



## PROCEDURAL HISTORY

In this action, BP is contesting the validity of certain Master Plans and Planned Unit Developments (PUDs) adopted by the Charleston City Council in 2014. The lands to which the Master Plans and PUDs apply are commonly known as the Cainhoy Plantation. The Cainhoy Plantation contains in excess of 9,000 acres and lies generally between Jack Primus and Cainhoy Roads, and is bounded by the Cooper River, Nowell Creek and the Wando River. When the Master Plans and PUDs were adopted, the Plantation was owned by three separate, but affiliated, landowners. City Council adopted three separate Master Plans and PUDs, one for the lands of each of the owners, all containing the identical land uses, densities and development criteria.

Two of the landowners moved to dismiss the case on the basis of BP's lack of standing. By Order dated November 14, 2014 the Honorable Kristi Lea Harrington dismissed the case as to Cainhoy Land & Timber, LLC and Southern Timber, LLC, finding that BP was not an adjoining landowner under S. C. Code § 6-29-760(C), and alternatively, that the action was barred by the statute of limitations set out in § 6-29-760(D). That Order is now on appeal.

## JURISDICTION

BP asserts the appeal divests this Court of jurisdiction to hear the City's and Tract 7's motions. I disagree. SCACR, Rule 205, addresses the effect of service of an appeal notice. It vests the appellate court with exclusive jurisdiction of an appeal, but specifically reserves to the lower court authority to hear matters not affected by the appeal: "Nothing in these rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." Essentially identical is SCACR Rule, 241, addressing matters stayed by an appeal: "The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal."

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The City seeks to have adjudicated the validity of all the Master Plans and PUDs. No issue on appeal involves the validity of these documents. The City did not join the motion to dismiss and is not a party to the appeal. BP is still pursuing an action against the City as to all three (3) Master Plans and PUDs. Moreover, the Third and Fifth Causes of Action are alleged only against the City. The remaining Causes of Action subject to the City's motion (the First, Second, Fifth, Sixth and Twelfth), though facially directed against all Defendants, are based solely on the actions of the City in enacting the Master Plans and PUDs. The appeal affects no issues between BP and the City, and I find no legal basis to preclude the City from having the issues of this case, as it relates to it, fully adjudicated.

BP contends inconsistent results could occur should the Court address the validity of the Master Plans and PUDs as to the City, only later to learn after the appeal, that BP has standing to pursue the Causes of Action against Cainhoy Land & Timber, LLC and Southern Timber, LLC. While that is a possibility, the issue is not whether a potential for inconsistent results exists. The issue is whether the appeal divests this Court of jurisdiction to consider the City's motion, as it pertains to allegations against it, and Tract 7, LLC's motion as it pertains to allegations against it.

#### DISCOVERY

BP seeks to delay adjudication of the motions for summary judgment to enable it to conduct discovery. I decline this request. At issue is the validity of legislative acts undertaken by the Charleston City Council. The legality of those acts is a matter of law for the Court. Those acts are all matters of public record. The public record will either support what City Council did or not. BP has not demonstrated how discovery will assist it in its case on the Causes of Action that are the subject of this Order, or benefit the Court as it evaluates the Record and renders its

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decision. Further, this court can discern no factual or legal issues that require further development through the discovery process necessary to aid the Court in rendering a decision.

**FACTS**\*\*leave in this sentence it is necessary to the grant of SJ\*\*

The Cainhoy Plantation was annexed to the City of Charleston in 1995. Prior to the annexation, the Plantation was not subject to any Berkeley County zoning. Upon annexing the Plantation, the City created the Cainhoy District Development Guidelines (herein "CY"), a zoning district that placed some constraints on development but which maintained the flexibility of development that existed when the Plantation was in unincorporated Berkeley County. The CY district allows generous land development options to a landowner. With few exceptions, the types, intensities and densities of uses in this district are at the discretion of the developer. Upon annexation, the Plantation was zoned CY. R. City Ex. 2A, Batchelder Affidavit.

Simultaneous with the annexation and zoning, Development Agreements, as authorized by S.C. Code Ann. § 6-31-10, *et seq* (South Carolina Development Agreement Act), were executed between the City and the owners of the Cainhoy Plantation. One effect of the Development Agreements was to vest the CY zoning of the Cainhoy Plantation for the fifty year term of each Agreement.

In 2001, the Development Agreements were amended (the "First Amendment"). The First Amendment set a cap on residential density at 2.1 units to the gross acre. The First Amendment also precluded, for the most part, any transfer of property on the Plantation until the entire Plantation had been master planned. The Agreements defined the master plan as a "general plan for the development of the Property which sets out the proposed highways, primary thoroughfares and arterial streets and the proposed locations of anticipated land uses". R. City

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Ex. 9A, Cainhoy Development Agreements, Sec. 2.38; City Ex. 9B, First Amendment to Development Agreements.

Sometime during 2012-2013, one of the Plantation owners entered into negotiations with the Berkeley County School District for the sale of land to the District for a high school. These negotiations prompted the owners of the Plantation to start the master planning process for the entire Plantation. R. City Ex. 1A, Master Plan and Zoning Texts, Tab 1, p.3; City Ex. 2A, Batchelder Affidavit; City Ex. 2B, Keane Affidavit.

City staff and owner representatives met over the Spring and Summer of 2013 to formulate master plans for the Plantation and zoning regulations to implement the recommendations of the plans. R. City Ex. 1A, Tract 7, Master Plans and Zoning Texts, p.3; City Ex. 2B, Keane Affidavit; City Ex. 2A, Batchelder Affidavit.

