and it was that spark of interest that: (1) caused her to ask more questions about the operation of Beaufort County, and (2) made her known to local government officials across all three levels of government. H. L. Mencken reportedly said that every citizen lives in fear of being noticed by the government, and this case proves the point *passim*. The fact that the County demonstrated bad faith by adopting shifting explanations for preventing appellant's access to public documents and forcing her to incur the expenses she has incurred, including, but not limited to, compelling her to pay for a Special Referee to adjudicate a *Freedom of Information Act* dispute is both unjust and contravenes the express purpose of the *Freedom of Information Act* and the numerous cases construing it. (Interestingly, on June 3, 2021, our Supreme Court addressed the hemorrhaging of legal expenses incurred by citizens seeking

access to the courts in Administrative Order No. 2021-06-03-02, in which it prohibited circuit courts subcontracting discovery disputes to special referees. Even though this Order came too late and ameliorates a different problem, it serves to highlight the crises now occurring across this State in which law firms are now billing over \$50,000.00 in routine Magistrate Court cases.) Beaufort County's mistreatment of the appellant is further exacerbated by the County's admission that its purchase of 1 Bostick Circle was, in fact, improper! See R.O.A. Vol. 1, page 338 [Exhibit 14] The County's shifting criteria for impeding her requests for documents combined with its efforts to not only block her access to public documents but also to get the adjoining municipalities to get on board is shocking and demonstrates the County's coordinated effort to obstruct and impede the appellant at every turn, even involving the local judicial officers. The appellant is clearly a "prevailing party," and the fact that the Special Referee places an *imprimatur* upon the County's unlawful acts only emboldens them to continue mistreating the appellant and others like her even though she is investing her time, her money, and her energy in providing a valuable service in checking the activities of her local government. The Special Referee's Order is controlled by palpable errors of law and fails to adhere to the requirements of the *South Carolina Freedom of Information Act's* procedural and substantive provisions. The appellant respectfully requests that the Order be reversed and the County be compelled to turn over public documents for inspection and for a remand to the circuit court for redetermination of the amount of attorney's fees to be awarded to the appellant as prevailing party.

Respectfully submitted,

April 12, 2022

/s/ Thomas R. Goldstein  
Thomas R. Goldstein, S. C. Bar No. 2186  
Belk, Cobb, Infinger & Goldstein, P.A.  
P. O. Box 71121  
N. Charleston, S. C. 29415-1121  
(843) 554 4291; (843) 554 5566 (fax)  
[tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)  
Attorneys for Appellant

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Apr 12 2022

SC Court of Appeals

CERTIFICATE OF COUNSEL

I certify that this Final Brief complies with Rule 211(b), *South Carolina Appellate Court Rules*.

April 12, 2022

/s/ Thomas R. Goldstein  
Thomas R. Goldstein, S. C. Bar No. 2186

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Apr 12 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Erin D. Dean, Special Referee

CASE NO.: 2019-CP-07-00818  
APPELLATE TRACKING NO.: 2021-00321

Mare Baracco,.....Appellant,

v.

County of Beaufort,.....Respondent.

RESPONDENT’S FINAL BRIEF OF APPELLANT/RESPONDENT

April 12, 2022

Thomas R. Goldstein, S. C. Bar No. 2186  
P. O. Box 71121  
N. Charleston, S. C. 29415-1121  
(843) 554 4291; (843) 554 5566 (fax)  
[tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)  
Attorneys for Appellant

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## REPLY TO RESPONDENT/APPELLANT'S STATEMENT OF FACTS

A cross appeal makes for awkward reading by referring to the Appellant as the Appellant/Respondent and the County as Respondent/Appellant, and therefore for convenience, this Brief adopts the convention of designating "Baracco" for "Appellant/Respondent" and "County" for "Respondent/Appellant."

The County mischaracterizes its limited production of the real estate documents it supplied in response to Baracco's F.O.I.A. Request No. 1: "Portions of the production were redacted by the County." (County's Brief at page 4) The County's redacted production is found in the Record on Appeal at Vol. 2, pages 448-614, and the Court can see for itself that nearly the entire production is blacked out. In other words, in order to be accurate, the County should say it released a few unimportant documents and redacted almost everything else.

On pages 6-7, the County asserts as a "statement of fact" that Baracco either waived most of her claims or is raising them for the first time on appeal. The Special Referee understood the issues and correctly summarized them on page 4 of her Order (R.O.A. Vol. 1, page 10): "Plaintiff asserts that the defendant Beaufort County redacted documents in violation of the Act and that the fees charged were done as a pretext designed to thwart Plaintiff's rights to public information." As the briefs filed with the Circuit Court and the Record on Appeal demonstrate *passim*, the County's statement is not correct, but it does highlight the inadequacy of the relief available to citizens under the *Freedom of Information Act*, which can be a toothless tiger because local governments utilize free money to stonewall citizens' access to public documents, and by doing so, drive away all but the most resolute litigants who are willing to put their time and limited economic resources against a force of inexhaustible resources to force governments to adhere to their obligation of transparency. Asserting that Baracco "waived" or is raising her claims for the

first time on appeal is stock-in-trade of governments' resistance to accountability. It may be a legal argument, but it is far from an established "fact."

Page 7 of the County's brief contains two additional erroneous statements of fact. The first is self-refuted by the County's Statement of the Case on page 3: "On September 3, 2020, the County revised its redacted production to remove redactions that covered the names of the senders/recipients of email in accordance with the Special Referee's instructions." (County's Brief, page 3; See also Order under review at Record on Appeal Vol. 1, page 8.) By forcing the County to display the correspondents in the blacked out e-mails was a major success and vindicated in part her efforts, making her a "prevailing party." The reason the County's subsequent statement is misleading is because Baracco commenced her suit on April 10, 2019 (R.O.A. Vol. 1, page 30 [amended complaint]), and the County did not reveal the recipients in the e-mail chains until the Special Referee required it on August 19, 2020, during the pre-trial conference. (R.O.A. Vol. 1, page 8 [September 3, 2020 transmission of the revised redacted documents via Citrix] Not until the Special Referee compelled the County to reveal the identities of the correspondents did Baracco learn who was included in the communications. (Interestingly, the County sent the revised redacted documents via encrypted files, which Baracco's counsel could not open.) The fact that Beaufort County would not reveal who was included on the communications sheds a powerful light on the County's motives and lack of transparency.

The second erroneous statement on page 7 is the County's assertion that the real estate agent who sold a real estate parcel to the County is a "privileged person" under the law. The County further states as a "fact" that the question of the real estate agent's relationship to the County is a novel question in South Carolina law. Again, Ms. Regecz's status may be a County legal argument (refuted by the record), it is a **fact** that the *South Carolina Freedom of Information*

Act specifically requires records relating to the purchase and sale of real estate be open for public inspection. See § 30-4-40(5), S. C. Code, ann.

### **REPLY TO RESPONDENT/APPELLANT’S STANDARD OF REVIEW**

The parties find common ground with the County in its summary of the standard of review, but the matters raised here are neither novel nor infrequent. The well-developed South Carolina caselaw on the *Freedom of Information Act*, along with the preamble to the Act contained in § 30-4-15, S. C. Code, ann. demonstrate the General Assembly’s anticipation of such disputes and emphasize that both the General Assembly and the Supreme Court are equally consistent that local governments should be transparent: “The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy.” Barraco’s exposure of private e-mail communications to avoid this openness is a “Captain Renault” moment when she brings to light local governments using private electronic communications to thwart both the letter and the spirit of the *Freedom of Information Act*:

Rick: How can you close me up? On what grounds?

Captain Renault: I’m shocked, shocked to find that gambling is going on in here!

[a croupier hands Renault a pile of money]

Croupier: Your winnings, sir.

Captain Renault: [sotto voice] Oh, thank you very much.

*Casablanca* (1942)

The County is not correct in suggesting that this case raises anything close to a novel issue. The well-developed “sunshine” laws across South Carolina and the entire nation prove *passim* that government secrecy is as inevitable as nature’s decay. The well-developed body of the *Freedom of Information Act* law in this State demonstrate two things: (1) Government always resists

openness, and (2) the well-developed case law in the appellate courts of this state have little deterrent effect on the conduct of local governments. Instead, the only thing standing between complete secrecy and governmental transparency is the resolve of a few citizens who care enough to take up the gauntlet and force local governments to adhere. It is an unfair fight, but a worthy one that will forever clog the Courts of this state for the simple reason that local governments have no skin in the game. As a result the Courts' repeated deterrent effects reach only as far as to a particular transgressor on a particular case and no further because there is no penalty when a government official violates the *F.O.I.A.* If a local government loses, they pay the citizen's attorney's fees with taxpayer's money, shrug, and continue unabated. Wherever the Court's decision ends up in this case, the issues raised here will be depressingly and frequently repetitive, but far from novel.

#### **REPLY TO ARGUMENT 1.**

**The *South Carolina Freedom of Information Act's* limitation on charges for producing documents is not ambiguous, and the County intentionally violated it to impede Baracco's efforts to examine public documents.**

The County's first argument alleges Baracco fails to present a justiciable controversy because she never paid the County's demand of \$12,079.00 as a condition of receiving the documents she requested. The County avoids the fact that to arrive at its "estimate" of \$12,079.00, it unlawfully inflated the figure by requiring her to be responsible for charges specifically prohibited by statute (including an unlawful 50% deposit discussed more fully below). A justiciable controversy is one that is not hypothetical or abstract. See *Black's Law Dictionary*, 5<sup>th</sup> Ed. "justiciable controversy." There is nothing hypothetical or academic about Beaufort County demanding that Baracco pay an unlawful fee of \$12,079.00 as a condition of obtaining public documents, especially when they turned out to be mostly blacked out and included demonstrably

unlawful charges in computing the required prepayment. (An unintended irony flows from the County's position that Councilmembers have an unmanageable "sheer volume" of personal e-mails when County business is supposed to be conducted in the open.) In 2013, the Supreme Court delineated "justiciable controversy" as follows:

To fall within the intended purpose and scope of the Declaratory Judgments [742 S.E.2d 374] Act, the parties must seek adjudication of a justiciable controversy. *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) ("Despite the [Declaratory Judgments] Act's broad language, it has its limits."); see also *Power*, 255 S.C. at 154–55, 177 S.E.2d at 553 (noting that where adjudication of a question "would settle no legal rights of the parties," it would be "only advisory and, therefore, beyond the intended purpose and scope of a declaratory judgment"). "Questions of statutory interpretation, by themselves, do not rise to the level of actual controversy." *Entergy Nuclear Generation Co. v. Dep't of Env'tl. Prot.*, 459 Mass. 319, 944 N.E.2d 1027, 1034 (2011) (quoting *Woods Hole, Martha's Vineyard & Nantucket S.S. Auth. v. Martha's Vineyard Comm'n*, 380 Mass. 785, 405 N.E.2d 961, 966 (1980)).

"The Uniform Declaratory Judgment[s] Act is not an independent grant of jurisdiction." *Brown v. Oregon State Bar*, 293 Or. 446, 648 P.2d 1289, 1292 (1982). Further, it is fundamental that the Declaratory Judgments Act does not eliminate the case-or-controversy requirement. See *Power*, 255 S.C. at 153–54, 177 S.E.2d at 552 (" 'The existence of an actual controversy is essential to jurisdiction to render a declaratory judgment.' " (quoting *S.C. Elec. & Gas Co. v. S.C. Pub. Serv. Auth.*, 215 S.C. 193, 215, 54 S.E.2d 777, 787 (1949))); *City of Columbia v. Sanders*, 231 S.C. 61, 68, 97 S.E.2d 210, 213 ("The Uniform Declaratory Judgment[s] Act ... 'does not require the Court to give a purely advisory [403 S.C. 82]opinion which the parties might, so to speak, put on ice to be used if and when the occasion might arise,' or 'license litigants to fish in judicial ponds for legal advice.' " (citations omitted)).

*Committee v. City of Myrtle Beach*, 403 S.C. 76, 742 S.E.2d 371 (S.C. 2013)

Baracco's demand to see public documents and the County's imposition of unlawful charges creates "the existence of an actual controversy requirement" because (1) the County withheld public documents from her unless she paid an unlawful amount, and (2) the statute itself confers standing upon her to bring the action. § 30-4-100, S. C. Code, ann. The whole purpose of § 30-4-100 is to empower citizens to bring actions for declaratory and injunctive release as guardrail to prevent secret government conduct. The Special Referee found that the County imposed illegal charges on Baracco but granted her no relief: "The Act is clear that the public shall not be charged fees for the 'examination and review to determine if the documents are subject

to disclosure. *Id.* Therefore, any attempt to charge fees by the Defendant's Legal Department were inappropriate under the Act." (R.O.A. Vol. 1, page 13 [Order under review at page 7]) The Special Referee then goes on to conclude that because Baracco did not pay the fees, she suffered no "damages," and this is the error of law addressed by Baracco's appeal. A citizen is not required to prove "damages" to bring a cognizable claim under the *Freedom of Information Act*. § 30-4-100(a), S. C. Code, ann. makes this clear: ". . . a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists." Thus the Special Referee's entire Order under review is based upon a material error of law. See also *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006): Additionally, this Court has held that standing under FOIA does not require the information seeker to have a "personal stake in the outcome. *Fowler v. Beasley*, 322 S.C. 463, 466, 472 S.E.2d 630, 632 (1996)."

In short, by interposing technical objections, the County seeks to profit from its own wrongdoing and shield its conduct from the openness requirements of the *Freedom of Information Act*. The *Act* does not allow the County to deny public records to a citizen by adopting the expedient of assessing unlawful charges to chill the effort. The County's violations are hardly a hypothetical or academic question. Baracco presents a real and ripe controversy, which if not addressed will be repeated without ever receiving judicial scrutiny because most citizens lack the ability to bring an action. As the Court of Appeals stated in another *F.O.I.A.* case involving a citizen's request for a copy of emergency call tapes:

A matter becomes moot "when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Curtis v. State*, 345 S.C. 557, 567-68, 549 S.E.2d 591, 596 (2001) (alteration in original) (quoting *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)), cert. denied, 535 U.S. 926, 122 S.Ct. 1295, 152 L.Ed.2d 208 (2002). In civil cases, there are three exceptions to the mootness doctrine: (1) an appellate court can retain jurisdiction if the issue is capable of repetition yet evading review, (2) an appellate court can decide cases of urgency to establish a rule for future conduct in matters of important public interest, and

(3) if the decision by the trial court can affect future events or have collateral consequences to the parties, the appellate court can take jurisdiction. *Id.* at 568, 549 S.E.2d at 596.

In *Byrd v. Irmo High School*, 321 S.C. 426, 468 S.E.2d 861 (1996), a student challenged the school district's order which suspended him for ten days for coming onto campus after consuming alcohol. The court chose to hear the case because school suspensions are very brief and are usually completed before judicial review can take place. *Id.* at 432, 468 S.E.2d at 864. Similarly, although we can grant no further relief in the current appeal, we choose to address The Post and Courier's argument because the facts presented here are capable of repetition yet evading review.

*Evening Post v. City of North Charleston*, 357 S.C. 59, 591 S.E.2d 39 (S.C. App. 2003)

The discussion of mootness sheds light on the discussion of a justiciable controversy, because the concepts are twin sides of the same coin. In *Evening Post*, this Court held that the 9-1-1 tapes were not subject to release, but the Supreme Court granted *certiorari* to review this decision reversing it two years later, but took pains to point out that the Court of Appeals applied the correct standard of review to find that the newspaper presented a justiciable controversy:

After the tape was played in open court at the lynching trial, the Post published a transcript. We agree with the Court of Appeals that the case is not moot, because "the facts presented here are capable of repetition yet evading review." *Evening Post Pub. Co.*, 357 S.C. at 62, 591 S.E.2d at 41.

*Evening Post v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (S.C. 2005)

Thus, Baracco was not required to pay the County \$12,079.00 of illegal fees to receive blacked out documents as a condition precedent to challenging the County's conduct and availing herself of the relief available under the *Freedom of Information Act*. Once the County demanded unlawful fees, Baracco had the right to challenge that action. Otherwise, the County can stymie requests for any document into perpetuity by demanding unlawful, inflated estimates and never be called to account for its violation when a citizen cannot pay them.

The rest of the County's rationale in Argument 1 is clearly refuted by the plain language of the *Freedom of Information Act*. In the preamble to its first argument, the County takes pains to identify the rules of statutory construction but then ignores them by splitting this semantic hair on page 13: "... the Special Referee reiterated that there was no violation by the County relative

to the fees but also concluded that “(search, retrieval, and redaction) are administrative not analytical in nature” and only the physical act of redacting would be compensable.” (Quoting Order under review at pages 5-6 in Record on Appeal at pages 11-12) Although the Special Referee is correct that the County can assess fees for retrieval: “The records must be furnished at the lowest possible cost to the person requesting the records,” both the Special Referee and the County are wrong about the County’s charges for the same reason. The County cannot escape the reach of the *Act* by the semantic subterfuge of labeling prohibited fees “administrative” and charge \$72.00 an hour for the County Attorney to examine them, a stratagem the Special Referee found “problematic,” but granted Baracco no relief. (R.O.A. page 13 [Order page 7] If re-labeling actions justified conduct, then human beings can absolve themselves from any act, no matter how horrible. Torture is not torture when it is “enhanced interrogation techniques.” As trial lawyers frequently say (channeling six thousand years of religious tradition): “we are judged by what we do, not by what we say.” Currently, there is a growing movement in this Country in which citizens seek to escape the applicability of laws by rebranding themselves as “sovereign citizens.” The County is attempting the same sleight-of-hand here, and the Special Referee erred in accepting it. The fact is the statute is clear, and the County disregarded it to intimidate Baracco from making her request:

Fees may not be charged for examination and review to determine if the documents are subject to disclosure. § 30-4-30(B), S. C. Code, Ann.

There is no “administrative” exemption to this rule, and the County’s recitation and application of the rules of statutory construction make this fact beyond dispute, and therefore both the Special Referee and the County err in arguing that the County can escape the requirements by adopting the expedient of simply relabeling the activity.

## REPLY TO COUNTY'S ARGUMENT 1(A)

**The *Freedom of Information Act* requires that documents “be furnished at the lowest possible cost to the person requesting the records.”**

The County stands the statute on its head. On page 14 of its brief, the County has the temerity to argue that a requestor is responsible for the County's fees in redacting documents. However, the statute says exactly the opposite, quoted above in the preceding paragraph. As the County say on page 15 of its Brief: “When the terms of a statute are plain and unambiguous and convey a plain and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.” (County's Brief at page 15 citing *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994) ) The County takes these undisputed principles and manufactures out of whole cloth a fictitious distinction between “gathering” the documents and “examining” the documents. This phony distinction is not to be found in any caselaw in South Carolina. The County launches its spurious argument into an even higher altitude of nonsense when it claims “redaction” means only removing “personal identifying information.” Obviously, Baracco cannot see what is redacted, but when viewed in context and when compared with UN-redacted e-mails the County furnished in other *F.O.I.A.* requests, which waives any privilege if it existed, the County is obviously redacting much more than “personal identifying information.” The County would not even reveal who was involved in the e-mail chains until the Special Referee compelled it to do so. R.O.A. page 8 [Order at page 2] When Baracco compared these e-mails to the ones the County previously provided un-redacted, R.O.A. Vol. 1, pages 328-333 [Exhibits 9, 10, 11, 12, and 13], she could easily determine the County had gone to considerable editorial effort to redact embarrassing details. The County's bogus argument

flies in the face of the very rules of statutory construction the County carefully lays out in pages 10-12 of its Brief and the weakness of its legal argument requires no further response.

### REPLY TO ARGUMENT 1(B)

**There is no ambiguity in the *South Carolina Freedom of Information Act* and thus the Court need not resort to the rules of statutory construction to enforce the cost limitations required by the *Act*.**

It is difficult to follow the County's opaque argument here. It is undisputed that the General Assembly amended the *South Carolina Freedom of Information Act* in 2017, but none of these amendments are germane to the dispute here. Here are the two sections of § 30-4-30 side-by-side:

#### **1998 Version**

Documents may be furnished when appropriate without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public. **Fees may not be charged for examination and review to determine if the documents are subject to disclosure.** Nothing in this chapter prevents the custodian of the public records from charging a reasonable hourly rate for making records available to the public nor requiring a reasonable deposit of these costs before searching for or making copies of the records.

#### **2017 Version**

The records must be furnished at the lowest possible cost to the person requesting the records. Records must be provided in a form that is both convenient and practical for use by the person requesting copies of the records concerned, if it is equally convenient for the public body to provide the records in this form. Documents may be furnished when appropriate without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is primarily benefitting the general public. **Fees may not be charged for examination and review to determine if the documents are subject to disclosure.** A deposit **not to exceed twenty-five percent** of the total reasonably anticipated cost for reproduction of the records may be required prior to the public body searching for or making copies of records. (emphasis added)

When applying this law to the County's actions here such as attempting to charge Baracco for items specifically excluded by the Act or by the County Attorney writing to surrounding municipalities and urging them to coordinate with the County in breaking the law by requiring a 50% deposit instead of what is allowed by the *Act* (see R.O.A. Vol. 1, page 343 [June 11, 2014,

Allison Coppage e-mail, Exhibit 17], this Court should be shocked. (To be fair to the County, the General Assembly did not put a 25% cap on the maximum deposit required originally, but it is also fair to infer that the General Assembly was reacting to inflated deposits, such as 50%, when it amended the *Act* in 2017.) First, as the record demonstrates the County produced 167 documents (R.O.A. Vol. 2, pages 448-614), and of these, most were almost entirely blacked out, including the participants in the e-mail chains. Because the County refused to allow Baracco to see who was included in the e-mail chains, it remained free to assert entirely bogus claims of attorney-client privilege. See Record on Appeal pages 448-614 [redacted documents]. Second, the County Attorney actively recruited other local government attorneys to get on board with the County's plan to single Baracco out for a punitive 50% deposit instead of a "reasonable deposit," which became the statutory minimum of 25% as in the 2017 amendment to §30-4-30(B): "A deposit not to exceed twenty-five percent of the total reasonably anticipated cost for reproduction of the records may be required prior to the public body searching for or making copies of records." See Record on Appeal Vol. 1, page 343 [Allison Coppage e-mail, June 11, 2014 Ex. 17]: "If you have any questions about this requestor, give me a call." Here, all of the costs passed on to Baracco involved the County's insistence to "examine and review [the documents] to determine if the documents are subject to disclosure," a charge the General Assembly specifically prohibited under the 1998 and the 2017 versions. Obviously, it takes minutes, if not seconds, to transfer electronic data from a central computer to a thumb drive for which the County charges \$7.00. At every stage, the County gives away the game, which is to erect every barrier in its arsenal to dissuade Baracco from requesting public documents. When the County asserts "FOIA's prohibition against charging fees for 'examination and review to determine if the documents are subject to disclosure' cannot be reconciled with the public body's right to charge fees for redacting exempt information given

the inherent obligation to analyze records as part of the redaction process,” it is being deliberately obtuse. The public body’s right to charge fees is carefully delineated in the 1998 and the 2017 versions of the *Act*, and no amount of sophistic hair-splitting changes either this fact or the legal requirement that Courts do not resort to statutory interpretation when the General Assembly speaks clearly. The General Assembly spoke clearly in § 30-4-30(B), and the County’s grasping at such slender reeds as a non-existent inconsistency in the *Act* further demonstrates commitment to avoid fulfilling its statutory duty.

## **REPLY TO COUNTY’S ARGUMENT 2**

Any communications between a Councilmember and the County Attorney and a third party are not covered by attorney-client privilege by definition. The Special Referee acknowledged this principle of law but failed to apply it: “The emails found on FOIA No. 3\_[Bate Stamped] 00175-179 that include Elizabeth Ryan of South Carolina Emergency Management Department should be produced to Plaintiff in un-redacted form as well since she is employed by an agency outside Beaufort County.” (R.O.A. at pages Vol. 1, page 17 and Vol. 2, pages 575-579 [Order under review at page 11] Obviously the Special Referee should have applied this correct statement of law across the board and not pick and choose to whom it should be applied. As discussed thoroughly in Baracco’s opening and reply briefs as Appellant, the County cannot invoke attorney-client privilege by the simple expedient of including the County Attorney in an e-mail chain. This is the holding of *Evening Post Publ’g Co. v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 824 (Ct. App. 2017). Moreover, attorney-client privilege is waived when allegedly protected conversations either involve third parties or when such communications are elsewhere disclosed such as happened here when the County provided the same e-mails un-redacted to Baracco. The Special Referee acknowledged this legal conclusion on page 13 of her Order: “As

referenced herein, correspondence which includes third parties waives the attorney-client privilege. See *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984).” (R.O.A. Vol. 1, page 19 [Order under review page 13]. See also *Floyd v. Floyd*, 615 S.E.2d 465, 365 S.C. 56 (S.C. 2005) The error is flows from the fact that the Special Referee identified the correct legal standard but failed to apply it to the facts of this case. These two issues are extensively briefed in the Baracco’s Initial Appellant’s Brief at pages 27 - 35 as well as in her Reply Brief at pages 6 - 15, citing *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 44) and other authorities, and it is an undue burden on the Court to repeat the identical arguments here. There is a full academic discussion of this issue, including an analysis of *Marshall v. Marshall*, *ibid.*, in the July 2012 edition of *South Carolina Lawyer*. See: Nathan Crystal, “Confidentiality, Privilege, and Work Product: Some Important Differences,” *South Carolina Lawyer*, July 2012, pages. 9-10.) Therefore, in order to avoid a repetition of the same arguments made in her opening and reply briefs, the Appellant/Respondent incorporates those arguments here as if set forth fully *verbatim*.

