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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT OCT 26 2015

R. Markley Dennis, Jr., Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2015-001309

County of Charleston, South Carolina, ... Appellant,

v.

South Carolina Department of Transportation, ... Respondent.

RECORD ON APPEAL

Joseph Dawson, III, County Attorney
Bernard E. Ferrara, Jr., Deputy County Attorney
Austin A. Bruner, Assistant County Attorney
Johanna S. Gardner, Assistant County Attorney
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(803) 737-1347
Attorneys for Respondent

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

County of Charleston, South Carolina,

Plaintiff,

vs.

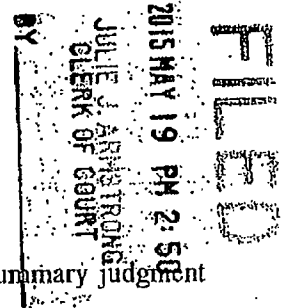
South Carolina Department of Transportation,

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Case No.: 2014-CP-10-6613

Order



The parties have submitted this matter to me on cross-motions for summary judgment agreeing that there are no disputes as to the material facts and that the case may be decided on the law alone.

On or about July 18, 2012, the County sent the Department a Notice of Tree Violation for removing three "Grand Trees" in connection with work on the on Maybank Highway (S.C. Route 700). The Notice required SCDOT to either replace the trees or donate money to the Charleston County Tree Fund. The Department responded by letter dated August 31, 2012, refusing to comply with the demands of the letter and the Ordinance on the grounds that zoning ordinances that conflict with a State agency's authority are void under the Constitution. The County filed its Complaint herein on October 27, 2014 seeking a Declaratory Judgment under S.C. Code Ann. §15-53-10 *et seq.* asking the Court to declare the rights, status, and legal relationships of the parties under the relevant statutes and ordinances.

The provision the County seeks to enforce is Article 9.4, Tree Protection and Preservation, of the Charleston County Zoning and Land Development Regulation Ordinance, Ordinance No. 1201, which provides in its relevant parts that a permit is required for the removal of trees. Permits are issued only after a "tree plan" is approved by the Planning

Handwritten signature/initials

Director. To obtain the permit, an applicant may be caused to replace trees "in the same general area" as the trees removed. Alternately, the landowner may be fined and caused to contribute money to the Tree Fund in an amount to be determined by the Planning Director. As support for its authority to impose the ordinance on SCDOT, the County cites S.C. Code Ann. §6-29-770(A) (Rev. 2004) stating that,

"Agencies, departments and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this State are subject to the zoning ordinances."

The Department does not contest that, as a department of the State government, it is subject to all local zoning ordinances as owner or tenant of real property. In fact, it fully complies with all such ordinances with respect to section sheds, district headquarters, equipment depots, and other non-highway uses of real property. However, with respect to the State Highway System, it is entitled to the exemption contained in article 8, section 14 of the Constitution as governmental service or function, responsibility for which rests with the State government or requires statewide uniformity.¹ It argues that compliance with local ordinances affecting the design and planning of highway projects may conflict with other federal or State regulations causing possible loss of funding or project delays. I agree with the Department's analysis of the law.

SCDOT has exclusive authority over the State Highway System and zoning ordinances which conflict with this State agency authority are void. Law v. City of Spartanburg, 148 S.C.

¹ Article VIII, section 14 of the South Carolina Constitution, S.C. Code Ann. Constitution, art. 8, §14 (Rev.2009) provides that, "General law provisions not to be set aside. In enacting provisions required or authorized by this article, general provisions applicable to the following matters shall not be set aside:

*** (6) the structure and the administration of any governmental service or function, responsibility for which rests with the State government or requires statewide uniformity."

RMOT/2

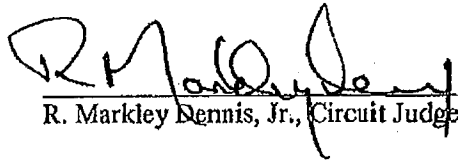
299, 146 S.E. 12 (1928); Colyer v. Thomas, 268 S.C. 455, 234 S.E.2d 862 (1977). Under section 14, article 8 of the Constitution, in enacting ordinances, provisions applicable to the administration of a governmental service or function, responsibility for which rests with State government or which requires statewide uniformity, shall not be set aside. The exclusivity of SCDOT's authority in this area is set forth in express terms where the General Assembly has conferred upon it the "exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges." S.C. Code Ann. §57-3-110 (1).

That the planning, construction, and maintenance of the State Highway System is a responsibility that rests with the State government and withdrawn from the field of local control has been firmly established by our Supreme Court. In Town of Hilton Head v. Coalition of Expressway Opponents, 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992), the Court said, "The planning, construction, and financing of state roads is a governmental service which requires statewide uniformity." This principle was affirmed in Brashier v. South Carolina Department of Transportation, et al., 327 S.C. 179, 185, 490 S.E.2d 8, 11 (1997), where the Court stated, "When construing Article VIII, section 14, we have consistently held that a subject requiring statewide uniformity is effectively withdrawn from the field of local concern." Further, "We have already held that '[t]he planning, construction, and financing of state roads is a governmental service which requires statewide uniformity.' [Citing Hilton Head, *supra*.] The Brashier opinion further holds that the validity of a local law purporting to impose regulation on the State Highway System may not be decided on the facts case-by-case but must be declared unconstitutional on its face. Brashier, *supra*, 327 S.C. at 186, 490 S.E.2d at 12 (1997).

The Department argues alternatively that the Ordinance is an unconstitutional tax on a State function. I agree. As set forth above, the scheme of Article 9.4 of the Charleston ordinance is to require a permit to remove trees. If violated, the Planning Director may impose a fine to be deposited into the "Tree Fund." ZLDR, Subsection 9.4.6 E. Because the removal of trees from highway travel lanes and clear zones is unavoidable and inescapable², the Ordinance applied to the Department is not regulation, rather a tax on the State-Highway System even if referred to as a "contribution" to the Tree Fund. Under article X, section 3 of our constitution, property of the State is exempt from *ad valorem* taxation. Thus, to the extent the Ordinance may be held to apply to the highway system at all, this exaction and the ordinance imposing it is unconstitutional.

The operation of the State Highway System is a service of the State under the exclusive control of the S.C. Department of Transportation, and its design, construction, and maintenance are functions that are withdrawn from the field of local concern per the State Constitution. Alternatively, the Ordinance as applied to the State Highway System is an unconstitutional tax. For these reasons, I declare the County's tree ordinance unconstitutional as applied to the State Highway System, deny Plaintiff's Motion for Summary Judgment, grant Defendant's Cross-Motion, and DISMISS the Complaint.

AND IT IS HEREBY ORDERED.


R. Markley Dennis, Jr., Circuit Judge

Charleston, S.C.

May 14, 2015

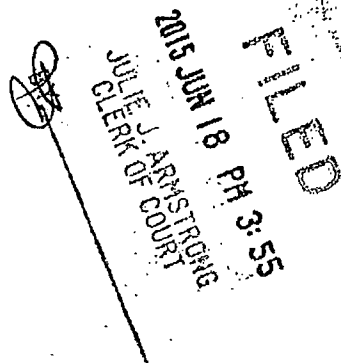
² S.C. Code Ann. § 57-5-10 mandates that the Department maintain its highways in a safe and serviceable condition.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2014-CP-10-6613



County of Charleston, ... Appellant,

v.

South Carolina Department of Transportation Respondent.

NOTICE OF APPEAL

Appellant County of Charleston appeals the Order of the Honorable R. Markley Dennis, Jr., filed May 19, 2015, a copy of which is attached as Exhibit A. Appellant received written notice of entry of the Order on May 26, 2015.

June 16, 2015

A handwritten signature in cursive script, appearing to read "J. Dawson", written over a horizontal line.

Joseph Dawson, III, County Attorney
Bernard E. Ferrara, Jr., Deputy County Attorney
Austin A. Bruner, Assistant County Attorney
Johanna S. Gardner, Assistant County Attorney
CHARLESTON COUNTY ATTORNEY'S OFFICE
Lonnie Hamilton, III Public Services Building
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North Charleston, South Carolina 29405
(843) 958-4010
Attorneys for Appellant

Other Counsel of Record:

Linda C. McDonald, Esquire
Beacham O. Brooker, Jr., Esquire
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Attorney for Respondent

Exhibit "A"

Order

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258
RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org

59



AUSTIN ADAMS BRUNER
CHARLESTON COUNTY ATTORNEY'S OFFICE
4045 BRIDGE VIEW DR B-314
N CHARLESTON SC 29405-7464

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRCP

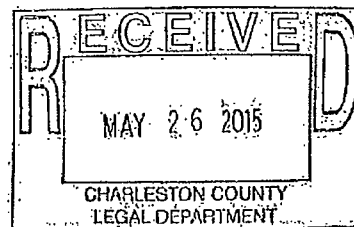
Order/deny plntff's mot for sum judg, grant defnt's cr/mot

CASE NO: 2014CP1006613

Charleston South Carolina County of VS South Carolina Department of Transportation

This judgment was entered on the 19th day of May, 2015, and notice mailed first class on Wednesday, May 20, 2015, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

County of Charleston, South Carolina,

Plaintiff,

vs.