As these meetings were occurring, City planning staff started reviewing the City's Planned Unit Development Ordinance, the ordinance that set out the requirements and procedure for acquiring a PUD zoning designation (the "Generic PUD Ordinance"). The review identified issues with the Generic PUD Ordinance that rendered it cumbersome and expensive for a property owner. The planning staff determined to update the Generic PUD Ordinance to conform it to practice and streamline the procedure and submittals for securing a PUD designation. With input from representatives of the Plantation owners, a revised PUD ordinance was brought forward, and was ultimately adopted by City Council. R. City Ex 3A, Ordinance 2013-125, ratified on November 6, 2013 (the "Revised PUD Ordinance"). The Record substantiates the Revised PUD Ordinance was drafted, in part, with large scale developments such as Cainhoy and Long Savannah in mind. R. City Ex. 2A, Batchelder Affidavit; City Ex. 2B, Keane Affidavit.

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On October 17, 2013, the owners of the Cainhoy Plantation filed an application for the adoption of a Master Plan for their respective properties on the Plantation and a Planned Unit Development ("PUD") to implement the Master Plan (collectively "Master Plans and Zoning Texts").

The Master Plans and Zoning Texts came before the Planning Commission on November 20, 2013. Notice of this meeting ran in The Post and Courier on November 7, 2013. Because the Cainhoy Master Plans and Zoning Texts constituted rezonings of the Plantation from the CY zoning district to a PUD, property posting requirements were implicated. See S.C. Code Ann. § 6-29- 760("...In cases involving rezoning, conspicuous notice shall be posted on or adjacent to the property affected, with at least one such notice being visible from each public thoroughfare that abuts the property."). Sec. 54- 942 (b) of the City Zoning Ordinance requires that properties being rezoned be posted at least 6 days in advance of the public hearing where the matter will be considered. The Cainhoy Plantation properties were posted in accordance with the provisions of these laws. The Record reveals notices of the rezonings were posted along Clements Ferry, Cainhoy and Jack Primus Roads, the only public thoroughfares abutting the properties, advising that a rezoning of the properties listed thereon was to be considered and provided contact information for details. R. City Ex. 4.D, Charleston Zoning Ord. Sec. 54-942; City Ex. 5B, Planning Commission Notice of Hearing published 11/7/13; City Ex. 2C, Julka Affidavit.

At its November 20, 2013 meeting, the Planning Commission held a public hearing on the Master Plans and Zoning Texts. It took no action, and carried the matters over to its meeting scheduled for December 18, 2013. R. City Ex. 6B, Planning Commission Minutes, 11/20/13.

Notice of the December 18, 2013 meeting of the Planning Commission ran in The Post and Courier on December 5, 2013, and postings of the properties were updated. No action was

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taken on the Cainhoj matters at this December meeting. R. City Ex. 5C, Planning Commission Notice of Hearing published 12/5/13; City Ex. 2C, Julka Affidavit; City Ex. 6C, Planning Commission Minutes, 12/18/13.

The Master Plans and Zoning Texts were scheduled to come back to the Planning Commission, for a third time, on January 29, 2014. This meeting was noticed in The Post and Courier on January 6, 2014, with the property postings being again updated. Due to an ice storm, the January 29 meeting was cancelled, but rescheduled for the following Thursday, February 6, 2014. Notice of the rescheduled meeting was posted at the City Planning Department, at City Hall and on the City website. R. City Ex. 5.D, Planning Commission Notice of Hearing published 1/16/14; City Ex. 2C, Julka Affidavit; City Ex, 2B, Keane Affidavit; City Ex. 5E, Notice of Hearing posted at City Hall on 12/29/13.

At the February 6, 2014 meeting, the Planning Commission, voted to recommend approval of the Master Plans and Zoning Texts. Representatives of BP appeared and participated at the hearing. R. City Ex. 6.D, Planning Commission Minutes, 2/6/14.

The Master Plans and Zoning Texts came before City Council on February 11, 2014. (leave as is needs the emphasis in a separate sentence b/c this is a statutory requirement) Notice of this hearing ran in The Post and Courier on January 26, 2014. Representatives of BP appeared and participated at the hearing. R. City Ex. 7B, City Council Notice of Hearing, published 1/26/14; City Ex. 8C, City Council Minutes, 2/11/14.

At the conclusion of the hearing, City Council gave first reading to the ordinances pertaining to Master Plans and Zoning Texts. At its meeting held on February 25, 2014, City Council gave second and third readings and ratified ordinances pertaining to the Master Plans and Zoning Texts of Cainhoj Land & Timber, LLC and Southern Timber, LLC. At the request

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of the owner, approval of the Master Plan and Zoning Text for Tract 7, LLC was deferred until May 2014. The purpose of the deferral was to allow Tract 7, LLC and BP an opportunity to resolve differences pertaining to the PUD for the Tract 7 portion of the Cainhoy Plantation. At its meeting held on June 17, 2014, City Council gave second and third readings and ratified the ordinance pertaining to the Master Plan and Zoning Text for Tract 7, LLC. R. City Ex. 8C, City Council Minutes, 2/11/14; City Ex. 8D, City Council Minutes, 2/25/14; City Ex. 8E, City Council Minutes, 6/17/14.

This lawsuit, contesting the adoption of the Revised PUD Ordinance and the Master Plans and Zoning Texts, was filed August 15, 2014.

#### **STANDARD OF REVIEW**

Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the Affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56 (c), SCRPC.

When opposing a summary judgment motion, the nonmoving party must do more than “simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.” Russell v. Wachovia Bank, NA, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2009) (quoting Baughman v. Tel. & Tel. Co., 306 S.C. 101,107, 410 S.E. 2d 537, 545 (1991)).