#### **REPLY TO COUNTY’S ARGUMENT 2 A.**

**Attorney client privilege is a narrow privilege and is specifically waived when such communications include third parties who are not clients and when otherwise disclosed.**

The County expands the attorney-client privilege into an omnibus exemption that includes every document that passes through a County’s Attorney’s hands. This expansive reading of the exemption provides an exception that swallows up the entire *Freedom of Information Act*, which, in the County’s view, can be abrogated at will by the simple expedient of copying the County Attorney on every correspondence. In the first place, the Court of Appeals previously disposed of this argument in *Evening Post Publ’g Co. v. Berkeley County School District (ibid)*. Second, as argued extensively in Baracco’s Initial Brief and Reply Brief, a member of Council who eschews his or her government supplied e-mail account and who chooses to communicate via private e-

mail cannot expect to be covered by attorney-client privilege because the County Attorney is not an elected official's private lawyer. Third, the County's expansive construction of the attorney client privilege is not supported by law:

Even if the attorney-client privilege were to apply, it was waived when Laurens produced the letters in discovery. The attorney-client privilege excludes from evidence confidential communications of a professional nature between attorney and client, unless the client, for whose benefit the rule is established, waives the privilege. *Drayton v. Industrial Life & Health Ins. Co.*, 205 S.C. 98, 31 S.E.2d 148 (1944). *State v. Doster*, 276 S.C. 647, 284 S.E.2d 218 (1981), edifies:

The attorney-client privilege has long been recognized in this State. The privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained. The privilege belongs to the client and, unless waived by him, survives even his death. *South Carolina State Highway Department v. Booker*, 260 S.C. 245, 195 S.E.2d 615 (1973). Generally, the party asserting the privilege must raise it. *State v. Love*, [275] S.C. [55], 271 S.E.2d 110 (1980).

Many jurisdictions strictly construe the privilege. *81 Am.Jur.2d Witnesses* § 174, at 210. The reasoning behind the strict construction is that evidence excluded under the privilege is not necessarily incompetent. See generally, *McCormick, Handbook of the Law of Evidence*, §§ 87, et seq. (2d Ed.1972).

We agree that the privilege must be tailored to protect only confidences disclosed within the relationship.

*Doster* at 650-51, 284 S.E.2d at 219-20.

The United States Supreme Court, in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), observed:

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. . . . The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.

*Upjohn* at 389, 101 S.Ct. 677 (internal quotation marks and citations omitted).

In order to protect a communication on the ground of attorney-client privilege, it must appear that the attorney was acting, at the time, as a legal advisor. *Marshall v. Marshall*, 282 S.C. 534,

539, 320 Page 483 S.E.2d 44, 47 (Ct.App.1984) (citing *Branden & Nethers v. Gowing*, 7 Rich. 459 (S.C.App.1854)). Only confidential communications are protected by the attorney-client privilege. *Cloniger v. Cloniger*, 261 S.C. 603, 193 S.E.2d 647 (1973). In *Ross v. Medical University of South Carolina*, 317 S.C. 377, 453 S.E.2d 880 (1994), the South Carolina Supreme Court stated:

Attorney-client privilege protects a client and any other person from disclosing confidential communications made to counsel relative to a legal matter. See generally *McCormick on Evidence* § 87 (E. Cleary, 3rd Ed.1984). However, this privilege is not absolute:

Not every communication within the attorney and client relationship is privileged. The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice. This is exemplified by the widely recognized rule that the privilege does not extend to communications in furtherance of criminal tortious or fraudulent conduct.

*State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 220 (1981) (internal citations omitted).

*Ross* at 383-84, 453 S.E.2d at 884-85.

The privilege may extend to agents of the attorney. For example, in *State v. Hitopoulus*, 279 S.C. 549, 309 S.E.2d 747 (1983), our supreme court held the attorney-client privilege extended to communications between a client and a psychiatrist retained to aid in the preparation of the client's case. As articulated in *State v. Thompson*, 329 S.C. 72, 495 S.E.2d 437 (1998):

[I]n determining whether the attorney-client privilege extends to communications between a client and a non-lawyer, [a court] must balance two factors: (1) the need of the attorney for the assistance of the non-lawyer to effectively represent his client, and (2) the increased potential for inaccuracy in the search for truth as the trier of fact is deprived of valuable witnesses. However, before reaching this test, a court must ascertain whether the communication is confidential in nature.

*Thompson*, 329 S.C. at 75, 495 S.E.2d at 438-39.

The attorney-client privilege is owned by the client and, therefore, can be waived by the client. *South Carolina State Highway Dep't v. Booker*, 260 S.C. 245, 254, 195 S.E.2d 615, 620 (1973). "Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed, but also to all communications between the same attorney and the same client on the same subject." *Marshall v. Marshall*, 282 S.C. 534, 538, 320 S.E.2d 44, 46-47 (Ct.App.1984) (citing *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146 (D.S.C.1975); *U.S. v. Jones*, 696 F.2d 1069 (4th Cir.1982)).

In *Marshall*, Mrs. Marshall inadvertently left a letter addressed to her from her attorney in Mr. Marshall's pickup truck. The parties were separated at the time. Mrs. Marshall's attorney had been sending copies of his correspondence with Mrs. Marshall to her father, who was the surety for payment of Mrs. Marshall's attorney's fees. On appeal, Mr. Marshall argued the letters from

Mrs. Marshall's attorney were admissible because the attorney-client privilege had been waived. We held that Mrs. Marshall did not waive the privilege by mistakenly leaving one of the letters in Mr. Marshall's truck. However, we found "[t]he copies of correspondence sent by Mrs. Marshall's attorney to her father" presented "a different question." *Marshall* at 538, 320 S.E.2d at 47.

In order to establish the attorney-client privilege, it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential nature. *State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (1980). The communication involved must relate to a fact of which the attorney was informed by his client without the presence of strangers for the purpose of securing primarily either an opinion on law or legal services or assistance in some legal proceeding. *SEC v. Kingsley*, 510 F.Supp. 561 (D.C.D.C.1981); *In Re Grand Jury Proceedings*, 517 F.2d 666 (5th Cir.1975). The attorney-client privilege also applies to communications originating from the lawyer rather than from the client. When the attorney communicates to the client, the privilege applies only if communication is based on confidential information provided by the client. *Brinton v. Department of State*, 636 F.2d 600 (C.A.D.C.1980). The attorney-client privilege, though, does not protect communications with non-clients. *State v. Love*, *supra*.

*Marshall* at 538-39, 320 S.E.2d at 47.

We found that Mrs. Marshall's father was not a client of her attorney. By sending copies of the letters to the father, Mrs. Marshall's attorney was informing a third party of the current state of his client's lawsuit. However, we found that the letter Mr. Marshall sought to admit was not relevant. Therefore, the trial court was affirmed.

The record indicates Laurens produced the letters he now asserts are protected by the attorney-client privilege. Thus, assuming these letters were subject to the attorney-client privilege, Laurens waived that privilege by producing the letters.

*Floyd v. Floyd*, 615 S.E.2d 465, 365 S.C. 56 (S.C. 2005)

An interesting footnote to the *Floyd* case is the General Assembly's 2008 adoption of § 62-1-110, S. C. Code, Ann. to delete the waiver of attorney client privilege in the Probate Court when lawyers communicate with fiduciaries. That exemption in Probate Court is tantamount to an exclamation mark on Baracco's legal position because members of Council and various third parties are not remotely equivalent to a fiduciary in a probate matter.

Here, the County thwarted Baracco's request for e-mails by interposing excessive fees and demanding an inflated deposit. When Baracco narrowed her request in an effort to overcome the County's obstruction, the County then struck back by providing nothing but blank documents.

When Baracco then attacked the redactions and filed suit, then, and only then, did the County unsheathe its ultimate excuse: attorney-client privilege. Baracco filed suit on April 10, 2019, and the County first produced, in response to an Order from the Special Referee, a putative privilege log on July 7, 2020, for the first time. This privilege log, contained in the Record on Appeal at Vol. 1, pages 89-96 [Court's Exhibits 1, 2, and 3] reveals nothing but conclusory statements with nothing approaching the specificity required to assert attorney-client privilege. Instead it contains only boiler plate language: "matters that would violate attorney-client relationship." Such deliberately vague language does not allow either the Court or Baracco to have a basis to evaluate, one way or the other, whether the claimed exemption is supported by evidence or whether it is pretext.

Of course, in replying to the County's expansive interpretation of attorney-client privilege, Baracco is at a disadvantage because she has never seen the body of the redacted e-mails the County supplied, but she has seen the ones the County provided un-redacted, which are in the R.O.A. at Vol. 1, pages 328-337 [Exhibits 9, 10, 11, 12, and 13], and these not only obliterate the County's claim of attorney-client privilege, but also waive the claim because of the voluntary production of the documents now claimed to be protected. *Floyd v. Floyd*, 615 S.E.2d 465, 365 S.C. 56 (S.C. 2005) However, she can draw a reasonable inference about them based on the timing, the identity of the correspondents (which she did not obtain until after she filed this action and until after the Special Referee required they be disclosed), and the release of some of the same redacted e-mails the County released in UN-redacted form in response to other requests, an act which waives the privilege if it ever existed. The record demonstrates the County refused to disclose to Baracco the identity of the correspondents until the Special Referee compelled the County to reveal the correspondents' identities on July 29, 2020 at the parties' pretrial conference,

which they finally did on September 20, 2020. (See Record on Appeal Vol. 1, page 8 [Order under review at page 2]: “Prior to the Merits Hearing, the Court instructed counsel for the Defendant to remove the redactions relative to the ‘to/from’ lines on the emails produced so that the distribution list would be available to Plaintiff.” See also August 10, 2020, e-mail from Special Referee scheduling pretrial conference and Vol. 1, page 125 [County’s production of the revised redacted documents on September 3, 2020]) Once the Special Referee compelled the County to disclose the identities of the correspondents, the County complied on September 3, 2020 by sending the redacted e-mails with the addressees disclosed in an encrypted Citrix file. R.O.A. Vol. 1, page 8 [Order under Review at page 2] Once the identity of the correspondents was revealed in September 2020, it became even more obvious that the communications are not remotely related to attorney client privilege because the revised documents include third parties and the context is clear that many of them involved members of County Council utilizing their private e-mail addresses to script upcoming Council meetings out of the public’s eye, something specifically prohibited by the Act, § 30-40-70(c). The following e-mails received after the Special Referee compelled disclosure show that non-employee third parties are included:

Keaveny e-mail March 11, 2016, County Bate Stamp 33 includes Jim Hicks, who is not a County employee (R.O.A. Vol. 2, page 448)

Rodman e-mail March 18, 2019 is from his private e-mail address, and includes persons not employed by the County. County Bate Stamp 50 (R.O.A. Vol. 2, page 460)

Rodman e-mail January 8, 2016 from private e-mail accounts conducting government business. County Bate Stamp 56 (R.O.A. Vol. 2, page 466)

Kenny Zentner e-mail dated June 6, 2018, and insurance company to councilmember’s private e-mail addresses. County Bate Stamp 65 (R.O.A. Vol. 2, page 475)

July 1, 2018 e-mail Paul Sommerville from private e-mail address County Bate Stamp 67 (R.O.A. Vol. 2, page 477)

July 3, 2018 e-mail from Paul Sommerville from private e-mail address to a County employee (County Bate Stamp No. 93) (R.O.A. Vol. 2, page 499) (By statute, Council members are prohibited from directing employees. See § 4-9-660, S. C. Code, ann.: “Except for the purposes of inquiries and investigations, the council shall del with county officers and employees who are subject to the direction and supervision of the county administrator solely through the administrator, and neither the council nor its members shall give orders or instructions to any such officers or employees.” This is a fascinating legal question beyond the scope of this appeal.)

July 6, 2018 e-mail from Paul Sommerville from private e-mail address (County Bate Stamp No. 95) (R.O.A. Vol. 2, page 501)

July 9, 2018 Keaveny e-mail to Council members’ private e-mail addresses and including third parties who are not county employees. County Bate Stamp 139 (R.O.A. Vol. 2, page 545)

July 10, 2018 Keaveny e-mail to Council members’ private e-mail addresses and including third parties who are not county employees. County Bate Stamp 141, 142 (R.O.A. Vol. 2, pages 547-548)

July 16, 2018 Keaveny e-mail to Council members’ private e-mail addresses County Bate Stamps 144, (R.O.A. Vol. 2, page 550)

July 16, 2018 e-mails to Keaveny from third parties. County Bate Stamp 152 (R.O.A. Vol. 2, page 558)

October 25, 2018 e-mail to Elizabeth Ryan, a third party. County Bate Stamp 175, 176, 178 (R.O.A. Vol. 2, pages 575, 576 and 578)

March 11, 2016 e-mail to and from third party. County Bate Stamp 249, 175, 176, 178 (R.O.A. pages 175, 176, 178 and 591)

In these redacted e-mails, there are two important points to recall. The first is that from June to October 2018, Thomas Keaveny was acting County Administrator. The second is that some of these same e-mails the County provided to Baracco in other disclosures are in the Record on Appeal at Vol. 1, pages 328-333 [Exhibits 9, 10, 11, 12 and 13] and these exhibits demonstrate two irrefutable points: The first is the revealed e-mails contain no discussion supporting a claim of attorney-client privilege unless County Attorneys duties include advising political officers on breaking the law. Second, when the County released them in response to other inquiries, it not only waived the attorney-client privilege—even if one existed—but also demonstrated no attorney-client privilege could attach because each one involves members of Beaufort County Council unlawfully scripting upcoming public meetings to control the outcome. Thus, these e-mails are merely a lazy effort to avoid the application of § 30-4-70(c) and an even clumsier effort to script a public meeting outside the view of the public. Throughout its brief, the County asserts these communications are proper because they do not involve a “quorum” of members. § 30-4-70(c) says nothing about a quorum. More importantly, the County ignores the elephant in the room, which is the illegality of such acts. Even more glaring is the County Attorney’s office coordinating with other local governments to conspire against Baracco to coordinate with one another to increase the fees “we are considering requiring a 50% deposit before processing the entire response,” and inhibit her access to public documents: “For anyone that [*sic.*] is not familiar with this matter or the requestor feel free call me or send questions my direction.” Exhibit 17, R.O.A. Vol. 1, page 343.

Thus, this evidence demonstrates that: (1) there is no attorney-client privilege for unlawful acts, (2) attorney client privilege only attaches when clients seek legal advice based on confidential disclosures, (3) attorney-client is waived when involving third parties or releasing documents later claimed to be covered by the privilege, and (4) the attorney-client privilege does not exist as a work-around the *Freedom of Information Act*. Baracco's evidence demonstrates that the County Councilmembers, utilizing their private e-mail addresses, were not seeking legal advice, but instead were doing the very thing the *Freedom of Information Act* is designed to prevent; to wit, scripting upcoming meetings. The County's answer to this is outrageous—it says that because the scripting did not include a quorum, the Council's conduct is therefore proper! The prohibition of § 30-4-70, S. C. Code, Section C does not mention a quorum and it is a preposterous assertion to claim that keeping the number of conspirators below a quorum gives them free reign to ignore the law. § 30-4-70 is clear that public officials shall not use electronic communications to subvert the transparency requirements of serving in government. The County tries to escape this trap by asserting that Baracco never filed suit for illegal meetings, which precludes appellate review of the Special Referee's Order. Such misdirection again demonstrates the County's refusal to meet the legal issue head on: Baracco's right to inspect public documents. Finally, as set forth above, Tom Keaveny was acting County Administrator from June through October of 2018, and it is astonishing that political figures are wrangling the County Administrator—who is specifically not supposed to be a political figure—see § 14-9-660, S. C. Code, quoted above on page 20—into political machinations. Councilmembers cannot intentionally violate the limitations of § 30-4-70(C) and disguise their efforts to control unlawfully the outcome of public meetings outside the public view and simultaneously claim that their unlawful acts are protected by attorney-client privilege. This issue is fully discussed in Baracco's opening brief at pages 13 – 16 and 22 – 44

and Beaufort County's assertion it can violate § 30-4-70(C) with impunity so long as it stays below a quorum elevates its chutzpah to superlative.

Only after the Special Referee compelled the County to reveal the correspondents' identities in the e-mail chains, did Baracco discover e-mails including persons who are not either County employees or agents, and the inclusion of third parties in private communications eviscerates the County's legal position on attorney-client privilege and its assertion of proper government conduct.

The County gives away the game on page 20: "Determining whether a particular communication is privileged, however, is a fact-intensive exercise and often requires the dedication of substantial legal and staff resources, as indicated in the case at hand." County's Brief at page 20. First, this is simply not true. As discussed in Baracco's opening brief and as explained above, an attorney-client privilege means a client is confiding confidential information in confidence, outside the presence of third parties, to receive legal advice. The un-redacted e-mails provided to Baracco in other disclosures, Exhibits 9, 10, 11, 12, and 13 (R.O.A. Vol. 1, pages 328 - 333 reveal that no one is asking for legal advice about anything. The County either intentionally misses the point or fails to apprehend it. Claiming that the *Freedom of Information Act* is ambiguous and that citizens, such as Baracco, must be satisfied with reliance on the County's honesty and good faith in deciding which documents are public and which are withheld under "attorney-client privilege" is illogical. The County grasps its dilemma when it writes: "This broad exemption similarly furthers the state-recognized goal of limiting taxpayer burden by eliminating extensive review of tens of thousands of documents annually in response to FOIA requests." (Brief at page 20) The assertion that the County Attorney is charged with responding to "tens of thousands" of requests for legal advice simultaneously demonstrates both the absurdity of the

County's position and its contempt for the law. Attorney-client privilege is a narrow exemption that must be intentionally invoked, but the County's broad interpretation allows the exemption of the *Freedom of Information Act* to swallow the whole. The County expands its exemption to cover every government lawyer's utterance, something the Supreme Court rejected in *Evening Post Publishing Company v. Berkeley County School District*, 392 S.C. 76, 708 S.E.2d 745 (2011). The indiscriminate deployment of attorney-client privilege as a sword rather than a shield is a textbook example of the manner in which a well-recognized privilege can be employed to conceal and obstruct. See Marva Strassburg's exhaustive treatment of this issue quoted on pages 6-7 of Baracco's Appellant's Reply Brief. Nathan Crystal covers the same topic in his article, "Confidentiality, Privilege, and Work Product: Some Important Differences." *ibid.*

#### **REPLY TO ARGUMENT 2 B**

**The *Freedom of Information Act* is clear and does not convey attorney-client privilege to third parties and specifically requires documents related to the sale or purchase of real estate be made public after the transaction has closed.**

The redacted emails not only included a real estate agent who is not an employee of the County but also several other individuals who are not employees of the County. See the list of non-employee correspondents list above on pages 15-16. Moreover, the County's assertion that a real estate agent who listed a parcel of real estate for sale became a "functional employee" of the County is absurd. First, she is paid based on a commission earned from the sales price—the seller pays her, not the County. Second, she is not obligated to the County in any way—she could have sold the parcel to anyone. Third, the Special Referee noted in her Order that Debra Regecz's contract with the County specifically exempted her from being considered as the agent of the County. See Order under review at Vol. 1, page 20 (R.O.A. page 14 of November 13, 2020 Order): "The language of the Contract arising out of the RFP specifically states that the Contractor [Regecz] is not an agent or employee." There is nothing ambiguous about that, and the County's

attempt to transform Regecz into a “functional employee” to thwart the disclosure of public documents is confounding.

Most importantly, and this is a point that the County ignores—the *Freedom of Information Act* specifically requires that contractual documents related to the sale or real estate be made public once the transaction is closed. See § 30-4-40(a)(5)(b), S. C. Code Ann.: “a contract for the sale or purchase of real estate shall remain exempt from disclosure until the deed is executed, but this exemption applies only to those contracts of sale or purchase where the execution of the deed occurs within twelve months from the date of sale or purchase.” The County grasps at straws and stands the burden of proof on its head when it asserts, in the face of overwhelming evidence to the contrary, “that any waiver of privilege was neither distinct nor equivocal.” (County’s Brief at page 24) Of course there is no evidence of a “distinct” waiver because: (1) all the documents in the record demonstrate that the agent, Regecz, went out of her way to make sure she was not considered the County’s employee, and (2) as the Special Referee noted in her Order, even the County’s Request for Proposals made clear that the County’s choice of sales agent would not be considered an employee. It is not up to Baracco to prove a distinct waiver; rather, the burden is on the County to show that a privilege exists! “Communications are protected by the attorney-client privilege only if an attorney-client relationship is first proven and the communications were intended to be confidential: ‘In order to establish the privilege, it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential nature. In general, the burden of establishing the privilege rests upon the party asserting it.’ *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 44 (Ct. Ap. 1984). At the time of the communication, the lawyer must be acting as a legal advisor. *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984).” Crystal at pages 9-10.

The factors necessary to create an attorney-client privilege are set forth above at pages 15 - 17, citing the *Floyd* case and as identified by Prof. Crystal in his article discussing *Marshall*. This record lacks a *scintilla* of evidence that either Regecz considered herself an agent or employee of the County or that the County considered her an employee who could impart confidential information to the County Attorney and expect him to render legal advice to her. Under the County's construction of attorney-client privilege, every vendor selling a product or service to the County becomes a client of the County Attorney.

### CONCLUSION

**The case should be remanded to the circuit court, not the Special Referee, to Order the release of the unredacted documents, to award the Appellant/Respondent a reasonable attorney's fee as a prevailing party, and to enjoin the County from future violations of the South Carolina Freedom of Information Act.**

As set forth in Baracco's Appellant's brief, the County goes to extraordinary lengths and asserts creative arguments to justify its unconscionable conduct flouting the *S. C. Freedom of Information Act*. The record shows how far Beaufort County will contort South Carolina law and normal conventions to thwart Baracco's access to public records. As the County Attorney said in her communication to Corporation Counsel for the municipalities: "For anyone that is not familiar with this matter or the requester feel free call me or send questions my direction." R.O.A. Vol. 1, page 343 [Allisson Coppage June 11, 2014 e-mail, Exhibit 17]) As set forth in her Appellant's Opening Brief, it is more important than ever than citizens remain well informed of their representatives' conduct, and the reason the General Assembly adopted a *Freedom of Information Act* is to provide the tools for ordinary citizens to gain access to the activities of government. As set forth her opening brief, the *Post & Courier* editorialized on this subject on Sunday, September 5, 2021:

Our changing media landscape—specifically the continuation and even disappearance of local newspapers in South Carolina's smaller communities—has led some

elected official to operate with less public oversight than ever, with often predictable and discouraging results.

This vacuum has been filled partly by public-minded citizens who invest their time to learn about what's going on—and then spread the news through their social circles and social media.

This record demonstrates that Beaufort County has gone to extraordinary lengths to thwart Baracco's access. It knowingly assessed unlawful fees to impede her access in the hope she would discontinue her search. Its lawyer even solicited neighboring local governments to get on board to charge her more than allowed by statute. The Councilmembers wrote to the local judiciary about her and encouraged other officials to get involved in a criminal prosecution against her. R.O.A. Vol. 1, page 331 [Gary Kubic's, County Administrator's, March 6, 2015 e-mail to various officials and County Attorney, Exhibit 12] They make spurious claims of attorney-client privilege to hide unlawful conduct, and assess outrageous fees for the simple task of capturing e-mails and transferring them to a thumb drive and continue to claim a privilege when the County waived it by releasing un-redacted some of the same e-mails it now contends are protected. The County's subterfuge is neither subtle nor well executed. It provides documents in one *F.O.I.A.* response and redacts the same documents in another based on contrived attorney-client privilege. It asserts a ridiculous claim that a real estate agent is the "functional equivalent" of a County employee whose communications are then protected by attorney-client privilege—even though her contract with the County precisely states she is not the County's agent! See Court's Exhibit 5, ¶ 13, page 6 of 8, Vol. 3 R.O.A. page 637: "The Contractor shall be fully independent in performing the services and shall not act as an agent or employee of the County." Quoted in November 13, 2020 Order at page 14, R.O.A. Vol. 1, page 20. In short, he County's conduct makes a mockery of the *S. C. Freedom of Information Act*. It even sought to shield access to documents about the acquisition of a parcel of real estate that the County itself found to be improperly acquired by "the unauthorized purchase by the former Interim County Administrator."