South Carolina Department of Transportation,

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Case No.: 2014-CP-10-6613

Order

FILED
2015 MAY 19 PM 2:50
JULIE J. ARISTIDE
CLERK OF COURT

The parties have submitted this matter to me on cross-motions for summary judgment agreeing that there are no disputes as to the material facts and that the case may be decided on the law alone.

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The provision the County seeks to enforce is Article 9.4, Tree Protection and Preservation, of the Charleston County Zoning and Land Development Regulation Ordinance, Ordinance No. 1201, which provides in its relevant parts that a permit is required for the removal of trees. Permits are issued only after a "tree plan" is approved by the Planning

Director. To obtain the permit, an applicant may be caused to replace trees "in the same general area" as the trees removed. Alternately, the landowner may be fined and caused to contribute money to the Tree Fund in an amount to be determined by the Planning Director. As support for its authority to impose the ordinance on SCDOT, the County cites S.C. Code Ann. §6-29-770(A) (Rev. 2004) stating that,

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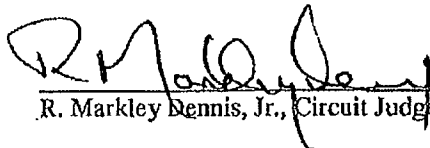
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The operation of the State Highway System is a service of the State under the exclusive control of the S.C. Department of Transportation, and its design, construction, and maintenance are functions that are withdrawn from the field of local concern per the State Constitution. Alternatively, the Ordinance as applied to the State Highway System is an unconstitutional tax. For these reasons, I declare the County's tree ordinance unconstitutional as applied to the State Highway System, deny Plaintiff's Motion for Summary Judgment, grant Defendant's Cross-Motion, and DISMISS the Complaint.

AND IT IS HEREBY ORDERED.


R. Markley Dennis, Jr., Circuit Judge

Charleston, S.C.

May 14, 2015

² S.C. Code Ann. § 57-5-10 mandates that the Department maintain its highways in a safe and serviceable condition.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-10- 6613

County of Charleston,)
South Carolina)

Plaintiff,)

vs.)

South Carolina Department
of Transportation,)

Defendant.)

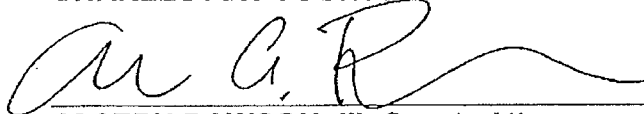
SUMMONS

FILED
2014 OCT 27 PM 12:22
JULIE J. ARMSTRONG
CLERK OF COURT

TO: THE DEFENDANT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

YOU ARE HEREBY SUMMONED, and required to answer the complaint herein,
a copy of which is herewith served upon you, and to serve a copy of your answer within
thirty (30) days after service hereof, exclusive of the day of such service, and if you fail
to answer the complaint within the time, judgment by default will be rendered against
you for the relief demanded in the complaint.

CHARLESTON COUNTY



JOSEPH DAWSON, III, County Attorney
BERNARD E. FERRARA, JR., Deputy County Attorney
AUSTIN A. BRUNER, Assistant County Attorney
CHARLESTON COUNTY ATTORNEY'S OFFICE
Lonnie Hamilton, III Public Services Building
4045 Bridge View Drive
North Charleston, South Carolina 29405
(843) 958-4010

ATTORNEYS FOR THE PLAINTIFF

Charleston, South Carolina
October 27, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

County of Charleston,)
South Carolina)
)
Plaintiff,)
)
vs.)
)
South Carolina Department)
of Transportation,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-10- 6613

COMPLAINT
(Declaratory Judgment Action
S.C. Code Ann. § 15-53-10 et seq.)

FILED
2014 OCT 27 PM 12:22
JULIE L. HAYSTRONG
CLERK OF COURT

The Plaintiff County of Charleston, South Carolina complaining of the Defendant South Carolina Department of Transportation alleges and will show unto this Honorable Court as follows:

1. The Plaintiff County of Charleston, South Carolina ("Charleston County" or the "County") is a body corporate and politic and a political subdivision of the State of South Carolina with its place of business at 4045 Bridge View Drive, North Charleston, South Carolina.

2. Defendant the South Carolina Department of Transportation ("SCDOT") is a political subdivision of the State of South Carolina having an address of 955 Park Street, Columbia, South Carolina 29202.

3. This Court has jurisdiction over the parties and subject matter hereto.

FACTS

4. The South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (the "Planning Act") authorizes local governments in South Carolina to adopt

zoning ordinances to regulate land use within their jurisdictions. On November 20, 2001, Charleston County Council adopted Ordinance No. 1202, as amended, referred to as the Charleston County Zoning and Land Development Regulations Ordinance ("ZLDR") to regulate land use in the unincorporated areas of the County.

5. The Planning Act provides that "[a]gencies, departments, and subdivisions of this State that use real property as owner or tenant, in any county or municipality in this State are subject to the zoning ordinances." S.C. Code Ann. Section 6-29-770.

6. Pursuant to the Planning Act, Charleston County Council adopted in its ZLDR provisions relating to the removal of trees within the County. The ZLDR provides in part that "[t]rees are an essential natural resource, an invaluable economic resource, and a priceless aesthetic resource. Trees play a critical role in purifying air and water, providing wildlife habitat, and enhancing natural drainage of stormwater and sediment control. They also help conserve energy by providing shade and shield against noise and glare. Trees promote commerce and tourism by buffering different land uses and beautifying the landscape. The Tree Protection and Preservation regulations of this Article are intended to enhance the health, safety and welfare of Charleston County citizens." ZLDR Art. 9.4, Tree Protection and Preservation, Section 9.4.1. The ZLDR prohibits the removal of trees prior to the issuance of a zoning permit by the Planning Director. See ZLDR Art. 9.4, Section 9.4.2.

7. Article 9.4 provides a partial exemption for the SCDOT allowing it to remove trees without a zoning permit except for the following:

- a. All trees species measuring 6 inches or greater DBH located in right-of-ways along Scenic Highways as designated in this Ordinance shall

be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5B and 9.4.6.

- b. Grand Tree Live Oak species in all present and proposed right-of-ways and easements shall be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5.B and 9.4.6.
- c. All Grand Trees other than Live Oak species in all present and proposed right-of-ways and easements not located on a Scenic Highway are protected but may be permitted to be removed administratively when mitigated per Article 9.4.6.

ZLDR, Art. 9.4, Section 9.4.1.B.3.

8. On or about July 18, 2012, the County sent the SCDOT a Notice of Tree Violation regarding work the SCDOT was performing on Maybank Highway (SC 700) in Charleston County. The SCDOT removed three Grand Trees measuring 24-inches or greater within its right of way on Maybank Highway without a zoning permit. This was part of its ongoing maintenance of the highway.

9. The SCDOT asserts that the County has no legal authority to order the SCDOT to comply with its local tree ordinance in regard to maintenance work within the SCDOT highway right of way.

10. The SCDOT claims that pursuant to S.C. Code Ann. Section 57-5-10 that it is charged with the duty to construct and maintain the state highway system in a safe and serviceable condition. In addition, the SCDOT claims that S.C. Code Ann Section 57-3-110(1) grants it exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges.

11. The SCDOT has stated that it will not comply with the provisions of the ZLDR regulating the protection and preservation of trees within its right of ways and it will continue to construct and maintain the highway system without due regard to the ZLDR.

CAUSE OF ACTION
(Declaratory Judgment Action - S.C. Code Ann. § 15-53-10 et seq.)

12. The County realleges each and every allegation of the Complaint, where consistent herewith, as fully as if set forth herein.

13. The SCDOT is not exempt from the regulatory provisions of the Planning Act and the ZLDR.

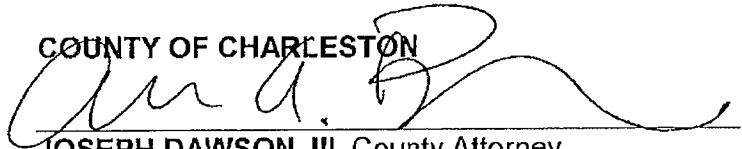
14. The SCDOT will not comply with the provision of the ZLDR regulating trees, and therefore, a justiciable controversy exists between the parties.