“...[T]he opposing party [to a summary judgment motion] may not rest on mere allegations or denials, but must respond with specific facts showing a genuine issue.” City of Columbia v. City of Irmo, 316 S.C. 193, 195, 447 S.E.2d 855,857 (1994).

#### **DISCUSSION**

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**I. The Statute of Limitations for the Revised PUD Ordinance and the Master Plans and Cainhoy Land & Timber and Southern Timber Zoning Texts.**

The City is entitled to summary judgment as to the challenge to the Revised PUD Ordinance (Ord. 2013 - 124) and to the Cainhoy Land & Timber and Southern Timber Zoning Texts (Ord. 2014 -24 and Ord. 2014-25).

The General Assembly has enacted a specific statute establishing the time within which a challenge to a zoning ordinance must be made. S.C. Code Ann. §6-29-760(D) provides:

No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it...may be made sixty days after the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing body or the planning commission.

BP is contesting the validity of Ordinance 2013-125, the Revised PUD Ordinance, ratified on October 22, 2013, and the validity of the Cainhoy Land & Timber and Southern Timber, Ordinances 2014-24 and 2014-25, ratified on February 25, 2014. This case was commenced on August 15, 2014, well outside the sixty day window established by S.C. Code Ann. § 6-29-760(D).

The Record does not support BP's contention that there was not substantial compliance with notice requirements. The Revised PUD Ordinance was a zoning text change that amended the procedure to acquire a PUD designation. Sec. 54-942 of the Charleston Zoning requires the Planning Commission to a hold public hearing on ordinance text changes, with notice of the hearing being given at least 10 days in advance of the hearing. The Record reveals the Planning Commission held a public hearing on the Revised PUD Ordinance on September 18, 2013, and that notice of this hearing ran in The Post and Courier, a daily newspaper of general circulation, on September 5, 2013, more than 10 days in advance of the hearing. R. City Ex. 4D, Charleston

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Zoning Ord. Sec. 54-942; City Ex. 5A, Planning Commission Notice of Hearing published 9/5/13; City Ex. 6A, Planning Commission minutes, 9/18/13.

Sec. 54-943 of the Charleston Zoning Ordinance requires the City Council to conduct a public hearing on zoning text amendments, with notice of its hearing being noticed at least 15 days in advance of the hearing. The Record reveals City Council held a public hearing on the Revised PUD Ordinance on October 22, 2013, and that notice of the hearing ran in The Post and Courier on October 6, 2013, more than 15 days in advance of the hearing. At the conclusion of the public hearing, Council gave first reading to the Revised PUD Ordinance, and at its meeting held on November 6, 2013, City Council gave second and third readings and ratified the Revised PUD Ordinance. R. City Ex. 4D, Charleston Zoning Ord. Sec. 54-943; City Ex. 7A, City Council Notice of Hearing published 10/6/13 for Revised PUD Ordinance; City Ex. 8A, City Council minutes dated 10/22/13; City Ex. 8B, City Council minutes, 11/6/13.

As to the Cainhoy Land & Timber and Southern Timber Master Plans and Zoning Texts, the Record reveals that each public hearing on these Plans, that being three before the Planning Commission and one before the City Council, were duly noticed in accordance with Zoning Ordinance Sec. 54-942, as to the Planning Commission, and Sec. 54-943 as to City Council. R. City Ex. 5B-5E, notices of Planning Commission public hearings; City Ex. 7C, notice of City Council public hearing. The Record further reveals that the properties subject to all the Master Plans and Zoning Texts were duly posted in accordance with S.C. Code § 6-29-760(A) and Sec. 54-942(b), and that these postings were erected for all the public hearings before the Planning Commission and the City Council. R. City Ex 2C, Julka Affidavit; City Ex. 4D, Charleston Zoning Ord. Sec. 54-942(b).

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As to the Revised PUD Ordinance and the Cainhoy Land & Timber and Southern Timber Master Plans and Zoning Texts, the Record reveals not just substantial compliance with notice procedures, but exact compliance.

BP's reliance on S.C. Code § 6-29-760(B) is misplaced. This statute provides:

If a landowner whose land is the subject of a proposed amendment will be allowed to present oral or written comments to the planning commission, at least ten days' notice and an opportunity to comment in the same manner must be given to other interested members of the public, including owners of adjoining property.

The City Council complied with this statute. City ordinances require a public hearing before the Planning Commission noticed 10 days in advance, and a public hearing before City Council noticed 15 days in advance. The Record on this issue is uncontroverted. All hearings on the contested ordinances were timely noticed in accordance with these timeframes. The nature of a public hearing is self-evident, that being a hearing where the public is invited to participate. BP got the same notice as other interested members of the public, and appeared and participated in hearings before the Planning Commission and City Council.

Moreover, as to the properties of Cainhoy Land & Timber, LLC and Southern Timber, LLC, it is clear from the Record that these properties do not adjoin those of BP. These properties are physically separated from those of BP by Flagg Creek and the property of Tract 7, LLC. That the owners of the Plantation are affiliated or share members in common is of no moment. Each is a separate entity under the law, independent of its members. See S.C. Code §33-44-201 ("...a limited liability company is a legal entity distinct from its members.") BP is not an adjoining property owner to either Cainhoy Land & Timber, LLC or Southern Timber, LLC.