(R.O.A. Ex. 14 [Weaver memorandum December 12, 2018]) It is impossible to reconcile Baracco's recognition of this impropriety, something the County acknowledges, with its open hostility for her and extraordinary effort to thwart her access to public documents. The only errors the Special Referee made was in not compelling the County to provide unredacted documents and her failure to recognize Baracco as the prevailing party and award fees and costs as such. On this point, the Appellant/Respondent, Baracco, acknowledges what a difficult position Judge Buckner placed the Special Referee in when he drafted her as an involuntary Special Referee. Judge Buckner placed the Special Referee in an untenable situation, forcing her to evaluate the conduct of the County in which she practices law. It was not fair of the circuit court to thrust this task upon a local lawyer, and the Special Referee discharged her duties with alacrity and impressive diligence, but in the end, it was not fair to her or to the parties for her to be forced into playing that role. As this case demonstrates, it is vital in a democratic society that citizens have access to public records in order to be informed about Government's conduct, and the evidence produced in this case demonstrated a strong governmental animus for Baracco's probing into government activity. The case should be reversed to the extent that the County's redactions are clearly improper, and the County should immediately turn over the material sought by the Appellant/Respondent. Moreover, the case should be remanded to the circuit court, not a Special Referee, to allow the circuit court to calculate the fees and costs to be awarded to Baracco as a prevailing party.

Respectfully submitted,

April 12, 2022

/s/ Thomas R. Goldstein  
Thomas R. Goldstein, S. C. Bar No. 2186  
Belk, Cobb, Infinger & Goldstein, P.A.  
P. O. Box 71121  
N. Charleston, S. C. 29415-1121  
(843) 554 4291; (843) 554 5566 (fax)  
[tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)  
Attorneys for Appellant/Respondent

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Apr 12 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Erin D. Dean, Special Circuit Judge

CASE NO.: 2019-CP-07-00818  
APPELLATE TRACKING NO.: 2021-00321

Mare Baracco,.....Appellant,

v.

County of Beaufort,.....Respondent.

CERTIFICATE OF COUNSEL

I certify that this Final Brief complies with Rule 211(b), *South Carolina Appellate Court Rules*.

April 12, 2022

/s/ Thomas R. Goldstein  
Thomas R. Goldstein, S. C. Bar No. 2186  
Belk, Cobb, Infinger & Goldstein, P.A.  
P. O. Box 71121  
N. Charleston, S. C. 29415-1121  
(843) 554 4291; (843) 554 5566 (fax)  
[tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)  
Attorneys for Appellant

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FINAL REPLY BRIEF OF APPELLANT/RESPONDENT

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April 12, 2022

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Thomas R. Goldstein, S. C. Bar No. 2186  
P. O. Box 71121  
N. Charleston, S. C. 29415-1121  
(843) 554 4291; (843) 554 5566 (fax)  
[tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)  
Attorneys for Appellant

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## REPLY TO STATEMENT OF FACTS

On pages 5-6 of the Respondent's brief, it inadvertently mischaracterizes the Appellant's request, the County's response, and the County Administrator, John Weaver's March 27, 2019, explanation furnished to Councilmember Mike Covert. As the record (R.O.A. Vol. 1, page 347 [Ex. 20, Weaver correspondence]) demonstrates, the explanation the County Administrator provided was not to the Plaintiff as set forth in the County's brief, but to a member of County Council who was concerned about the County's lack of transparency. (The Administrator did send her a cursory response on March 27, 2019, R.O.A. Vol. 1, page 341 [Exhibit 15], but it did nothing but amplify Ms. Spells' ignoring the Appellant's question about the exorbitant costs.) The Record further demonstrates the County's uniform hostility, and no amount of skillful advocacy can transform a suggestion that "the former County Administrator . . . promptly responded" to her into an accurate statement of fact. The record makes the County's animus clear; nowhere as unsettling, for example, as in the County Administrator's, Gary Cubic's, condescending response to Councilmember Covert's inquiry about the County overstepping its authority by inserting itself, including the County Judicial branch, into an alleged municipal infraction over which a jury acquitted Baracco. See R.O.A. Vol. 1, page 331 [Ex. 12]. Administrator Cubic's response reads like a declaration of war against Appellant.

The following paragraph (Respondent's Brief at page 6) also contains a misleading statement as fact. The Respondent is accurate in stating that the Appellant reduced her request for records, but she did so only because the County demanded that she \$14,432.06 for the requested documents, requiring an initial deposit of \$3,608.02. This putative statement of fact reappears on page 16 of Respondent's brief and will be addressed more fully below, but it is not a correct to say the Appellant reduced her request "upon receipt of this explanation," (Respondent's brief at page 6) because the Respondent is referring to the County Administrator's, John Weaver's, explanation to a County

Council member, not to Appellant. The County based its manufactured hurdle of prohibitive cost to producing the e-mails on its insistence that the legal department review the e-mails at \$72.00 an hour, a patently illegal charge (R.O.A. Vol. 1, page 319 [Ex. 5]); however, only after the Appellant filed suit, did the allegation of attorney-client privilege arise. Along this same vein, the County never produced a “privilege log” identifying the basis for its attorney-client privilege until the Special Referee compelled it to provide one, and a review of the putative privilege logs in the Record on Appeal Vol. 1 at pages 87-96 demonstrates just how vague they are. As discussed more fully below, when the County produced the almost entirely redacted e-mails, it even blacked out the correspondents in the e-mail chain and would not provide even that information until the Special Referee compelled it to do so in July 2020. See correspondence from counsel dated August 10, 2020 and response from Special Referee July 29, 2020 at R.O.A. at Vol. 1, pages 101, 111 and 8. In short, the County’s explanations for not providing documents evolved. First it was cost. Then it was attorney-client privilege that prohibited disclosing even the participants in the conversations. Finally, it became an amended privilege log, which the Court can see is unlawfully vague. See *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001) for a discussion of vagueness related to the failure to announce specific reasons for executive session.

The Respondent makes a further misleading statement on page 6 when it writes that the Appellant sought e-mails from Alice Howard’s personal e-mail address. The County’s characterization incorrectly suggests that the Appellant was attempting to intrude on Councilmember Howard’s personal affairs. As this record demonstrates, Appellant was becoming gradually more aware that Councilmembers were acting in unison on governmental matters, including becoming involved in what turned out to be an unlawful conspiracy to disadvantage the Appellant using the County’s legal department and magistrate system to single her out, a stratagem that ultimately landed the County in court. The Appellant has no interest in Councilmember Howard’s personal e-mails and

never sought them, except to the extent she was using her private e-mail account to conduct government business. As a practical matter, the County would have no access to her private e-mails except those sent to Beaufort County government addresses. When a Councilmember uses her personal e-mail account to conduct government business, those communications are subject to a *Freedom of Information Act* disclosure, and those are the documents the Appellant sought.

Finally, the Respondent on page 7 suggests that the some of the issues before the Court are raised for the first time on appeal. This is a legal argument (addressed below), not a statement of fact, but Appellant controverts that statement to avoid being perceived as acquiescing to it.

### REPLY TO ARGUMENT 1

**1(A). The use of private e-mail communication to the County Attorney and the inclusion of third parties in the communication waives the attorney-client privilege. The County Attorney represents the County, not the various members of County Council in their individual capacities, and when Council members choose to transact County Business on their private e-mail accounts, those communications become subject to the S. C. *Freedom of Information Act*.**

As the Respondent correctly notes, the Special Referee based her decisions on an impossible requirement that the Appellant to prove a negative. In essence, the Special Referee says:

- (1) Appellant cannot identify a law prohibiting the use of private e-mail.
- (2) Therefore, such communications are exempted from disclosure.

There are two palpable legal errors in the Special Referee's conclusions, both of which are fully addressed in Appellant's initial brief. The Respondent ignores both.

The first is the Special Referee's overarching failure to adhere to and apply the General Assembly's statement of purpose of the *Freedom of Information Act* contained in § 30-4-15, "Findings and purpose," S. C. Code, ann., and the frequent statements by our Supreme Court defining the Court's duties in interpreting, applying, and enforcing the transparency of government conduct as required by the *Act*.

The second is the Respondent's incorrect assertion in its Statement of Facts requiring the Appellant to prove a negative to succeed. The impossibility of proving a negative is a given of logic, but the assertion to prove a negative in the attorney-client privilege arena is an area of law specifically addressed in Professor Maura I. Strassberg's encyclopedic discussion of this issue in the January 15, 2007, *Seton Hall Law Review* in her article entitled: "Privilege Can Be Abused: Exploring the Ethical Obligation to Avoid Frivolous Claims of Attorney-Client Privilege," *Seton Hall Law Review*, Vol. 37, 2007, pages 413 – 495:

Much is made of the ethical duty to protect attorney-client privilege. Both the ethical duty of confidentiality and the ethical duty of zealous representation require attorneys to vigorously defend privileged information from attempts to compel its disclosure. The notion that there might be ethical limits to such a duty is hardly ever considered and certainly not emphasized. For most lawyers, this emphasis on the importance of protecting privilege and lack of attention to the ethical limits of such claims has produced a sense that there is an unlimited ethical duty to protect privileged information from compulsory disclosure. Indeed, many lawyers seem to think that they are ethically obligated to give privilege the same level of protection given to criminal defendants. Just as criminal defendants are presumed innocent until the government has proven their guilt, lawyers often treat confidential information as privileged until the party seeking compulsory disclosure proves that it is not.

Strassberg at page 414

Compounding the impossibility of proving a negative, Appellant has never viewed the body of the e-mails as the Special Referee's examination of them occurred *in camera* without the Appellant's participation. The only people who know what material is redacted are the County Attorney and the Special Referee, so no one can expect the Appellant to address specific content, although the County provided some of the redacted e-mails to Appellant in response to other requests and in discovery in a separate suit (Exhibits 9, 10, 11, 12, and 13, R.O.A. Vol. 1, pages 328-333), and these disclosures shed light on what the County is redacting, much of what involves the County's illegal arrangement for payments to its former Administrator and four Councilmembers' efforts to engineer a rehiring of him out of the view of the public. Moreover, the same e-mail cannot be redacted in one F.O.I.A. request and not another, which waives the privilege if one exists. See *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984): "Any voluntary disclosure by a client to

a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject.” One principle with which everyone agrees is that the exemption provisions of the *Freedom of Information Act* are not intended to shield unlawful conduct.

While no one can quarrel with the Special Referee’s statement that the General Assembly has not enacted a statute specifically prohibiting the use of private e-mail for government business, the Special Referee overlooked the General Assembly’s specific prohibition against “electronic communications” to circumvent the requirement that the Government business be conducted in the open: § 30-4-70( c):

“No chance meeting, social meeting, or **electronic communication** may be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” (emphasis added)

It is frankly shocking that the County persists in protecting Councilmembers’ use of private e-mail communications on government business for two reasons. The first is, as addressed in Appellant’s initial brief, the County never furnished an explanation to Appellant as to why the e-mails—including the identity of the correspondents—were redacted despite the Appellant making an inquiry. See Ex. 3, Vol. 1, page 316 R.O.A. After the plaintiff filed suit, they then became “attorney-client” privilege but only **after** the Appellant filed suit, and even then, the County never produced a privilege log until the Special Referee compelled them to do so. The privilege logs are contained in the Record on Appeal at Vol. 1, pages 87-96, and the Court can see that the vague descriptions provided are mere conclusory assertions with none of specificity required by the Supreme Court in *Quality Towing*. This vagueness issue is similar to the line of cases involving executive session where the Supreme Court has repeatedly found vague explanations insufficient. See *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 163, 547 S.E.2d 862, 865 (2001). As Respondent concedes,

government officials are never “off duty,” but when they choose to communicate government business via their private e-mail accounts, the Councilmembers are intentionally acting as private citizens and not legislative authorities. This is especially salient here as this case demonstrates elected officials operating badly when left to operate in secret. See Exhibit 9 Vol. 1 at page 328, R.O.A. (one of the redacted e-mails disclosed to Appellant in a separate request) in which four members of Council and the County Administrator/Attorney script an upcoming meeting to rehire Josh Gruber, a former Administrator known for creating a controversy of providing himself a consulting agreement when he left Beaufort. (This stratagem of paying departing employees “consulting” fees recently ensnared a County Attorney appointed to the federal bench, another example of why transparency in government is so important.) This record demonstrates a pattern of improper communication between Councilmembers Howard, Somerville, and Rodman, involving both the County Administrator, the Sheriff’s Department, and even the Magistrate Courts in continuing a bogus criminal prosecution against the Appellant for an alleged municipal violation over which the County has no jurisdiction. In responding to the Appellant in other *F.O.I.A.* requests and in her tort case, the Country provided some of the redacted communications in this case, and these e-mails reveal how four Councilmembers were scripting upcoming public meetings to control the outcome to rehire the departed County Administrator. See R.O.A. Vol. 1, pages 328-330 [Exhibits 9, 10, 11] The fact that the County previously provided some of the same documents to the Appellant they now claim are protected by attorney-client privilege demonstrates the redactions are not protecting privilege but rather to shield Councilmembers’ unlawful conduct from becoming exposed. Moreover the disclosures waives the privilege:

Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications [Page 47] between the same attorney and the same client on the same subject. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146 (D.S.C.1975); *U.S. v. Jones*, 696 F.2d 1069 (4th Cir.1982).

*Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (S.C. App. 1984)

See R.O.A. Vol. 1, page328 [Ex. 9 July 18, 2018 from Stu Rodman to Paul Somervealle, *et. al*, 10, July 2018 Stu Rodman to Paul Sommerville, 11, September 25, 2018 Stu Rodman to Paul Sommerville]

Finally, it is absurd to suggest that the County Attorney provides legal representation to Councilmembers in their individual capacities. A County Attorney represents the County as a legal entity, not the individual members who make up Council:

In the absence of legislative restriction, a municipal corporation which is authorized to contract and to sue or be sued has the implied power to employ counsel to appear in the litigation in which it is involved, when in the exercise of its reasonable discretion the interest of the municipality so requires. Most municipal corporations employ an attorney to head a law department to attend to all the ordinary litigation to which the municipality is a party. He or she may be known as the corporation counsel, city solicitor or city or town attorney.

*56 Am. Jur.2d Municipal Corporations, Counties, and Other Political Subdivisions*, § 198, Employment of Counsel

Thus, a County Attorney is no different than a Solicitor—his or her duties are to the governmental entity, not the individuals who comprise the government.

Moreover, as discussed fully in the Appellant’s initial brief at pages 27-36, the Supreme Court has already disallowed invoking attorney-client privilege simply because the County Attorney is included in an e-mail chain, a principle of law the County concedes. See Respondent’s Brief at page 12: “The South Carolina Supreme Court has already dismissed the notion that the status of the attorney can eliminate the protections provided by the attorney-client privilege. *Evening Post Publ’g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011).” The Appellant agrees, but the parties disagree what the County Attorney’s “status” is here, especially in the months of June—October 2018 when the County Attorney was acting in a dual capacity as Administrator and lawyer. One thing is certain, the Appellant has never alleged that the County Attorney lacks the authority to act on behalf of the County, and when Councilmembers seek the advice of counsel on County business through government communications, the attorney-client privilege might apply. That is not

what happened here. What happened here is that the Councilmembers utilized their private e-mail addresses to circumvent the transparency required of government service for the purposes of concealment, not the receipt of legal advice. The County reconfigures Appellant's argument into a straw man in order to knock it down more easily. The Appellant never questioned the status of the County Attorney as the County Attorney, but instead demonstrated: (1) Tom Keaveny acted in a dual capacity as County Administrator and County Attorney from June 2018 until October 2018, (2) a private correspondent cannot invoke attorney-client privilege by adopting the simple expedient of including a County Attorney in an e-mail chain, which is the holding of *Evening Post Publ'g. Co.*, and (3) members of Council cannot utilize their private e-mail accounts as a workaround of § 30-4-70(c), (4) attorney-client privilege cannot shield unlawful conduct, and finally, (5) having disclosed the communications in other productions, the privilege, if it existed, is waived.

This record demonstrates that Beaufort County asserts an unlawfully broad interpretation of attorney-client privilege, a fact made clear when the County redacted the correspondents from its *Freedom of Information Act* disclosure. It took a lawsuit and a directive from the Special Referee to force the County to reveal the identities of the persons included in the communications! On this front alone, the Appellant is a "prevailing party" because without her filing suit and demanding access to the persons included in the communications, the County would have succeeded in redacting the identities of the persons included in the e-mail communications. Here, not only did Beaufort County redact everything in the requested e-mails, but also precluded the Appellant from seeing who was included in the communications. Only after the Special Referee directed the County to reveal the correspondents did Appellant learn for the first time the identities of the correspondents, which include third persons who are not County employees. See Record on Appeal Vol. 1, page 8 [Special Referee's directive to the County])

Thus, when the County stakes reliance on a case like *Ross v. City of Memphis*, 423 F.3d 596 (6<sup>th</sup> Cir. 2005), the County is doing the Appellant’s work for her. In *Ross*, a police officer sued the City of Memphis, and her supervisors, Walter Crews and Alfred Gray, for denying her a promotion from Patrol Officer to Sergeant and for demoting her from Patrol Officer II to Patrol Officer II Probationary because she received answers to a police exam in advance of the test. This demotion resulted in a loss of pay and seniority. During discovery, the defendant, Crews, testified that he conducted a City investigation about the allegations of improper test answers and as a result of the City investigation, he took actions against Ross based on his investigation and upon the advice from Corporation Counsel and thus asserted the advice of counsel as a basis for a qualified immunity defense to her claims. In other words, Crews sought specific advice from Corporation Counsel about how to conduct a City disciplinary action involving a city employee. The City claimed that Crews could not divulge the advice he received, and Crews, naturally, concluded that not being able to divulge what the legal advice provided impaired his defense of qualified immunity.

In other words, the *Ross* case is 180 degrees from this case. Crews was a City employee asking the City’s attorney how to conduct a City investigation into a City cheating scandal. In such circumstances the privilege belonged to the City, and Crews **might not** be free to abrogate it because he was asking for help in how to conduct a proper investigation. (The *Ross* Court did not decide the issue—it remanded it to the trial court to take evidence on the issue.) In other words, the information potentially divulged in *Ross* is more like the Appellant sending a *Freedom of Information Act* request to an appellate court staff counsel to review the communications between the staff counsel and the Court. The *Ross* case makes this point clear:

Though citation to outside authority is no substitute for our independent judgment, we find these authorities persuasive. As the Supreme Court has observed regarding the corporate privilege “[b]oth for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. **It thereby encourages observance of the law and aids in the administration of justice.**” *Weintraub*, 471 U.S. at 348, 105

S.Ct. 1986. We see no reason that that function is no longer served simply because the corporation is a municipality, or more broadly, that the organization or agency is a government entity. Governments must not only follow the laws, but are under additional constitutional and ethical obligations to their citizens. The privilege helps insure that conversations between municipal officials and attorneys will be honest and complete. In so doing, it encourages and facilitates the fulfillment of those obligations. See *Grand Jury Investigation*, 399 F.3d at 534 (“Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.”)

In *Commodity Futures Trading Comm. v. Weintraub, et. al.*, 471 U.S. 343, 105 S.Ct. 1986 (1985), the Supreme Court makes clear that attorney-client privilege cannot be asserted to cover up wrongdoing. After a bankrupt corporation tried to prevent the Bankruptcy Trustee from waiving attorney-client privilege, the U. S. Supreme Court said that the Directors’ interest in keeping those conversations secret had to yield to the Trustee’s duties to shareholders, a situation analogous to a citizen seeking access to public documents. The case before the Court is more like *Weintraub* than *Ross*. Unlike *Ross*, the authors of the public e-mails are government officials, not County employees, and as the unredacted versions of some of the e-mails demonstrate, they were mounting an unlawful scheme not only to control public meetings outside the public’s view, but also to encourage an unlawful prosecution of Appellant. Here, the un-redacted e-mails provided to Appellant in separate requests opens a window on the subject of the communications flowing from the Councilmember’s private e-mail accounts to the County Administrator/County Attorney and that the subject of the e-mails was as far removed from **observance of the law and . . . administration of justice** as can be imagined. As *Ross* makes clear, the privilege is not automatic or absolute and must be decided on the facts of each case. The *Ross* court evaluated whether the privilege must yield to the defense of qualified immunity, not whether the communications are protected from the *Freedom of Information Act*. Crew’s attempt to waive privilege controlled his ability to mount a defense, and even there, the *Ross* court did not declare the privilege immutable; instead, it remanded the case to the district court

to conduct an evidentiary examination to determine if the advice being rendered to Crews was on behalf of the City or on behalf of Crews individually:

We therefore hold both that municipalities can assert attorney-client privilege and the Crew's decision to claim qualified immunity based on advice he received from the city's counsel does not prevent the City from asserting attorney-client privilege. Having removed these obstacles from the city's attempt to assert attorney-client privilege, we note that the City still bears the burden of proving the existence of the privilege, *Dakota*, 197 F.3d at 825, about which there may be some question.

*Ross v. City of Memphis* at page 606

In other words, in *Ross*, the City asserted it was the client, not Crews. The Sixth Circuit spoke clearly that the assertion of a privilege cannot be simultaneously employed as a sword and a shield: "This image is meant to convey that 'the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications.' *Ibid*. Crews certainly could not assert that he relied on privileged communications and then hide behind the privilege, if he ever had it." *Ross* at pages 604-605. This statement by the Sixth Circuit highlights the issue before the Court, which is: can Councilmembers utilize their private e-mail accounts to circumvent the prohibition of § 30-4-70(c) and then adopt the simple expedient of copying the County Attorney in order to further unlawful aims? This rhetorical question is already answered by § 30-4-70(c), and the Special Referee erred in providing cover to the County to continue to violate the law.

One final reply is required to the County's Argument 1(A), and it is the rejection of the County's assertion that "privileged" communications related to the acquisition of real property continue after the transaction has closed. The *Freedom of Information Act* speaks to issue precisely and succinctly: "these documents are not exempt from disclosure once a contract is entered into or the property is sold or purchased except as otherwise provided in this section." § 30-4-40(5) S. C. Code, Ann. No greater potential for governmental mischief occurs than in the arena of local governments buying and selling real estate, and the citizens of South Carolina have few more important concerns than access to the local governments' expenditure of taxpayers' money in the area

of real estate acquisition. (The citizens of Charleston County had a front row seat to governmental mischief in this area in the sale of the Naval Base and the gigantic loss incurred by County taxpayers over the mishandling of the Naval Hospital.) Thus, this Court need look no further than the plain language of the statute to determine that documents related to real estate acquisition are not protected.

### **REPLY TO RESPONDENT’S ARGUMENT 1(B)**

**The reason the Appellant narrowed her request is because the County informed her she would be obligated to pay \$14,432.06 for her initial request, including a pre-payment of \$3,608.02 as a condition of fulfilling the request.**

In its argument 1B, the County asserts that the Appellant fails to present a “justiciable controversy” because the County successfully intimidated the Appellant into a Hobson’s choice of either altering her request or paying \$14,432.06 for what should have been a routine disclosure. The County asserts that because the Appellant did not pay it, she cannot complain, which is like a defendant denying an armed robbery because she did not pull the trigger. The only way the County can make such an allegation is by ignoring the purpose and authority of the *South Carolina Freedom of Information Act* which allows citizens to sue for injunctive and declaratory relief. See § 30-4-100, S. C. Code, Ann. When the County demanded the exorbitant—and unauthorized—sum from the Appellant, its demand created a “justiciable controversy.” The demand for unlawful costs chilled the Appellant’s exercise of her right, and the demand for unlawful fees alone allows her to bring a suit under § 30-4-100, S. C. Code, Ann. Because she did not have \$14,432.06 to pay to the County to put easily compiled e-mails on a thumb drive, the County forced her to amend her request, which is not “voluntarily” narrowing the scope of her request. Acting under government threat is never “voluntary.” She narrowed the scope of her request in response to the County’s demand for exorbitant fees and its refusal to explain them. It is a measure of the County’s tin ear that it cannot comprehend how a citizen of modest means might not have over \$14,000.00 to pay for e-mails on a thumb drive. The Special Referee agreed that the County’s charges were unlawful, but she erred in concluding that

because the Appellant did not pay them, she did not suffer “damages” and therefore there was nothing for the Court to do. See R.O.A. Vol. 1, pages 13-14 [Order at pages7-8]: “Although it appears that the estimated fee schedules originally provided to the Plaintiff in response to her four FOIA requests may not have complied with the mandates of S.C. Code Ann. Section 30-4-30(B), because the Plaintiff did not pay the requested deposits for FOIA No. 2 (now moot), 3, or 4, nor is she contesting the reasonableness of the fee she paid relative to FOIA No. 1, I find that the Plaintiff has suffered no damages as a result of the Defendant’s estimated fee calculations.” This is an error of law because the remedy under the *Freedom of Information Act* is not for “damages,” but rather for injunctive and declaratory relief and attorney’s fees. In short, the Country cannot profit from its own wrongdoing by backing the Appellant down from paying an unlawful fee.

In support of its position, the County makes a surprising selection of authority. In *Sloan v. South Carolina Dept. of Revenue*, 409 S.C. 551, 762 S.E.2d 687 (2014), the Supreme Court upheld a finding that the case was moot because the Department of Revenue provided the requested documents almost immediately after Sloan filed his *F.O.I.A.* suit. The timeline of *Sloan* is:

November 19, 2012—Sloan made request for documents

December 20, 2012—The D.O.R. responded: “As soon as the information has been compiled, you will be contacted again and the requested information will be sent to you.”

December 21, 2012—Sloan filed suit.

