STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Nathan Bluestein, Ettaleah Bluestein, Theodore Albenesius and Karen Albenesius,	)	Case No. 10-CP-10-5449
	)	Order Granting Defendants' Motion to Strike Damages Claim Due To Location of OCRM Critical Line
Plaintiffs,	)	
	)	
Versus	)	
	)	
Town of Sullivan's Island and Sullivan's Island Town Council,	)	
	)	
Defendants.	)	

This matter comes before the Court pursuant to the Defendants' 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, by enacting ordinances in 1995 and 2005, 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. As will be shown, however, Plaintiffs can presently establish no damages against the Town because, *regardless of whatever Town ordinance might exist,* the vegetation Plaintiffs complain about lies within the OCRM "Critical Zone". Since the Plaintiffs lack a cutting permit from the State Coastal Council, the Plaintiffs

[1] Plaintiffs describe their right 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".

cannot legally cut as desired no matter what Town permission might be issued and no matter what Town ordinance might be on the books. The Town's ordinance cannot have "damaged" the Plaintiffs or "taken" anything from them in light of this.

The Plaintiffs occupy "front row" lots on Sullivan's Island, meaning that no other *buildable lots* exist between Plaintiffs and the ocean. (Plaintiffs' parcels are 529-10-00-064 and 070). See Para. 50, Second Amended Complaint. That is not to say, however, that the Plaintiffs actually abut the beach. To the contrary, as shown in the following diagram at least one platted parcel (Parcel 529-10-00-087) owned by the Town exists between the Plaintiffs and the water. See diagram within Exhibit 4 to Second Amended Complaint.

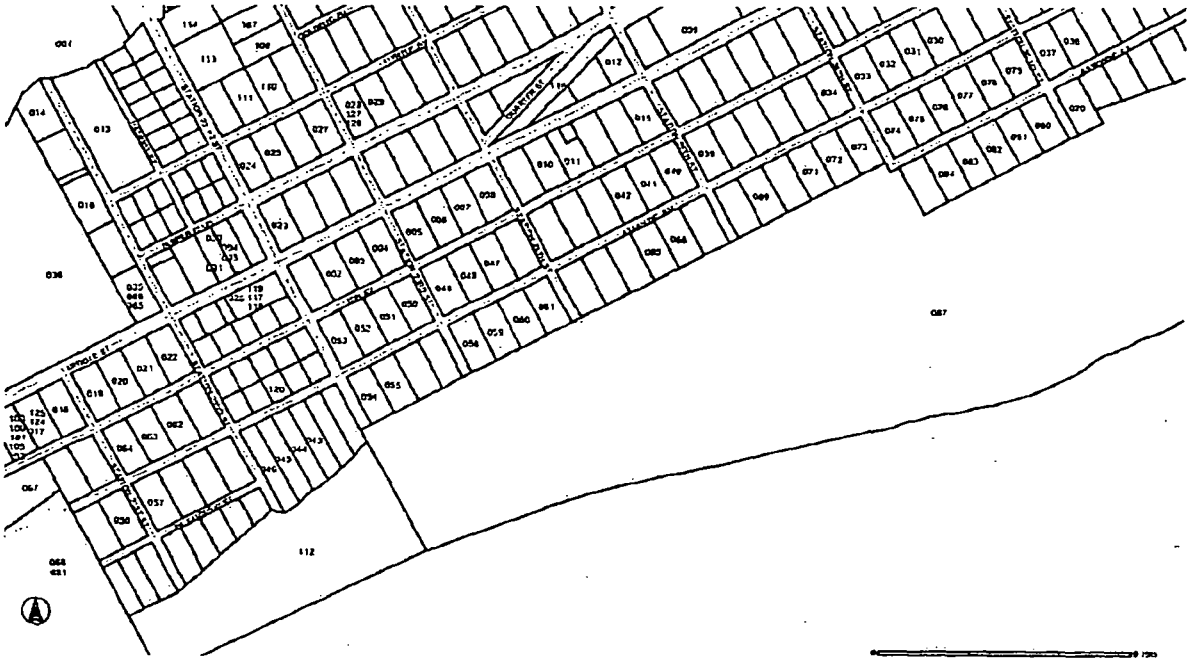

Diagram taken from: http://ccgisweb.charlestoncounty .org/website/Charleston/viewer.htm [2]

