

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Nathan Bluestein, Ettaleah Bluestein,))
 Theodore Albenesius and Karen)
 Albenesius,)
)
 Plaintiffs,)
)
 Versus)
)
 Town of Sullivan's Island and)
 Sullivan's Island Town Council,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 Case No. 10-CP-10-5449
 Order Granting Summary Judgment to Defendants
 Based on Plaintiffs' Lack of Right to a View

FILED
 2015 JUL 30 AM 10:29
 JULIE J. ARSTRONG
 CLERK OF COURT

I. INTRODUCTION

This matter comes before the Court pursuant to the Town's Motion for Summary Judgment. Plaintiffs sued the Town of Sullivan's Island complaining over the Town's management of Town-owned land. Naturally occurring plants located on the Town's land have grown to a height that partially obscures the Plaintiffs' view of the beach.¹ Plaintiffs contend that the Town has deprived them of a right to a view by failing to cut (or allow others to cut) trees and shrubbery growing on town-owned land that lies between Plaintiffs' houses and the ocean. The Plaintiffs contend that the right they possess stems from a promise contained in 1991 deed restrictions. This Court has reviewed the deed restrictions and the Plaintiffs' arguments and concludes that the claimed promise was never made to the Plaintiffs.

¹ Plaintiffs describe their claim with various labels (right to have vegetation pruned, condemnation of their view or beachfront status, etc.), but in essence the dispute in this case revolves around whether the Plaintiffs can force the Town to engage in the vegetation cutting necessary to allow Plaintiffs to see the ocean. For ease of reference in this Order, regardless of Plaintiffs label, this will generally be termed "right to a view".

The relevant facts are not disputable. This is confirmed by the fact that both the Plaintiffs and the Defendants *both* moved for Summary Judgment on this general issue. In so doing both parties implicitly represented to the Court that the question is a legal issue of contract interpretation.

The Court finds the following to be uncontrovertable and sufficient to allow interpretation of the deed / contract and resolution of the question before the Court:

- 1) The Plaintiffs own houses located at 2513 and 2411 Atlantic Avenue. See Para. 1, Second Amended Complaint (hereinafter, "SAC".)
- 2) The Plaintiffs houses are "front row houses" meaning that they are in the row of houses closest to the beach. See generally, Para. 50, SAC. See also, following diagram herein.
- 3) The Plaintiffs house parcels are not the closest parcel to the beach. The Town-owned parcel (TMS 529-10-00-087), known as the Accreted Land ("AL"), lies between the Plaintiffs properties and the beach. See Para. 35, SAC. The following diagram illustrates the layout.