“Three weeks after Sloan filed suit, DOR provided Sloan with the documents he had requested. The trial court held a hearing at which Sloan conceded that his request for injunctive relief was mooted by DOR’s production of documents, but Sloan maintained that his request for declaratory relief and attorney’s fees and costs remained viable.” *Sloan* at page 688 The Supreme Court agreed, holding that not only was Sloan the “prevailing party,” but also: “When a public body frustrates a citizen’s FOIA request to the extent that the citizen must seek relief in the courts and incur litigation

costs, the public body should not be able to preclude the prevailing party status to the citizen by producing the documents after litigation is filed.” *Sloan* at page 689 The same principle applies here in a different context. The County cannot assert a bogus inflated pre-payment demand to back the Appellant down and then profit from its own wrongdoing by claiming there is no “justiciable controversy” because she did not pay it. The County’s assertion of the inflated fees included, by its own admission, the rate of \$72.00 per hour for an attorney to review the materials for privilege, a charge that the *Freedom of Information Act* specifically prohibits: “Fees may not be charged for examination and review to determine if the documents are subject to disclosure.” § 30-4-30(B) The County’s assertion of inflated fees is a *Freedom of Information Act* violation, and the Appellant was not required to pay it to maintain her claim any more than a citizen subject to false arrest is required to resist the unlawful arrest to the death to preserve her right to challenge it. The Department of Revenue treated Sloan with more respect than the County provided to this Appellant, and the Supreme Court found that he presented a “justiciable controversy.”

### **REPLY TO RESPONDENT’S ARGUMENT 1(C)**

**The use of private e-mail is a violation of § 30-4-70(c) as well as a waiver of attorney-client privilege.**

The County argues that the Appellant is raising this issue for the first time on appeal. The Record on Appeal refutes this. At the hearing before the Special Referee, the Appellant explained in detail why she zeroed in on the Councilmembers’ private e-mail:

A. And subsequently, I began requesting FOIA because I believe that I was involved in some kind of Kafkaesque nightmare where there were other forces behind the scenes that were creating something unlawful. I made numerous FOIA requests, and they were all denied or I was given excessive charges. I did get some e-mails—private e-mails from the Town of Port Royal which led me to believe that all of what I just said to you is correct.

R.O.A. Vol. 1, page 237 [tr. page 22, lines 6—15]

Q. And as a result of that [receiving information], did you revise your second FOIA request narrow it?

A. Yes.

Q. Is that Exhibit 5?

Q. that's where you requested any and all e-mails to/from/between [psommerville@hargray.com](mailto:psommerville@hargray.com) and the following e-mail?

A. Correct.

Q. Why were you zeroed in on Paul [Sommerville—psommerville@hargray.com](mailto:Sommerville-psommerville@hargray.com)? Why were you interested in that particular address?

A. The same private e-mail address for council people were coming up in some other e-mails that I had gotten, some other FOIAs. In one of the exhibits, when we get to it, I can enlarge upon that a little bit further.

R.O.A. Vol. 1, page 246 [tr. page 31, lines 8—24]

Q. And how many documents have you already received as a result of bringing this action that you did not previously get in response to your FOIA requests?

A. How many additional ones did I get?

Q. Yeah.

A. Well, if you count the 167 redacted, Paul Sommerville's private e-mails, and then there was just last week, Mr. Richardson, I know that you sent a – it was the closing document for 429 Broad River Boulevard. I think there was 10 pages.

A. Otherwise, I didn't get any of the other documents that went with the closing documents.

R.O.A. Vol. 1, page 266 [tr. page 51, lines 10 – 24]

A. I'm not trying to vex the County in any way. I simply asked for things that I believe I have a right as a citizen to see and that our community has a right to see. I didn't ask specifically for anything that was under or in litigation or the subject of any litigation. I asked for documents about an administrator that involved an administrator search that already closed, a real estate transaction that was determined by the defendant to be unauthorized to begin with, and just people's personal e-mail accounts to government accounts, which I believe given that Mr. Weaver acknowledged they're using the private e-mails that would be something that we have a right to see, because I think that's the intent of the transparent, open government that we all expect and that we're all paying for.

R.O.A. Vol. 1, page 268 [tr. page 53, lines 8 –25]

A. No. I didn't receive this one through the discovery. This was through a FOIA that I had received when I asked for personal e-mails because there were personal e-mails that were in my discovery. So I just asked for separate FOIA's because the personal e-mails—because as I was referencing earlier when I said that there was—there were e-mails that they were doing intel on me and then there were private e-mails. And I was just – you know, I was alarmed by that. I had no idea that I was going to be getting these e-mails when I asked for that.

Q. So what we've described as FOIA request number two and FOIA request number three and FOIA request number four in this action, those were all FOIA requests related to personal e-mails form a six-year period as to different things. Which FOIA request did you receive this particular document, Number 11, and was that a separate FOIA request for personal e-mails?

A. That was a previous FOIA request for personal e-mails, correct. If I might just speak to the Court about these Alice Howard ones. Alice Howard is my representative regarding Port Royal. And I couldn't get any help from Alice Howard, and I never understood why until I got some of these

e-mails. And I didn't know about the e-mails from her to the town manager about doing intel. And again, one of the reasons I'm asking for the e-mails was I just was alarmed that there was like an active investigation of me by council members. I couldn't understand that.

R.O.A. page 274-275 [tr. page 59, line 7 – page 60, line 13]

The first sentence of Appellant's November 19, 2020 motion for reconsideration filed with the Special Referee begins:

**1. The use of private e-mail communications is a waiver of attorney/client privilege.**

1. In holding that certain e-mail communications between government officials, which included the County attorney as part of the address chain, the Court overlooks that the bulk of these e-mails originate from Council members **private** e-mail addresses. (R.O.A. Vol. 1, page 152 [November 19, 2020 Motion for Reconsideration]) (The boldface appears in the original.)

The issue of public officials using private communications to conduct County business has been a salient issue in this case from the beginning, and there is no support in the record to suggest that the Appellant raises this issue for the first time on appeal. The County attempts to insert confusion where there is none, and this stems from the County's mis-characterization of Appellant's case as being an attack on County Council for conducting unlawful meetings under § 30-4-70(c). See Respondent's Brief at page 17 where it continues the canard that Appellant is bringing this action because the County was conducting improper meetings and argues that because the e-mail chains fell just below a quorum, the County committed no violation. Harkening back to the armed robbery metaphor above, it is not a defense to armed robbery to say the gun was not loaded. This effort to sow confusion results from the County's creation of the straw man assertion that Appellant is grounding her case on this section prohibiting unlawful meetings when the Appellant is relies upon § 30-4-70(c) for exactly what it says and to offer it to explain the **why** of Councilmembers' utilizing their private e-mail accounts, not to create the **what** of the case. § 30-4-70(c) does not discuss "quorum"; it specifically prohibits government officials from utilizing "electronic communication" to avoid the required transparency of the *Freedom of Information Act*. The issue of a quorum is a red herring, and Councilmembers are not free to violate the *Freedom of Information Act* because they do

it with fewer members than constitute a quorum. This is the age-old *de minimus* rationalization of bad conduct similar to: “it is not really stealing if I take only a little from a lot of people.” Of course Councilmembers are free to use their private e-mail to do whatever they like, but they cannot use their private e-mail accounts either to conceal government business or to conduct government business out of the public’s eye, and when they resort to their private citizen status, they cannot invoke governmental attorney-client privilege as a private citizen to shield their violations of the *Freedom of Information Act*. By analogy, if this were a tort claim instead of a statutory equitable claim for injunctive and declaratory relief, a Councilmember for whom the County provides a County vehicle to conduct County business could not claim the protection of the State Tort Claims Act for a wreck in her private vehicle by claiming she was on her way to the grocery store to bring lunch to the office. The County Attorney represents the County, not the individual Councilmembers, and should they desire to bring themselves under the protection of the County Attorney’s privilege, they must do so operating on their Government Issue e-mail account, and any privilege applies only to proper conduct during the course and scope of the government activities. The County’s Brief reinforces the Appellant’s argument that County Councilmembers improperly utilize their private e-mail accounts to script public meetings. On page 4 of its Brief, the County concedes that Appellant’s F.O.I.A. request “implicated thousands of documents.” The County helpfully explains that the \$14,000.00 estimate for e-mails resulted from the “sheer volume of documents,” an assertion that reveals too much about what Councilmembers are up to. As the Queen of Denmark remarked in another context, “The lady doth protest too much, methinks.” If the County were conducting its business in the open as it should, there would not be “thousands of documents,” *i.e.* thousands of personal e-mails conducting government business.

**REPLY TO RESPONDENT’S ARGUMENT 1(D)**

**Matters related to a real estate purchase are not privileged once the transaction has closed.**

In its argument 1(D), the County argues that communications related to the acquisition of real estate retain their privilege even after the transaction has closed. As discussed above on pages 11-12, the *South Carolina Freedom of Information Act* specifically makes these documents public. § 30-4-40(5) S. C. Code, Ann. The reply to the County's spurious assertion is fully addressed above and does not require repetition here. The Appellant will not pounce on the County's unintended irony on this point. On pages 13-14 of Respondent's Brief, the County informs the Court that "*the County's attorneys were brought into these communications due to their legal knowledge . . .*," which is simultaneously humorous and revealing because the County's own investigation into the acquisition of 1 Bostwick Circle concluded that it was an unlawful transaction. See R.O.A. Vol. 1, page 338 [Exhibit 14] for Chris Inglese's report to the County Administrator, John Weaver, concluding that the County improperly acquired the parcel, but could take no corrective action because the person responsible resigned.

## **REPLY TO RESPONDENT'S ARGUMENT 2**

### **The Special Referee erred in not awarding the plaintiff attorney's fees and costs.**

The County's final argument is that the plaintiff was not a prevailing party and thus not entitled to fees or costs. This legal issue and the facts of the case are fully discussed in the Appellant's Initial Brief at pages 41 - 44 and do not require repetition here. Since the issue is fully addressed in the Initial Brief, the Appellant limits herself to the correction of factual errors contained in the County's Brief.

First the County asserts that the issue of the listing agent's relationship to the County raised "extremely difficult and unique challenges posed by the interplay between the *Freedom of Information Act* and the attorney client privilege." (Respondent's Brief at page 20) As set forth above, the least private communications in the conduct of government business are those related to the sale and purchase of real property, and these records, once the transaction is completed, are

specifically disqualified from exemption. The County's vigorous defense of the privacy of its communications with a real estate agent in the face of a specific statutory requirement of openness is emblematic of its resolve to thwart the plaintiff at every turn.

Second, the County asserts the Appellant did not address this issue as the main issue in the case. She did. The County attempted to hide the correspondents' identity in the redacted e-mails. The Special Referee ordered the County to disclose these. The County sought to shield its communications with a real estate agent, and the Special Referee required those communications be disclosed. The Special Referee found that some documents were improperly redacted and ordered those be produced. The receipt of any of these documents over the County's refusal to produce them makes her a prevailing party.

The second erroneous assertion contained in the County's final argument is that the Appellant "voluntarily" abandoned her claim under her first *F.O.I.A.* request. As discussed above on pages 15 - 16 and as demonstrated by the testimony presented at the hearing, there was nothing "voluntary" about the Appellant's decision not to pay \$14,432.06 to get what turned out to be blacked out documents. (See Record on Appeal Vol. 2, pages 448-614 for the blacked out documents the County produced.) Even the Respondent concedes that it was improper to charge the Appellant \$72.00 an hour for a County Attorney to examine the records to determine if they are public. Doing an act under compulsion does not fit the definition of "voluntary," and very few citizens of South Carolina have the wherewithal to hand over \$14,000.00 to examine e-mails that the County blacked out. (At the minimum wage of \$7.25 per hour, the County's fee amounted to 1,991 hours or 50 weeks of work. That is a considerable sum to expect a citizen to pay to examine public documents.)

The final argument in the County's brief is to make light of the County's animus for the Appellant. It is, no doubt, a trivial matter to the County as Exhibit 12, Gary Cubic's resolve to see

to it that the County prosecuted Baracco for an alleged incident over which it had no jurisdiction (R.O.A. Vol. 1, page 331), and the Appellant is neither the first nor the last citizen to receive rough treatment at the hands of government officials, and the Court does not need a lesson in the function of the judicial branch as a check on executive and legislative action. The Appellant did not introduce the element of animus as an element of her *Freedom of Information Act* claim except to demonstrate the County's motivation and lack of good faith in thwarting her access to public documents. The issue of the County's mistreatment of Appellant was the subject of a separate lawsuit, which the Appellant resolved on terms favorable to her. However, as H. L. Mencken allegedly remarked: "A citizen's greatest fear is being noticed by the government," and Beaufort County noticed the Appellant. While the County puts forward a well-written and zealously argued brief, the facts are clear: the County erected every roadblock it could find to thwart the Appellant's access to public records, and the Appellant's failure to present the case without the evidence of animus would leave this Court perplexed as to the source of the County's hostility for Ms. Baracco. The animus is not the reason for the lawsuit—the lawsuit is the reason for the animus. Beaufort County is preventing public access to public records, and the Appellant is one of the few citizens sufficiently courageous to take up the gauntlet to challenge the County's conduct.

### CONCLUSION

This case demonstrates the fragility of the *Freedom of Information Act* as a remedy to support citizens' efforts to be informed about government conduct. Not only was the Appellant required to battle the County for access to public records, but also she was required to retain counsel, file a suit, pay a Special Referee's fee—all for privilege of fighting for her right to be informed about what her local government is doing. There are few citizens who are willing to run this gauntlet, and the economics of this case paint a daunting portrait of what a citizen can expect when challenging government misconduct—the Col. Vindman effect. As pointed out by more

than one commentator on the *Freedom of Information Act*, the reason government officials continuously operate in secret is because they have no skin in the game when a citizen takes the time and invests the money to question improper conduct. The relief promised under the *Freedom of Information Act* failed the Appellant in this case, and the Respondent's brief, though expertly written and cogently argued, defends the same governmental hubris that led to this litigation. Even if this Court were not to reverse the Special Referee on the redacted e-mails, the Appellant still successfully compelled the County to disclose the identities of the persons communicating on the redacted correspondence, forced the County to disgorge obviously public documents, and demonstrated that the County's demand for exorbitant fees was unlawful. On these issues alone, the Plaintiff is a prevailing party, and the Special Referee erred in both providing cover for the County to keep public records out of public view and in failing to award attorney's fees and costs to the Appellant who bravely stepped forward to insist the County obey the law. In an astonishing exhibition of chutzpah, Beaufort County, in response to this action, has now adopted a written policy of refusing to turn over any public official's e-mail originating from a private address. This new policy is a powerful indictment of Beaufort County's contempt for its responsibilities to be open. As set forth in the Appellant's Initial Brief, this Court should examine the redacted e-mails, order them produced to the Appellant and remand this case back to the Special Referee or, more importantly, to the circuit court since the circuit court referred the case *sua sponte*, to award the Appellant attorney's fees and costs as a prevailing party under the *Freedom of Information Act*.

Respectfully submitted,

April 12, 2022

/s/Thomas R. Goldstein  
Thomas R. Goldstein, S. C. Bar No. 2186  
Belk, Cobb, Infinger & Goldstein, P.A.  
P. O. Box 71121  
N. Charleston, S. C. 29415-1121  
(843) 554 4291; (843) 554 5566 (fax)  
[tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)  
Attorneys for Appellant/Respondent

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Apr 12 2022

SC Court of Appeals

CERTIFICATE OF COUNSEL

I certify that this Final Brief complies with Rule 211(b), *South Carolina Appellate Court Rules*.

April 12, 2022

/s/ Thomas R. Goldstein  
Thomas R. Goldstein, S. C. Bar No. 2186

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**Apr 12 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Erin D. Dean, Special Referee

Case No.: 2019-CP-07-00818  
Appellate Case No. 2021-00321

Mare Baracco..... Appellant-Respondent,

v.

Beaufort County..... Respondent-Appellant.

**FINAL BRIEF OF RESPONDENT-APPELLANT  
BEAUFORT COUNTY**

April 11, 2022

s/ E. Richardson LaBruce  
E. Richardson LaBruce, S.C. Bar No. 80106  
FINGER, MELNICK, BROOKS & LABRUCE, P.A.  
Post Office Box 24005  
Hilton Head Island, SC 29925-4005  
Telephone: (843) 681-7000  
Email: [erlabruce@fingerlaw.com](mailto:erlabruce@fingerlaw.com)

*Attorney(s) for Respondent-Appellant Beaufort  
County*

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## STATEMENT OF ISSUES

- I. THE SPECIAL REFEREE ERRED AS A MATTER OF LAW IN DETERMINING THAT THE COUNTY’S INCLUSION OF THE ESTIMATED HOURLY CHARGE FOR THE COUNTY’S LEGAL DEPARTMENT TO REVIEW AND REDACT DOCUMENTS VIOLATED THE FREEDOM OF INFORMATION ACT.
  
- II. THE SPECIAL REFEREE ERRED IN ORDERING DISCLOSURE OF CERTAIN PUBLIC RECORDS AFTER FINDING ANY PRIVILEGE WAS WAIVED.

## STATEMENT OF THE CASE

Appellant-Respondent Mare Baracco (“*Baracco*”) filed this lawsuit on April 10, 2019, against Respondent-Appellant Beaufort County (“*County*”). On June 29, 2019, before service of a responsive pleading by the County, Baracco served and filed an Amended Complaint seeking an injunction against the County and attorneys’ fees for the County’s alleged violation of the Freedom of Information Act (“*FOIA*”). (R. pp. 31-37). In particular, Baracco challenged the reasonableness of the County’s estimated fee for the production of requested documents in response to a series of FOIA requests pertaining to years’ worth of emails from/by/to various County Councilmembers and their personal email accounts, and the propriety of the redactions completed by the County in producing certain documents to Baracco pursuant to another FOIA request involving a real estate transaction. *Id.*

Although the relevant portion of the Freedom of Information Act does not require responsive pleadings, on August 14, 2019, the County answered the Amended Complaint and raised four defenses, including a general denial and Rule 12, SCRCF. (R. pp. 38-41). On February 3, 2020, Baracco served her memorandum of law in support of the Amended Complaint. (R. pp. 42-54).

On May 28, 2020, the Chief Administrative Judge *sua sponte* assigned the case to the Honorable Perry Buckner to conduct a hearing in accordance with S.C. Code Ann. § 30-4-100(A). (R. p. 1). On June 1, 2020, the County served its memorandum of law in opposition to the Amended Complaint and the memorandum of law served by Baracco. (R. pp. 57-75).

On June 2, 2020, the matter came before Judge Buckner via WebEx hearing. By written order dated June 3, 2020, Judge Buckner (i) ordered Baracco to identify which documents she was requesting under FOIA, which documents remained in dispute, and to provide a list of the same within fifteen days to the County; (ii) ordered the County, within thirty days of receipt of the document identification from Baracco, to provide the basis for any objections to the requested documents as well as the exact fee that County intended to charge for the production of the same; and, (iii) appointed Erin Dean as special referee to “determine the reasonableness of the fee, and whether or not any of the exceptions under the applicable FOIA statute apply.” (R. p. 5).

On June 19, 2020, Baracco provided the County and the Special Referee with her list of requested documents. (R. p. 81). On June 29, 2020, the County responded. (R. pp. 84-86). On July 6, 2020, and July 7, 2020, the County produced (i) redacted versions of the requested documents along with a privilege log asserting the basis of the FOIA exemption to Baracco and the Special Referee, and (ii) “clean” versions of the documents to the Special Referee for in camera review. (R. pp. 87-96). Given the sheer volume of documents, the parties agreed to accept receipt of the same via electronic transfer over Citrix ShareFile, an encrypted document sharing software program.

On July 28, 2020, after reviewing the pleadings, the memoranda of law and a letter from counsel for Baracco, the Special Referee posed a series of nine questions to the Parties. (R. p. 101). On that same date, Baracco responded to the same. (R. pp. 102-103). On August 12, 2020, the

County responded with its answers to the July 28, 2020, letters from the Special Referee and Baracco. (R. pp. 113-115). On September 3, 2020, the County revised its redacted production to remove redactions that covered the names of the senders/recipients of emails in accordance with the Special Referee's instructions. (R. pp. 125-126).

The Parties appeared before the Special Referee on September 25, 2020, for a final hearing conducted via Lifesize streaming program supplied by the court reporter. After taking testimony and considering the briefing and arguments of counsel, the Special Referee issued an Order on November 13, 2020. (R. pp. 7-22).

On November 19, 2020, the Appellant-Respondent filed and served her Motion for Reconsideration. (R. pp. 152-161). On November 23, 2020, the Respondent-Appellant filed and served its Motion for Reconsideration. (R. pp. 162-168). By Order dated March 2, 2021, the Special Referee denied both Motions for Reconsideration. (R. pp. 23-30).

On March 22, 2021, the Appellant-Respondent filed her Notice of Appeal. (R. p. 199). On March 23, 2021, the Respondent-Appellant filed its Notice of Appeal. (R. p. 201). On May 18, 2021, the Special Referee billed \$7,280.00 for her services in this case. In accordance with the Order from Judge Buckner, each party paid one-half of those costs.

### **STATEMENT OF FACTS**

On February 10, 2019, Mare Baracco, a resident of Port Royal, South Carolina, submitted a Freedom of Information Act ("*FOIA*") request to Beaufort County for communications related to the sale and purchase of two parcels of real estate commonly referred to as 1 Bostwick Circle and 429 Broad River Road ("*FOIA Request No. 1*"). (R. p. 313-15). On February 20, 2019, Beaufort County responded requesting an initial deposit of \$124.66 as a condition of fulfilling the request.

After tendering the initial deposit, Ms. Baracco was provided with the responsive documents on March 21, 2019. At that time, the County refunded Ms. Baracco \$53.66 due to the County's overestimating the initial costs of production. Portions of the production were redacted by the County prior to the delivery to Ms. Baracco.

On March 10, 2019, Ms. Baracco submitted an additional FOIA request to Beaufort County. In this request, Ms. Baracco requested all emails to/from/between two County Councilmembers with various County department heads, the County Administrator, the County Attorney, the County Sheriff, members of County Council, and/or other public and private individuals over an approximately six (6) years period ("*FOIA Request No. 2*"). (R. pp. 317-318). There was no limit as to subject matter. The request implicated thousands of documents.

On March 18, 2019, the County responded to FOIA Request No. 2 by requesting a deposit of \$3,019.75, which represented approximately 25% of the reasonably anticipated costs to be incurred by the County in responding to FOIA Request No. 2. (R. pp. 319-20). The County estimated that searching and retrieving the hundreds of records requested by FOIA Request No. 2 would take approximately 167 hours, based on an estimated time of one minute per document. (*Id.*).

On that same day, the Plaintiff requested a thorough explanation from the former County Administrator, who promptly responded that (i) SLED, as the primary law enforcement agency for the state, has recommended stronger internal controls on access to the County network, presumably to limit outside interference/hacking; (ii) the IT charge was expected to range from \$49.07/an hour to \$30.74/an hour based upon which member of the County IT Department conducts the search; (iii) the County Attorney is required to review any disclosed emails from elected or appointed officials to ensure that the attorney-client privilege is not waived; and, (iv) that the County Attorney's rate for review is \$72.00/an hour. (R. p. 347).

Upon receipt of this explanation on March 18, 2019, Ms. Baracco revised FOIA Request No. 2, by reducing its scope to all e-mails over a 6-year period between the County Council Chairman, the former County Administrator, the former County Attorney/former Deputy County Administrator, and the County Attorney (“*FOIA Request No. 3*”). (R. pp 321-322). On March 25, 2019, the County responded that an initial deposit of \$152.82 – once again, 25% of the estimated cost of fulfillment - would be required prior to record compilation. (R. pp 323-325).

Thereafter, on March 31, 2019, Ms. Baracco submitted her fourth FOIA request to the County specifically requesting emails from County Council member Alice Howard’s personal e-mail address from January 1, 2015, to the “present” to/from/between Ms. Howard and multiple individuals (“*FOIA Request No. 4*”). (R. p. 326). On April 2, 2019, the County responded that an initial deposit of \$404.29 would be required prior to the County beginning the process of fulfilling this request. (R. p. 327). This deposit represented 25% of the reasonably anticipated costs of producing the records, which the County determined was \$1,617.14. (R. p. 327).

The Appellant-Respondent commenced this lawsuit on April 10, 2019, amending her complaint once. Throughout the course of this litigation and into this appeal, the Appellant-Respondent has alleged that the County violated FOIA. In particular, the Appellant-Respondent has asserted the following claims, some of which are raised for the first time on appeal and others which have been abandoned:

1. Communications to and from an in-house governmental attorney are never afforded protections from FOIA disclosure as such communications can never be considered privileged.

2. Communications in which an attorney purportedly delivers inaccurate legal advice regarding whether the county's governing body must approve of the acquisition of real property is not subject to privilege per the crime-fraud exception (abandoned).
3. The consummation of a real estate transaction eliminates any ability to exempt privileged documents from FOIA disclosure (not raised below).
4. Upon being appointed as Interim County Administrator, the County Attorney was operating in a dual capacity and therefore no communications from the County Attorney during that time could be considered privileged, regardless of the content or context of the communications (abandoned).
5. The copying of the County's contractually retained third-party real estate agent on email communications between the County Attorney and County staff waives any claim of attorney-client privilege.
6. The County's inclusion of an estimated eight (8) hours billed at the rate of \$72.00/an hour for the County's legal department to redact records in response to FOIA Request No. 3 violates the Freedom of Information Act.
7. The County's inclusion of an estimated twenty-two (22) hours billed at the rate of \$72.00/an hour for the County's legal department to redact records in response to FOIA Request No. 4 violates the Freedom of Information Act.