Over the years the Town's parcel 087 (hereinafter known as the "accreted land" or "AL") has grown in size due to sand accretion. See Para. 19, Second Amended Complaint. Plants growing on the AL have also matured. See Footnote 8, Second Amended Complaint. The Town has permitted nearby residents, such as the Plaintiffs, to enter the Town-owned AL to trim vegetation under certain terms and conditions specified by a zoning ordinance. See Para. 42 and 43, Second Amended Complaint. In 1991 when certain deed restrictions were put into place trimming was permitted to a height of three (3') feet. In 1995 the height limit changed to seven (7') for a few selected species and most species were no longer permitted to be trimmed at all.[3] In 2005 the height limit again changed, this time to five (5') feet, and the species restrictions were unchanged.

The Plaintiffs argue that the Town has an obligation to keep the AL property in the *exact* condition it existed on the day the deed was delivered in 1991.[4] Plaintiffs claim that by enforcing the 1995 and 2005 zoning ordinances, and thus restricting their ability to cut, the Town has "taken" value or otherwise damaged them because they can no longer see the ocean as well as they once did. Plaintiffs ignore, however, the fact that the OCRM Critical Line has moved over the years. At this point the Critical Line is such that it protects the overwhelming majority of the land which Plaintiffs wish to cut. This is documented by the following OCRM image:

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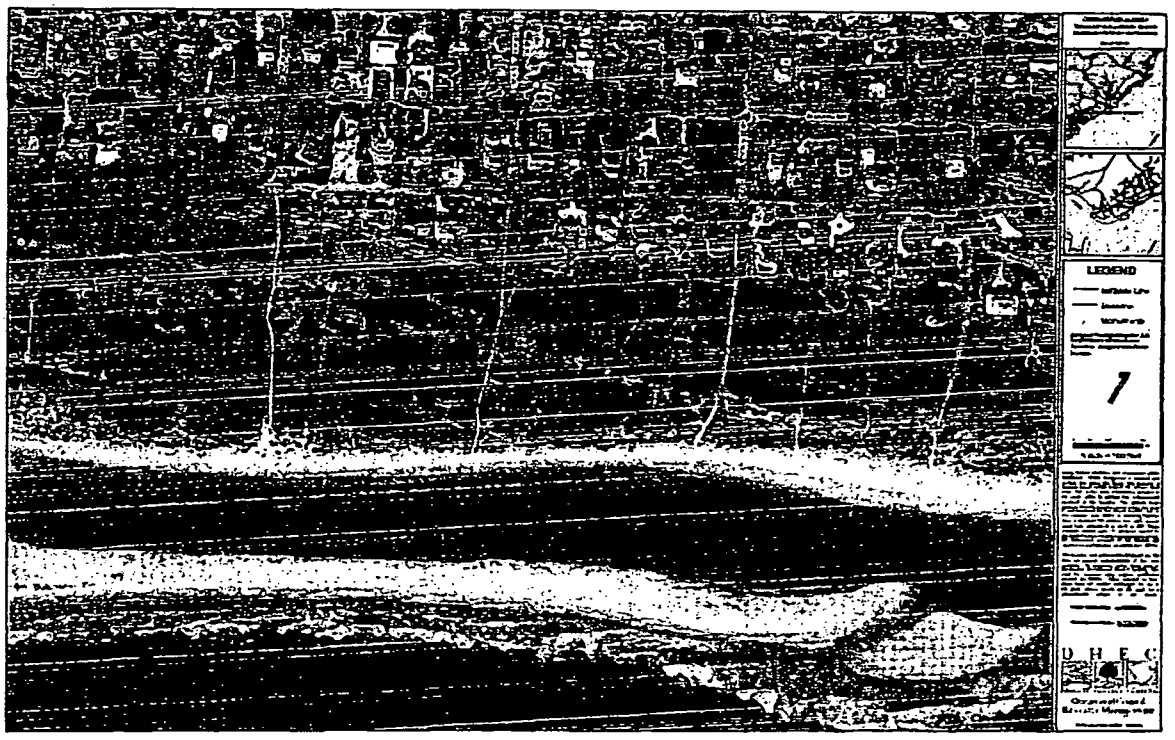
[2] A very similar map was provided by Plaintiffs as Exhibit 3 and 4 to the Second Amended Complaint. For reading ease the official Charleston County electronic image is used herein.

