STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
)	
Nathan Bluestein, Ettaleah Bluestein,)	Case No. 10-CP-10-5449
Theodore Albenesius and Karen)	
Albenesius,)	Order Denying Plaintiffs' Summary Judgment
)	Motion Regarding Breach of Contract
Plaintiffs,)	
)	
Versus)	
)	
Town of Sullivan's Island and)	
Sullivan's Island Town Council,)	
)	
Defendants.)	

I. INTRODUCTION

This matter comes before the Court pursuant to the Plaintiffs' 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. Plaintiffs filed a Motion for Summary Judgment asking for a ruling that the deed restrictions (contract) had been breached. This Court has reviewed the deed restrictions and

[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 Plaintiffs' arguments and concludes that the claimed promise was never made to the Plaintiffs.

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 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 facts to be beyond challenge 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.

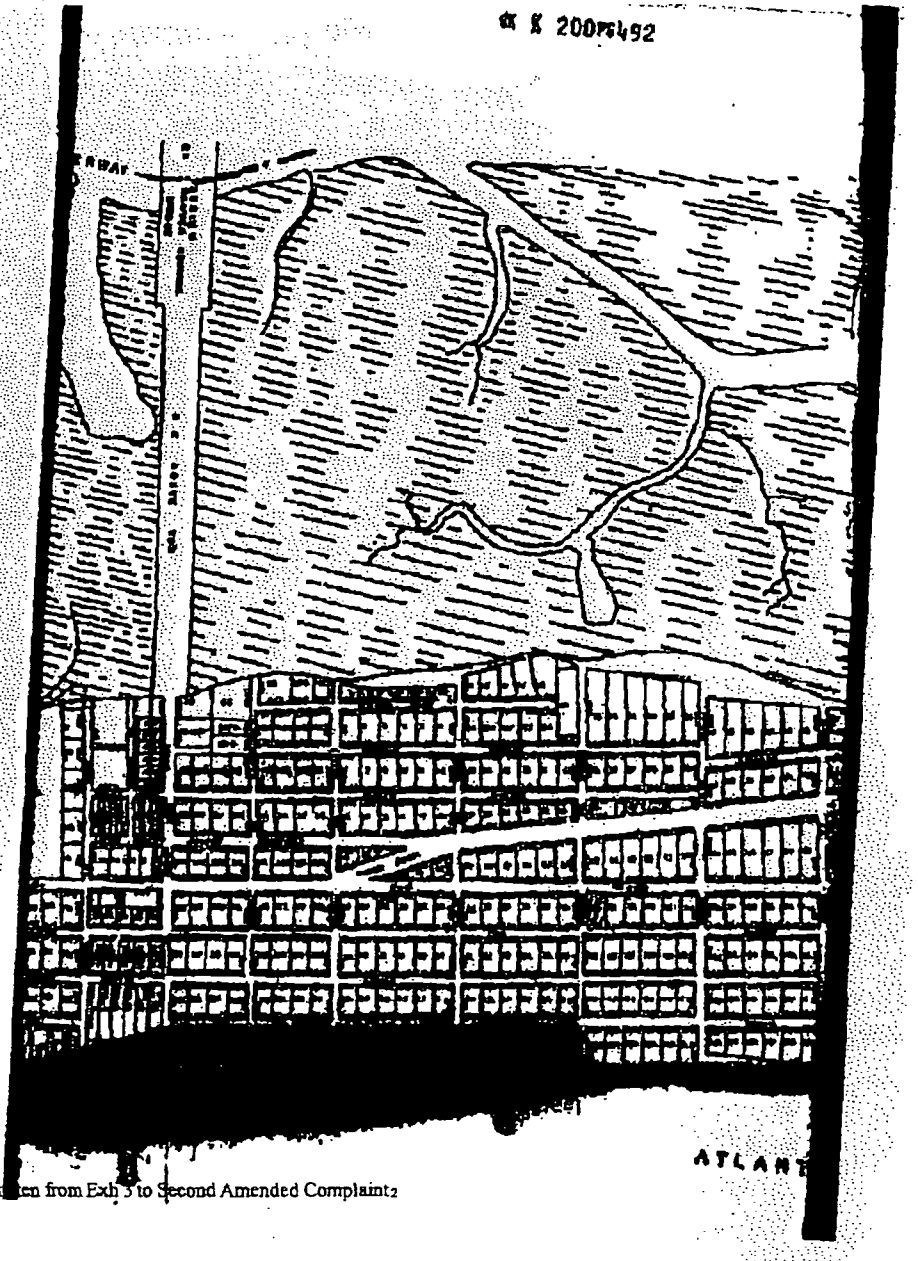

Diagram taken from Exh 3 to Second Amended Complaint[2]

[2] An identical diagram is contained within Exh 4 to the Second Amended Complaint (deed from LOL To the Town), recorded Bk K 200 PG 507. 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 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 stated 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

Standards 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, 19-1 (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

no genuine issues of fact remain, there is no requirement 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 always[4] 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. Plaintiffs' Memorandum of Law and Equity in Opposition to Defendants' Motion for Summary Judgment and Motion to Strike, p. 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

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

most seaward portions of the AL that, significantly, do not apply to the Bayonne Avenue Extension strip 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

[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.

be changed to their detriment. Paragraph 2 just the opposite. 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 Ordinance[7], 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 balance interests and approve or deny cutting requests. Homeowners had no

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

"right" to cut 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.

Having determined that the deed did not "promise" the Plaintiffs what they claim, the Plaintiffs' Motion for Summary Judgment must respectfully be denied.

This 17 day of October 2015

Hon. Mikell Scarborough
Master in Equity

FORM 4

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

JUDGMENT IN A CIVIL CASE

FILED
2015 NOV 10 PM 4:36
JULIE J. ARMSTRONG
CLERK OF COURT

CASE NO. 2010 CP-10-5449

Bluestein, et. al.	Town of Sullivan's Island, et. al.
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

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

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC 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)
		$
		$
		$

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

3062
Judge Code

11/10/15
Date

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-10-5449

FILED
2015 AUG -5 PM 2:20
JULIE J. ARMSTRONG
CLERK OF COURT

Bluestein, et. al. — PLAINTIFF(S)

Town of Sullivan's Island, et. al. — DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

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

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IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiffs' Motion for Summary Judgment for Breach of Contract is Denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC 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)
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Circuit Court Judge — 3062 Judge Code — Date 7/31/15