Prior to the final hearing on the matter, the Special Referee received all of the documents pertaining to FOIA Request No. 1, both redacted and un-redacted, as well as all of the documents implicated by the Appellant-Respondent's revised FOIA Request No. 4, both redacted and un-redacted.

In regard to FOIA Request No. 1, the Special Referee determined that all of the redactions completed by the County fell within a recognized FOIA exemption except for those redactions on communication in which Debra Regecz, a third-party real estate agent retained by the County to assist with the location and acquisition of real property, was copied. (R. pp. 16-20). The Special Referee recognized that the question of whether a third party realtor was an “agent of the client” to qualify as a “privileged person” to avoid waiver was a novel question in South Carolina. The Special Referee further acknowledged that had the County not redacted this information, any privilege would have been waived upon disclosure; nevertheless, the Special Referee found that the County’s RFP for brokerage services included an explicit disclaimer that any contractor retained for such services “shall not act as an agent or employee of the County.” (R. pp. 19-20). For this reason, the Special Referee declined to extend “privileged persons” status to Ms. Regecz.

In regard to revised FOIA Request No. 3, “[a] thorough review by this Court of the 167 pages of documents produced ... revealed that the majority of redactions did pertain to legal advice received from Keaveny.” (R. p. 16). Three exceptions were found and the Special Referee ordered that those three documents be provided to the Appellant-Respondent. On December 15, 2020, those three documents were provided to Appellant-Respondent through her counsel.

As the Statement of the Case outlines, the Special Referee reviewed extensive pleadings on all of these issues, received the testimony of the Appellant-Respondent, and on November 13, 2020, issued her final Order. (R. pp. 7-22); *see* discussion *supra* in the Statement of the Case.

## STANDARD OF REVIEW

Declaratory judgments in and of themselves are neither legal nor equitable. *See Felts v. Richland Cty.*, 303 S.C. 354, 400 S.E.2d 781 (1991); *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003); *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001). The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue. *Campbell*, 354 S.C. at 279, 580 S.E.2d at 165; *Travelers Indem. Co. v. Auto World*, 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999) (suit for declaratory judgment is neither legal nor equitable, but is determined by nature of underlying issue). The underlying issues relevant to this appeal involve questions of novel statutory interpretation and the existence of privilege.

As to the existence of privilege, “[t]he determination of whether or not a communication is privileged and confidential is a matter for the trial judge to decide after a preliminary inquiry into all the facts and circumstances.” *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 692 S.E.2d 526 (2010). “The trial judge’s decision will not be overturned absent an abuse of discretion.” *Id.* “An abuse of discretion occurs when the trial court’s decision is based on an error of law or upon factual findings that are without evidentiary support.” *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008), quoted in *Lambries v. Saluda County Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014).

As to the remaining two issues, the Special Referee’s Orders turn on the statutory interpretation of two different sections of the Freedom of Information Act both of which raised novel issues of law. “Determining the proper interpretation of a statute is a question of law, and [the appellate court] reviews questions of law de novo.” *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). “In a case raising a novel issue of law

regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court.” *Lambries*, 409 S.C. at 7, 760 S.E.2d at 788, *citing Sloan v. S.C. Board of Physical Therapy Examiners*, 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006).

An order granting an injunction is reviewed for an abuse of discretion. *Id.* “An abuse of discretion occurs when the trial court’s decision is based on an error of law or upon factual findings that are without evidentiary support.” *Kiriakides v. Sch. Dist. of Greenville County*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (*citing Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)). “An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.” *Id.*, 675 S.E.2d at 445 (*quoting Layman*, 376 S.C. at 444, 658 S.E.2d at 325); *Sloan v. Friends of The Hunley Inc.*, 393 S.C. 152, 711 S.E.2d 895 (S.C. 2011). “[T]he trial court’s factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge’s findings.” *Campbell*, 354 S.C. 274,280, 580 S.E.2d 163, 165-66 (citations omitted); *see also Harkins v. Greenville County*, 340 S.C. 606,533 S.E.2d 886 (2000).

### **PERTINENT PRINCIPLES OF STATUTORY INTERPRETATION**

The cardinal rule in statutory construction is that a court must ascertain and effectuate legislative intent whenever possible. *Joint Legislative Committee v. Huff*, 320 S.C. 241, 245, 464 S.E.2d 324, 326 (1995). Legislative intent must prevail if it can reasonably be discovered in language used and construed in light of its intended purpose. *Glover by Cauthen v. Suitt Construction Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995). “The determination of legislative intent is a matter of law.” *Media Gen. Commc’ns, Inc. v. S.C. Dep’t of Revenue*, 388 S.C. 138, 148, 694 S.E.2d 525, 529 (2010) (citations omitted).

In addition to the ordinary rules of statutory construction applicable when interpreting a state statute, the South Carolina Freedom of Information Act provides:

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15. “South Carolina's FOIA was designed to guarantee the public **reasonable** access to certain activities of the government.” *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004), citing *Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996) (double emphasis added). The Act is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. *Id.*

Nevertheless, courts must apply the terms of a statute according to its literal meaning, without resort to subtle or forced construction in an attempt to limit or expand the scope of the statute. *Holley v. Mount Vernon Mills, Inc.*, 312 S.C. 320, 440 S.E.2d 373 (1994). Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language. *Timmons v. Tricentennial Commission*, 254 S.C. 378, 175 S.E.2d 805 (1970). When the terms and language of a statute are plain and unambiguous and convey a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994); *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996).

When a statute is ambiguous, the Court considers the terms of the statute and employs the rules of statutory interpretation. *Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) (citing *Lester v. South Carolina Workers' Comp. Comm'n*, 334 S.C. 557, 514 S.E.2d 751 (1999)). Under South Carolina's rules of statutory construction, a reviewing court "must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (citing *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998)). "In construing a statute, this Court will [nonetheless] reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature." *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008).

"Under the 'last legislative expression' rule, where conflicting provisions exist, the last in point of time or order of arrangement, prevails." *Ramsey v. County of McCormick*, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991). "In accordance with the principle that the last expression of the legislative will is the law, where conflicting provisions are found in the same statute, or in different statutes, the last in point of time or order of arrangement prevails." *Feldman v. S.C. Tax Comm'n*, 203 S.C. 49, 51, 26 S.E.2d 22, 24 (1943). "[L]ater legislation supersedes earlier laws addressing the identical issue." *Whiteside v. Cherokee Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993).

## ARGUMENT

- I. THE SPECIAL REFEREE ERRED AS A MATTER OF LAW IN SUGGESTING THAT THE COUNTY'S INCLUSION OF THE ESTIMATED HOURLY CHARGE FOR THE COUNTY'S LEGAL DEPARTMENT TO REVIEW AND REDACT DOCUMENTS VIOLATED THE FREEDOM OF INFORMATION ACT.

The Special Referee correctly found that there was no violation of the Freedom of Information Act relative to the deposits estimated by the County because Ms. Baracco never paid the deposits. (R. pp. 13-14). Since no deposits were paid, Ms. Baracco's questions were merely academic. *See Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474, 478 (2006)(finding that even in FOIA cases appellate courts will not decide academic questions). "Generally, this Court only considers cases presenting a justiciable controversy." *Id.* (citing *Byrd v. Irmo High School*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996)). "A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract." *Id.*

Despite finding there was no violation of the Freedom of Information Act by the County, the Special Referee noted in the Order that a public body's attempt to charge fees for "reviewing and redacting [ ] records" were both "problematic" and "inappropriate" as such fees would necessarily be for "the examination and review to determine if the documents are subject to disclosure." (R. p. 13). Given the substantial resources devoted by public bodies to ensure that legally privileged material (*e.g.*, social security numbers, victim and witness identifying information, work product, information regarding minors, etc.) is segregated from public material, the County moved the Special Referee to reconsider her position that the imposition of such fees would be problematic or inappropriate. (R. pp. 162-168). Upon reconsideration, the Special Referee reiterated that there was no violation by the County relative to the fees but also concluded

that “(search, retrieval, and redaction) are administrative not analytical in nature” and only the physical act of redaction would be compensable. (R. pp. 26-27).

The Special Referee’s decision to interpret FOIA as limiting the recoverable costs associated with redactions to the time necessary to physically obscure the exempt material is without support in the Record. Further, it is an interpretation that strains logic and reason. The process of analyzing potentially sensitive documents for exempt material is a necessary and substantial component of redaction and requires extensive training. To separate the two would effectively nullify the General Assembly’s decision to permit public bodies to recover the cost of redaction. Moreover, in reaching her conclusion, the Special Referee failed to consider an alternative interpretation that is consistent with the express language of the Freedom of Information Act.

**A. The Freedom of Information Act Only Prohibits Charging Fees to Determine Whether Documents Constitute Public Records Subject to Disclosure.**

The South Carolina Freedom of Information Act grants public bodies the right to require a “deposit not to exceed twenty-five percent of the total reasonably anticipated cost for reproduction of the records...prior to the public body searching for or making copies of records.” *See* S.C. Code Ann. § 30-4-30(B). In determining the amount of a proposed deposit, a public body must first estimate the total permissible fee that could be levied under FOIA. FOIA permits public bodies to recover a reasonable fee for the cost of having an employee of the public body search, retrieve, **and redact** public records in response to a valid FOIA request. *See* S.C. Code Ann. § 30–4–30(B) (double emphasis added). The hourly fee for this service “shall not exceed the prorated hourly salary of the lowest paid employee who, in the reasonable discretion of the custodian of the records, has the necessary skill and training to perform the request.” *Id.*

For years, South Carolina limited local governments to recovering fees only for the cost of the “search and retrieval” of public records in response to a FOIA request, with such costs “not to exceed the actual cost of searching for or making copies of records.” *See* S.C. Code Ann. § 30–4–30(B)(2016). In 2017, the Freedom of Information Act was amended to add the costs associated with “redaction” and to permit recovery based on the lowest hourly rate of the public body employee that has the necessary skill and training to perform the search, retrieval, and redaction of records. *Id.*; (R. pp. 62-67). Thus, operating under the revised FOIA, the time spent redacting public records in response to a FOIA request is expressly compensable on an hourly rate. *Id.*; (R. pp. 162-166).

While the Act permits public bodies to recoup costs incurred in the redaction of records, it also provides that “[f]ees may not be charged for examination and review to **determine if the documents are subject to disclosure.**” S.C. Code Ann. § 30–4–30(B) (double emphasis added) (R. pp. 162-166). By its very nature, the process by which exempt material is separated from non-exempt material must be subsequent to the determination of whether the underlying public records are even subject to the disclosure requirement of Section 30-4-30(A)(1) of the Act. Upon receipt of a FOIA request, the public body has between ten and twenty days - depending on the age of the record(s) being requested – to make a “determination...as to the public availability of the requested public record.” S.C. Code Ann. § 30–4–30(C).

In accordance with FOIA, many “public records” are not publically available and are not subject to disclosure. *See* S.C. Code Ann. § 30-4-20(c). In fact, the definition of “public record” in the Act identifies well over a dozen different subsets of public records (*e.g.*, “income tax returns, medical records, hospital medical staff reports, scholastic records, adoption records,” etc.) that the General Assembly determined should never be disclosed as part of a FOIA production. *Id.*

Only upon first reviewing the requested documents and determining that the FOIA request implicates public records subject to disclosure – a determination that must be relayed to the requestor – is the public body obligated to produce such records, “specific portions of [which] may be subject to redaction according to the exemptions provided for by Section 30-4-40 or other state or federal laws.” S.C. Code Ann. § 30-4-30(C). Thus, in redacting material in accordance with S.C. Code Ann. § 30-4-40, the public body is not making a determination as to whether the documents are subject to disclosure; rather, it is analyzing whether portions of documents already determined to be subject to disclosure *may be* otherwise exempt per Section 30-4-40 of the Act.

This interpretation recognizes that FOIA places two distinct and separate review obligations upon public bodies and avoids an irreconcilable conflict. *See* S.C. Code Ann. § 30-4-30(C). When the terms and language of a statute are plain and unambiguous and convey a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994); *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996). Any other interpretation of these provisions would render the Act hopelessly contradictory as analyzing records for disclosure determinations is an essential part of the redaction process.

Under the County’s interpretation, the prohibition on charging for “examination and review” applies *exclusively* to the review of the public records during the initial 10-day acknowledgement period required by FOIA. In other words, the public body could not charge for the time it takes to determine whether it will comply with a FOIA request and/or whether there are any responsive documents during the initial ten-day period; however, it could charge for the time spent reviewing and redacting responsive public records.

Moreover, eliminating fees for this initial review is consistent with public policy and the codified purpose of FOIA. *See* S.C. Code Ann. § 30-4-15. This interpretation clarifies that the public body has no right to charge a requestor in providing its initial response regarding the public availability of such documents and the public body’s reasonably anticipated costs of production. *Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). By removing the possibility of such an expense, the General Assembly reaffirmed the right of the public to inquire about publically available documents without risk of financial penalty, while simultaneously acknowledging the admirable goal of limiting taxpayer burden. Public money pays for the creation of the public records, the maintenance of them, the storage of them, and, ultimately, their production pursuant to a FOIA request. Requiring extensive retrieval, review and production of tens of thousands of documents annually in response to FOIA requests conflicts with this goal when local governments cannot recover *the actual* direct cost of numerous and expensive FOIA requests.

The Special Referee’s conclusion that the term “redaction” is limited to the physical act of blotting out exempt information embraces a forced construction of FOIA, one that Ms. Baracco did not proffer throughout this matter. Ms. Baracco’s position is that only those redactions required to remove “personal identifying information” are compensable, a position devoid of any support in the Act and relying solely on Rule 41.2, SCRPC. (R. p. 170). By adopting an interpretation of “redaction” that was without the benefit of legal authority and was in opposition to the positions espoused by both Ms. Baracco and the County, the Special Referee plainly erred.

**B. The “Last Legislative Expression” Rule Requires Any Ambiguity Be Interpreted in Favor of Permitting the Recovery of the Direct Costs Associated with Redaction.**

Arguably, FOIA’s prohibition against charging fees for “examination and review to determine if the documents are subject to disclosure” cannot be reconciled with the public body’s right to charge fees for redacting exempt information given the inherent obligation to analyze records as part of the redaction process.

Under the principles of statutory interpretation, if an irreconcilable conflict exists within a statute regarding whether fees may be charged for determining what portions of documents may be redacted, then the “last legislative expression” rule of statutory construction would require a court to presume that the legislature intended to confer upon public bodies this power. *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002). “Under the ‘last legislative expression’ rule, where conflicting provisions exist, the last in point of time or order of arrangement, prevails.” *Ramsey v. County of McCormick*, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991); *Whiteside v. Cherokee Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (finding that “later legislation supersedes earlier laws addressing the identical issue”).

The General Assembly amended FOIA in 2017 to grant public bodies the right to recover the actual costs related to redacting public records prior to production. As such, the last legislative expression rule would hold that the time spent reviewing documents *as part of the redaction process* is compensable under FOIA.

## II. THE SPECIAL REFEREE ERRED IN ORDERING DISCLOSURE OF CERTAIN PUBLIC RECORDS AFTER FINDING ANY PRIVILEGE WAS WAIVED.

FOIA’s judicially enforceable right to access public records is subject to certain well-recognized exceptions, including the right of the public body to exempt from disclosure “[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships.” *See* S.C. Code Ann. § 30–4–40(a)(7). The Special

Referee determined that a small portion of the public records redacted by the County did not qualify for this exemption as any claim of privilege was waived by the County's copying of a third-party real estate agent on the communications. (R. pp. 19-20). The Special Referee's conclusions were incorrect.

**A. The Literal Interpretation of the Statute Exempts All Correspondence of Legal Counsel for a Public Body.**

The Special Referee erred in finding that privilege had been waived by the County in copying a third party real estate agent on communications between legal counsel and County employees. Despite the statutory exemption at issue failing to include the word "privilege," the Special Referee analyzed all documents under such a standard. Applying this standard was improper under a plain reading of the statute.

The Freedom of Information Act grants public bodies the right to exempt from disclosure "[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships." *See* S.C. Code Ann. § 30-4-40(a)(7). Interpreting this exemption literally, the Act provides three separate exemptions: (1) correspondence of legal counsel for a public body, (2) work products of legal counsel for a public body, and (3) any material that would violate attorney-client relationships. *See* S.C. Code Ann. § 30-4-40(a)(7). "Unless there is something in the statute requiring a different interpretation, the words used in the statute must be given their ordinary meaning. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal terms." *Cothran v State Farm Mut. Auto. Ins. Co.*, 421 S.C. 562, 808 S.E.2d 824 (Ct. App. 2017). Applying the exemption in this manner would permit a public body to refuse to disclose

any correspondence from legal counsel for a public body to the public body and its representatives as part of a FOIA request.

While a South Carolina appellate court has not directly addressed whether such an interpretation is proper, the Supreme Court has implied that not all attorney-client communications are immune from discovery pursuant to FOIA. *Evening Post Publ'g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745 (2011). In this case, the Supreme Court did not address the literal interpretation of the exemption; rather, it determined that under certain circumstances, a court review may be necessary to determine whether the public body's interest in confidentiality should trump the public's right to know. *Id.* The Court, in reaching this conclusion, did not elaborate on the proposed balancing of interests. *Id.*

Nevertheless, in requiring that the County establish that the documents were "privileged," the Special Referee imposed a standard upon the County that is not within the text of the statute. *See In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." (citation omitted)). When each word in the exemption is given its actual effect, the plain language of FOIA exempts "correspondence of legal counsel for a public body." *See* S.C. Code Ann. § 30-4-40(a)(7); *see also, Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 365, 798 S.E.2d 555, 558-559 (2017) (holding that "and" as used in the South Carolina Revenue Procedures Act should not be read to combine multiple provisions into a single limited category of disputes).

This interpretation finds support in public policy and in practicality. In granting a blanket exemption for correspondence from legal counsel for a public body, the General Assembly appropriately balanced the competing public concerns of accountability through transparency and ensuring functionality at the local government level. A plain reading of the statute encourages

public officials and public bodies to face unpopular truths and ask difficult questions to legal counsel without concern of potential political ramifications. Such legal guidance can include the downsides, risks, and costs of pursuing a certain course of action; the existence of any potential alternatives; and, the possible collateral benefits and/or risks in terms of expense, politics, and/or public harm. Determining whether a particular communication is privileged, however, is a fact-intensive exercise and often requires the dedication of substantial legal and staff resources, as indicated in the case at hand. This broad exemption similarly furthers the state-recognized goal of limiting taxpayer burden by eliminating extensive review of tens of thousands of documents annually in response to FOIA requests.

The Special Referee's inclusion of a "privilege" standard is not supported by the text of the exemption, nor was this standard ever truly argued by Ms. Baracco. Rather, Ms. Baracco contended that no communication with in-house governmental counsel could ever be considered privileged: "The assertion that the email communications of government officials are 'privileged' is nonsense...." (R. p. 47). By requiring that the County establish privilege under the exemption, the Special Referee plainly erred. FOIA does not require proof of privilege, rather, it permits public bodies to exempt from disclosure correspondence of legal counsel for a public body.

**B. Including a Third Party Real Estate Agent Retained by the Public Body on Communications with Legal Counsel Does Not Waive Privilege.**

Assuming for the sake of argument that a public body must establish the existence of privilege or work product in order to exempt correspondence of legal counsel from disclosure, the Special Referee erred in finding that any such privilege had been waived by the County. In rendering her decision, the Special Referee recognized that the question of whether a third party

realtor was an “agent of the client” to qualify as a “privileged person” to avoid waiver was a novel question in South Carolina.

“The attorney-client privilege has long been recognized in this State and protects against disclosure of confidential communications by a client to his attorney regarding a legal matter.” *In re Mt. Hawley Insurance Company*, 427 S.C. 159, 829 S.E.2d 707 (2019) (citing *Tobaccoville USA*, 387 S.C. at 293, 692 S.E.2d at 529; *State v. Doster*, 276 S.C. 647, 650, 284 S.E.2d 218, 219 (1981)). As discussed at length in a recent South Carolina Supreme Court opinion:

The privilege is based upon a “wise public policy” that determines the best interest of society is served by “inviting the utmost confidence on the part of the client in disclosing his secrets to his professional advisor, under the pledge of the law that such confidence shall not be abused by permitting disclosure of such communications.” [*S.C. State Highway Dep’t v. Booker*, 260 S.C. 245, 254, 195 S.E.2d 615, 619-20 (1973)]; *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009) (“By assuring confidentiality, the privilege encourages clients to make ‘full and frank’ disclosures to their attorneys, who are then better able to provide candid advice and effective representation.” (citation omitted)); *Hartsock v. Goodyear Dunlop Tires N. Am. Ltd.*, 422 S.C. 643, 647 n.1, 813 S.E.2d 696, 699 n.1 (2018) (describing the privilege as “rooted in the imperative need for confidence and trust” (quoting *Jaffee v. Redmond*, 518 U.S. 1, 10, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996))).

*In re Mt. Hawley Insurance Company*, 427 S.C. at 167, 829 S.E.2d at 712. The Court further provided that the privilege is not absolute. *Id.* The attorney-client privilege belongs solely to the client and can only be waived by the client. *State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (1980). “Although a client may waive his attorney-client privilege, the waiver must be distinct and unequivocal.” *State v. Hitopoulus*, 279 S.C. 549, 551, 309 S.E.2d 747, 749 (1983).

Three categories of people are considered privileged persons: (1) the client or prospective clients; (2) the lawyer; and (3) ***the agents of the client*** and the lawyer. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 (2000) (double emphasis added). South Carolina has a robust

“agency exception” to the waiver of the attorney-client privilege. *See State v. Thompson*, 329 S.C. 72, 75, 495 S.E.2d 437, 438-39 (1997).

At issue in this case is whether a realtor working with a governmental entity may be considered an “agent of the client” so as to retain the privileged nature of such communications. (R. pp. 18-20). Although there is no bright line rule for determining when a third party constitutes an “agent of the client,” courts have looked at the context of the relationship and the necessity that such persons be included within protected communications. *Faloney v. Wachovia Bank, N.A.* 254 F.R.D. 204, 212-13 (E.D. Pa. 2008) (finding email between corporate attorney and two bank officials was protected). Some courts have similarly applied the “functional equivalent” test to determine whether a third party was acting as the functional equivalent of an employee. *See Alliance Constr. Solutions, Inc. v. Dep’t of Corr.*, 54 P.3d 861, 867, 870-71 (Colo. 2002) (independent contractor of government agency was the functional equivalent of an employee for purposes of privilege).

In this particular case, Ms. Debra Regecz was retained by the County to represent the County’s interests in potential real property acquisitions and sales. Her role was unique at the County and, as such, she worked directly with various department heads and counsel to ensure that her actions on behalf of the County were consistent with South Carolina law. The acquisition and disposition of real property by a local government is heavily regulated and requires a comprehensive understanding of various legal issues and responsibilities for governmental actors. To withhold privilege in such a context would be contrary to the very “wise public policy” for which privilege exists: Open communication with legal counsel regarding the potential acquisition of real property and the construction of a Department of Special Needs home in a private

subdivision is not only proper but should be encouraged. *In re Mt. Hawley Insurance Company*, 427 S.C. at 167, 829 S.E.2d at 712.

In holding that Beaufort County waived privilege by communicating with Ms. Regecz, the Special Referee relied upon the County's Request for Proposals ("RFP") for brokerage services including an explicit disclaimer that any contractor retained for such services "shall not act as an agent or employee of the County." (R. pp. 20). Whether a communication is privileged does not hinge on the terms of any contract between them; rather, it depends of the nature of the communication and the client's expectation that it remain confidential. *Love*, 275 S.C. at 59, 271 S.E.2d at 112; *see also United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) (finding that an accountant's presence while the client communicated with legal counsel did not destroy the privilege because the accountant's presence was useful "for the effective consultation between the client and the lawyer"); *AVX Corp. v. Horry Land Co.*, No. 4:07-CV-3299-TLW-TER, 2010 WL 4884903, at 7-8 (D.S.C. Nov. 24, 2010) (acknowledging the *Kovel* doctrine).

The South Carolina Code imposes upon real estate brokerage firms a duty of confidentiality similar to that imposed upon attorneys.

Designated agents may not disclose, except to the designated agent's broker-in-charge or appointed representative, information made confidential by written request or instruction of the client whom the designated agent is representing, except information allowed to be disclosed by this section or required to be disclosed by this section. Unless required to be disclosed by law, the broker-in-charge of a designated agent may not reveal confidential information received from either the designated agent or the client with whom the designated agent is working. For the purposes of this section, confidential information is information the disclosure of which has not been consented to by the client and that could harm the negotiating position of the client.

*See* S.C. Code Ann. § 40-57-350(J)(9). As noted by the South Carolina Supreme Court, multiple aspects of a real estate transaction are considered the practice of law in this state and regulated as

such. *See Matrix Financial Services Corporation v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011).

As the representative of one of the parties to the transaction, a realtor must have the freedom to communicate directly with legal counsel to ensure that any such actions taken on behalf of the respective party complies with the law.