[3] The "only vegetation that may be trimmed and pruned is limited to the following: Southern Waxmyrtle..., Eastern Baccharis ..., and Popcorn trees...." (See 1995 Ord, Sec 21-39.IE). Thus, live oak trees, pine trees, and other species could no longer be cut.

[4] The Plaintiffs argue that "natural state" must mean the precise and exact condition of the property on the day that the deed restrictions were signed in 1991. The Town maintains that such an interpretation of the term "natural state" is not only at odds with the deed as a whole, but a physical impossibility given the changing tides, winds and other forces of nature that impact the property.



Plaintiffs have received no permits from the State to allow such cutting. Consequently, they may not legally cut (as requested in their lawsuit) even if this Court were to rule in their favor or if the Town were to entirely repeal the ordinances about which they complain. This fact makes clear that they cannot be experiencing any damage or taking at this time as a result of Town activity. Summary Judgment is appropriate.

Legal Conclusions

The Town cannot have damaged the Plaintiffs in this action because the Plaintiffs lack State permission to perform their desired cutting. The Plaintiffs will have no improved view whether this Court rules in their favor or not. This reality conclusively demonstrates that the Town's ordinances cannot be damaging the Plaintiffs at present.

The Plaintiffs may not presently cut the vast majority of the vegetation that blocks their view. South Carolina's Regulation 30-ll(D)(6) prohibits "[t]he destruction of beach or dune vegetation seaward of the setback line ... unless there is no feasible alternative." Regulation 30-21(F)(4) goes on to state that "[a]ny activity that will disturb the beach or dune vegetation within the critical area requires a Coastal Council permit." The OCRM map makes absolutely clear that the overwhelming majority of the vegetation between the Plaintiffs and the ocean falls within the critical area and thus may not be disturbed without State approval.

It is also abundantly clear that the Plaintiffs lack State permission to perform the cutting they ask this Court to force upon Sullivan's Island. No less than the Chief Counsel for OCRM wrote to Counsel for the Plaintiffs on January 24, 2014, quoted the Plaintiff's own Complaint regarding the desired cutting, and put the Plaintiffs on notice that they must comply with Section 30-11 and 30-21. See Letter of Chief Counsel for OCRM. This letter clearly demonstrates that Plaintiffs do not have the required State permissions.

Breach of Contract

The Plaintiffs seek monetary damages from the Town claiming that their houses are worth less because a Town ordinance has stopped them from being able to cut vegetation which lies between Plaintiffs and the ocean. See Para. 89 – 114. The problem is, the OCRM rules mean that the Plaintiffs could not perform meaningful cutting whether the Town ordinance existed or not. Since one could ignore the Town ordinance entirely and the Plaintiffs would still not have a materially improved view, one cannot say that the Town has damaged the Plaintiffs. Thus, the Court strikes any claim for alleged Breach of Contract damages based on diminished view.

Inverse Condemnation

The Plaintiffs claim that the Town has essentially "taken" the value of their homes because, *but for* the Town ordinance, they could cut vegetation on the Accreted Land as desired. See Para. 124 – 126. The link between the Town's ordinance and Plaintiffs' view does not exist, however, since the OCRM Critical Line means that the Plaintiffs could not cut enough to obtain a view even if the Town repealed its ordinance tomorrow. The fact that State regulations mean that the Plaintiffs still cannot cut demonstrates that the Town's ordinance has effectively "taken" nothing from the Plaintiffs. Any such claim for damages is stricken.

Impairment of Contract

The Plaintiffs claim that the Town's ordinance amendments restrict cutting on the Accreted Land in a way that impairs the value of pre-existing deed restrictions because the Town's ordinance stops them from certain cutting. See Para. 128 – 133. As with every other cause of action, the problem is that the Plaintiffs lack OCRM permission to cut. Consequently, whatever diminished view they complain about would be basically unchanged even if the Town repealed the ordinance. This makes clear that the Town ordinance cannot have caused damage to the Plaintiffs. Any such claim for damages is stricken.

For the foregoing reasons, the Plaintiffs' claims for monetary damages are stricken.

This 9 day of July, 2015

Hon. Mikell Scarborough
Master in Equity