BK K 200PG492

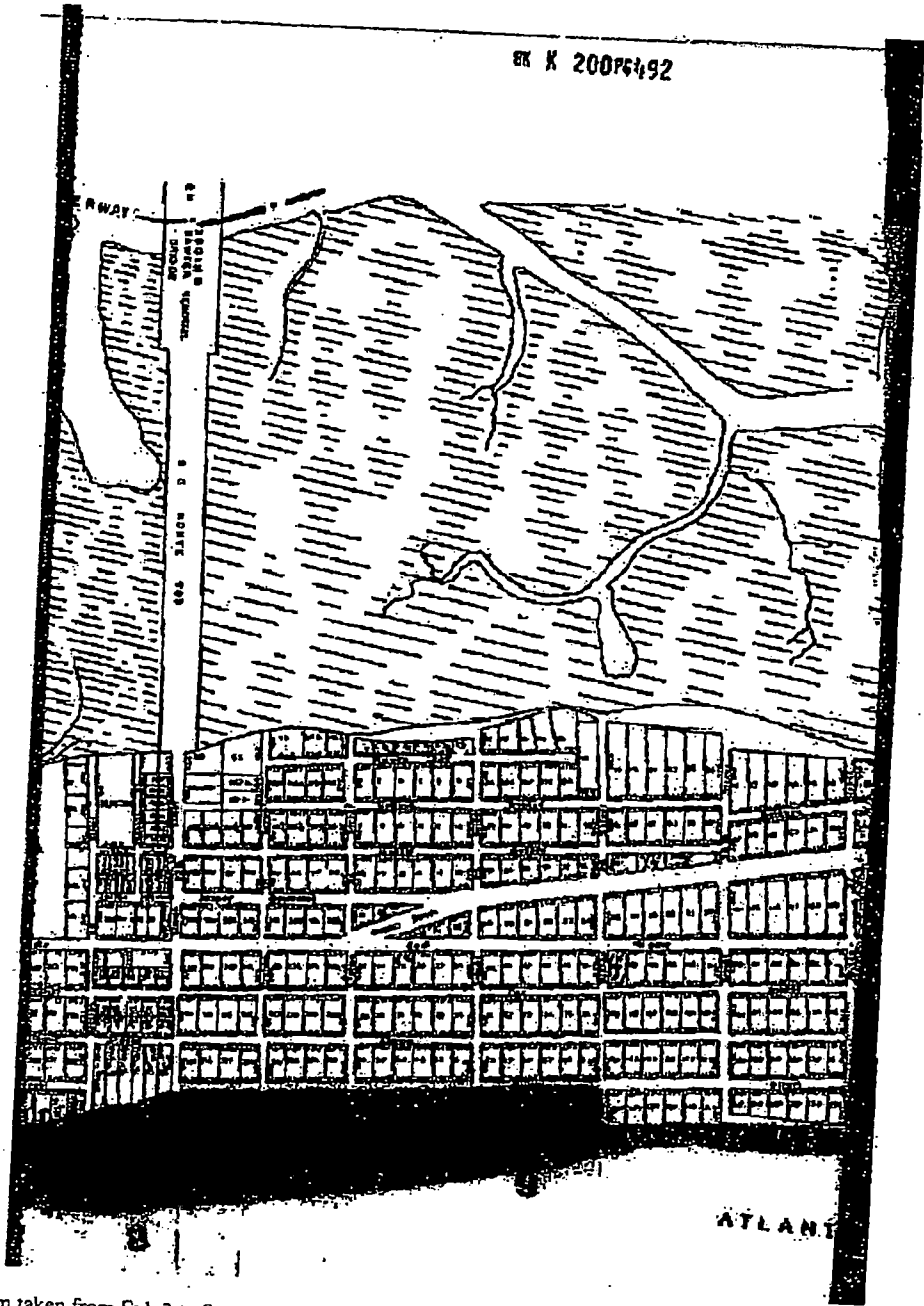


Diagram taken from Exh 3 to Second Amended Complaint²

² An identical diagram is contained within Exh 4 to the Second Amended Complaint (deed from LOLT to Town), recorded Bk K 200 PG507. The version from Exh. 3 is reproduced herein as it has a higher photocopy quality.

- 4) The AL is subject to certain deed restrictions as a result of the 1991 deed. A copy of this deed is attached as an Exhibit to the SAC and incorporated by reference herein.
- 5) The deed restrictions do not cover the entirety of the AL. See prior diagram showing an "unshaded" portion closest to Plaintiffs' properties.
- 6) In the vicinity of the Plaintiffs' properties, the "unshaded" portion of the AL that immediately abuts the Plaintiffs' seaward property line is colloquially known as "Bayonne Avenue Extension." This area is not subject to the AL deed restrictions and lies between the Plaintiffs' properties and the deed-restricted property. See Diagram.
- 7) Photographs exist reflecting the appearance of the AL in 1991;
- 8) The condition of the AL today is not in controversy and that the appearance differs from the exact way it looked in 1991;
- 9) Both parties argued to the Court that the words of the Deed Restrictions are clear. (The parties differ on the interpretation they would attach to these words. This disagreement is not one of fact, but rather is a question of law.);
- 10) Both parties argued to the Court that the following language quoted from the Deed Restriction Summary: "The scenic value of this property is due to its visibility from the Atlantic Ocean and the public beach. Open space values derive from the undeveloped natural character of the entire property." As both parties cite this language it is clearly not in dispute.³
- 11) The Low Country Open Land Trust has a right to enforce the deed restrictions;
- 12) The Plaintiffs are "third party beneficiaries" under the deed restrictions and that the deed restrictions permit such persons to seek enforcement of the deed.

In addition to the above, there are also certain other "absolutes" that are not realistically capable of being disputed by either side in this case:

³ See Plaintiffs' Memorandum in Support of Partial Summary Judgment, pg. 13, quoting the Lowcountry Open Land Trust's "Summary of Deed Restrictions."