BP's reliance on the 30 day notice provisions of S.C. Code Ann. § 6-29- 1130(B) of the South Carolina Local Government Planning Enabling Act (the "Enabling Act") is also

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misplaced. That Article governs land development regulations. Land development regulations are those that pertain to changing land characteristics by redevelopment, construction or subdivision. They are not zoning ordinances. See S.C. Code Ann. § 6-29-1110(1) (“Land development” means the changing of land characteristics through redevelopment, construction, subdivision into parcels, condominium complexes, commercial parks, shopping centers, industrial parks, mobile home parks, and similar developments for sale, lease or any combination of owner and rental characteristics.”). The Revised PUD Ordinance and Master Plans and Zoning Texts do not result in a change to the characteristics of land, and are thus not land development regulations. The Revised PUD Ordinance and Master Plans and Zoning Texts are zoning ordinances, governed by Article 5 of the Act, specifically §6-29-720(A). It is undeniable but that the City complied with this statute.

Moreover, if Article 7 of the Enabling Act was applicable, the Record reveals BP failed to abide by its provisions for contesting land development regulations. S.C. Code § 6-29-1150(C) requires that an appeal be taken from the Planning Commission to the Circuit Court, and that appeal be taken within thirty days of actual notice of the decision. BP appeared at the February 6, 2014 meeting of the Planning Commission where its decision was rendered. Thus even if Article 7 was in play here, BP failed to appeal the decision of the Planning Commission or do so in a timely manner.

The Record does not support BP’s contention that its rights to due process and equal protection guaranteed by the State Constitution were violated by the enactment of the Revised PUD Ordinance, as alleged in its Fifth Cause of Action. BP alleges City staff engaged in *ex parte* meetings with the owners of the Cainhoy Plantation regarding Revised PUD Ordinance and “failed to reveal the motivation” behind the Ordinance, (Complaint ¶ 89), and that this alleged

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failure infected the later process undertaken when the Master Plans and Zoning Texts were considered (Complaint ¶ 93).

The impetus behind the Revised PUD Ordinance is set out in the minutes of the Planning Commission, City Council and the Affidavit of Tim Keane. R. City Ex. 2B, City Ex.6A; City Ex. 8A. These exhibits reveal the Revised PUD Ordinance was designed to address deficiencies of the Generic PUD Ordinance and to make its administration less cumbersome. The Ordinance inured to the benefit of the owners of the Cainhoy Plantation, just as it did to owners of other large developments in the City. I find nothing wrong or unlawful with City staff meeting and consulting with the private sector regarding planning and zoning initiatives. Such is commonplace. And, the Record does not support BP's contention that staff evaded questions from the Council. The minutes of City Council upon which BP relies reveals that the questions posed by the Council were answered by the staff. R. City Ex. 8A, City Council minutes, 10/22/13.

BP's alleged constitutional violation is bottomed on actions of the City staff. This cause of action must fail, because it was the City Council, and not its staff, that enacted the Revised PUD Ordinance. Even if there was some ulterior motive at play that could be attributable to the City Council in adopting the Ordinance, precedent admonishes against delving into the minds or motivations of a legislative body.

Essentially, HTC's argument is that the individual members had motives for denying consent to the franchise agreement which were prohibited by the Act. This argument asks this Court to inquire into individual city council members' motives behind their legislative acts.... This is a fundamentally inappropriate inquiry for a court. (citations omitted).

Horry Tel. Coop., Inc. v. City of Georgetown, 408 S.C. 348, 354, 759 S.E.2d 132, 135 (2014).

**II. The Master Plans and Zoning Text and the Enabling Act.**

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In its first cause of action, BP contests the validity of the Master Plans and Zoning Texts because of an alleged failure to comply with the Enabling Act. BP contends the Master Plans and Zoning Texts do not result in a unified site design, as required by the Enabling Act, that the uses permitted in the PUDs are inconsistent and non-uniform, and Zoning Texts lack standards to achieve compatibility. BP further alleges the Master Plans and Zoning Texts were not adopted in accordance with prescribed procedures. The Record does not support these contentions.

The Zoning Texts create a planned unit development (PUD) to implement the recommendations of the Master Plans. A planned unit development is a customized zoning district, intended to provide flexibility in development. S.C. Code Ann. §6-29-740 provides:

In order to achieve the objectives of the comprehensive plan ... and to allow flexibility in development that will result in improved design, character, and quality of new mixed use developments and preserve natural and scenic features of open spaces, the local government authority may provide for the establishment of planned development districts...The planned development provisions must encourage innovative site planning of residential, commercial, institutional, and industrial developments within the planned development districts. Planned development districts may provide for variations from other ordinances and the regulations of other established zoning districts concerning use, setbacks, lot size, density, bulk, and other requirements to accommodate flexibility in the arrangement of uses for the general purpose of promoting and protecting the public health, safety, and general welfare....

S.C. Code Ann. § 6-29-720(C)(4) provides:

[P]lanned development district or a development project comprised of housing of different types and densities and of compatible commercial uses, or shopping centers, office parks, and mixed use developments. A planned development district is established by rezoning prior to development and is characterized by a unified site design for a mixed use development.

The Zoning Texts conforms to these provisions.

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The Zoning Texts establish various use zones, and maps where those zones are located<sup>1</sup>. The site layout of each PUD is delineated on Exhibit 10 to the Zoning Texts, and the layout of each PUD in relation to the other PUDs is found on Exhibit 7 of the Master Plans. R. City Ex. 1A, Master Plan and Zoning Text, Tab 2, Exhibit 10, Map of Zones; City Ex. 1A, Master Plan and Zoning Text, Tab 1, Exhibit 7, Illustrative Master Plan.

