STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**NINTH JUDICIAL CIRCUIT**
COUNTY OF CHARLESTON	)	**Case No. 2010-CP-10-5449**
	)	
	)	
Nathan Bluestein, Ettaleah Bluestein, Theodore Albenesius and Karen Albenesius,	)	**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' NUISANCE, BREACH OF CONTRACT, AND MANDAMUS CLAIMS**
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
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 ("Town") 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 Plaintiffs' view of the beach. Plaintiffs contend that ordinances enacted in 1995 and 2005 deprive them of a right to a view by failing to cut trees and shrubbery growing on Town owned land that is situated between Plaintiffs' houses and the Atlantic Ocean. Plaintiffs further argue that as a result of the 1995 and 2005 ordinances, the Accreted Land ("AL") has become an actionable nuisance because wildlife has flourished within the AL and may cross onto their properties causing a higher risk of human interaction with varmints, bugs, coyotes, and poisonous snakes. Plaintiffs further allege the increased plant material may increase the risk of fire.

STANDARD OF REVIEW

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 (Ct. App. 1998). 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)). Therefore, 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 537, 545 (SC 1991).

LEGAL CONCLUSIONS

Plaintiffs argue that unchecked plant growth on the AL constitutes a nuisance by providing wildlife habitat to varmints which become a food source to dangerous animals such as coyotes and poisonous snakes. The basis of Plaintiffs' argument is that the Town created a nuisance per se or a nuisance per accidens when amendments to a 1981 ordinance were enacted and enforced in 1995 and 2005. See Pls.' Second Am. Complaint at Para. 36. Plaintiffs seek to force the Town to allow the cutting of plant growth back to the 1981 ordinance standards, or in the alternative, monetary damages.

A. Plaintiffs do not have a nuisance per se claim or a nuisance per accidens claim.

"The traditional test for determining what is a nuisance per se is that the nuisance has become dangerous at all times and in all circumstances to life, health or property." Suddeth v. Knight, 280 S.C. 540, 314 S.E.2d 11 (Ct. App. 1984). "A nuisance per accidens is an act, occupation or structure which is not a nuisance per se, but which may become a nuisance by

reason of circumstances, location or surrounding." Neal v. Darby, 282 S.C. 277, 318 S.E.2d 18 (Ct. App. 1984).

Plaintiffs argue that because of the Town's actions in enacting and enforcing the 1995 and 2005 amended ordinances, a nuisance was directly created by increasing wildlife, which poses a serious health threat at all times to the Plaintiffs. However, this Court finds that while there may be an increase in bugs, rats, and other wildlife, there is no immediate threat to Plaintiffs' health and well-being.

Next, Plaintiffs argue that if there is no nuisance per se then a nuisance per accidens was created by the Town when they restricted the cutting of shrubbery and trees. This Court finds that the Town's enactment and enforcement of the amended ordinance does not constitute a nuisance per accidens because any nuisance that may occur is a result of nature which may occur no matter the height of the vegetation and not as a result of the lawful act of the Town. There is no evidence that the Town planted trees, fertilized bushes, or imported wildlife. Tree growth and mosquito mating are acts of nature, and cannot be a wrongful act by the Town. *See* Home Sales, Inc. v. City of North Myrtle Beach, 382 S.E.2d 463, 469 (Ct. App. 1988). Once a valid zoning law is enacted, the Town's authority under the police powers is to see that the terms of the law are carried out.

B. Plaintiffs do not have a public nuisance claim or private nuisance claim.

A nuisance is public because of the danger to the public which might have been created by the nature or character of the thing or activity itself. State v. Turner, 198 S.C. 487, 18 S.E.2d 372, 375 (S.C. 1942). A law cannot constitute a public nuisance. Home Sales, Inc. v. City of North Myrtle Beach, 382 S.E.2d 463, 469 (Ct. App. 1988). Additionally, nothing is a nuisance which the law itself authorizes. Id. A nuisance is private only because the individual as distinguished from the public has been or may be injured. Id. To maintain an action for private

nuisance, a wrongful act of the defendant must be shown and the maintenance of the nuisance must be the natural and proximate cause of the injury suffered by the plaintiff. Id. State law gives municipalities the authority to enact zoning ordinances. See S.C. Code Ann. Title 6, Chapter. 29.

Plaintiffs' claims of a public nuisance cannot stand against the Town because their argument alleges a duly enacted law constitutes a nuisance. This Court has in two previous Orders (August 4, 2015 and November 5, 2015) found that the amendments to the 1981 ordinance were lawful. The Town's legislative passages of the 1995 and 2005 zoning laws are lawful acts and are therefore not a public nuisance. Contracts involving legislative functions and governmental powers may not bind a future council. City of Beaufort v. Beaufort-Jasper Water and Sewer Authority, 325 S.C. 174, 480 S.E.2d 728 (SC 1997).

The acts of one council cannot serve to bind subsequent council's actions. There is nothing wrongful about the Town Council enacting these ordinances. Nor is there a breach of contract or contract clause violation here. There is no lawful provision allowing for zoning by referendum. I'On, L.L.C v. Town of Mount Pleasant, 338 S.C. 406; 526 S.E.2d 716 (SC 2000).

Thus, this Court finds there is no action for private nuisance. No evidence was presented that the Town performed specific and wrongful acts such as planting trees, fertilizing bushes, or importing wildlife. Plant growth and an increase in the wildlife population are the result of acts of nature and not by any act of the Town other than by enforcement of lawful zoning ordinance criteria.

C. Plaintiff is barred from seeking monetary damages.

Furthermore, the South Carolina Tort Claims Act bars nuisance damages from being awarded against the Town. "The governmental entity is not liable for a loss resulting from: (7) a nuisance." S.C. Code Ann. § 15-78-60(7).

CONCLUSION

The logic of Home Sales fully disposes of Plaintiffs' nuisance claim. The 1995 and 2005 zoning ordinances were valid legislative acts passed by the Town. State law gives the Town the authority to enact zoning ordinances and there were no unlawful acts enacted by the Town.

Accordingly, there are no genuine issues of material fact presented to this Court and therefore I find that summary judgment is proper. Therefore, Defendants' Motion for Summary Judgment on Plaintiffs' nuisance claim is Granted. As a consequence, the claim for mandamus must fail as well.

AND IT IS SO ORDERED!

The Honorable Mikell R. Scarborough
Master-In-Equity, Charleston, South Carolina

Charleston, South Carolina

November 10, 2015.