- 1) The Lowcountry Open Land Trust (the grantor of the Deed Restrictions) has made annual inspection visits to the AL for the state purpose of assuring that the Town has faithfully honored the deed restriction requirements. See Affidavit of Hagood.
- 2) The Lowcountry Open Land Trust has for more than a decade, after every such visit, issued a written report finding that the Town is in compliance with the deed restrictions. See Affidavit of Hagood.
- 3) The Deed Restrictions, at Paragraph 2, contain the language "Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given the unrestricted authority to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean, and providing views of the ocean and beaches to its citizens."
- 4) Paragraph 2 of the Deed Restrictions is the only paragraph in the Deed Restrictions which makes mention of a view of the ocean and beaches.
- 5) The Deed Restrictions contain the language "The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Regulations or which are not inconsistent with these Restrictions." Deed Restrictions, Para. 6.
- 6) The cutting ordinance in effect at the time of the 1991 deed restrictions was the Town's 1981 Ordinance. See Exh. 10 and 11, SAC.
- 7) The Town's 1981 Ordinance allowed for citizens to apply to the Town for permission to cut vegetation on the accreted land to trimmed height of not less than three (3) feet, provided the Town's Zoning Administrator made certain findings. See Exh. 9, SAC.
- 8) The Town's 1981 Ordinance did not expressly limit what species could be trimmed. See Exh. 9, SAC.
- 9) The Town's 1995 Ordinance raised the minimum trimmed height from three (3') feet to seven (7') feet. The 1995 Ordinance also added a species list limiting the plants that could be trimmed. See 1995 Ordinance attached as Exhibit to Defendants' Motion for Summary Judgment on All Causes of Action Due to Plaintiffs' Lack of Any Right to Control or Look Over Neighboring Parcels.

- 10) The Town's 2005 Ordinance adjusted the minimum after-trimming height to five (5') feet and retained the same species list as in the 1995 ordinance. See 2005 Ordinance attached as Exhibit to Defendants' Motion for Summary Judgment on All Causes of Action Due to Plaintiffs' Lack of Any Right to Control or Look Over Neighboring Parcels
- 11) The 1995 and 2005 Deed Restrictions allow less cutting than did the 1981 ordinance. As such, these ordinances are "more restrictive." See Para. 36, SAC; see also N. Bluestein Depo p. 71, lines 14-18; See also, 1981, 1995 and 2005 ordinances.
- 12) No cutting ordinance amendment has been passed since 2005. See Para. 133, SAC, seeking to invalidate 2005 ordinance as most recent listed version.
- 13) Since 1991, nature has caused plants to grow higher on the Accreted Land such that it no longer looks as it did in 1991. See Para. 37, SAC.
- 14) Since 1991 sand has naturally accreted on the Accreted Land such that the Accreted Land no longer looks exactly as it did in 1991. See Para. 19, SAC.
- 15) The AL remains undeveloped. See Photographs attached to SAC.

Law

Standard for Decision

Summary judgment is appropriate where no genuine issues of material fact remain for trial when viewed in the light most favorable to the opponent. Tupper v. Dorchester County, 487 S.E.2d 187, 191 (SC 1997); Adamson v. Richland County School District One, 503 S.E.2d 752 (S.C.App. 1998). Mere denials contained within a party's pleadings are not sufficient under S.C.R.C.P. 56(e). And while the moving party has the initial burden of showing that no genuine issues of fact remain, there is no requirement that the moving party negate every aspect of the

opponent's claim. Baughman v. American Telephone and Telegraph, 410 S.E.2d 537, 545 (SC 1991)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Thus, the opponent must "do more than simply show that there is some metaphysical doubt as to the material facts" but "must come forward with 'specific facts showing there is a *genuine issue for trial*.'" Baughman, 410 S.E.2d at 545, citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Notably, while Summary Judgment may be inappropriate when *facts* remain in dispute, the fact that the parties disagree on the legal interpretation of contract is a question of law for which Summary Judgment is particularly appropriate.