Within each use zone, the Zoning Texts delineate authorized uses and impose development criteria addressing lot occupancy, height, setbacks and parking. R. City Ex. 1A, Master Plans and Zoning Texts, Tab 2, Zoning Text, Sec.4, 5 and 6. One reviewing the Master Plans and Zoning Texts can discern the uses permitted, where the uses can occur and their respective development criteria. These provisions of the Zoning Texts provide a site design for a mixtures of uses in the PUDs and establish development criteria for the uses, as contemplated by S. C. Code Ann. §§ 6-29-740 and 6-29- 720(C)(4) of the Enabling Act.<sup>2</sup>

The Records does not substantiate BP's claims that the Master Plans and Zoning Texts give a developer unbridled discretion, and that the Texts lack uniform standards. The Zoning Texts are specific as to what uses are allowed and where they may be sited. The Zoning Texts are specific as to the criterion that governs development in each of the use zones. A developer can only avail itself of a use that is permitted by the Zoning Texts in the applicable zone, and then must implement that use in accordance with the development standards of the applicable zone. There is no unbridled discretion or non-uniformity within the zones.

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<sup>1</sup> Ordinance 2014-24, applicable to properties owned by Cainhoy Land & Timber, LLC, Ordinance 2014-25, applicable to properties owned by Southern Timber, LLC, and Ordinance 2014-82, applicable to properties owned by Tract 7, LLC, have identical master plans and zoning texts. To avoid redundancy, citations in this Order are only to the Master Plan and Zoning Text for Tract 7, LLC, but are intended to capture the parallel provisions of the Master Plans and Zoning Texts of the other two entities.

<sup>2</sup> The Court makes note that while each Master Plan and Zoning Text is complete in and of itself, because of their identical land uses and regulations are to be administered in a coordinated fashion, the effect produces a unified site and development scheme for the entire Plantation. R. City Ex.1A, Tab 1, p.3.

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BP's contention that the PUDs permit inconsistent uses is legally flawed. City Council determined the uses it deemed appropriate and compatible for the Cainho Plantation, on a zone-by-zone basis, and codified them in the Zoning Texts. That BP may perceive the uses as incompatible is of no legal consequence. These Texts, adopted by City Council, constitute legislative acts, and it is not within the purview of the Court to second guess that decision.

Rezoning is a legislative matter. The decision of the legislative body is presumptively valid, and the property owner bears the burden of proving otherwise.... The governing bodies of municipalities clothed with authority to determine residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than are the courts and they will not be interfered with unless there is a plain violation of the constitutional rights of citizens.... It is not the prerogative of the court to pass upon the wisdom of the decision. (citations omitted)

Lenardis v. City of Greenville, 316 S.C. 471, 472, 450 S.E.2d 597 (Ct. App. 1994).

While S.C. Code § 6-29- 720(C)(4) speaks in terms of "compatible" commercial uses within a PUD, the lesson of precedent is that a legislative body, when enacting a PUD, must include a mixture of uses. Sinkler v. Charleston County, 387 S.C. 67, 78, 690 S.E.2d 777, 782 (2010) ("...Accordingly, the essence of a PD under the Enabling Act is that the property will provide for mixed use"). The Master Plans and Zoning Texts comply with this mandate. As to the nature and compatibility of uses, that determination remains with those "better qualified by their knowledge of the situation to act upon such matters."

The Record demonstrates the City adhered to the Enabling Act and established procedure in enacting the Master Plans and Zoning Texts. The Planning Commission held three public hearings on the Plans and Texts. Notice of each hearing was run in a newspaper of general circulation ten days in advance of the hearing, as required by Sec. 54-942 of the Charleston Zoning Ordinance. The City Council conducted its public hearing on February 11, 2014. Notice

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of this hearing ran in a newspaper of general circulation on January 26, 2014, more than fifteen days in advance of the hearing, as required by Sec. 54-943 of the Charleston Zoning Ordinance.

Furthermore, the properties were posted with notice of the rezoning as required by the Enabling Act and the Charleston Zoning Ordinances. R. City Ex. 2C, Affidavit of Julka. BP's attempt to create an issue as to posting is unavailing. The affidavit proffered on this issue does not rise to the level of creating an issue of material fact. The affidavit does not contradict those proffered by the City or BP, and the Court finds compelling the picture of the posted notice produced by BP. R. Tract 7's Reply to BP's Response to Motion for Summary Judgment, Ex. A.

**III. The Master Plans and Zoning Texts and Sec. 54-255 (c) of the Zoning Ordinance.**

BP alleges the Master Plans and Zoning Texts are fatally flawed because they fail to include some of the criteria required by Sec. 54-255(c) of the City Zoning Ordinance<sup>3</sup>. Each of the alleged deficiencies is addressed in the Affidavit of Lee Batchelder, the City's zoning administrator. R. City Ex.2A. BP's argument on this issue seems to center on the manner in which the criteria of Sec. 54-255(c) are presented in the Master Plan and Zoning Text, but nothing in Sec. 54-255(c) mandates a particular format for presenting the criteria. Sec. 54-255(c) only requires that the criteria be addressed. The criteria BP claims is missing from the Master Plans and Zoning Texts is addressed by the Affidavit proffered by the City, which explains where and how that criteria is addressed in the Plans and Texts, and reveals BP's complaints to be technical, at best.

**IV. The Master Plans and Texts and Unlawful Delegation of Authority.**

In its third cause of action, BP alleges that the Master Plans and Zoning Texts violate the separation of powers doctrine of the South Carolina Constitution and constitute unlawful

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<sup>3</sup> Exhibit 4B is Sec. 54-255 (c) of the City Zoning Ordinance.

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delegations of legislative power. BP relies on Section 2.1 of the Zoning Texts to support these contentions. This reliance is misplaced.

Section 2.1 of the Zoning Texts explains how the Texts interplay with the City Zoning Ordinance. It provides, in pertinent part:

### **2.1 Relationship to City Zoning**

The Zoning Ordinance and Development Agreement are incorporated herein by reference, except as amended herein. In the event of a conflict between the provisions of this Master Plan Zoning Text and those of the Zoning Ordinance, the provisions of this Master Plan Text shall apply... In the event Zoning Ordinance is amended...such amendments shall not apply to this Master Plan Zoning Text unless the Developer gives its written consent.