15. The County is entitled to have this Court issue a declaratory judgment, wherein the Court declares the rights, status, and other legal relationships of the parties as provided by the enabling act of the SCDOT, The South Carolina Local Government Comprehensive Planning Enabling Act of 1994, and the Charleston County Zoning and Land Development Regulations Ordinance, particularly whether the SCDOT is exempt from the Planning Act and ZLDR powers to regulate tree protection and preservation as alleged herein.

WHEREFORE, the Plaintiff County of Charleston prays that this Honorable Court issue an order declaring that the South Carolina Department of Transportation is not exempt from the regulatory provisions of the Planning Act and ZLDR regarding the preservation and protection of trees when it is performing its duty to construct and

maintain highways within its right of ways in Charleston County and for such other and further relief as this Court deems just and proper.

COUNTY OF CHARLESTON



JOSEPH DAWSON, III, County Attorney
BERNARD E. FERRARA, JR., Deputy County Attorney
AUSTIN A. BRUNER, Assistant County Attorney
CHARLESTON COUNTY ATTORNEY'S OFFICE
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4045 Bridge View Drive
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(843) 958-4010

ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
October 27, 2014

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

County of Charleston,)
 South Carolina)

Case No.: 2014-CP-10-6613

Plaintiff,)

ANSWER OF SCDOT

vs.)

South Carolina Department)
 of Transportation,)

Defendant.)

FILED
 2014 NOV 17 PM 2:00
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY *[Signature]*

Defendant South Carolina Department of Transportation ("SCDOT") answers Plaintiff's Complaint as follows:

1. The allegations of Paragraphs 1-3 are admitted.
2. SCDOT admits the allegations of Paragraph 4, but alleges that the application of the Plaintiff's Zoning and Land Development Regulations Ordinance ("ZLDR") to SCDOT's removal of trees within highway rights of way over which SCDOT has jurisdiction (i.e., the "State Highway System") violates the South Carolina Constitution, Article 8, Section 14. Article 8, Section 14 prohibits local governments from enacting ordinances that set aside the administration of a governmental service that has been delegated to State government and requires statewide uniformity. SCDOT's maintenance of the State Highway System is a governmental service that has been delegated to SCDOT pursuant to S. C. Code Sections 57-1-30, 57-1-110(1) and 57-5-10 and requires statewide uniformity.
3. SCDOT admits the allegations of Paragraph 5, but alleges that:
 - a) S. C. Code Ann. Section 6-29-770 is not applicable to SCDOT because it is not "using real property as owner or tenant" when it is carrying out its statutory duty to maintain the State Highway System pursuant to S. C. Code Sections 57-1-30, 57-1-110(1), and 57-5-10.
 - b) S.C. Code Ann. Section 6-29-770 as applied to SCDOT's maintenance of the State Highway System violates the South Carolina Constitution, Article 8, Section 14, for the reasons set forth in Paragraph 2 of this Answer.

4. SCDOT admits the allegations of Paragraphs 6 and 7, and craves reference to the Planning Act and the ZLDR for the exact language and context of the quoted provisions.

5. SCDOT admits the allegations of Paragraphs 8, 9 and 10.

6. SCDOT admits the allegations of Paragraph 11, except the assertion that SCDOT is not giving "due" regard to the ZLDR. SCDOT alleges that no regard is due for the reasons set forth above.

7. In response to Paragraph 12, SCDOT reiterates the responses set forth above.

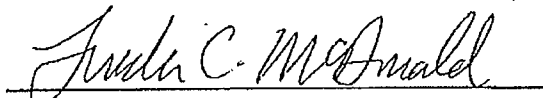
8. SCDOT denies the allegations of Paragraph 13 as they relate to the issues raised in the Complaint.

9. SCDOT admits the allegations of Paragraph 14 and 15 and joins in the request to have the court issue a declaratory judgment on the issues raised herein.

WHEREFORE, having fully answered, SCDOT prays that the Court issue its declaratory judgment declaring that:

- a) In carrying out its statutory duties to maintain the State Highway System, SCDOT is not an agency that "use(s) real property as an owner or tenant" within the meaning of S. C. Code Section 6-29-770; and
- b) The application of the Plaintiff's ZLDR to SCDOT's removal of trees within the rights of way of the State Highway System violates the South Carolina Constitution, Article 8, Section 14; and
- c) For such other and further relief as this Court deems just and proper.

South Carolina Department of Transportation



Linda C. McDonald, Chief Counsel

PO Box 191

Columbia, SC 29202

803/ 737-1255 (tel)

803/ 737-2071 (fax)

November 13, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Case No.: 2014-CP-10-6613

County of Charleston, South Carolina,

Plaintiff,

vs.

South Carolina Department of Transportation,

Defendant.

Defendant's Motion for Summary Judgment

FILED
2015 JAN 23 PM 2:30
JULIE J. ARMSTRONG
CLERK OF COURT

Defendant, the South Carolina Department of Transportation, respectfully moves the Court for summary judgment, pursuant to Rule 56, SCRPC, for the reason there are no material issues of fact and Defendant is entitled to judgment in its favor as a matter of law. In support of its motion, Defendant relies on the pleadings and the following memorandum of law.

I. Background.

A. Facts.

On or about July 18, 2012, the County sent the Department a Notice of Tree Violation for removing three "Grand Trees" in connection with work on the on Maybank Highway (S.C. Route 700). Exhibit 1. The Notice required SCDOT to either replace the trees or donate money to the Charleston County Tree Fund. The Department responded by letter dated August 31, 2012, refusing to comply with the demands of the letter and the Ordinance on the grounds that zoning ordinances that conflict with a State agency's authority are void under the Constitution. Exhibit 2. Another exchange of correspondence occurred on November 14, 2012 and January 16, 2013, where the parties re-stated their positions. Exhibit 3.

The County filed its Complaint herein on October 27, 2014 seeking a Declaratory Judgment under S.C. Code Ann. §15-53-10 *et seq.* asking the Court to declare the rights, status, and legal relationships of the parties under the relevant statutes and ordinances. Those we believe to be applicable are discussed below.

B. Constitutional Provisions, Statutes, Regulations, and Ordinances Involved.

1. Article VIII, section 14 of the South Carolina Constitution, S.C. Code Ann. Constitution, art. 8, §14 (Rev.2009) provides that, “**General law provisions not to be set aside.** In enacting provisions required or authorized by this article, general provisions applicable to the following matters shall not be set aside:
*** (6) the structure and the administration of any governmental service or function, responsibility for which rests with the State government or requires statewide uniformity.”
2. Article X, section 3 of the South Carolina Constitution, S.C. Code Ann. Constitution, art. 10, §3 (Rev.2009) provides that, “**Property exempt for ad valorem taxation.** There shall be exempt from ad valorem-taxation: (a) all property of the State, counties, municipalities, school districts and other political subdivisions, if the property is used exclusively for public purposes.”
3. S.C. Code Ann. §6-29-770 (Rev. 2004) provides that, “**Governmental entities subject to zoning ordinances; exceptions.** (A) Agencies, departments, and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this State are subject to the zoning ordinances.”
4. S.C. Code Ann. §57-3-110 (Rev. 2006) provides that, “**Powers and duties of the Department of Transportation.** The Department of Transportation shall have the following duties and powers: (1) lay out, build, and maintain public highways and bridges, including the exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges.”
5. S.C. Code Ann. §57-5-10 (Rev. 2006) mandates that the Department maintain its highways in a “safe and serviceable condition.”