Legal Analysis

In general terms, the Plaintiffs contend that the 1991 Deed Restrictions contain a promise that front row home owners would always⁴ be able to cut vegetation on the AL lying seaward of their houses under the same ordinance terms existing in 1991 when the deed was signed. As a matter of law, I find that the deed restrictions do not contain the promise the Plaintiffs claim.

1) **No Right to a View Across Bayonne Avenue.**

The Plaintiffs concede that no common law or statutory right to a view easement exists under South Carolina law. See Plaintiffs' Memorandum of Law and Equity in Opposition to Defendants' Motion for Summary Judgment and Motion to Strike at pg. 9; See also, Hill v. Beach Co., 306 S.E.2d 604 (SC 1983). The Plaintiffs instead base their claim to a view on the deed restrictions pertaining to the AL. See Id. However, whatever deed restrictions might apply to the most seaward portions of the AL do not apply to the Bayonne Avenue Extension strip

⁴ The term of the deed restrictions appears to be fifty (50) years followed by a fifty (50) year renewal term.

of land lying closest to the Plaintiffs' parcels. See prior diagram. The Plaintiffs have no common law, statutory, or deed restriction-based right to be able to look across Bayonne Avenue. See Hill, 306 S.E.2d 604. There is nothing that would legally stop the Town from constructing a parking garage, wall, or hedgerow on the Bayonne Avenue Extension property, thus totally cutting off Plaintiffs' ability to even see the deed-restricted portion of the Accreted Land. Since the Plaintiffs' possess no legal right to look across Bayonne Avenue Extension to see the most inland edge of the deed-restricted portion of the AL, they cannot claim any right to look all the way to the far side of the AL to get an ocean view.

2) The Deed Restrictions Do Not Promise the Plaintiffs a View and Do Not Promise that the Town's Vegetation Trimming Ordinances Will Remain Unchanged.

The Deed Restrictions never promised that the Town would refrain from amending its AL cutting ordinances and never promised that the Plaintiffs' view would be unchanging. To the contrary, the Deed restrictions expressly granted the Town the "unrestricted authority" to control the growth of vegetation of the AL.

This controversy is resolved by Paragraph 2 of the Deed Restrictions. That Paragraph states "Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given the unrestricted authority to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access



to the Atlantic Ocean, and providing views of the ocean and beaches to its citizens.” Though Plaintiffs argued that portions of Paragraphs 1 and 3 of the Deed Restrictions should be applied to this dispute, such arguments are foreclosed by Paragraph 2’s phrase “Notwithstanding the provisions of Paragraphs 1 and 3....”⁵

There is no dispute that this case centers on the Town’s power and decisions of how to “trim and control growth of vegetation” on the AL. Accordingly, that requirement of Paragraph 2 is satisfied.

There is also no dispute that the trimming of vegetation at issue here is (among other things) related to “providing view of the ocean and beaches to its citizens.” That is the central basis of the Plaintiffs’ complaint. Consequently, it is clear that the Ordinances and plant height issues before the Court fall within Paragraph 2 in this regard as well.

Paragraph 2’s phrase “unrestricted authority” conclusively settles this dispute in the Town’s favor. The Plaintiffs’ argue that the Deed Restrictions contained a promise from the Town that the rules governing vegetation trimming would never be changed to their detriment. Paragraph 2 says just the opposite. Paragraph 2

⁵ Plaintiffs also, in various filings, have argued that “scenic enhancement” as used at various places in the deed is meant to encompass a view from the island towards the ocean. However, the very LOLT deed summary offered by the Plaintiffs elsewhere as authoritative belies such a reading. The deed summary clearly indicates that “scenic value” refers to the view of the AL from the beach. Further, if “scenic enhancement” meant “ocean view” there would be no purpose in separately describing the two purposes within Paragraph 2 of the deed. Notably, no other paragraph refers to ocean views. Thus, this case revolves around Paragraph 2.

says that the Town expressly reserved the "unrestricted authority" to change those rules.

Paragraph 6 further confirms that the Deed Restrictions do not contain a Town promise that the AL trimming rules would never change. Paragraph 6 specifically says that the Town may enact rules governing the AL which are *more restrictive* than what existed at the time the Deed Restrictions were signed. The 1995 and 2005 ordinances are more restrictive than that which existed in 1991. That is clear from the text. Further, the entire basis of the Plaintiffs' complaint is that the current rules are more restrictive. Paragraph 6 grants the Town express, independent authority for the 1995 and 2005 ordinances.