The Record illustrates that any waiver of privilege was neither distinct nor unequivocal. Both the realtor and the client have similar interests in obtaining legal advice necessary to ensure the closing takes place as intended. The Order's reliance on the nonexistence of a contractual principal-agent relationship disregards the common interests of the Defendant and its realtor. In allowing the absence of clear contractual language establishing a principal-agent relationship to eradicate the attorney-client privilege, the Special Referee abused her discretion and erred.

The Court should reverse the Special Referee's finding of a waiver of privilege.

### **CONCLUSION**

The County recognizes the crucial role that both accountability and transparency play in local government. Transparent governance fosters trust through collective oversight. While it is indisputable that the South Carolina Freedom of Information Act serves as one of the strongest guarantors of public transparency, it does not guarantee the public unfettered access to any and all public records. The General Assembly crafted limitations to FOIA to ensure that the delicate balance between efficient governance and disclosure could be maintained. One of those limitations is the broad exemption granted to public bodies to redact communications from legal counsel.

The General Assembly also recognized the excessive costs and constraints that open disclosure requirements can impose on municipalities and counties. Public money pays for the creation of the public records, the maintenance of them, the storage of them, and, ultimately, their

production pursuant to a FOIA request. Each step in the process is a cost to the taxpayer. Requiring extensive retrieval, review and production of tens of thousands of documents annually in response to FOIA requests conflicts with this goal if local governments cannot recover the actual direct and indirect cost of numerous and expensive FOIA requests. By amending the South Carolina Freedom of Information Act to grant public bodies the right to recover the actual costs of redaction, the General Assembly reasonably reduced the fiscal demands on taxpayers. Moreover, the byproduct of not allowing the full costs of redaction to be recovered by the public body is the financial incentive to delegate the review of potentially sensitive material to those not in a position of trust and/or expertise.

For all of the foregoing reasons, this honorable Court should reverse the Special Referee's decisions as to the matters stated herein.

Respectfully submitted,

April 11, 2022

s/ E. Richardson LaBruce  
E. Richardson LaBruce, S.C. Bar No. 80106  
FINGER, MELNICK, BROOKS & LABRUCE, P.A.  
Post Office Box 24005  
Hilton Head Island, SC 29925-4005  
Telephone: (843) 681-7000  
Email: [erlabruce@fingerlaw.com](mailto:erlabruce@fingerlaw.com)  
Attorney(s) for Respondent-Appellant

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**Apr 12 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Erin D. Dean, Special Referee

Case No.: 2019-CP-07-00818  
Appellate Case No. 2021-00321

Mare Baracco..... Appellant-Respondent,

v.

Beaufort County..... Respondent-Appellant.

**FINAL RESPONSE BRIEF OF RESPONDENT-APPELLANT  
BEAUFORT COUNTY**

April 11, 2022

s/ E. Richardson LaBruce  
E. Richardson LaBruce, S.C. Bar No. 80106  
FINGER, MELNICK, BROOKS & LABRUCE, P.A.  
Post Office Box 24005  
Hilton Head Island, SC 29925-4005  
Telephone: (843) 681-7000  
Email: [erlabruce@fingerlaw.com](mailto:erlabruce@fingerlaw.com)

*Attorney(s) for Respondent-Appellant Beaufort  
County*

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## STATEMENT OF ISSUES

- I. THE SPECIAL REFEREE WAS CORRECT AS A MATTER OF LAW IN DETERMINING THAT THE COUNTY ACTED PROPERLY IN REDACTING VARIOUS EMAILS PRODUCED TO THE APPELLANT-RESPONDENT.
- A. **Public Officials' Use of Private Email Does Not Eliminate the Attorney-Client Privilege.**
  - B. **There Was No Justiciable Controversy as to the Estimated Deposits.**
  - C. **The Use of Private Email by a Public Official Is Not a Violation of the Freedom of Information Act.**
  - D. **The Consummation of a Real Estate Transaction Does Not Eliminate Privilege.**
- II. THE SPECIAL REFEREE ACTED WITHIN HER DISCRETION IN DECLINING TO AWARD ATTORNEYS' FEES.

## STATEMENT OF THE CASE

Appellant-Respondent Mare Baracco (“*Baracco*”) filed this lawsuit on April 10, 2019, against Respondent-Appellant Beaufort County (“*County*”). On June 29, 2019, before service of a responsive pleading by the County, Baracco served and filed an Amended Complaint seeking an injunction against the County and attorneys’ fees for the County’s alleged violation of the Freedom of Information Act (“*FOIA*”). (R. pp. 31-37). In particular, Baracco challenged the reasonableness of the County’s estimated fee for the production of requested documents in response to a series of FOIA requests pertaining to years’ worth of emails from/by/to various County Councilmembers and their personal email accounts, and the propriety of the redactions completed by the County in

producing certain documents to Baracco pursuant to another FOIA request involving a real estate transaction. *Id.*

Although the relevant portion of the Freedom of Information Act does not require responsive pleadings, on August 14, 2019, the County answered the Amended Complaint and raised four defenses, including a general denial and Rule 12, SCRPC. (R. pp. 38-41). On February 3, 2020, Baracco served her memorandum of law in support of the Amended Complaint. (R. pp. 42-54).

On May 28, 2020, the Chief Administrative Judge *sua sponte* assigned the case to the Honorable Perry Buckner to conduct a hearing in accordance with S.C. Code Ann. § 30-4-100(A). (R. p. 1). On June 1, 2020, the County served its memorandum of law in opposition to the Amended Complaint and the memorandum of law served by Baracco. (R. pp. 57-75).

On June 2, 2020, the matter came before Judge Buckner via WebEx hearing. By written order dated June 3, 2020, Judge Buckner (i) ordered Baracco to identify which documents she was requesting under FOIA, which documents remained in dispute, and to provide a list of the same within fifteen days to the County; (ii) ordered the County, within thirty days of receipt of the document identification from Baracco, to provide the basis for any objections to the requested documents as well as the exact fee that County intended to charge for the production of the same; and, (iii) appointed Erin Dean as special referee to “determine the reasonableness of the fee, and whether or not any of the exceptions under the applicable FOIA statute apply.” (R. p. 5).

On June 19, 2020, Baracco provided the County and the Special Referee with her list of requested documents. (R. p. 81). On June 29, 2020, the County responded. (R. pp. 84-86). On July 6, 2020, and July 7, 2020, the County produced (i) redacted versions of the requested documents along with a privilege log asserting the basis of the FOIA exemption to Baracco and the Special

Referee, and (ii) “clean” versions of the documents to the Special Referee for in camera review. (R. pp. 87-96). Given the sheer volume of documents, the parties agreed to accept receipt of the same via electronic transfer over Citrix ShareFile, an encrypted document sharing software program.

On July 28, 2020, after reviewing the pleadings, the memoranda of law and a letter from counsel for Baracco, the Special Referee posed a series of nine questions to the Parties. (R. p. 97). On that same date, Baracco responded to the same. (R. pp. 102-103). On August 12, 2020, the County responded with its answers to the July 28, 2020, letters from the Special Referee and Baracco. (R. pp. 113-115). On September 3, 2020, the County revised its redacted production to remove redactions that covered the names of the senders/recipients of emails in accordance with the Special Referee’s instructions. (R. pp. 125-26).

The Parties appeared before the Special Referee on September 25, 2020, for a final hearing conducted via Lifesize streaming program supplied by the court reporter. After taking testimony and considering the briefing and arguments of counsel, the Special Referee issued an Order on November 13, 2020. (R. pp. 7-22).

On November 19, 2020, the Appellant-Respondent filed and served her Motion for Reconsideration. (R. pp. 152-161). On November 23, 2020, the Respondent-Appellant filed and served its Motion for Reconsideration. (R. pp. 162-168). By Order dated March 2, 2021, the Special Referee denied both Motions for Reconsideration. (R. pp. 23-30).

On March 22, 2021, the Appellant-Respondent filed her Notice of Appeal. (R. p. 199). On March 23, 2021, the Respondent-Appellant filed its Notice of Appeal. (R. p. 201). On May 18, 2021, the Special Referee billed \$7,280.00 for her services in this case. In accordance with the Order from Judge Buckner, each party paid one-half of those costs.

## STATEMENT OF FACTS

On February 10, 2019, Mare Baracco, a resident of Port Royal, South Carolina, submitted a Freedom of Information Act (“FOIA”) request to Beaufort County for communications related to the sale and purchase of two parcels of real estate commonly referred to as 1 Bostwick Circle and 429 Broad River Road (“FOIA Request No. 1”). (R. pp. 313-15). On February 20, 2019, Beaufort County responded requesting an initial deposit of \$124.66 as a condition of fulfilling the request. After tendering the initial deposit, Ms. Baracco was provided with the responsive documents on March 21, 2019. At that time, the County refunded Ms. Baracco \$53.66 due to the County’s overestimating the initial costs of production. Portions of the production were redacted by the County prior to the delivery to Ms. Baracco.

On March 10, 2019, Ms. Baracco submitted an additional FOIA request to Beaufort County. In this request, Ms. Baracco requested all emails to/from/between two County Councilmembers with various County department heads, the County Administrator, the County Attorney, the County Sheriff, members of County Council, and/or other public and private individuals over an approximately six (6) years period (“FOIA Request No. 2”). (R. pp. 317-318). There was no limit as to subject matter. The request implicated thousands of documents.

On March 18, 2019, the County responded to FOIA Request No. 2 by requesting a deposit of \$3,019.75, which represented approximately 25% of the reasonably anticipated costs to be incurred by the County in responding to FOIA Request No. 2. (R. p. 319-20). The County estimated that searching and retrieving the hundreds of records requested by FOIA Request No. 2 would take approximately 167 hours, based on an estimated time of one minute per document. (*Id.*).

On that same day, the Plaintiff requested a thorough explanation from the former County Administrator, who promptly responded that (i) SLED, as the primary law enforcement agency for

the state, has recommended stronger internal controls on access to the County network, presumably to limit outside interference/hacking; (ii) the IT charge should range from \$49.07/an hour to \$30.74/an hour based upon which member of the County IT Department conducts the search; (iii) the County Attorney is required to review any disclosed emails from elected or appointed officials to ensure that the attorney-client privilege is not waived; and, (iv) that the County Attorney's rate for review is \$72.00/an hour. (R. p. 347).

Upon receipt of this explanation on March 18, 2019, Ms. Baracco revised FOIA Request No. 2, by reducing its scope to all e-mails over a 6-year period between the County Council Chairman, the former County Administrator, the former County Attorney/former Deputy County Administrator, and the County Attorney ("*FOIA Request No. 3*"). (R. pp. 321-22). On March 25, 2019, the County responded that an initial deposit of \$152.82 – once again, 25% of the estimated cost of fulfillment - would be required prior to record compilation. (R. pp 323-325).

Thereafter, on March 31, 2019, Ms. Baracco submitted her fourth FOIA request to the County specifically requesting emails from County Council member Alice Howard's personal e-mail address from January 1, 2015, to the "present" to/from/between Ms. Howard and multiple individuals ("*FOIA Request No. 4*"). (R. p. 326). On April 2, 2019, the County responded that an initial deposit of \$404.29 would be required prior to the County beginning the process of fulfilling this request. (R. p. 327). This deposit represented 25% of the reasonably anticipated costs of producing the records, which the County determined was \$1,617.14. (R. p. 327).

The Appellant-Respondent commenced this lawsuit on April 10, 2019, amending her complaint once. Throughout the course of this litigation and into this appeal, the Appellant-Respondent has alleged that the County violated FOIA. In particular, the Appellant-Respondent

has asserted the following claims, some of which are raised for the first time on appeal and others which have been abandoned:

1. Communications to and from an in-house governmental attorney are never afforded protections from FOIA disclosure as such communications can never be considered privileged.
2. Communications in which an attorney purportedly delivers inaccurate legal advice regarding whether the county's governing body must approve of the acquisition of real property is not subject to privilege per the crime-fraud exception (abandoned).
3. The consummation of a real estate transaction eliminates any ability to exempt privileged documents from FOIA disclosure (not raised below).
4. Upon being appointed as Interim County Administrator, the County Attorney was operating in a dual capacity and therefore no communications from the County Attorney during that time could be considered privileged, regardless of the content or context of the communications (abandoned).
5. The copying of the County's contractually retained third-party real estate agent on email communications between the County Attorney and County staff waives any claim of attorney-client privilege.
6. The County's inclusion of an estimated eight (8) hours billed at the rate of \$72.00/an hour for the County's legal department to redact records in response to FOIA Request No. 3 violates the Freedom of Information Act.
7. The County's inclusion of an estimated twenty-two (22) hours billed at the rate of \$72.00/an hour for the County's legal department to redact records in response to FOIA Request No. 4 violates the Freedom of Information Act.

Prior to the final hearing on the matter, the Special Referee received all of the documents pertaining to FOIA Request No. 1, both redacted and un-redacted, as well as all of the documents implicated by the Appellant-Respondent's revised FOIA Request No. 4, both redacted and un-redacted.

In regard to FOIA Request No. 1, the Special Referee determined that all of the redactions completed by the County fell within a recognized FOIA exemption except for those redactions on communication in which Debra Regecz, a third-party real estate agent retained by the County to assist with the location and acquisition of real property, was copied. (R. pp. 16-20). The Special Referee recognized that the question of whether a third party realtor was an "agent of the client" to qualify as a "privileged person" to avoid waiver was a novel question in South Carolina. The Special Referee further acknowledged that had the County not redacted this information, any privilege would have been waived upon disclosure; nevertheless, the Special Referee found that the County's RFP for brokerage services included an explicit disclaimer that any contractor retained for such services "shall not act as an agent or employee of the County." (R. pp. 19-20). For this reason, the Special Referee declined to extend "privileged persons" status to Ms. Regecz.

In regard to revised FOIA Request No. 3, "[a] thorough review by this Court of the 167 pages of documents produced ... revealed that the majority of redactions did pertain to legal advice received from Keaveny." (R. p. 16). Three exceptions were found and the Special Referee ordered that those three documents be provided to the Appellant-Respondent. On December 15, 2020, those three documents were provided to Appellant-Respondent through her counsel.

As the Statement of the Case outlines, the Special Referee reviewed extensive pleadings on all of these issues, received the testimony of the Appellant-Respondent, and on November 13, 2020, issued her final Order. (R. pp. 7-22); *see* discussion *supra* in the Statement of the Case.

### **STANDARD OF REVIEW**

Declaratory judgments in and of themselves are neither legal nor equitable. *See Felts v. Richland Cty.*, 303 S.C. 354, 400 S.E.2d 781 (1991); *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003); *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001). The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue. *Campbell*, 354 S.C. at 279, 580 S.E.2d at 165; *Travelers Indem. Co. v. Auto World*, 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999) (suit for declaratory judgment is neither legal nor equitable, but is determined by nature of underlying issue).

“The determination of whether or not a communication is privileged and confidential is a matter for the trial judge to decide after a preliminary inquiry into all the facts and circumstances.” *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 692 S.E.2d 526 (2010). “The trial judge’s decision will not be overturned absent an abuse of discretion.” *Id.* “An abuse of discretion occurs when the trial court’s decision is based on an error of law or upon factual findings that are without evidentiary support.” *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008), quoted in *Lambries v. Saluda County Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014).

“The decision to award or deny attorneys’ fees under a state statute will not be disturbed on appeal absent an abuse of discretion.” *Kiriakides v. Sch. Dist. of Greenville County*, 382 S.C.

8, 20, 675 S.E.2d 439, 445 (2009) (citing *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)). “An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.” *Id.*, 675 S.E.2d at 445 (quoting *Layman*, 376 S.C. at 444, 658 S.E.2d at 325); *Sloan v. Friends of The Hunley Inc.*, 393 S.C. 152, 711 S.E.2d 895 (S.C. 2011). “[T]he trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings.” *Campbell*, 354 S.C. 274,280, 580 S.E.2d 163, 165-66 (citations omitted); see also *Harkins v. Greenville County*, 340 S.C. 606,533 S.E.2d 886 (2000).

### **ARGUMENT IN REPLY**

- I. THE SPECIAL REFEREE WAS CORRECT AS A MATTER OF LAW IN DETERMINING THAT THE COUNTY ACTED PROPERLY IN REDACTING VARIOUS EMAILS PRODUCED TO THE APPELLANT-RESPONDENT.

The heart of the Appellant-Respondent’s first issue on appeal is whether the Special Referee erred in finding that the majority of documents produced by the County in response to FOIA Request No. 1 and FOIA Request No. 3 were properly redacted as exempt material under the Freedom of Information Act. The Appellant-Respondent offers multiple different positions as to why the County’s redactions were improper. As discussed herein, the Special Referee’s conclusions to the contrary were based on a complete and exhaustive review of each redaction, grounded in established law, and the result of a proper analysis of the facts.

- A. **Public Officials’ Use of Private Email Does Not Eliminate the Attorney-Client Privilege.**

The Special Referee correctly refused to accept Appellant-Respondent’s assertion that a public body may never exempt from disclosure a communication between legal counsel for a

public body and a member of that public body if such communication originated from or was received through the public official's private email address. The Special Referee reasoned that "[w]hile use of private email to conduct governmental business is not best practices, I can find no statutory authority or South Carolina case that indicates 1) such manner of communication is prohibited, or 2) that such manner of communication operates to waive attorney-client privilege." (R. p. 24).

The Freedom of Information Act's basic premise is to give "any person [the] right to inspect or copy any public record of a public body." *See* S.C. Code Ann. § 30-4-30(a). In defining "public record" for FOIA purposes, the General Assembly deliberately chose a broad definition – one that focuses on the content of the record and the manner in which the record was created, not on its location or current custodian. *See* S.C. Code Ann. § 30-4-20(c) (defining public records as "books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body").

At no point relevant to this action has Beaufort County challenged the proposition that a public official's private emails are subject to the Freedom of Information Act when such emails are used to conduct public business. FOIA's definition of "public record" is designed to encompass all records that relate to public business, not just those records that are created and/or stored on publically-owned communication systems. Moreover, as discussed *infra*, the County agrees with the Appellant-Respondent that there is no distinction between private emails and public emails when such emails are being used to conduct public business. (App. Initial Brief, p. 25-27). Rather, the issue presented to the Special Referee was whether the County erred in exempting portions of these public records.

FOIA's judicially enforceable right to access public records is subject to certain well-recognized exceptions, including the right of the public body to exempt from disclosure "[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships." See S.C. Code Ann. § 30-4-40(a)(7). Initially, Ms. Baracco contended that no communication with in-house governmental counsel can be considered privileged: "The assertion that the email communications of government officials are 'privileged' is nonsense...." (R. p. 47). Although not directly raised as an "issue" in this Appeal, this contention appears to have been resurrected: "[T]here is no such thing as 'privileged information' when government officials communicate with third parties or one another." (R. p. 45).

The South Carolina Supreme Court has already dismissed the notion that the status of the attorney can eliminate the protections provided by the attorney-client privilege. *Evening Post Publ'g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745 (2011)(recognizing the existence of the attorney-client privilege for governmental clients but questioning whether inclusion of outside counsel on employee questionnaires was done solely to avoid disclosure); see also, *In re Grand Jury Investigation (John Doe)*, 399 F.3d 527 (2<sup>nd</sup> Cir. 2005) (finding, "if anything, the traditional rationale for the [attorney-client] privilege applies with special force in the government context"); *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 2004). ("The lawyer whose testimony the government seeks in this case served as in-house attorney. That status alone does not dilute the privilege."); *Ross v. City of Memphis*, 423 F.3d 596, 601-603 (6<sup>th</sup> Cir. 2005)(noting that the privilege in the civil context for government employees should be even more robust so that the government can investigate wrongdoing more thoroughly and pursue remedial options). Thus, the Special Referee correctly rejected the contention that the attorney-client

privilege is somehow not applicable to any communications between a governmental official or employee and its in-house counsel.

Given that the attorney-client privilege is recognized in the governmental client context, the issue presented on appeal is whether the use of personal email by a public official constitutes an automatic waiver of the attorney-client privilege. Neither the text of the applicable statute nor South Carolina law supports such a position. Much like FOIA's definition of "public record" hinges on the context of the communication to determine whether it is subject to disclosure, the applicability of the exemptions set forth in S.C. Code Ann. § 30-4-40 are based on the content of the communication, not the medium used. If the public record contains "[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships" then such material may be exempted from disclosure. *See* S.C. Code Ann. § 30-4-40(a)(7).

At its core, the attorney-client privilege protects communications between attorneys and clients in which legal advice was sought or rendered, and which was intended to be and was in fact kept confidential, unless otherwise waived. "In order to establish the privilege, it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential nature." *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44, 46-47 (S.C. Ct. App. 1984). Like lawyers working within the private sector, governmental attorneys' communications should be protected by the attorney-client privilege so long as they relate to some legal strategy, or to the meaning, requirements, allowances, or prohibitions of the law.

As to FOIA Request No. 1, the County's attorneys were brought into these communications due to their legal knowledge and the existence of potential legal issues regarding the acquisition

of real estate and the potential development of a Department of Special Needs home in a residential subdivision. (R. pp. 71-72). The communications were predominantly centered on the process by which a local government could acquire this real estate and the various title issues revealed by the title work, in particular various restrictive covenants. *See Matrix Financial Services Corporation v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011)(recognizing certain aspects of real estate acquisition constitute the practice of law). The Special Referee agreed. “After careful review of the un-redacted documents produced to the Court...with the exception of the documents that include Debra Regecz [the County’s real estate agent] ... I find the remaining redactions appropriate and subject to exemption pursuant to S.C. Code Ann. § 30-4-40(a)(7).” (R. p. 17). The Special Referee’s finding that copying a third party real estate agent on communications between an attorney and a client constitutes a waiver of privilege is an issue raised and addressed in the County’s cross-appeal.

As to FOIA Request No. 3, following a “thorough” *in camera* review of the “167 pages” of redacted and un-redacted documents produced by Beaufort County, the Special Referee similarly found “that the majority of the redactions did pertain to legal advice received from Keaveny [the County Attorney].” (R. p. 16). The Special Referee ultimately found that there were three (3) documents improperly redacted as to FOIA Request No. 3, at least one of which she inferred was an “oversight.” (R. pp. 16-17).

While the County recognizes that whether a particular communication is privileged can become cloudier given the recognized public benefit of transparency in government actions and the complex and varied roles expected of a county attorney on a daily basis, the redactions made by the County in this case were proper, legal, and necessary to avoid an inadvertent waiver of privileged material through disclosure to a third party. Upon a thorough review of all of the public

records produced by the County in this action, the Special Referee agreed, correctly finding that the vast majority of them – with two notable exceptions – were privileged and properly redacted in accordance with FOIA. (R. pp. 14-18). For these reasons, the Special Referee’s order as to these issues should be affirmed.

**B. There Was No Justiciable Controversy as to the Estimated Deposits.**

In further support of her primary claim that the “Special Referee err[ed] in finding government officials conducting government business on private e-mail accounts, can claim ‘privilege’ from disclosure under the *Freedom of Information Act*,” the Appellant-Respondent alleges that the Special Referee erred in finding there was no violation of the Act related to the calculation of the estimated deposits for costs of production. Although the Amended Complaint alleged violations related to the amount of fees charged by the County, no fees were ever charged by the County; rather, the County requested from Baracco a twenty-five (25%) percent deposit based on the reasonably anticipated costs to be incurred by the County in responding to the substantial requests. (R. p. 324). This particular distinction is addressed more thoroughly in the Respondent’s cross-appeal.

The Special Referee correctly found that there was no violation of the Freedom of Information Act relative to the deposits because the Appellant-Respondent never paid the deposits. (R. pp. 13-14). Since no deposits were paid, the Appellant-Respondent’s questions were merely academic. *See Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474, 478 (2006)(finding that even in FOIA cases appellate courts will not decide academic questions). “Generally, this Court only considers cases presenting a justiciable controversy.” *Id.* (citing *Byrd v. Irmo High School*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996)). “A justiciable controversy

exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract.” *Id.*

The Appellant-Respondent has not alleged any exception as to why this particular matter meets any of the recognized exceptions to the aforementioned rule; thus, the Special Referee correctly found that there was a cognizable violation of the Freedom of Information Act. Further, even to the extent a justiciable controversy may have existed, the Appellant-Respondent mooted any claims related thereto by **voluntarily** amending FOIA Request No. 3 and FOIA Request No. 4, to which amended FOIA requests the County provided revised estimated deposits. (R. pp. 81, 87-88). At no point during this action has the Appellant-Respondent challenged the revised estimated deposits.

**C. The Use of Private Email by a Public Official Is Not a Violation of the Freedom of Information Act.**

The Appellant-Respondent alleges the County violated S.C. Code Ann. § 30-4-70(c) for the first time on appeal. Although couched by the Appellant-Respondent as the County advancing “a straw man argument that the plaintiff was attempting to bring an action under § 30-4-70(c)” and an attempt to “sow confusion where there is none,” the Appellant-Respondent nevertheless asserts that the “Special Referee erred in failing to recognize that conducting government business on private e-mail communications is a violation of the prohibition of § 30-4-70, S.C. Code, Ann., and are not communications shielded from public inspection.” (App. Initial Brief, p. 23-25).