6. The State Highway System is defined in Article 1 of Chapter 5, Title 57, S.C. Code of Laws, S.C. Code Ann. §§57-5-10, *et. seq.* The jurisdiction of counties over county roads is set forth in Chapters 17 and 19 of Title 57, S.C. Code Ann. §§ 57-17-10, *et. seq.*
7. The National Environmental Policy Act of 1969, P.L. 91-190, 42 U.S.C. §§4321-4327 ("NEPA"), directs all agencies of the federal government to consider the environment in planning and decision-making. It sets up a Council on Environmental Quality which, in turn has promulgated regulations, 40 C.F.R. §§1500-1508, establishing a complex system of environmental assessments, environmental impact statements, public involvement and the like to assess the social, economic and environmental impacts of a proposed action or project, to analyze reasonable alternatives to the project, and to consider appropriate impact mitigation. The Federal Highway Administration has imposed these standards and other planning requirements on state transportation departments who receive federal-aid-to-highways assistance through regulations published at 23 C.F.R Part 771. The range of impacts to be considered and balanced involve air quality, bicycle and pedestrian issues, noise, roadside vegetation, Title VI and Environmental Justice, water quality, community preservation and many others. The South Carolina General Assembly has assented to the terms of the federal-aid-to highways acts, S.C. Code Ann. §57-1-50, directed SCDOT to seek and receive federal aid and assistance, S.C. Code Ann. §57-3-110 (6), and directed it to "do any and all things necessary to carry out the provisions of any Federal-Aid Highway Act, including, but not limited to, the planning, construction, and maintenance of federal-aid highways," S.C. Code Ann. §57-3-670.
8. Article 9.4, Tree Protection and Preservation, of the Charleston County Zoning and Land Development Regulation Ordinance, Ordinance No. 1201 (the "ZLDR" copy attached as Exhibit 4) provides in its relevant parts that a permit is required for the removal of trees. Permits are issued only after a "tree plan" is approved by the Planning Director. To obtain the permit, an applicant may be caused to replace trees "in the same general area" as the trees removed. Alternately, the landowner may be fined and caused to contribute money to the Tree Fund in an amount to be determined by the Planning Director.

II. Argument.

A. Plaintiff lacks jurisdiction or authority to impose its tree ordinance on the State Highway System.

Charleston County seeks to impose the tree protection section of its zoning ordinance upon the operations of SCDOT with respect to the maintenance of State Highways within its borders. As support for this authority, the County cites S.C. Code Ann. §6-29-770(A) (Rev. 2004) stating that,

“Agencies, departments and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this State are subject to the zoning ordinances.”

The Department does not contest that, as a department of the State government, it is subject to all local zoning ordinances as owner or tenant of real property. In fact, it fully complies with all such ordinances with respect to section sheds, district headquarters, equipment depots, and other non-highway uses of real property. However, with respect to the State Highway System, it is entitled to the exemption contained in article 8, section 14 of the Constitution as governmental service or function, responsibility for which rests with the State government or requires statewide uniformity.¹

SCDOT has exclusive authority over the State Highway System and zoning ordinances which conflict with this State agency authority are void. Law v. City of Spartanburg, 148 S.C. 299, 146 S.E. 12 (1928); Colyer v. Thomas, 268 S.C. 455, 234 S.E.2d 862 (1977). Under section 14, article 8 of the Constitution, in enacting ordinances, provisions applicable to the administration of a governmental service or function, responsibility for which rests with State government or which requires statewide uniformity, shall not be set aside. The exclusivity of SCDOT's authority in this area is set forth in express terms where the General Assembly has

¹ See, also, Edgefield County v. Georgia-Carolina Power Co., 104 S.C. 311, 88 S.E. 801 (1916) (“A highway is termed an incorporeal hereditament...”)

conferred upon it the "exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges." S.C. Code Ann. §57-3-110 (1).

That the planning, construction, and maintenance of the State Highway System is a responsibility that rests with the State government and withdrawn from the field of local control has been firmly established by our Supreme Court. In Town of Hilton Head v. Coalition of Expressway Opponents, 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992), the Court said, "The planning, construction, and financing of state roads is a governmental service which requires statewide uniformity." This principle was affirmed in Brashier v. South Carolina Department of Transportation, et al., 327 S.C. 179, 185, 490 S.E.2d 8, 11 (1997), where the Court stated, "When construing Article VIII, section 14, we have consistently held that a subject requiring statewide uniformity is effectively withdrawn from the field of local concern." Further, "We have already held that '[t]he planning, construction, and financing of state roads is a governmental service which requires statewide uniformity.'" [Citing Hilton Head, *supra*.]

Quoting further from Brashier:

Furthermore, the State, with which the duty to plan, construct, maintain and operate the state highway system has been entrusted, and which has been specifically authorized to finance state roads with tolls, has no other method of building these toll roads without getting county approval. *See* S.C. Code Ann. §§ 57-1-30; 57-3-200, (Supp. 1996). Thus, counties have been delegated the authority to approve or disapprove a governmental service requiring statewide uniformity. The master correctly held Article VIII, section 14(6) forbids such delegation. We find, however, the master erred in ruling section 57-3-615 unconstitutional only as applied to the Southern Connector Project. He based this limitation on his finding that some highway projects might be of a "purely local nature." This finding conflicts with the holding from *Town of Hilton Head Island*, which we have here reaffirmed, that state highway projects require

statewide uniformity. Therefore, we modify the master's ruling to hold section 57-3-615 unconstitutional on its face.

Brashier, supra, 327 S.C. at 186, 490 S.E.2d at 12 (1997).

Conferring upon each of the 46 counties and 278 municipalities in South Carolina the power to impose design standards on State Highways whether through tree ordinances or other land use mandates or restrictions would clearly upset the well-designed legislative system for building, maintaining, and financing a State system of interconnected highways. Yielding to local priorities regarding land use which conflict with NEPA and FHWA guidelines could jeopardize federal financial participation in the State's highway system, which is clearly a high priority of our General Assembly. See, Code sections 57-1-50, 57-3-110(6), and 57-3-670, all supra. The goal of tree preservation is commendable and is part of the environmental review process the Department undertakes in its planning. However, in many cases, the interest of tree preservation must yield to human interests such as dividing communities or other natural resource objectives such as the protection of waterways and recreation areas. (For instance, Section 4(f) of the Department of Transportation Act, 49 U.S.C. §303, stipulates that FHWA and other DOT agencies cannot approve the use of land from publicly owned parks, recreational areas, wildlife and waterfowl refuges, or public and private historical sites unless there is no alternative.) The goal of the NEPA process is to find the least damaging practical alternative when planning highway improvements. Moreover, confusion among the travelling public may result where highway design changes at the border of each town, city, or county. Finally, proper highway engineering may suffer to the detriment of the safety of the travelling public.

Our Supreme Court has discussed the law regarding the preemption of local law by State law in detail in S.C. State Ports Authority v. Jasper County, 368 S.C. 388, 629 S.E.2d 624 (2006). The Court discussed the three categories of preemption theretofore utilized in

determining whether federal law preempts State law: 1) express preemption, 2) implied field preemption, and 3) implied conflict preemption. According to the Jasper County Court, express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area. SCDOT's enabling statute is clear that, as to the subset of public roads under its purview, the State Highway System as defined in S.C. Code Ann. §§57-5-10, the Department has the "exclusive" authority to determine the design criteria and standards for construction and maintenance. S.C. Code Ann. §57-5-110.

Centralizing the State Highway System under a single highway commission proceeded under a succession of acts of the General Assembly in the early twentieth century. This culminated in one of the greatest political and legal conflicts of that century. In 1929, the General Assembly enacted a statute allowing the State Highway Commission to issue bonds backed in part by the motor fuels tax for the purpose of completing the State Highway System. 36 Stat. at Large, P. 670 (March 14, 1929). The State Highway System had until then been under the control of counties within their respective boundaries.² Opponents of the "Bond Act" sued and the Supreme Court sitting *en banc* for the last time in our history upheld the law, the majority of the Circuit Court judges outvoting the majority of the Supreme Court. State v. Mooror, 152 S.C. 455, 150 S.E. 629 (1929) cert. denied sub nom Johnson v. State Highway Commission of South Carolina, 281 U.S. 691, 50 S.Ct. 238, 74 L.Ed. 1120 (1930).³

² A small portion of the tax was distributed to counties to which they objected on the grounds that the amount was too small to be bondable.

³ At argument, Justice Van Devanter asked L.G. Southard, attorney for the bond opponents, whether the South Carolina Supreme Court was not the final arbiter of the State's constitution. Southard began his argument on the 14th amendment and Chief Justice Hughes said that argument wouldn't work. Southard asked, "Am I out of court?" to which C.J. Hughes said, "It looks that way." The Court adjourned without hearing from the respondent. J.H. Moore, *The South Carolina Highway Department 1917-1987* (1987).

III. As applied to the State Highway System, the tree ordinance constitutes a tax on a State government activity and State property.

As set forth above, the scheme of Article 9.4 of the Charleston ordinance is to require a permit to remove trees. If violated, the Planning Director may impose a fine to be deposited into the "Tree Fund." ZLDR, Subsection 9.4.6 E. Because the removal of trees from highway travel lanes and clear zones is unavoidable and inescapable⁴, the Ordinance applied to the Department is not regulation, rather a tax on the State Highway System even if referred to as a "contribution" to the Tree Fund. Under article X, section 3 of our constitution, property of the State is exempt from *ad valorem* taxation. Other than *ad valorem* property tax authorized by S.C. Code Ann. §§ 12-37-10, *et seq.*, and certain local option sales taxes, counties have no other taxing powers. Thus, to the extent the Ordinance may be held to apply to the highway system at all, this exaction is unconstitutional.