The Court further finds that reading the contract in the manner advocated by the Plaintiffs would violate South Carolina's caselaw on impairment of legislative power. In general terms the Plaintiffs argue that in accepting the 1991 Deed the Town promised not to change its zoning ordinances pertaining to the AL.⁶ One Town Council must pass on to successor councils the full legislative authority of office. See Piedmont Public Service District v. Cowart, 459 S.E.2d 876 (SC App. 1986). If one read the 1991 Deed Restrictions to promise that later-elected City Council's were prevented from passing different zoning ordinances (as argued by Plaintiffs) this well-established law would be violated.

⁶ See Deposition of E. Bluestein, p. 36, lines 8 - 11 ("Q: Okay. So again, the crux of it is that you believe that the deed restricts the Town from passing laws that violate the deed? A: Yeah.")

3) Even Under the Vegetation Trimming Ordinance in Place When the Deed Restrictions Were Signed, the Plaintiffs Possessed No Right to Cut for a View.

The Plaintiffs argue that the Town's 1995 and 2005 ordinance deprived them of a deed-based *right* to cut vegetation to three (3') feet under the 1981 ordinance that existed when the deed was accepted. Upon inspection of the 1981 Ordinance⁷, the Court concludes that the Plaintiffs possessed no such right at the time the AL deed restrictions were imposed. The 1995 and 2005 ordinances cannot have deprived the Plaintiffs of a right they never possessed.


The 1981 Ordinance did not grant the Plaintiffs a *right* to cut in order to preserve their view. To be sure, the 1981 Ordinance did allow for cutting to a height of not less than three (3') feet when the height of vegetation became objectionable. It may even have been that such permit requests were granted routinely by the Town in order to improve the view of homeowners. However, the 1981 ordinance did not allow homeowners to cut as a matter of right. Instead, such permits were to issue "[w]hen the Zoning Administrator finds as a fact that bushes and trees create a hazard to the health, safety, and welfare of the Town in a particular area due to density, mosquito breeding, or standing water..." Sec. 21-39(A). Further, cutting was only permitted when "the cumulative effect of the trimming, cutting or pruning shall not be detrimental to the safety, welfare, and health of the people of the Town." In other words, under the 1981 Ordinance the Town had discretion to approve or deny cutting requests. Homeowners had no absolute "right" to cut

⁷ The 1981 Ordinance was in place at the time the deed restrictions were imposed.

when the deed was executed in 1991 and thus the 1995 and 2005 ordinances cannot be said to have "taken" a right that they never possessed in the first place.

The Plaintiffs' lack of any right to control neighboring property to assure a view invalidates numerous causes of actions within the Complaint⁸

Declaratory Judgment (First Cause of Action)

 ~~Plaintiffs seek a declaration from this court adopting their view that the deed restrictions block the Town's 1995 and 2005 Ordinances and confer upon them a right to a view. For the reasons stated above, the Town is granted Summary Judgment on this claim. There is no common law right to a view. Moreover, the deed did not promise a right to a view or promise that the rules governing cutting on the AL would remain unchanged. Instead the deed restrictions left the Town with the unrestricted authority to control trimming on the AL as is relevant to this case. Further, the deed restrictions left the Town with the power to pass rules more restrictive than existed in 1991. The Plaintiffs therefore cannot be granted the relief they seek. Summary Judgment is appropriate.~~

Injunctive Relief⁹ (Second Cause of Action)

⁸ Separate discussion will not be made herein for the Plaintiffs' claims for an injunction against the collection of taxes, Unfair Trade Practices, and Breach of Contract by Fraudulent Act as these were disposed of on Summary Judgment by way of separate order. However, had these not been separately disposed of then the Court would have granted Summary Judgment on those claims on the basis of the arguments contained herein. Thus, this Order shall be considered an additional sustaining ground with respect to the Court's judgment on those causes of action.

⁹ By separate order the Court granted Summary Judgment on the Town's motion to dispose of the Injunctive Relief claim as it pertains to taxation issues.