As an initial matter, this issue is not properly before the Court. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *Linda Mc Co., Inc. v.*

*Shore*, 390 S.C. 543, 556-57, 703 S.E.2d 499, 506 (2010). “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *Home Med. Sys., Inc. v. South Carolina Dep’t of Rev.*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009). “It prevents a party from keeping an ace card up his sleeve intentionally or by chance in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to provide his case.” *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). As a result, Ms. Baracco should not be permitted to appeal the Special Referee’s finding that FOIA was not violated on this basis, nor present a novel argument for an alleged FOIA violation on appeal.

Moreover, as noted herein, nothing within the Freedom of Information Act explicitly prohibits the use of private email by a public official. The relevant portion of the Act states that “[n]o chance meeting, social meeting, or electronic communication may be used in circumvention of the spirits of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” S.C. Code Ann. § 30-4-70(c). This section addresses meetings of public bodies. Meeting is defined by the Code as “the convening of *a quorum* of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.” S.C. Code Ann. § 30-4-20(d) (double emphasis added).

In order for a meeting to occur, there must be a quorum. *Id.* For there to be a quorum, “a simple majority of the constituent membership of a public body” must be present. S.C. Code Ann. § 30-4-20(e). The email offered by the Appellant-Respondent is between four (4) of nine (9) County councilmembers and the Interim County Administrator/County Attorney. (App. Initial Brief, pp. 23 & 25). Without a majority of the councilmembers present, there could be no quorum.

S.C. Code Ann. § 30-4-20(e). Without a quorum, there can be no meeting. S.C. Code Ann. § 30-4-20(d). Without a meeting, there can be no violation of S.C. Code Ann. § 30-4-70(c). For these reasons, the expansive argument presented by the Appellant-Respondent – that the use of any private equipment to conduct public business by a public official automatically constitutes a violation of the Freedom of Information Act – is simply not supported by the text of the Act.

**D. The Consummation of a Real Estate Transaction Does Not Eliminate Privilege.**

The Appellant-Respondent, for the first time on appeal, contends that S.C. Code Ann. § 30-4-40(a)(5) operates to eliminate attorney-client privilege. For an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 556-57, 703 S.E.2d 499, 506 (2010). As a result, Ms. Baracco should not be permitted to appeal the Special Referee’s finding that FOIA was not violated on this basis, nor present a novel argument for an alleged FOIA violation on appeal.

Additionally, the exemption for privileged and confidential documents granted to public bodies by S.C. Code Ann. § 30-4-40(a)(7) are not limited, much less extinguished, by S.C. Code Ann. § 30-4-40(a)(5). S.C. Code Ann. § 30-4-40(a)(5) generally permits public bodies to exempt from disclosure certain documents incidental to contractual arrangements and/or the sale or purchase of property. *See* S.C. Code Ann. § 30-4-40(a)(5). The basis for this exemption is clear and apparent: Not permitting certain information to remain confidential is likely to harm the public body’s bargaining position in contractual negotiations. *See* S.C. Code Ann. §§ 40-57-350(C)(1)(f) & (E)(1)(f) (recognizing a real estate agent’s obligation to preserve confidential information

provided by parties that could harm the party's respective bargaining power). Once the transaction is consummated, however, the purpose behind this particular exemption is eliminated. For this reason, FOIA's exemption for prospective or pending contractual arrangements related to real property terminate once "the deed is executed," provided "the execution of the deed occurs within twelve months from the date of sale or purchase." S.C. Code Ann. § 30-4-40(a)(5)(b).

Contrary to the Appellant-Respondent's assertion, attorney-client privileged documents pertaining to a real estate transaction nonetheless retain their privilege and remain exempt from disclosure after the consummation of the underlying real estate transaction. The attorney-client privilege exemption is a separate and independent exemption within the Freedom of Information Act. When interpreting statutes, courts must apply the terms of a statute according to its literal meaning, without resort to subtle or forced construction in an attempt to limit or expand the scope of the statute. *Holley v. Mount Vernon Mills, Inc.*, 312 S.C. 320, 440 S.E.2d 373 (1994). Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language. *Timmons v. Tricentennial Commission*, 254 S.C. 378, 175 S.E.2d 805 (1970). Further, the purpose behind preserving confidential legal communications is not eliminated by the completion of the transaction. Many legal issues addressed by a purchaser of real property may remain after acquiring title, including but not limited to development issues or the existence of potential title defects.

II. THE SPECIAL REFEREE ACTED WITHIN HER DISCRETION IN DECLINING TO AWARD ATTORNEYS' FEES.

The Freedom of Information Act provides for a discretionary, not mandatory and automatic, award of attorney's fees: "If a person or entity seeking relief under this section prevails,

he may be awarded reasonable attorney's fees and other costs of litigation specific to the request. If the person or entity prevails in part, the court *may in its discretion* award him reasonable attorney's fees or an appropriate portion of those attorney's fees." S.C. Code Ann. § 30-4-100(B)(double emphasis added). The Special Referee found that the Appellant-Petitioner had only prevailed in part, specifically on the claim that the County's copying of a third-party real estate agent constituted a waiver of the attorney-client privilege as to certain documents. (R. pp. 21-22).

The Special Referee recognized that the question of whether a third party realtor was an "agent of the client" to qualify as a "privileged person" to avoid waiver was a novel question in South Carolina. The Special Referee further acknowledged that had the County not redacted this information, any privilege would have been waived upon disclosure; nevertheless, the Special Referee found that the County's RFP for brokerage services included an explicit disclaimer that any contractor retained for such services "shall not act as an agent or employee of the County." (R. pp. 16, 19-20). Thus, while the Special Referee declined to extend "privileged persons" status to Ms. Regecz, the Special Referee similarly declined to penalize the County for these redactions as the decision to redact was made under the good faith belief that the redactions were necessary to prevent waiver of privilege.

In this particular set of circumstances, it should not be deemed an abuse of the Special Referee's statutory discretion to decline to award any attorneys' fees to the Appellant-Respondent. The Special Referee recognized that these redactions were the result of the extremely difficult and unique challenges posed by the interplay between the Freedom of Information Act and the attorney-client privilege. Limited and strict timelines coupled with vague and often overwhelming requests create an environment ripe for mistake. Given the limited timeframe in which to respond to a valid FOIA request, a thorough analysis of every communication (including but not limited to

an analysis of contracts and RFPs for all parties copied on any communication) to determine whether the attorney-client privilege will apply is simply not feasible in certain scenarios.

The Appellant-Respondent did not prevail on the primary or main issues in this litigation. Rather, after reviewing all documents and thorough briefing by both parties and conducting a hearing on the matters, the Special Referee analyzed the facts and the law as presented to her and found in favor of both Parties. In particular, the Special Referee's ruling in favor of the Appellant-Respondent impacted only a small subset of the documents at issue and constitutes a far cry from "prevailing on the main issue," which, as alleged by the Appellant-Respondent, is the trigger that requires an award of attorneys' fees. (App. Initial Brief, p. 42).

The unambiguous language of FOIA empowered the Special Referee with the discretion to award or deny any attorneys' fees to a prevailing party. *See* S.C. Code Ann. § 30-4-100(B). FOIA is not a punitive statute designed to punish public bodies for all manner of transgressions, no matter how slight, provided that the prosecuting party is capable of prevailing on just one of many different claims. *See Litchfield Plantation Co., Inc. v. Georgetown County Water & Sewer Dist.*, 314 S.C. 30, 443 S.E.2d 574 (1994) (finding that Special Referee did not err in refusing to award attorneys' fees to prevailing party); *but see Sloan v. Dep't of Revenue*, 409 S.C. 551, 762 S.E.2d 687, 689 (2014) ("As the prevailing party under these circumstances, the trial court erred in not awarding Sloan his reasonable attorney's fees and costs."). The explicit and codified purpose of FOIA is public disclosure, not discipline. *See* S.C. Code Ann. § 30-4-15. Interpreting the Act to require the award of attorneys' fees not only runs counter to the purpose of FOIA, but also rejects established South Carolina case law.

The Appellant-Respondent's reliance on *Sloan v. Friends of the Hunley* ("*Hunley II*"), 393 S.C. 152, 711 S.E.2d 895 (2011) is misplaced as inapplicable to the present case, as determined

by the Special Referee. For one, the holding therein was dependent upon the plaintiff prevailing on the main issue. *Id.* The Special Referee clearly and unmistakably found that the Appellant-Respondent did not prevail on the main issue in this matter. (R. pp. 25-26). “[T]he specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion.” *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (quoting *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)); see *Hunley II*, 393 S.C. at 156, 711 S.E.2d at 897 (applying the abuse of discretion standard to an award of attorneys' fees under the FOIA).

Additionally, in *Hunley II*, the Supreme Court determined that while **the public body's voluntary production** of records after the initiation of litigation may moot the case, the individual litigant may still be considered the prevailing party for the purposes of attorneys' fees. *Hunley II*, 393 S.C. at 156, 711 S.E.2d at 897. In this case, however, the claims were not mooted due to action of the public body; rather, it was Ms. Baracco's own voluntary actions that mooted the claims. (R. pp. 13-14). The estimate provided in response to FOIA Request No. 1 was never challenged and FOIA Request No. 2 was abandoned by the Plaintiff's voluntary amendment thereof prior to the initiation of litigation. (R. p. 11). Similarly, after the initiation of litigation, FOIA Request No. 3 and FOIA Request No. 4 were dramatically reduced by voluntary action of Ms. Baracco. (R. p. 11). Unlike the facts set forth in *Hunley II*, the public body's actions were not responsible for mooting the case. Instead, the intervening act that mooted the case was the voluntarily action of the party claiming it should be entitled to prevailing party status. For these reasons, the Special Referee did not abuse her discretion in declining to award any attorneys' fees.

The Appellant-Respondent also leans heavily on allegations of the County's animus against her in support of her argument for attorneys' fees, a factor which is wholly irrelevant. Even

assuming, arguendo, that there is a shred of relevant connection, communications made by long-gone former County employees from 2012-2015 have no bearing on a Freedom of Information Act request filed years later in 2019. For example, the Appellant-Respondent devotes substantial portions of her Initial Brief to two email exchanges that are completely irrelevant to this matter.

The first email is dated June 11, 2014, and allegedly “gives away the game” of the County. (R. pp. 343-344). This email from an Assistant County Attorney purportedly urges other local governments “to get on board with a ‘similar approach’ of the County requiring a 50% deposit for plaintiff’s requests.” The Appellant-Respondent goes to great lengths to imply how such action was criminal under the former iteration of the Act. This position is completely without merit. Prior to the 2017 revisions to the Freedom of Information Act, the Act granted the public body with the right to charge a “reasonable deposit of these costs.” S.C. Code Ann. § 30-4-30(b) (2016). While reasonable minds could differ regarding the imposition of a fifty (50%) percent deposit requirement, arguing that the mere consideration of it was criminal borders on the absurd. In 2017, the Act was amended to permit a “deposit not to exceed twenty-five percent of the total reasonably anticipated cost for reproduction of the records.” See S.C. Code Ann. § 30-4-30(b) (2018). The County has used this percentage since the revisions to FOIA became effective. Moreover, “the County Attorney” referenced in the email has been employed elsewhere since 2017.

The second email is dated June 10, 2014, and purportedly establishes “the County’s willfulness in harassing her” despite it being between the former Town Manager of Bluffton and the former Bluffton Police Chief, with a copy to the Bluffton Town Attorney. (R. pp. 344-45). Although located in Beaufort County, the Town of Bluffton is a separate and independent municipality that has absolutely zero involvement in this litigation.

The Special Referee analyzed all of the evidence and facts available to her and recognized that the redactions made in this case – despite the claims of the Appellant-Respondent – were not made with animus, but rather, in a diligent effort by County attorneys attempting to comply with their legal responsibilities. Even though the application of the laws of privilege in the context of governmental attorneys may result in different attorneys reaching different conclusions regarding the appropriateness of any redactions, the Special Referee appropriately exercised her discretion and declined to award attorneys’ fees.

### CONCLUSION

As compellingly argued by the Appellant-Respondent, the recognition of the governmental attorney-client privilege seemingly stands in conflict with the public’s interest in open and honest government. Transparency is an important contributor to ensuring that governments function fairly and efficiently. At the same time, the litany of different statutes, ordinances, and regulations that apply to public officials and public employees require full and competent representation to minimize risk to the public and the individual.

When a client requests legal advice, the client expects candor, confidentiality, and competence. If a client knows that legal advice is to be made public, the client may choose to not seek legal advice that could be politically unpopular or could hurt his/her reputation. As such, the privacy and protections afforded by the attorney-client privilege are essential to allowing unpopular truths to be spoken. Zealously defended for centuries, the attorney-client privilege remains a cornerstone of American jurisprudence for this reason. Like lawyers working within the private sector, governmental attorneys’ communications should be protected by the attorney-client privilege so long as they relate to some legal strategy, or to the meaning, requirements, allowances,

or prohibitions of the law. In this case, the County's attorneys were brought into these communications due to their legal knowledge and the existence of potential legal issues, and they remained engaged in the planning and completion of the real property acquisition. In recognizing the appropriateness of the County's redactions and declining to award either party any attorneys' fees, the Special Referee carefully and adeptly balanced these competing concerns.

For all of the foregoing reasons and those so well stated by the Special Referee, this honorable Court should affirm the Special Referee's decisions as to the matters stated herein. Pursuant to Rule 220(c), SCACR, this honorable Court may affirm for any ground appearing in the record.

Respectfully submitted,

April 11, 2022

s/ E. Richardson LaBruce  
E. Richardson LaBruce, S.C. Bar No. 80106  
FINGER, MELNICK, BROOKS & LABRUCE, P.A.  
Post Office Box 24005  
Hilton Head Island, SC 29925-4005  
Telephone: (843) 681-7000  
Email: [erlabruce@fingerlaw.com](mailto:erlabruce@fingerlaw.com)  
Attorney(s) for Respondent-Appellant

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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Erin D. Dean, Special Referee

Case No.: 2019-CP-07-00818  
Appellate Case No. 2021-00321

Mare Baracco..... Appellant-Respondent,

v.

Beaufort County..... Respondent-Appellant.

**FINAL RESPONSE BRIEF OF RESPONDENT-APPELLANT  
BEAUFORT COUNTY**

April 11, 2022

s/ E. Richardson LaBruce  
E. Richardson LaBruce, S.C. Bar No. 80106  
FINGER, MELNICK, BROOKS & LABRUCE, P.A.  
Post Office Box 24005  
Hilton Head Island, SC 29925-4005  
Telephone: (843) 681-7000  
Email: [erlabruce@fingerlaw.com](mailto:erlabruce@fingerlaw.com)

*Attorney(s) for Respondent-Appellant Beaufort  
County*

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## STATEMENT OF ISSUES

- I. THE SPECIAL REFEREE WAS CORRECT AS A MATTER OF LAW IN DETERMINING THAT THE COUNTY ACTED PROPERLY IN REDACTING VARIOUS EMAILS PRODUCED TO THE APPELLANT-RESPONDENT.
- A. **Public Officials' Use of Private Email Does Not Eliminate the Attorney-Client Privilege.**
  - B. **There Was No Justiciable Controversy as to the Estimated Deposits.**
  - C. **The Use of Private Email by a Public Official Is Not a Violation of the Freedom of Information Act.**
  - D. **The Consummation of a Real Estate Transaction Does Not Eliminate Privilege.**
- II. THE SPECIAL REFEREE ACTED WITHIN HER DISCRETION IN DECLINING TO AWARD ATTORNEYS' FEES.

## STATEMENT OF THE CASE

Appellant-Respondent Mare Baracco (“*Baracco*”) filed this lawsuit on April 10, 2019, against Respondent-Appellant Beaufort County (“*County*”). On June 29, 2019, before service of a responsive pleading by the County, Baracco served and filed an Amended Complaint seeking an injunction against the County and attorneys’ fees for the County’s alleged violation of the Freedom of Information Act (“*FOIA*”). (R. pp. 31-37). In particular, Baracco challenged the reasonableness of the County’s estimated fee for the production of requested documents in response to a series of FOIA requests pertaining to years’ worth of emails from/by/to various County Councilmembers and their personal email accounts, and the propriety of the redactions completed by the County in

producing certain documents to Baracco pursuant to another FOIA request involving a real estate transaction. *Id.*

Although the relevant portion of the Freedom of Information Act does not require responsive pleadings, on August 14, 2019, the County answered the Amended Complaint and raised four defenses, including a general denial and Rule 12, SCRPC. (R. pp. 38-41). On February 3, 2020, Baracco served her memorandum of law in support of the Amended Complaint. (R. pp. 42-54).

On May 28, 2020, the Chief Administrative Judge *sua sponte* assigned the case to the Honorable Perry Buckner to conduct a hearing in accordance with S.C. Code Ann. § 30-4-100(A). (R. p. 1). On June 1, 2020, the County served its memorandum of law in opposition to the Amended Complaint and the memorandum of law served by Baracco. (R. pp. 57-75).

On June 2, 2020, the matter came before Judge Buckner via WebEx hearing. By written order dated June 3, 2020, Judge Buckner (i) ordered Baracco to identify which documents she was requesting under FOIA, which documents remained in dispute, and to provide a list of the same within fifteen days to the County; (ii) ordered the County, within thirty days of receipt of the document identification from Baracco, to provide the basis for any objections to the requested documents as well as the exact fee that County intended to charge for the production of the same; and, (iii) appointed Erin Dean as special referee to “determine the reasonableness of the fee, and whether or not any of the exceptions under the applicable FOIA statute apply.” (R. p. 5).

On June 19, 2020, Baracco provided the County and the Special Referee with her list of requested documents. (R. p. 81). On June 29, 2020, the County responded. (R. pp. 84-86). On July 6, 2020, and July 7, 2020, the County produced (i) redacted versions of the requested documents along with a privilege log asserting the basis of the FOIA exemption to Baracco and the Special

Referee, and (ii) “clean” versions of the documents to the Special Referee for in camera review. (R. pp. 87-96). Given the sheer volume of documents, the parties agreed to accept receipt of the same via electronic transfer over Citrix ShareFile, an encrypted document sharing software program.

On July 28, 2020, after reviewing the pleadings, the memoranda of law and a letter from counsel for Baracco, the Special Referee posed a series of nine questions to the Parties. (R. p. 97). On that same date, Baracco responded to the same. (R. pp. 102-103). On August 12, 2020, the County responded with its answers to the July 28, 2020, letters from the Special Referee and Baracco. (R. pp. 113-115). On September 3, 2020, the County revised its redacted production to remove redactions that covered the names of the senders/recipients of emails in accordance with the Special Referee’s instructions. (R. pp. 125-26).

The Parties appeared before the Special Referee on September 25, 2020, for a final hearing conducted via Lifesize streaming program supplied by the court reporter. After taking testimony and considering the briefing and arguments of counsel, the Special Referee issued an Order on November 13, 2020. (R. pp. 7-22).

On November 19, 2020, the Appellant-Respondent filed and served her Motion for Reconsideration. (R. pp. 152-161). On November 23, 2020, the Respondent-Appellant filed and served its Motion for Reconsideration. (R. pp. 162-168). By Order dated March 2, 2021, the Special Referee denied both Motions for Reconsideration. (R. pp. 23-30).

On March 22, 2021, the Appellant-Respondent filed her Notice of Appeal. (R. p. 199). On March 23, 2021, the Respondent-Appellant filed its Notice of Appeal. (R. p. 201). On May 18, 2021, the Special Referee billed \$7,280.00 for her services in this case. In accordance with the Order from Judge Buckner, each party paid one-half of those costs.

## STATEMENT OF FACTS

On February 10, 2019, Mare Baracco, a resident of Port Royal, South Carolina, submitted a Freedom of Information Act (“FOIA”) request to Beaufort County for communications related to the sale and purchase of two parcels of real estate commonly referred to as 1 Bostwick Circle and 429 Broad River Road (“FOIA Request No. 1”). (R. pp. 313-15). On February 20, 2019, Beaufort County responded requesting an initial deposit of \$124.66 as a condition of fulfilling the request. After tendering the initial deposit, Ms. Baracco was provided with the responsive documents on March 21, 2019. At that time, the County refunded Ms. Baracco \$53.66 due to the County’s overestimating the initial costs of production. Portions of the production were redacted by the County prior to the delivery to Ms. Baracco.

On March 10, 2019, Ms. Baracco submitted an additional FOIA request to Beaufort County. In this request, Ms. Baracco requested all emails to/from/between two County Councilmembers with various County department heads, the County Administrator, the County Attorney, the County Sheriff, members of County Council, and/or other public and private individuals over an approximately six (6) years period (“FOIA Request No. 2”). (R. pp. 317-318). There was no limit as to subject matter. The request implicated thousands of documents.

On March 18, 2019, the County responded to FOIA Request No. 2 by requesting a deposit of \$3,019.75, which represented approximately 25% of the reasonably anticipated costs to be incurred by the County in responding to FOIA Request No. 2. (R. p. 319-20). The County estimated that searching and retrieving the hundreds of records requested by FOIA Request No. 2 would take approximately 167 hours, based on an estimated time of one minute per document. (*Id.*).

On that same day, the Plaintiff requested a thorough explanation from the former County Administrator, who promptly responded that (i) SLED, as the primary law enforcement agency for

the state, has recommended stronger internal controls on access to the County network, presumably to limit outside interference/hacking; (ii) the IT charge should range from \$49.07/an hour to \$30.74/an hour based upon which member of the County IT Department conducts the search; (iii) the County Attorney is required to review any disclosed emails from elected or appointed officials to ensure that the attorney-client privilege is not waived; and, (iv) that the County Attorney's rate for review is \$72.00/an hour. (R. p. 347).

Upon receipt of this explanation on March 18, 2019, Ms. Baracco revised FOIA Request No. 2, by reducing its scope to all e-mails over a 6-year period between the County Council Chairman, the former County Administrator, the former County Attorney/former Deputy County Administrator, and the County Attorney ("*FOIA Request No. 3*"). (R. pp. 321-22). On March 25, 2019, the County responded that an initial deposit of \$152.82 – once again, 25% of the estimated cost of fulfillment - would be required prior to record compilation. (R. pp 323-325).

Thereafter, on March 31, 2019, Ms. Baracco submitted her fourth FOIA request to the County specifically requesting emails from County Council member Alice Howard's personal e-mail address from January 1, 2015, to the "present" to/from/between Ms. Howard and multiple individuals ("*FOIA Request No. 4*"). (R. p. 326). On April 2, 2019, the County responded that an initial deposit of \$404.29 would be required prior to the County beginning the process of fulfilling this request. (R. p. 327). This deposit represented 25% of the reasonably anticipated costs of producing the records, which the County determined was \$1,617.14. (R. p. 327).

The Appellant-Respondent commenced this lawsuit on April 10, 2019, amending her complaint once. Throughout the course of this litigation and into this appeal, the Appellant-Respondent has alleged that the County violated FOIA. In particular, the Appellant-Respondent

has asserted the following claims, some of which are raised for the first time on appeal and others which have been abandoned:

1. Communications to and from an in-house governmental attorney are never afforded protections from FOIA disclosure as such communications can never be considered privileged.
2. Communications in which an attorney purportedly delivers inaccurate legal advice regarding whether the county's governing body must approve of the acquisition of real property is not subject to privilege per the crime-fraud exception (abandoned).
3. The consummation of a real estate transaction eliminates any ability to exempt privileged documents from FOIA disclosure (not raised below).
4. Upon being appointed as Interim County Administrator, the County Attorney was operating in a dual capacity and therefore no communications from the County Attorney during that time could be considered privileged, regardless of the content or context of the communications (abandoned).
5. The copying of the County's contractually retained third-party real estate agent on email communications between the County Attorney and County staff waives any claim of attorney-client privilege.
6. The County's inclusion of an estimated eight (8) hours billed at the rate of \$72.00/an hour for the County's legal department to redact records in response to FOIA Request No. 3 violates the Freedom of Information Act.
7. The County's inclusion of an estimated twenty-two (22) hours billed at the rate of \$72.00/an hour for the County's legal department to redact records in response to FOIA Request No. 4 violates the Freedom of Information Act.

Prior to the final hearing on the matter, the Special Referee received all of the documents pertaining to FOIA Request No. 1, both redacted and un-redacted, as well as all of the documents implicated by the Appellant-Respondent's revised FOIA Request No. 4, both redacted and un-redacted.

In regard to FOIA Request No. 1, the Special Referee determined that all of the redactions completed by the County fell within a recognized FOIA exemption except for those redactions on communication in which Debra Regecz, a third-party real estate agent retained by the County to assist with the location and acquisition of real property, was copied. (R. pp. 16-20). The Special Referee recognized that the question of whether a third party realtor was an "agent of the client" to qualify as a "privileged person" to avoid waiver was a novel question in South Carolina. The Special Referee further acknowledged that had the County not redacted this information, any privilege would have been waived upon disclosure; nevertheless, the Special Referee found that the County's RFP for brokerage services included an explicit disclaimer that any contractor retained for such services "shall not act as an agent or employee of the County." (R. pp. 19-20). For this reason, the Special Referee declined to extend "privileged persons" status to Ms. Regecz.