Highways exist on various property interests vested in the Department and obtained by gift, purchase, or condemnation. The property is titled in the State, operated exclusively for the benefit of the public and not for revenue and, thus, is exempt from taxation under section 3 of Article X of the Constitution. Benjamin v. Housing Authority of Darlington County, 198 S.C. 79, 15 S.E.2d 737, 739 (1941).

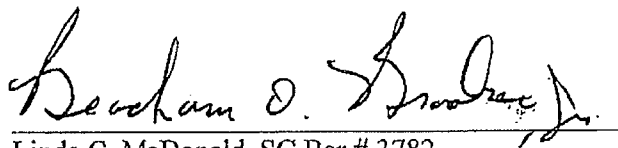
IV. Conclusion.

The operation of the State Highway System is a service of the State under the exclusive control of the S.C. Department of Transportation and its design, construction, and maintenance are functions that are withdrawn from the field of local concern per the State Constitution. This Court should declare that as a matter of law the Charleston County Zoning and Land

⁴ S.C. Code Ann. § 57-5-10 mandates that the Department maintain its highways in a safe and serviceable condition.

Development Regulation Ordinance is void and of no effect as applied to the State Highway System.

Respectfully submitted,

A handwritten signature in cursive script, reading "Beacham O. Brooker, Jr.", written in black ink over a horizontal line.

Linda C. McDonald, SC Bar # 3782
Beacham O. Brooker, Jr., SC Bar # 909
Post Office Box 191
Columbia, South Carolina 29202-0191
(803) 737-1347
brookerbo@scdot.org

Attorney for Defendant

Columbia, S.C.
January 21, 2015

Daniel C. Pennick, AICP
Director



Phone: 843.202.7200
Fax: 843.202.7222
Lonnie Hamilton III Public Services Building,
4045 Bridge View Drive
North Charleston, SC 29405

July 18, 2012

South Carolina Department of Transportation
Attn: Marcie Timmons
6355 Frontage Road
North Charleston, SC 29405

Re: Tree Violation Notice – Maybank Highway (SC 700)

Dear Ms. Timmons:

Based on a recent inspection of tree removal performed by the South Carolina Department of Transportation (SCDOT) within the Maybank Highway right-of-way on Wadmalaw Island, three Grand Trees were documented as being removed in violation of the *Charleston County Zoning and Land Development Regulations Ordinance*. The Ordinance defines a Grand Tree as, "Any tree measuring 24 inches or greater diameter breast height (DBH) except pines. All Grand Trees are prohibited from removal unless a Grand Tree Removal Permit is issued." A Grand Tree Removal Permit was not issued for the following trees:

- 1) 42 inches stump diameter at 18 inches stump height
- 2) 34 inches stump diameter at 12 inches stump height
- 3) 34 inches stump diameter at 18 inches stump height

Please see the attached reference regarding tree DBH in relation to stump diameter at various heights. Utilizing the calculations per this reference, each of these trees would have been a minimum of 24 inches DBH.

Article 11.6 Tree Protection and Preservation Violations, §11.6.1 Trees Removed Without Permits, B. Grand Trees states, "1. *Where Grand Trees have been removed in violation of this Ordinance or where removal is necessitated at any time due to acts of negligence, trees shall be replaced in accordance with a replacement schedule approved by the Planning Director. The replacement schedule shall establish the number, species, caliper, and location of replacement trees, and at a minimum shall require: a. That the combined caliper of replacement trees is equal to or greater than three times the caliper of the Grand Tree removed; and b.*

EXHIBIT 1

Individual replacements of trees are of the largest transplantable caliper available or equal to the loss of DBH inches." Based on this requirement, the replacement schedule shall be calculated as follows:

3 trees x 24 inches = 72 inches; therefore

72 inches x 3 due to violation requirements = 216 inches of replacement trees; therefore

216 inches / 2.5 inches minimum tree caliper = 86.4 total replacement trees

The SCDOT may opt to use trees of a larger caliper resulting in the reduction of the number of replacement trees. Additionally, the SCDOT may opt to donate money to the Charleston County Tree Fund in lieu of planting replacement trees. The Ordinance explains, *"The Tree Fund is a fund established to receive monies exacted from tree removal violation fines to include, but not be limited to, removal, damage, destruction, or as defined in Section 9.4.1.C of this Chapter, and as a form of mitigation when planting of the required trees is determined to be detrimental to the overall health of existing trees or impractical for the intended site design. The Planning Director shall impose a Tree Mitigation fee based on the current market retail value of two- to three-inch caliper trees installed to the American Association of Nurserymen Standards. If the applicant disagrees with the amount of the Tree Mitigation fee imposed, they may file appeal with the Board of Zoning Appeals in accordance with the provisions contained in this Ordinance. All Tree Mitigation fees collected shall be paid to the County Treasurer and placed in an account established exclusively for public beautification through the planting of trees in Charleston County."*

The County continues to receive multiple complaints from the citizens of Wadmalaw Island regarding this violation. Based on the Ordinance, the County must require the SCDOT to replant trees as mitigation for the removal of the three Grand Trees. The County will work with the SCDOT on the placement and location of the replacement trees within the Maybank Highway right-of-way. Please submit a timeline and replacement schedule proposal to the Charleston County Zoning/Planning Department no later than August 31, 2012. Thank you for your cooperation and community spirit in resolving this violation.

Sincerely,



Sally Brooks, ISA
Charleston County Code Enforcement Officer

CC: Joel Evans, Planner IV
Daniel Pennick, Zoning/Planning Director
Walter Smalls, Deputy Administrator for General Services



South Carolina
Department of Transportation
Office of Chief Counsel

FILE COPY

August 31, 2012

Linda C. McDonald
Chief Counsel

Assistant Chief Counsel
Natalie J. Moore
Barbara M. Wessinger
Beacham O. Brooker, Jr.
Amanda T. Taylor, Claims
Glennith C. Johnson

Claims Office
737-1260

Mr. Daniel Pennick
Director
Zoning and Planning Department
Charleston County
4045 Bridge View Drive
North Charleston, SC 29405

Re: Tree Violation Notice – Maybank Highway (SC 700)

Dear Mr. Pennick:

This is in response to the July 18, 2012 letter to Marcie Timmons of South Carolina Department of Transportation (SCDOT) from Sally Brooks, ISA, Charleston County Code Enforcement Officer, in regard to the referenced matter. The letter has been referred to this office for response.

SCDOT respectfully refuses to comply with the County's requests as set forth in the letter. Charleston County has no legal authority to order SCDOT to comply with its local tree ordinances in regard to maintenance work within the SCDOT highway right of way.

Pursuant to S. C. Code Section 57-5-10 SCDOT is charged with the duty to construct and maintain the state highway system in safe and serviceable condition. Pursuant to S. C. Code Section 57-3-110(1) SCDOT is granted the exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges. SCDOT's removal of the trees within the Maybank Highway right of way was deemed necessary for maintenance purposes and the safety of the travelling public.

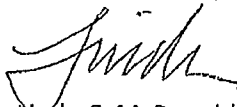
Zoning ordinances passed by local governments which conflict with a state agency's authority are void. See Law vs. City of Spartanburg, 148 S.C. 299, 146 S. E. 12 (1928); Colyer vs. Thomas, 268 S. C. 455, 234 S. E. 2d 862 (1977). See also South Carolina Attorney General's Opinion dated June 16, 1981 [1981 WL 96582 (S.C.A.G.)] wherein the Attorney General concluded that "any local ordinance which prohibits removal of trees by the South Carolina Department of Highways and Public Transportation pursuant to its authority to construct or maintain state highways would be in violation of the Constitution and law of this State."

EXHIBIT 2

Page Two
Letter to Pennick
August 31, 2012

We understand that Charleston County has a strong interest in preserving the beautiful low country environment and trees are certainly part of that environment. SCDOT will work with the County to promote this interest insofar as it does not impair SCDOT's statutory duty to maintain the highways in the State system for the safety of the travelling public.

Sincerely,

A handwritten signature in cursive script, appearing to read "Linda C. McDonald".