This Court's analysis of the deed and "right to a view" compels that the Town be granted Summary Judgment on Plaintiffs' claim for injunctive relief. The Plaintiffs seek an injunction from this Court that would forbid the Town from enforcing the 1995 and 2005 zoning ordinances because these ordinances conflict with *Plaintiffs' reading* of the Deed Restrictions. For all of the reasons previously stated, the Plaintiffs' reading of the Deed Restrictions is flawed. The Town has not violated the deed restrictions or any other law. Accordingly, there is no basis for the issuance of an injunction to stop the Town from operating in its current, lawful fashion.

Writ of Mandamus (Third Cause of Action)

~~The Plaintiffs are not entitled to a Writ of Mandamus. The Plaintiffs have no common law right to control neighboring land in order to preserve their view. For the reasons previously stated, they also have no such right as a result of the deed restrictions. The deed restrictions specifically allow for the 1995 and 2005 ordinances. Consequently the Plaintiffs cannot be granted a Writ of Mandamus that would allow them to cut AL vegetation in violation of law. Further reasons supporting the Court's dismissal of the Mandamus order may be found in a separate Order.~~

Breach of Contract (Fourth Cause of Action)

~~For the reasons stated above and in a separate order regarding this cause of action, the Town is granted Summary Judgment on this claim. There is no common law right to a view. Moreover, the deed did not promise a right to a view or promise that the rules governing cutting on the AL would remain unchanged. Instead the deed restrictions left the Town with the unrestricted authority to control trimming on the AL as is relevant to this case. Further, the deed restrictions left the Town with the power to pass rules more restrictive than existed in 1991.~~

Since the Town had the authority under the deed to enact the 1995 and 2005 ordinances the Town cannot have breached the terms of the deed restrictions. Summary Judgment is appropriate.

Nuisance (Seventh Cause of Action)

For the reasons stated above, the Court concludes that the Town's 1995 and 2005 ordinances do not violate the Deed Restrictions. Accordingly, the current Town ordinance is valid. Further, the Ordinance itself cannot legally constitute a nuisance. See Home Sales Inc. v. City of North Myrtle Beach, 382 S.E.2d 463, 469 (SC App. 1989); Brading v. County of Georgetown, 490 S.E.2d 4, 8 (SC 1997). Acts of nature which may flow from an ordinance are not "acts" by the Town.

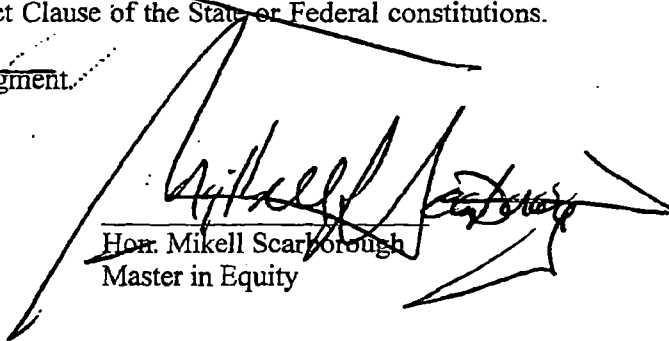
Inverse Condemnation (Eighth Cause of Action)

The Plaintiffs claim for Inverse Condemnation also fails as a matter of law. Inverse condemnation is a species of "taking" claim. Significantly, "[w]here the proscribed use is not part of the owner's title to begin with, no compensatory taking has occurred." McQueen v. SC Coastal Council, 580 S.E.2d 116, 119 (SC 2003); Lucas, 505 US at 1027. Thus, a seminal issue is whether or not the "right taken" was a right the plaintiff even owned. For the reasons previously described in this Order, I conclude that the Plaintiffs here have no relevant legal right and consequently have no inverse condemnation claim.

Contract Clause Claims (Ninth Cause of Action)

As described in regards to the Plaintiffs' Breach of Contract claim, the Court concludes that the Town honored the terms of the deed and that no "breach" occurred when the Town enacted the 1995 and 2005 ordinances. Given that the Town has complied with the alleged "contract" there can be no violation of the Contract Clause of the State or Federal constitutions. Accordingly, the Town is entitled to Summary Judgment.

TRK
This 19 day of July, 2015


Hon. Mikell Scarborough
Master in Equity