In regard to revised FOIA Request No. 3, "[a] thorough review by this Court of the 167 pages of documents produced ... revealed that the majority of redactions did pertain to legal advice received from Keaveny." (R. p. 16). Three exceptions were found and the Special Referee ordered that those three documents be provided to the Appellant-Respondent. On December 15, 2020, those three documents were provided to Appellant-Respondent through her counsel.

As the Statement of the Case outlines, the Special Referee reviewed extensive pleadings on all of these issues, received the testimony of the Appellant-Respondent, and on November 13, 2020, issued her final Order. (R. pp. 7-22); *see* discussion *supra* in the Statement of the Case.

### **STANDARD OF REVIEW**

Declaratory judgments in and of themselves are neither legal nor equitable. *See Felts v. Richland Cty.*, 303 S.C. 354, 400 S.E.2d 781 (1991); *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003); *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001). The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue. *Campbell*, 354 S.C. at 279, 580 S.E.2d at 165; *Travelers Indem. Co. v. Auto World*, 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999) (suit for declaratory judgment is neither legal nor equitable, but is determined by nature of underlying issue).

“The determination of whether or not a communication is privileged and confidential is a matter for the trial judge to decide after a preliminary inquiry into all the facts and circumstances.” *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 692 S.E.2d 526 (2010). “The trial judge’s decision will not be overturned absent an abuse of discretion.” *Id.* “An abuse of discretion occurs when the trial court’s decision is based on an error of law or upon factual findings that are without evidentiary support.” *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008), quoted in *Lambries v. Saluda County Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014).

“The decision to award or deny attorneys’ fees under a state statute will not be disturbed on appeal absent an abuse of discretion.” *Kiriakides v. Sch. Dist. of Greenville County*, 382 S.C.

8, 20, 675 S.E.2d 439, 445 (2009) (*citing Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)). “An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.” *Id.*, 675 S.E.2d at 445 (*quoting Layman*, 376 S.C. at 444, 658 S.E.2d at 325); *Sloan v. Friends of The Hunley Inc.*, 393 S.C. 152, 711 S.E.2d 895 (S.C. 2011). “[T]he trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings.” *Campbell*, 354 S.C. 274,280, 580 S.E.2d 163, 165-66 (citations omitted); *see also Harkins v. Greenville County*, 340 S.C. 606,533 S.E.2d 886 (2000).

### **ARGUMENT IN REPLY**

- I. THE SPECIAL REFEREE WAS CORRECT AS A MATTER OF LAW IN DETERMINING THAT THE COUNTY ACTED PROPERLY IN REDACTING VARIOUS EMAILS PRODUCED TO THE APPELLANT-RESPONDENT.

The heart of the Appellant-Respondent’s first issue on appeal is whether the Special Referee erred in finding that the majority of documents produced by the County in response to FOIA Request No. 1 and FOIA Request No. 3 were properly redacted as exempt material under the Freedom of Information Act. The Appellant-Respondent offers multiple different positions as to why the County’s redactions were improper. As discussed herein, the Special Referee’s conclusions to the contrary were based on a complete and exhaustive review of each redaction, grounded in established law, and the result of a proper analysis of the facts.

- A. **Public Officials’ Use of Private Email Does Not Eliminate the Attorney-Client Privilege.**

The Special Referee correctly refused to accept Appellant-Respondent’s assertion that a public body may never exempt from disclosure a communication between legal counsel for a

public body and a member of that public body if such communication originated from or was received through the public official's private email address. The Special Referee reasoned that "[w]hile use of private email to conduct governmental business is not best practices, I can find no statutory authority or South Carolina case that indicates 1) such manner of communication is prohibited, or 2) that such manner of communication operates to waive attorney-client privilege." (R. p. 24).

The Freedom of Information Act's basic premise is to give "any person [the] right to inspect or copy any public record of a public body." *See* S.C. Code Ann. § 30-4-30(a). In defining "public record" for FOIA purposes, the General Assembly deliberately chose a broad definition – one that focuses on the content of the record and the manner in which the record was created, not on its location or current custodian. *See* S.C. Code Ann. § 30-4-20(c) (defining public records as "books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body").

At no point relevant to this action has Beaufort County challenged the proposition that a public official's private emails are subject to the Freedom of Information Act when such emails are used to conduct public business. FOIA's definition of "public record" is designed to encompass all records that relate to public business, not just those records that are created and/or stored on publically-owned communication systems. Moreover, as discussed *infra*, the County agrees with the Appellant-Respondent that there is no distinction between private emails and public emails when such emails are being used to conduct public business. (App. Initial Brief, p. 25-27). Rather, the issue presented to the Special Referee was whether the County erred in exempting portions of these public records.

FOIA's judicially enforceable right to access public records is subject to certain well-recognized exceptions, including the right of the public body to exempt from disclosure "[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships." See S.C. Code Ann. § 30-4-40(a)(7). Initially, Ms. Baracco contended that no communication with in-house governmental counsel can be considered privileged: "The assertion that the email communications of government officials are 'privileged' is nonsense...." (R. p. 47). Although not directly raised as an "issue" in this Appeal, this contention appears to have been resurrected: "[T]here is no such thing as 'privileged information' when government officials communicate with third parties or one another." (R. p. 45).

The South Carolina Supreme Court has already dismissed the notion that the status of the attorney can eliminate the protections provided by the attorney-client privilege. *Evening Post Publ'g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745 (2011)(recognizing the existence of the attorney-client privilege for governmental clients but questioning whether inclusion of outside counsel on employee questionnaires was done solely to avoid disclosure); see also, *In re Grand Jury Investigation (John Doe)*, 399 F.3d 527 (2<sup>nd</sup> Cir. 2005) (finding, "if anything, the traditional rationale for the [attorney-client] privilege applies with special force in the government context"); *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 2004). ("The lawyer whose testimony the government seeks in this case served as in-house attorney. That status alone does not dilute the privilege."); *Ross v. City of Memphis*, 423 F.3d 596, 601-603 (6<sup>th</sup> Cir. 2005)(noting that the privilege in the civil context for government employees should be even more robust so that the government can investigate wrongdoing more thoroughly and pursue remedial options). Thus, the Special Referee correctly rejected the contention that the attorney-client

privilege is somehow not applicable to any communications between a governmental official or employee and its in-house counsel.

Given that the attorney-client privilege is recognized in the governmental client context, the issue presented on appeal is whether the use of personal email by a public official constitutes an automatic waiver of the attorney-client privilege. Neither the text of the applicable statute nor South Carolina law supports such a position. Much like FOIA's definition of "public record" hinges on the context of the communication to determine whether it is subject to disclosure, the applicability of the exemptions set forth in S.C. Code Ann. § 30-4-40 are based on the content of the communication, not the medium used. If the public record contains "[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships" then such material may be exempted from disclosure. *See* S.C. Code Ann. § 30-4-40(a)(7).

At its core, the attorney-client privilege protects communications between attorneys and clients in which legal advice was sought or rendered, and which was intended to be and was in fact kept confidential, unless otherwise waived. "In order to establish the privilege, it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential nature." *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44, 46-47 (S.C. Ct. App. 1984). Like lawyers working within the private sector, governmental attorneys' communications should be protected by the attorney-client privilege so long as they relate to some legal strategy, or to the meaning, requirements, allowances, or prohibitions of the law.

As to FOIA Request No. 1, the County's attorneys were brought into these communications due to their legal knowledge and the existence of potential legal issues regarding the acquisition

of real estate and the potential development of a Department of Special Needs home in a residential subdivision. (R. pp. 71-72). The communications were predominantly centered on the process by which a local government could acquire this real estate and the various title issues revealed by the title work, in particular various restrictive covenants. *See Matrix Financial Services Corporation v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011)(recognizing certain aspects of real estate acquisition constitute the practice of law). The Special Referee agreed. “After careful review of the un-redacted documents produced to the Court...with the exception of the documents that include Debra Regecz [the County’s real estate agent] ... I find the remaining redactions appropriate and subject to exemption pursuant to S.C. Code Ann. § 30-4-40(a)(7).” (R. p. 17). The Special Referee’s finding that copying a third party real estate agent on communications between an attorney and a client constitutes a waiver of privilege is an issue raised and addressed in the County’s cross-appeal.

As to FOIA Request No. 3, following a “thorough” *in camera* review of the “167 pages” of redacted and un-redacted documents produced by Beaufort County, the Special Referee similarly found “that the majority of the redactions did pertain to legal advice received from Keaveny [the County Attorney].” (R. p. 16). The Special Referee ultimately found that there were three (3) documents improperly redacted as to FOIA Request No. 3, at least one of which she inferred was an “oversight.” (R. pp. 16-17).

While the County recognizes that whether a particular communication is privileged can become cloudier given the recognized public benefit of transparency in government actions and the complex and varied roles expected of a county attorney on a daily basis, the redactions made by the County in this case were proper, legal, and necessary to avoid an inadvertent waiver of privileged material through disclosure to a third party. Upon a thorough review of all of the public

records produced by the County in this action, the Special Referee agreed, correctly finding that the vast majority of them – with two notable exceptions – were privileged and properly redacted in accordance with FOIA. (R. pp. 14-18). For these reasons, the Special Referee’s order as to these issues should be affirmed.

**B. There Was No Justiciable Controversy as to the Estimated Deposits.**

In further support of her primary claim that the “Special Referee err[ed] in finding government officials conducting government business on private e-mail accounts, can claim ‘privilege’ from disclosure under the *Freedom of Information Act*,” the Appellant-Respondent alleges that the Special Referee erred in finding there was no violation of the Act related to the calculation of the estimated deposits for costs of production. Although the Amended Complaint alleged violations related to the amount of fees charged by the County, no fees were ever charged by the County; rather, the County requested from Baracco a twenty-five (25%) percent deposit based on the reasonably anticipated costs to be incurred by the County in responding to the substantial requests. (R. p. 324). This particular distinction is addressed more thoroughly in the Respondent’s cross-appeal.

The Special Referee correctly found that there was no violation of the Freedom of Information Act relative to the deposits because the Appellant-Respondent never paid the deposits. (R. pp. 13-14). Since no deposits were paid, the Appellant-Respondent’s questions were merely academic. *See Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474, 478 (2006)(finding that even in FOIA cases appellate courts will not decide academic questions). “Generally, this Court only considers cases presenting a justiciable controversy.” *Id.* (citing *Byrd v. Irmo High School*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996)). “A justiciable controversy

exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract.” *Id.*

The Appellant-Respondent has not alleged any exception as to why this particular matter meets any of the recognized exceptions to the aforementioned rule; thus, the Special Referee correctly found that there was a cognizable violation of the Freedom of Information Act. Further, even to the extent a justiciable controversy may have existed, the Appellant-Respondent mooted any claims related thereto by **voluntarily** amending FOIA Request No. 3 and FOIA Request No. 4, to which amended FOIA requests the County provided revised estimated deposits. (R. pp. 81, 87-88). At no point during this action has the Appellant-Respondent challenged the revised estimated deposits.

**C. The Use of Private Email by a Public Official Is Not a Violation of the Freedom of Information Act.**

The Appellant-Respondent alleges the County violated S.C. Code Ann. § 30-4-70(c) for the first time on appeal. Although couched by the Appellant-Respondent as the County advancing “a straw man argument that the plaintiff was attempting to bring an action under § 30-4-70(c)” and an attempt to “sow confusion where there is none,” the Appellant-Respondent nevertheless asserts that the “Special Referee erred in failing to recognize that conducting government business on private e-mail communications is a violation of the prohibition of § 30-4-70, S.C. Code, Ann., and are not communications shielded from public inspection.” (App. Initial Brief, p. 23-25).

As an initial matter, this issue is not properly before the Court. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *Linda Mc Co., Inc. v.*

*Shore*, 390 S.C. 543, 556-57, 703 S.E.2d 499, 506 (2010). “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after is has considered all relevant facts, law, and arguments.” *Home Med. Sys., Inc. v. South Carolina Dep’t of Rev.*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009). “It prevents a party from keeping an ace card up his sleeve intentionally or by chance in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to provide his case.” *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). As a result, Ms. Baracco should not be permitted to appeal the Special Referee’s finding that FOIA was not violated on this basis, nor present a novel argument for an alleged FOIA violation on appeal.

Moreover, as noted herein, nothing within the Freedom of Information Act explicitly prohibits the use of private email by a public official. The relevant portion of the Act states that “[n]o chance meeting, social meeting, or electronic communication may be used in circumvention of the spirits of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” S.C. Code Ann. § 30-4-70(c). This section addresses meetings of public bodies. Meeting is defined by the Code as “the convening of *a quorum* of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.” S.C. Code Ann. § 30-4-20(d) (double emphasis added).

In order for a meeting to occur, there must be a quorum. *Id.* For there to be a quorum, “a simple majority of the constituent membership of a public body” must be present. S.C. Code Ann. § 30-4-20(e). The email offered by the Appellant-Respondent is between four (4) of nine (9) County councilmembers and the Interim County Administrator/County Attorney. (App. Initial Brief, pp. 23 & 25). Without a majority of the councilmembers present, there could be no quorum.

S.C. Code Ann. § 30-4-20(e). Without a quorum, there can be no meeting. S.C. Code Ann. § 30-4-20(d). Without a meeting, there can be no violation of S.C. Code Ann. § 30-4-70(c). For these reasons, the expansive argument presented by the Appellant-Respondent – that the use of any private equipment to conduct public business by a public official automatically constitutes a violation of the Freedom of Information Act – is simply not supported by the text of the Act.

**D. The Consummation of a Real Estate Transaction Does Not Eliminate Privilege.**

The Appellant-Respondent, for the first time on appeal, contends that S.C. Code Ann. § 30-4-40(a)(5) operates to eliminate attorney-client privilege. For an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 556-57, 703 S.E.2d 499, 506 (2010). As a result, Ms. Baracco should not be permitted to appeal the Special Referee’s finding that FOIA was not violated on this basis, nor present a novel argument for an alleged FOIA violation on appeal.

Additionally, the exemption for privileged and confidential documents granted to public bodies by S.C. Code Ann. § 30-4-40(a)(7) are not limited, much less extinguished, by S.C. Code Ann. § 30-4-40(a)(5). S.C. Code Ann. § 30-4-40(a)(5) generally permits public bodies to exempt from disclosure certain documents incidental to contractual arrangements and/or the sale or purchase of property. *See* S.C. Code Ann. § 30-4-40(a)(5). The basis for this exemption is clear and apparent: Not permitting certain information to remain confidential is likely to harm the public body’s bargaining position in contractual negotiations. *See* S.C. Code Ann. §§ 40-57-350(C)(1)(f) & (E)(1)(f) (recognizing a real estate agent’s obligation to preserve confidential information

provided by parties that could harm the party's respective bargaining power). Once the transaction is consummated, however, the purpose behind this particular exemption is eliminated. For this reason, FOIA's exemption for prospective or pending contractual arrangements related to real property terminate once "the deed is executed," provided "the execution of the deed occurs within twelve months from the date of sale or purchase." S.C. Code Ann. § 30-4-40(a)(5)(b).

Contrary to the Appellant-Respondent's assertion, attorney-client privileged documents pertaining to a real estate transaction nonetheless retain their privilege and remain exempt from disclosure after the consummation of the underlying real estate transaction. The attorney-client privilege exemption is a separate and independent exemption within the Freedom of Information Act. When interpreting statutes, courts must apply the terms of a statute according to its literal meaning, without resort to subtle or forced construction in an attempt to limit or expand the scope of the statute. *Holley v. Mount Vernon Mills, Inc.*, 312 S.C. 320, 440 S.E.2d 373 (1994). Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language. *Timmons v. Tricentennial Commission*, 254 S.C. 378, 175 S.E.2d 805 (1970). Further, the purpose behind preserving confidential legal communications is not eliminated by the completion of the transaction. Many legal issues addressed by a purchaser of real property may remain after acquiring title, including but not limited to development issues or the existence of potential title defects.

II. THE SPECIAL REFEREE ACTED WITHIN HER DISCRETION IN DECLINING TO AWARD ATTORNEYS' FEES.

The Freedom of Information Act provides for a discretionary, not mandatory and automatic, award of attorney's fees: "If a person or entity seeking relief under this section prevails,

he may be awarded reasonable attorney's fees and other costs of litigation specific to the request. If the person or entity prevails in part, the court *may in its discretion* award him reasonable attorney's fees or an appropriate portion of those attorney's fees." S.C. Code Ann. § 30-4-100(B)(double emphasis added). The Special Referee found that the Appellant-Petitioner had only prevailed in part, specifically on the claim that the County's copying of a third-party real estate agent constituted a waiver of the attorney-client privilege as to certain documents. (R. pp. 21-22).

The Special Referee recognized that the question of whether a third party realtor was an "agent of the client" to qualify as a "privileged person" to avoid waiver was a novel question in South Carolina. The Special Referee further acknowledged that had the County not redacted this information, any privilege would have been waived upon disclosure; nevertheless, the Special Referee found that the County's RFP for brokerage services included an explicit disclaimer that any contractor retained for such services "shall not act as an agent or employee of the County." (R. pp. 16, 19-20). Thus, while the Special Referee declined to extend "privileged persons" status to Ms. Regecz, the Special Referee similarly declined to penalize the County for these redactions as the decision to redact was made under the good faith belief that the redactions were necessary to prevent waiver of privilege.

In this particular set of circumstances, it should not be deemed an abuse of the Special Referee's statutory discretion to decline to award any attorneys' fees to the Appellant-Respondent. The Special Referee recognized that these redactions were the result of the extremely difficult and unique challenges posed by the interplay between the Freedom of Information Act and the attorney-client privilege. Limited and strict timelines coupled with vague and often overwhelming requests create an environment ripe for mistake. Given the limited timeframe in which to respond to a valid FOIA request, a thorough analysis of every communication (including but not limited to

an analysis of contracts and RFPs for all parties copied on any communication) to determine whether the attorney-client privilege will apply is simply not feasible in certain scenarios.

The Appellant-Respondent did not prevail on the primary or main issues in this litigation. Rather, after reviewing all documents and thorough briefing by both parties and conducting a hearing on the matters, the Special Referee analyzed the facts and the law as presented to her and found in favor of both Parties. In particular, the Special Referee's ruling in favor of the Appellant-Respondent impacted only a small subset of the documents at issue and constitutes a far cry from "prevailing on the main issue," which, as alleged by the Appellant-Respondent, is the trigger that requires an award of attorneys' fees. (App. Initial Brief, p. 42).

The unambiguous language of FOIA empowered the Special Referee with the discretion to award or deny any attorneys' fees to a prevailing party. *See* S.C. Code Ann. § 30-4-100(B). FOIA is not a punitive statute designed to punish public bodies for all manner of transgressions, no matter how slight, provided that the prosecuting party is capable of prevailing on just one of many different claims. *See Litchfield Plantation Co., Inc. v. Georgetown County Water & Sewer Dist.*, 314 S.C. 30, 443 S.E.2d 574 (1994) (finding that Special Referee did not err in refusing to award attorneys' fees to prevailing party); *but see Sloan v. Dep't of Revenue*, 409 S.C. 551, 762 S.E.2d 687, 689 (2014) ("As the prevailing party under these circumstances, the trial court erred in not awarding Sloan his reasonable attorney's fees and costs."). The explicit and codified purpose of FOIA is public disclosure, not discipline. *See* S.C. Code Ann. § 30-4-15. Interpreting the Act to require the award of attorneys' fees not only runs counter to the purpose of FOIA, but also rejects established South Carolina case law.

The Appellant-Respondent's reliance on *Sloan v. Friends of the Hunley* ("*Hunley II*"), 393 S.C. 152, 711 S.E.2d 895 (2011) is misplaced as inapplicable to the present case, as determined

by the Special Referee. For one, the holding therein was dependent upon the plaintiff prevailing on the main issue. *Id.* The Special Referee clearly and unmistakably found that the Appellant-Respondent did not prevail on the main issue in this matter. (R. pp. 25-26). “[T]he specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion.” *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (quoting *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)); see *Hunley II*, 393 S.C. at 156, 711 S.E.2d at 897 (applying the abuse of discretion standard to an award of attorneys' fees under the FOIA).

Additionally, in *Hunley II*, the Supreme Court determined that while **the public body's voluntary production** of records after the initiation of litigation may moot the case, the individual litigant may still be considered the prevailing party for the purposes of attorneys' fees. *Hunley II*, 393 S.C. at 156, 711 S.E.2d at 897. In this case, however, the claims were not mooted due to action of the public body; rather, it was Ms. Baracco's own voluntary actions that mooted the claims. (R. pp. 13-14). The estimate provided in response to FOIA Request No. 1 was never challenged and FOIA Request No. 2 was abandoned by the Plaintiff's voluntary amendment thereof prior to the initiation of litigation. (R. p. 11). Similarly, after the initiation of litigation, FOIA Request No. 3 and FOIA Request No. 4 were dramatically reduced by voluntary action of Ms. Baracco. (R. p. 11). Unlike the facts set forth in *Hunley II*, the public body's actions were not responsible for mooted the case. Instead, the intervening act that mooted the case was the voluntarily action of the party claiming it should be entitled to prevailing party status. For these reasons, the Special Referee did not abuse her discretion in declining to award any attorneys' fees.

The Appellant-Respondent also leans heavily on allegations of the County's animus against her in support of her argument for attorneys' fees, a factor which is wholly irrelevant. Even

assuming, arguendo, that there is a shred of relevant connection, communications made by long-gone former County employees from 2012-2015 have no bearing on a Freedom of Information Act request filed years later in 2019. For example, the Appellant-Respondent devotes substantial portions of her Initial Brief to two email exchanges that are completely irrelevant to this matter.

The first email is dated June 11, 2014, and allegedly “gives away the game” of the County. (R. pp. 343-344). This email from an Assistant County Attorney purportedly urges other local governments “to get on board with a ‘similar approach’ of the County requiring a 50% deposit for plaintiff’s requests.” The Appellant-Respondent goes to great lengths to imply how such action was criminal under the former iteration of the Act. This position is completely without merit. Prior to the 2017 revisions to the Freedom of Information Act, the Act granted the public body with the right to charge a “reasonable deposit of these costs.” S.C. Code Ann. § 30-4-30(b) (2016). While reasonable minds could differ regarding the imposition of a fifty (50%) percent deposit requirement, arguing that the mere consideration of it was criminal borders on the absurd. In 2017, the Act was amended to permit a “deposit not to exceed twenty-five percent of the total reasonably anticipated cost for reproduction of the records.” See S.C. Code Ann. § 30-4-30(b) (2018). The County has used this percentage since the revisions to FOIA became effective. Moreover, “the County Attorney” referenced in the email has been employed elsewhere since 2017.

The second email is dated June 10, 2014, and purportedly establishes “the County’s willfulness in harassing her” despite it being between the former Town Manager of Bluffton and the former Bluffton Police Chief, with a copy to the Bluffton Town Attorney. (R. pp. 344-45). Although located in Beaufort County, the Town of Bluffton is a separate and independent municipality that has absolutely zero involvement in this litigation.

The Special Referee analyzed all of the evidence and facts available to her and recognized that the redactions made in this case – despite the claims of the Appellant-Respondent – were not made with animus, but rather, in a diligent effort by County attorneys attempting to comply with their legal responsibilities. Even though the application of the laws of privilege in the context of governmental attorneys may result in different attorneys reaching different conclusions regarding the appropriateness of any redactions, the Special Referee appropriately exercised her discretion and declined to award attorneys’ fees.

### CONCLUSION

As compellingly argued by the Appellant-Respondent, the recognition of the governmental attorney-client privilege seemingly stands in conflict with the public’s interest in open and honest government. Transparency is an important contributor to ensuring that governments function fairly and efficiently. At the same time, the litany of different statutes, ordinances, and regulations that apply to public officials and public employees require full and competent representation to minimize risk to the public and the individual.

When a client requests legal advice, the client expects candor, confidentiality, and competence. If a client knows that legal advice is to be made public, the client may choose to not seek legal advice that could be politically unpopular or could hurt his/her reputation. As such, the privacy and protections afforded by the attorney-client privilege are essential to allowing unpopular truths to be spoken. Zealously defended for centuries, the attorney-client privilege remains a cornerstone of American jurisprudence for this reason. Like lawyers working within the private sector, governmental attorneys’ communications should be protected by the attorney-client privilege so long as they relate to some legal strategy, or to the meaning, requirements, allowances,

or prohibitions of the law. In this case, the County's attorneys were brought into these communications due to their legal knowledge and the existence of potential legal issues, and they remained engaged in the planning and completion of the real property acquisition. In recognizing the appropriateness of the County's redactions and declining to award either party any attorneys' fees, the Special Referee carefully and adeptly balanced these competing concerns.

For all of the foregoing reasons and those so well stated by the Special Referee, this honorable Court should affirm the Special Referee's decisions as to the matters stated herein. Pursuant to Rule 220(c), SCACR, this honorable Court may affirm for any ground appearing in the record.

Respectfully submitted,

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s/ E. Richardson LaBruce  
E. Richardson LaBruce, S.C. Bar No. 80106  
FINGER, MELNICK, BROOKS & LABRUCE, P.A.  
Post Office Box 24005  
Hilton Head Island, SC 29925-4005  
Telephone: (843) 681-7000  
Email: [erlabruce@fingerlaw.com](mailto:erlabruce@fingerlaw.com)  
Attorney(s) for Respondent-Appellant