Linda C. McDonald
Chief Counsel

LCM/lm

cc: John Walsh, Deputy Secretary of Engineering
Robert Clark, District Six Engineering Administrator
Beacham O. Brooker, Assistant Chief Counsel



Daniel C. Pennick, AICP
Zoning/Planning Director

843.202.7200
Fax: 843.202.7218
Lonnie Hamilton III Public Services Building
4045 Bridge View Drive
North Charleston, SC 29405

November 14, 2012

Linda C. McDonald, Esquire
South Carolina Department of Transportation
Office of Chief Counsel
955 Park Street- Suite 343, Post Office Box 191
Columbia, South Carolina, 29202-0191

Re: Tree Violation Notice – Maybank Highway (SC 700)

Dear Ms. McDonald:

The Charleston County Zoning/Planning Department has reviewed your letter dated August 31, 2012 in response to a Tree Violation Notice on Maybank Highway sent by Sally Brooks from the Zoning & Planning Department to Marcie Timmons of the South Carolina Department of Transportation (SCDOT) dated July 18, 2012. We respectfully disagree with your assessment that the SCDOT is not required to comply with the *Charleston County Zoning and Land Development Regulations Ordinance*, specifically: *Article 9.4, Tree Protection and Preservation*; and *Article 11.6, Tree Protection and Preservation Violations*.

Title 6, Chapter 29, Section 6-29-770(A) of the Code of Laws of South Carolina, 1976, as amended, provides that ***"Agencies, departments, and subdivisions of the State that use real property, as owner or tenant, in any county or municipality in this State are subject to the zoning ordinances."*** Therefore, The Charleston County Zoning and Planning Department requires the SCDOT to comply with all applicable provisions contained in the *Zoning and Land Development Regulations Ordinance*.

The Charleston County Zoning and Planning Department staff will assist the SCDOT in the processing of any request for tree removal, and will answer any questions regarding tree removal violations, as required by the County's Ordinance.

Sincerely,

Daniel C. Pennick, AICP
Zoning and Planning Director

cc: Kurt Taylor, County Administrator
Walt Smalls, Deputy County Administer for General Services
Joe Dawson, County Attorney
File

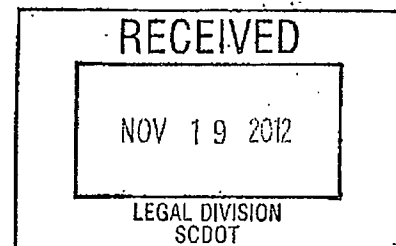
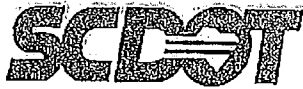


EXHIBIT 3



South Carolina
Department of Transportation
Office of Chief Counsel

January 16, 2013

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Chief Counsel

Assistant Chief Counsel
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Barbara M. Wessinger
Beacham O. Brooker, Jr.
Amanda T. Taylor, Claims
Glenn H. C. Johnson

Claims Office
737-1260

Mr. Daniel Pennick, AICP
Director
Zoning and Planning Department
Charleston County
4045 Bridge View Drive
North Charleston, SC 29405

Re: Tree Violation Notice – Maybank Highway (SC 700)

Dear Mr. Pennick:

Thank you for your letter of November 14, 2012. Unfortunately, we still disagree that the County has authority to override SCDOT's statutory duty to construct and maintain highways in the state highway system and to set the standards for constructing and maintaining those highways. Therefore, SCDOT respectfully reiterates its refusal to comply with the demands of the County set forth in its July 18, 2012 letter.

SCDOT's Deputy Secretary of Engineering John Walsh, Assistant Deputy Secretary Clem Watson, District Engineering Administrator Robert Clark and I met with County attorneys Joe Dawson, Austin Bruner and Bradley Mitchell last week to discuss this issue. Both SCDOT and the County want to comply with the law, but we disagree on its application. Therefore, it appears that the best way to proceed is to obtain a judicial resolution of this matter. We stand ready to respond to such action as the County deems appropriate.

Sincerely,

Linda C. McDonald
Chief Counsel

LCM/lm

cc: John Walsh, Deputy Secretary of Engineering
Robert Clark, District Six Engineering Administrator
Beacham O. Brooker, Assistant Chief Counsel
Joseph Dawson, III, Attorney

be used outside of right-of-ways when deemed appropriate to surrounding development characteristics by the Planning Director.

ARTICLE 9.4 TREE PROTECTION AND PRESERVATION

§9.4.1

GENERAL

A. Findings

Trees are an essential natural resource, an invaluable economic resource, and a priceless aesthetic resource. Trees play a critical role in purifying air and water, providing wildlife habitat, and enhancing natural drainage of stormwater and sediment control. They also help conserve energy by providing shade and shield against noise and glare. Trees promote commerce and tourism by buffering different land uses and beautifying the landscape. The Tree Protection and Preservation regulations of this Article are intended to enhance the health, safety and welfare of Charleston County citizens.

B. Applicability and Exemptions

1. Applicability

The provisions of this Article in their entirety shall apply to all real property in unincorporated Charleston County, except as otherwise expressly exempted.

2. Exemptions

- a. Single family detached residential lots of record shall be exempt from all provisions in this Article except for the Grand Tree documentation, protection and replacement provisions. This exemption does not include applications for Major or Minor Subdivisions for which landscape buffers may be required per Section 9.5.4.
- b. The Planning Director shall be authorized to modify or reduce the standards of this Article for commercial nursery operations.
- c. This Article shall not restrict public utilities and electric suppliers from maintaining safe clearance around existing utility lines, and existing easements in accordance with applicable state laws. Siting and construction of future gas, telephone, communications, electrical lines or other easements shall not be exempt from the provisions of this Article.
- d. Removal of trees for the purpose of conducting "bona fide forestry operations" shall be exempt from the provisions of this Article except for removal of Live Oak species of Grand trees.

- e. Removal of trees for the purpose of establishing bona fide agricultural uses, as specified in Section 3.8.2A of this Ordinance, shall be exempt from the provisions of this Article except for the Grand Tree documentation, protection and replacement provisions.
- f. Removal of trees for the purposes of maintaining safe clearance for aircraft as required by federal law or the establishment of facilities exclusively dedicated to aviation operations are exempt from this Article.
- g. Removal of trees on properties in the Industrial Zoning District is permitted pursuant to the following conditions:
 - i. Tree removal cannot occur prior to site plan approval;
 - ii. This exemption shall not apply to Live Oak species of Grand Trees or any protected trees within required buffers and parking lots; and
 - iii. Mitigation of removed trees, as stated in this Section, is required. Staff shall approve the mitigation of such trees in accordance with Section 9.4.6 of this Ordinance.

3. Partial Exemptions for SCDOT and CCPW

The South Carolina Department of Transportation (SCDOT) and Charleston County Public Works (CCPW) shall be exempt from the provisions of this Article except the following:

- a. All trees species measuring 6 inches or greater DBH located in right-of-ways along Scenic Highways as designated in this Ordinance shall be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5B and 9.4.6.
- b. Grand Tree Live Oak species in all present and proposed right-of-ways and easements shall be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5.B and 9.4.6.
- c. All Grand Trees other than Live Oak species in all present and proposed right-of-ways and easements not located on a Scenic Highway are protected but may be permitted to be removed administratively when mitigated per Article 9.4.6.

C. DEFINITION OF "TREE REMOVAL"

For the purpose of this Article, the term "tree removal" shall include, but not be limited to, damage inflicted to the root system by machinery; girdling; storage of materials and soil compaction, changing the natural grade above or below the root system or around the trunk; damage inflicted on the tree permitting fungus infection or pest infestation; excessive pruning; excessive thinning; paving with concrete, asphalt or other impervious material within such proximity as to be

harmful to the tree; or any act of malicious damage to a tree. Excessive pruning or thinning shall be pruning or thinning that exceeds more than 25 percent of the leaf surface on both the lateral branch and the overall foliage of a mature tree that is pruned within a growing season. Additionally, one-half of the foliage of a mature tree is to remain evenly distributed in the lower two thirds of the crown and individual limbs upon completion of any pruning.

D. MEASUREMENTS AND DEFINITIONS

1. Diameter Breast Height

Diameter Breast Height is used for measuring all trees greater than 12-inch caliper. The Diameter Breast Height (DBH) of a tree is the total diameter, in inches, of a tree trunk or trunks measured 4½ feet above existing grade (at the base of the tree). In measuring DBH, the circumference of the tree shall be measured with a measuring tape designed specifically to calculate diameter. A standard measuring tape may be used to measure diameter when the circumference is divided by 3.14. If a tree trunk splits at ground level and the trunks do not share a common base (separated by earth at natural grade), then each trunk shall be measured as a separate tree. If a multi-trunk tree splits below the 4.5 foot mark and the trunks share a common base, all trunks shall be measured separately, added together, and count as one tree. Any trunk measuring less than 8 inches DBH is not included in the calculation.