A PUD is a customized zoning category applicable to a specific parcel of land. Within a PUD, regulations contained in the zoning ordinance can be waived or varied. See S.C. Code Ann § 6-29-740 (“...Planned development districts may provide for variation from other ordinances and the regulations of other established zoning districts...”); R. City Ex. 4C, Zoning Ord. Sec. 54-256. The language BP find troublesome in Section 2.1 of the Master Plan and Zoning Texts is nothing more than an acknowledgment that the City Zoning Ordinance applies to the PUDs, except where varied by the Master Plan Zoning Texts. This language does not delegate any authority to the owners of PUD properties. This language only reflects the interplay between a PUD and a zoning ordinance.

The language in Section 2.1 that requires the owner’s consent to the application of future zoning ordinances is premised on the existence of a Development Agreement adopted under the State Development Agreement Act. That Act specifically says laws that govern properties subject to a development agreement are those in existence at the time of its execution. See S.C. Code § 6-31-80(A) (“...laws applicable to development of the property subject to a development agreement are those in effect at the time of the execution of the agreement.”). Subsequently

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enacted laws may only be applied to such properties under certain circumstances.<sup>4</sup> Absent these circumstances, an agreement may only be modified or amended with the consent of all parties. S.C. Code § 6-31-100 (“A development agreement may be amended or cancelled by mutual consent of the parties or by their successors in interest.”)

BP is not contesting the validity of either the Development Agreement Act or the Cainho Agreements. What BP is contesting is Section 2.1 of the Zoning Texts. In construing a statute, the Court is required to read the statute in its entirety, and in context. Laurens County Sch. Dists. 55 & 56 v. Cox, 308 S. C. 171, 174, 417 S.E.2d 560, 561 (1992) (“In cases involving statutory construction, this Court has repeatedly held that a statute shall not be construed by concentrating on an isolated phrase. The true guide to statutory construction is no the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose.”); S.C. Energy Users Comm. v. S. C. PSC, 388 S.C. 486, 492, 697 S.E.2d 587, 590 (2010) (“...Words in a statute must be construed in context, and their meaning may be ascertained by reference to words associated with them in the statute.”) Reviewing Section 2.1 of the Zoning Text with these principles in mind reveals that the language BP finds offensive, and on which its allegation of unlawful delegation of authority is based, is but an acknowledgment that the properties subject to the Zoning Texts are subject to a Development Agreement. Section 2.1 of the Zoning Text specifically acknowledges the existence of the Development Agreements applicable to the PUDs and incorporates that Agreement. Section 2.1 then recites the law applicable to Development Agreements, to wit:

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<sup>4</sup> Those circumstances are: the subsequent laws do not conflict with laws governing the development and do not prevent development of the property; the subsequent laws are essential to public health, safety and welfare and expressly state they apply to properties subject to developments; the development agreement specifically contemplates the application of a subsequent law; conditions have changed such that, if the subsequent law was not applied, a serious threat to public health, safety or welfare would result; or the development agreement is premised on substantially and materially inaccurate information supplied by the developer. See S.C. Code §6-31-80 (B). BP has not alleged that any of these circumstances exist.

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subsequent revisions to zoning laws applicable to the properties shall not be applicable to the PUDs unless the developer agrees. This provision is wholly consistent with Sections 6-31-80 and 6-31-100 of the Development Agreement Act. The Master Plans and Zoning Texts do not accord a developer any "veto" right not already given it by the Development Agreement Act. And, because the Cainhoy Development Agreements reserve to the City the right of amendment in accordance with the Act, there has been no "unlawful delegation" of authority.

**V. The Master Plans and Zoning Texts and Sec. 54-254 of the Zoning Ordinance.**

In its Fourth Cause of Action, BP contends the Planning Commission and City Council failed to review the Master Plans and Zoning Texts under the criteria listed in Sec. 54-254 of the Zoning Ordinance or make findings with respect thereto or that if they did, such findings were arbitrary and capricious. (Complaint ¶ 82, 83, 84)

Precedent holds that findings and reasoning of a body may be discerned from the Record of its proceedings. Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 34-35, 606 S.E.2d 209, 212 (Ct. App. 2004) ("...[I]t is well-settled that courts reviewing decisions of zoning boards and other administrative agencies may look to the written documents as well as Records of proceedings as sufficient formats for final decision.... [G]enerally, the format of a final decision is immaterial as long as the substance of the decision is sufficiently detailed so as to allow a reviewing court to determine if the decision is supported by the facts of the case."). (citations omitted). When the Master Plans and Zoning Texts were under consideration, both the Planning Commission and the City Council had before them the documents themselves, an explanation of those documents and significant public input about those documents. The Record of proceedings of these bodies substantiates that each was cognizant of the issues, both positive and negative,

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associated with the proposed Master Plans and Zoning Texts, debated those issues and rendered a decision.

BP claims the Master Plans and Zoning Texts are inconsistent with the City's Comprehensive Plan. The Record reveals otherwise. When the Plans and Texts were under consideration, the City's Comprehensive Plan identified the Cainhoy Plantation as an area for future study. That study occurred when the Master Plans for the Plantation were being formulated, and culminated in City Council amending the Comprehensive Plan to specifically incorporate the recommendations of the Master Plans for the Cainhoy Plantation. R. City Ex. 2B, Keane Affidavit; City Ex. 3D, City of Charleston V 2010 Comprehensive Plan Update Amended, Ord. 2014-26.