2. Caliper

Caliper is the diameter of a tree trunk measured six inches above the ground on trees with calipers of four inches or less. For trees between four-inch and 12-inch caliper, the trunk is measured 12 inches above the ground.

3. Grand Tree

Any tree measuring 24 inches or greater diameter breast height (DBH) except pines. All Grand Trees are prohibited from removal unless a Grand Tree Removal Permit is issued.

4. Protected Trees

Any tree on a parcel with a diameter breast height of eight inches or greater prior to development and all trees within required buffers or required landscape areas. Limited removal is allowed only when specified by the provisions of this Ordinance.

§9.4.2

ADMINISTRATION

A. Zoning Permit Required

1. Tree Removal

Removal of required trees is prohibited prior to the issuance of a Zoning Permit by the Planning Director. Zoning Permits will be issued only after a tree plan is approved by the Planning Director, as outlined below.

2. Excess Canopy (Limb) Removal

- a. Removal of three or more limbs with an individual diameter of six inches or greater shall require a Zoning Permit.
- b. Removal of any size limbs which contribute to more than one hundred continuous linear feet of canopy over public roadways shall require Variance approval from the Board of Zoning Appeals. This requirement shall not preclude the SCDOT, CCPW or other entities from maintaining height clearances of 14' or less and width clearances within designated travel ways and from removing unprotected trees along right-of-ways for road widening projects.

B. Documentation

Tree plans, prepared by a licensed registered surveyor, civil engineer or landscape architect shall be required on all non-exempt parcels before any zoning permits are issued.

§9.4.3

TREE PLANS AND SURVEYS

A. General

Tree plans of the same scale as, and superimposed on, a development site plan or preliminary plat shall include location, number, size (DBH), and species with a scaled graphic representation of each Grand Tree, canopy size and shape, and the trunk location. All required tree surveys shall include the name, phone number, address, signature, and seal of a licensed surveyor, landscape architect, or civil engineer registered in the State of South Carolina. The survey shall include all trees to be protected or preserved, and those scheduled to be removed, including dead and damaged trees. In cases where a previously approved recorded plat is utilized for the purpose of tree plans the name, address, phone number, signature and seal of the licensed landscape architect, civil engineer, forester or surveyor, registered in the State of South Carolina shall be provided. A scaled infrared or high resolution black and white aerial photograph or print of equal quality may be substituted in cases where the Planning Director determines that it would provide the same information as a tree plan. However, all Grand Trees within 40 feet of proposed construction and land disturbance areas and trees within required buffers must be surveyed and mapped.

B. Major and Minor Subdivision Preliminary Plats

Refer to Section 8.4.2.A.4 Preliminary Plat Application in the Subdivision Regulations of Chapter 8 of this Ordinance.

C. Commercial, Industrial and Multi-Family Parcels

1. All tree surveys must show the location, number, size and species of all trees 8 inches or greater DBH (Diameter Breast Height) including those scheduled to be removed.

2. When there are no trees 8 inches or greater DBH, documentation of this fact shall be provided from a registered surveyor, engineer or landscape architect.

[Commentary: Assistance in tree identification and condition should be provided by a forester or qualified arborist.]

D. Single Family Detached Residential Parcels

1. Single family detached residential parcels shall show all Grand Trees within the area of construction and land disturbance and in conjunction with the subdivision regulations of this Ordinance at the time a zoning or building permit application is made.

§9.4.4 REQUIRED TREE PROTECTION

A. General

All Grand Trees and any other trees required to remain on a site as outlined in this Ordinance must be protected during construction and development of the parcel. Tree protection must be shown on all development plans prior to site plan approval. A site inspection of the tree barricades must be scheduled by the applicant with the Planning Department for approval prior to the issuance of permits or the start of development activities.

Prior to issuance of a zoning permit, a pre-construction planning conference for tree preservation is required on site with the Planning Director's representative, the applicants, and any parties deemed appropriate for the purpose of determining if there is a need for additional tree protection techniques and for designating placement of tree barricades, construction employee parking, temporary construction office and dumpsters.

B. Tree Protection During Development and Construction

Protective barricades shall be placed around all required trees in or near development areas on all zoning parcels, prior to the start of development activities. These barricades, constructed of wood or plastic fencing or other approved materials shall be erected in accordance with standards by the Planning Director and placed beneath the canopy drip line or one and one-half feet times the DBH of the tree. Other protective devices or construction techniques may be used as approved by the Planning Director. The barricades shall remain in place until development activities are complete. The area within the protective barricade shall remain free of all building materials, dirt, fill, or other construction debris, vehicles, and development activities. All required trees are also subject to the provisions of Section 9.5.6 of this Chapter and subject to the enforcement criteria of Chapter 11.

C. Partial Exception for Limited Clearing

Limited clearing and grubbing may be authorized by the Planning Director prior to the installation of protective tree barricades on sites that exhibit unusually heavy undergrowth where access to the interior of the site and its protected trees would be otherwise highly impractical. Limited clearing shall be for the

express purpose of accessing the property and protected trees to erect the required tree protection and silt fencing. For the purposes of this Article, limited clearing shall be clearing done with hand tools, push or walk behind equipment or lightweight bush-hog type equipment designed specifically for brush and undergrowth clearing that is not capable of removing vegetation greater than 3 inches in diameter. Under no circumstances will metal tracked bulldozers, loaders, or similar rider/operator types of equipment be allowed on the site until the protective barricades are erected and a zoning permit is issued.

D. Separation of Trees from Pavement, Grading and Structures

Paved areas shall be separated from trees by a minimum distance of the drip line or one and one-half feet times the DBH or as modified by the Planning Director as deemed necessary to protect the root system of the tree. Paved areas shall not constitute more than 25 percent of the protected area beneath a tree. Any paving, grading, trenching, or filling within the remaining 75 percent of the protected area must be approved by the Planning Director and may require specific construction techniques be used in order to preserve the health of the tree. Refer to Chapter 9 exhibits for examples. When grading and construction within the protected area of a tree has been approved, all damaged roots shall be severed clean and inspected by the County Landscape Architect or Inspector prior to the receipt of a Zoning Permit.

E. Quantity and Location of Trees to be Protected

Before the issuance of a Zoning Permit for Commercial, Industrial, Multi-Family, and Civic/Institutional uses, the following number of trees with a diameter breast height of 8 inches or greater shall be preserved and protected in accordance with the provisions of Section 9.4.4.B of this Ordinance. All trees located within required buffers as outlined in Article 9.5 shall be protected.

1. 20 trees per acre; or
2. Any number of trees with a combined diameter breast height of at least 160 inches per acre.
3. Required drainage improvements such as detention and retention ponds and wetlands may be subtracted from the area used to calculate tree preservation requirements.

§9.4.5

TREE REMOVAL

A. Generally

Permits for tree removal may be approved where one or more of the following conditions are deemed to exist by the Planning Director:

1. Trees are not required to be retained by the provisions of this Article.
2. Trees are diseased, dead or dying (as determined by the Planning Director or a qualified arborist);

3. Trees pose an imminent safety hazard to nearby buildings, or pedestrian or vehicular traffic (as determined by the Planning Director or a qualified arborist); or
4. Removal of required trees has been approved by the Board of Zoning Appeals.

B. Variances

Grand Trees and protected trees that do not meet the above criteria may be removed only where approved by the Board of Zoning Appeals, and shall be replaced according to a schedule determined by the Board. The Planning Director will make recommendations to the Board concerning the number, species, DBH or caliper, and placement of such trees.

C. Emergency Provisions

In the event that a tree poses a serious and imminent threat to public safety due to death, disease or damage resulting from emergencies including, but not limited to, fires, flooding, storms, and natural disasters, the Planning Director may waive requirements of this Article. Documentation must later be submitted for review outlining the threat to public safety which initiated the removal. Documentation must include any written findings by a qualified arborist and photographs supporting the tree removal emergency. The Planning Director may require replacement of required trees that are removed where it is determined that death or disease resulted from negligence.

D. Violations and Penalties

Violations and penalties are specified in Chapter 11 of this Ordinance.

§9.4.6

TREE REPLACEMENT

A. Generally

Tree replacement shall be required accompanying development on all non-exempt properties in the manner described below:

1. When replacement canopy trees are required in fulfillment of the requirements of this Article, they shall be no smaller than two and one-half-inch caliper.
2. The Planning Director or Board of Zoning Appeals is empowered to require trees of larger caliper as determined appropriate for site-specific conditions and the circumstances, lawful or illegal, under which removal occurred.