The issue of whether the Master Plans and Zoning Texts better achieve the goals of adopted plans or better protects and preserves cultural and natural resources is a matter of policy, and in this case, must be considered in the context of the Development Agreements. Because of the Agreements, the City could not, without cause, amend the CY district regulations applicable to the Cainhoy Plantation. The CY regulations give far more latitude to a developer than do the Zoning Texts. BP does not argue otherwise. BP's real argument is that the Planning Commission and City Council could have done better. But that is policy, not legal, matter. When presented with maintaining the liberal development criteria of the CY regulations or the more structured regulations of the Master Plans and Zoning Texts, the Planning Commission and City Council opted for structure and specificity, a choice the Record reveals laid a basis for more control of development and more opportunity to preserve cultural and natural resources.

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The Master Plans and Zoning Texts conform to the City's master road plan, the reason being the City's plan does not include any roads in the City that are in Berkeley County. R. City Ex. 2B, Keane Affidavit.

The Record does not reveal incompatibility in density or height between the Master Plans and Zoning Texts and existing neighborhoods. Existing City neighborhoods on Cainhoy Plantation have been developed under the CY regulations with a density cap of 2.1 units to the gross acre. The Master Plans and Zoning Texts respect this density cap. And the Court makes note that Master Plans and Zoning Texts are more specific as to uses and their locations, and requires streets connecting with neighborhoods to be compatible with the neighborhoods, safeguards that are not included in the CY district.

The implication that the Master Plans and Zoning Texts do not provide for a mixture of uses, open space and recreational amenities or address parking cannot be sustained. These very matters are specifically addressed in the Plans and Texts, R. City Ex. 1A, Master Plans and Zoning Texts, Tab 2, Zoning Text, pp. 10, 15-22 and Sec. 5.1, 5.3, 5.4, and 2.1, and the Record of proceedings reveals that adequate infrastructure as roads, water, sewer and schools, are in place or are planned. R. City Ex. 2B, Keane Affidavit.

The Master Plans and Zoning Texts incorporate the criteria of Sec. 54 – 254. The minutes of the Planning Commission and City Council substantiate that the Commission and Council were cognizant of what the Plans and Texts were proposing. There is no evidence in the Record that suggests otherwise. Felder v. Johnston, 121 S.C.215, 217, 121 S.E. 54, 54 (1927) (“In the absence of evidence to the contrary, Courts are bound to presume that public officials have properly discharged their duties and their acts are in all respects regular.”)

BP's claim that City Council acted arbitrarily or capriciously in adopting the Master Plans and Zoning Texts is not credible or legally sustainable. A challenge to a zoning ordinance will only be sustained where the acts of the Council are not fairly debatable.

With respect to judicial review of zoning ordinances, we first note that there is a strong presumption in favor of validity of municipal zoning ordinances and validity of their application.... The burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent upon the party attacking it to show through clear and convincing evidence the arbitrary and capricious nature of the ordinance.... The action of a municipality regarding the rezoning of property will not be overturned by a court as long as the decision is "fairly debatable". (*citations omitted*).

Petersen v. City of Clemson, 312 S.C. 162, 165, 439 S.E.2d 317, 320 (Ct. App. 1993).

From the Record, it is not plausible to maintain that the adoption of the Master Plans and Zoning Texts was capricious or beyond the realm of fair debate. The Plans and Texts provide more definition and certainty as to uses and their locations, include specific standards for streets, tree protection, usable open space, a National Forest buffer and protections of historic buildings, none of which were guaranteed by the CY district that formerly governed the development of Tract 7.

BP's contention that the Master Plans and Zoning Texts fail to recognize the National Forest is belied by the requirement for a National Forest Buffer along Cainhoy Road, a protection nonexistent under the CY district<sup>5</sup>. BP's contention that a large scale mixed development is not compatible with its industrial uses across Flagg Creek falls short. BP has been faced with the prospect of a large scale, mixed used development across the Creek on Cainhoy Plantation for nearly twenty years, when the Plantation was annexed and zoned CY.

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<sup>5</sup> BP's claim that other City zoning districts, such as Conservation, would better protect cultural and natural resources ignores the reality that the Development Agreements, which constrain the ability to amend the CY zoning, at will. In other words, absent a circumstance enumerated in the Development Agreement Act that would allow the application of new or subsequent development laws (which BP Amoco does not claim to be the case), City Council could either keep CY in place or work with the property owners on a different solution.

As for traffic and roads, the Master Plans and Zoning Texts include a preliminary traffic report and require updated reports as development occurs, consistent with the requirements of the Revised PUD Ordinance. R. City Ex. 1A, Master Plans and Zoning Texts, Tab 5, Preliminary Traffic Study; and Tab 2, Zoning Text, Section 2.14; City Ex. 3A. A mechanism is in place to assure that street infrastructure is in place. City Ex. 1A, Master Plans and Zoning Texts, , Tab 2, Zoning Text, Sec. 2.16, p.15 and Sec. 8.6, p.29. And as for open space, the Master Plan and Zoning Text require as much open space as any other planned development in the City. R. City Ex. 1A, Master Plans and Zoning Texts, Tab 2, Zoning Text, Sec. 3.2, p.16. BP's dissatisfaction with the amount or adequacy of open space is a political, not legal, issue.

BP's apparent disappointment with the development program City Council chose for the Cainhoy Plantation does not serve to undermine the actions of the Council in its legislative capacity or give rise to a cognizable cause of action.

**VI. The Master Plans and Zoning Texts and the Coastal Tidelands and Wetlands Act.**

In its Sixth Cause of Action, BP alleges the Master Plans and Zoning Texts violate the South Carolina Coastal Tidelands and Wetlands Act because they have provisions that apply to critical areas, and thus must be approved by DHEC-OCRM.<sup>6</sup>

The circumstance of property containing critical area as defined by the Tidelands and Wetlands Act does not, alone, trigger DHEC-OCRM review of the its applicable zoning under S.C. Code Ann. § 48-39-100(B). Section 48-39-100(B) is applicable only when a local ordinance applies to critical areas:

<sup>6</sup> In its response to the City's motion for summary judgment, BP asserts this cause of action is not applicable to Ordinance No. 2014-82, the Ordinance adopting the Tract 7 Master Plan and Zoning Text. Its Complaint alleges this cause of action against all defendants and specifically includes relief declaring Ordinance No. 2014-82 invalid on the basis of its violating the South Carolina Coastal Tidelands and Wetlands Act (Complaint ¶100, 101 and 102).

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Any city or county that is currently enforcing a zoning ordinance, subdivision regulation or building code, a part of which applies to critical areas, shall submit the elements of such ordinances and regulations applying to critical areas to the department for review. (emphasis added).

Nothing in the Master Plans or Zoning Texts imposes any regulation *to or in* critical areas. The Master Plans and Zoning Text require a buffer *around* critical areas. They require filtration of storm water *before* it reaches critical area. They require drainage basin studies to analyze storm water runoff to alleviate *downstream* impacts. R. City Ex. 1A, Master Plan and Zoning Texts, Tab 2, pp.15, 19. All these regulations apply and have efficacy *outside* the critical areas over which DHEC-OCRM has jurisdiction. Consequently, S. C. Code Ann. § 48-39-100 has no application here.

**VII. Injunctive Relief.**

The Twelfth Cause of Action seeks temporary and permanent injunctive relief, based on the allegations of its First, Second, Third, Fourth, Fifth and Sixth Causes of Action. As BP has not succeeded on the merits of these Causes of Action, its request for injunctive relief thus fails.

**CONCLUSION**

Considering the facts in the light most favorable to the Plaintiff, this Court finds there is no genuine issue as to any material fact and the Defendants are entitled to judgment as a matter of law. Having considered the Defendants' Motion, the Plaintiff's Memorandum in Opposition thereto, the Defendants' Motion for Summary Judgment for the City of Charleston and Partial Summary Judgment for Tract 7, LLC is hereby GRANTED.

NOW, THEREFORE, in light of the foregoing it is

ORDERED that the motion of the City of Charleston for summary judgment on the First, Second, Third, Fourth, Fifth, Sixth and Twelfth Causes of Action contesting the validity of the

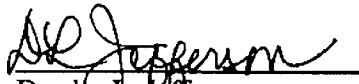
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Cainhoy Land & Timber Master Plan and Zoning Text, the Southern Timber Master Plan and Zoning Text and the Tract 7 Master Plan and Zoning Text, be, and hereby is, granted; and it is

ORDERED that the motion of Tract 7, LLC for summary judgment on the First, Second, Fourth, Sixth and Twelfth Causes of Action contesting the validity of the Tract 7 Master Plan and Zoning Text be, and hereby is, granted; and

IT IS SO ORDERED.

Charleston, South Carolina  
October 22, 2015  
At Chambers

  
Deadra L. Jefferson  
Presiding Judge

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
IN THE COURT OF COMMON PLEAS
BP AMOCO CHEMICAL COMPANY,

JUDGMENT IN A CIVIL CASE

CASE NO. 2014-CP-08-1840

v. CITY OF CHARLESTON, TRACT 7, LLC,
CAINHOY LAND AND TIMBER, LLC,
and SOUTHERN TIMBER, LLC,

PLAINTIFF

DEFENDANTS

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury.
DECISION BY THE COURT. This action came to trial or hearing before the court.
ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other

15 OCT 28 PM 1:19
FILED
CLERK OF COURT
BERKELEY COUNTY, SC

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

IT IS ORDERED AND ADJUDGED: See attached order. (Formal order to follow)
Statement of Judgment by the Court:

This case came before the Court on August 3, 2015 during the common pleas non-jury term for a hearing on Defendant Tract 7, LLC's Motion for Summary Judgment, filed June 25, 2015. "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law." Evening Post Pub. Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 81, 708 S.E.2d 745, 748 (2011); Rule 56(c), SCRPC. "Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986)). In considering a motion for summary judgment, "the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." Id. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. . . . Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." USAA Property & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). Defendant's Motion is heard and respectfully DENIED as to the Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Causes of Action. The First, Second, Fourth, Sixth and Twelfth Causes of Action have been GRANTED pursuant to this Courts Order signed on October 22, 2015.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
n/a		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

  
Circuit Court Judge

2128  
Judge Code

10/22/15  
Date

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

Douglas M. Muller, Esq.  
E. Brandon Gaskins, Esq.  
\_\_\_\_\_  
ATTORNEYS FOR THE PLAINTIFF

M. Dawes Cooke, Esq.  
D. Summers Clark, II, Esq.  
\_\_\_\_\_  
ATTORNEY FOR THE DEFENDANT

\_\_\_\_\_  
CLERK OF COURT

**Court Reporter: Ruth Mott**

## Wendy Stockhausen

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**Subject:** FW: BP Amoco vs City of Charleston  
**Attachments:** 2014CP0801840\_ORDER\_203250.PDF

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

From: Courtmail08\_DoNotReply@sccourts.org [mailto:Courtmail08\_DoNotReply@sccourts.org]  
Sent: Tuesday, November 03, 2015 3:49 PM  
To: Brandon Gaskins; mdc@barnwell-whaley.com; cantwellf@charleston-sc.gov  
Cc: devon.wilson@berkeleycountysc.gov  
Subject: BP Amoco vs City of Charleston

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