B. Protected Trees Removed in Violation

When trees of 8 inches DBH or greater have been removed in violation of this Ordinance, replacement trees shall be planted in the same general area according to a replacement schedule approved by the Planning Director.

C. Sites with Less Than 160 Inches per Acre Combined DBH

When lots lack a sufficient number of trees to meet the requirement for DBH/number of trees per acre, all trees six inches DBH or greater shall be

preserved and protected in accordance with Section 9.4.4.B of this Chapter during development and must equal no less than 40 inches per acre combined DBH. On lots with less than 40 inches per acre combined DBH, additional trees shall be planted on the lot equaling or exceeding 40 inches per acre combined DBH. Planting schedules shall be approved by the Planning Director.

D. Previously Cleared Sites

Where sites were completely cleared of trees prior to adoption of this Article or have been cleared subsequently for activities exempted from this Article, replacement trees shall be planted, the combined caliper of which equals or exceeds 40 inches per acre. Replacement schedules, including number, species, caliper and placement shall be approved by the Planning Director.

E. Tree Fund

The Tree Fund is a fund established to receive monies exacted from tree removal violation fines to include, but not be limited to, removal, damage, destruction, or as defined in Section 9.4.1.C of this Chapter, and as a form of mitigation when planting of the required trees is determined to be detrimental to the overall health of existing trees or impractical for the intended site design. The Planning Director shall impose a Tree Mitigation fee based on the current market retail value of two- to three-inch caliper trees installed to the American Association of Nurserymen Standards. If the applicant disagrees with the amount of the Tree Mitigation fee imposed, they may file appeal with the Board of Zoning Appeals in accordance with the provisions contained in this Ordinance. All Tree Mitigation fees collected shall be paid to the County Treasurer and placed in an account established exclusively for public beautification through the planting of trees in Charleston County.

F. Bankruptcy or Abandonment of Site

When trees have been removed through an approved mitigation program and the project will not be completed for any reason (i.e., bankruptcy, abandonment, change in ownership, etc.), the owners of the subject property are responsible for the mitigation of the removed trees as outlined and agreed or subject to Section 9.4.6E of this Chapter.

§9.4.7 INSPECTIONS AND FINAL APPROVAL

- A.** The Planning Director shall periodically visit development sites prior to completion to monitor compliance with the tree plan approved for a project.
- B.** Prior to issuance of a Certificate of Occupancy for a completed structure by the Director of Building Services, the Planning Director shall issue a statement of approval attesting to the developer's compliance with the site plan approved for the project (including landscaping, parking, drainage, etc.). The Director of Building Services shall withhold certificates of occupancy pending verification of compliance. It is the responsibility of the owner or agent to contact the Planning Director regarding the compliance inspection. Such inspections will occur within five working days of contact. Failure to obtain a Certificate of Occupancy prior to occupying or using the building for its intended purpose will result in ticketing and fines. However, the Planning Director shall approve a

delayed schedule for planting materials (provided by the applicant's contractor) when the immediate planting schedule would impair the health of the plants. When a delayed planting schedule is approved, the applicant shall provide a bond equivalent to one and one-half times the projected cost of the planting materials. This is designed to include severe weather, such as droughts, heat waves, and floods.

- C. Within three years of the issuance of the Certificate of Occupancy, the Planning Director shall perform a site inspection to verify the health of trees which were retained to meet the requirements of this Article and which may have suffered damage due to insufficient protective measures during development.
- D. Each required tree that is determined by the Planning Director to be diseased or injured to the extent it is irreparably damaged shall be approved for removal. The burden of proof of the extent of the disease or injury shall rest with the applicant, who must provide documentation from a qualified arborist. Any tree damaged during or as a result of construction shall be repaired to the satisfaction of the Planning Director and in accordance with accepted ANSI A300 or International Society of Arboriculture practices. Tree damage must be repaired prior to issuance of a Certificate of Occupancy.
- E. The owners of a non-exempt property or properties shall be responsible for the maintenance of all required trees. No department or agent of the County of Charleston is in any way responsible for the maintenance of required trees on private property.

ARTICLE 9.5. LANDSCAPING, SCREENING AND BUFFERS

§9.5.1 APPLICABILITY

Unless expressly exempted, the landscaping, screening and buffering standards of this Article shall apply to all new non-residential development and all new major roadways that serve Residential Major Subdivisions (ten or more lots). Minor Subdivisions (those with fewer than ten lots) may be required to provide landscaping, screening or buffering on major roadways when the Planning Director determines that such landscaping, screening or buffering is necessary to ensure that the purposes of this Ordinance are met. When modifications or additions are being made to an existing non-residential building or site, the standards of this Article shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning Director, provided that when modifications or additions are proposed that would increase the number of parking spaces, the area of vehicular use areas or gross floor area of buildings by more than 25 percent (above existing), then the entire parcel shall be brought into compliance with all applicable standards of this Article. Before calculating the percentage of area for re-development and improvement, any proposed demolition of structures and parking is subtracted from the existing gross floor area of buildings and number of parking spaces.

§9.5.2 EXHIBITS

Drawings included as exhibits at the end of this Chapter are meant to compliment the language of the Ordinance. In the event of a conflict with the text of the Ordinance, the text shall apply.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

County of Charleston,)
South Carolina,)

Plaintiff,)

vs.)

South Carolina Department)
of Transportation,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-10-6613

FILED
2015 FEB 23 PM 4:40
JULIE J. ARNOLD
CLERK OF COURT
BY

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR SUMMARY JUDGMENT**

TO: DEFENDANT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
AND LINDA C. MCDONALD, ESQUIRE AND BEACHAM O. BROOKER, JR.,
ESQUIRE, ATTORNEYS FOR DEFENDANT

PLEASE TAKE NOTICE that the Plaintiff County of Charleston, South Carolina will move before the presiding judge of the Court of Common Pleas, Ninth Judicial Circuit, Charleston County for and order granting it summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. In support of this motion, the County submits there is no genuine issue as to any material fact and the County is entitled to judgment as a matter of law on the grounds that:

(1) the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 ("Planning Act") and South Carolina law require the South Carolina Department of Transportation ("SCDOT") to adhere to the County's zoning ordinances;

(2) the Planning Act authorizes local governments in South Carolina to adopt zoning ordinances regulating land use within their jurisdictions; and

(3) Charleston County Council adopted its zoning and land planning ordinances pursuant to the Planning Act on November 20, 2001, as amended, referred to as the Charleston County Zoning and Land Development Regulations Ordinance ("ZLDR") to regulate land use and development in the unincorporated areas of the County. The ZLDR provides various tree protection and preservation regulations and prohibits the removal of trees prior to the issuance of a zoning permit by the Charleston County Planning Director. The SCDOT removed trees in the County in violation of the ZLDR.

The motion will be supported by the pleadings, a memorandum of law in support of the motion, and oral argument.

CHARLESTON COUNTY, SOUTH CAROLINA



JOSEPH DAWSON, III, County Attorney

BERNARD E. FERRARA, JR., Deputy County Attorney

AUSTIN A. BRUNER, Assistant County Attorney

CHARLESTON COUNTY ATTORNEY'S OFFICE

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North Charleston, South Carolina 29405

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ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
February 23, 2015

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
County of Charleston,	)	
	)	
Appellant,	)	
v.	)	Case No. 14-CP-10-6613
	)	
South Carolina Department of	)	
Transportation,	)	
	)	
Respondent.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on April 7, 2015, before The Honorable R. Markley Dennis, Jr. in Courtroom 4B of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by counsel as follows:

APPEARANCES:

Beacham Brooker, Jr., Esq
Austin Bruner, Esq.
Appearing for Appellant

Joe Dawson, Esq.
Bernie Ferrera, Esq.
Appearing for Respondent

Deborah Garrison
Circuit Court Reporter – 9th Judicial Circuit
P O Box 901
Johns Island, South Carolina 29457
dgarrison@sccourts.org

County of Charleston v South Carolina DOT

Case No. 14-CP-10-6613

Hearing of April 7, 2015

Before The Honorable R. Markley Dennis, Jr.

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1 THE COURT: Charleston County
2 versus the South Carolina Department of
3 Transportation, DOT. Cross-Motions for
4 summary judgment.

5 MR. DAWSON: Good afternoon, Your
6 Honor.

7 THE COURT: How are you, sir?

8 MR. DAWSON: Very good, thank you.

9 THE COURT: Since they are cross-
10 Motions, then this must be a matter that has
11 to be decided as a matter of law. Right?

12 MR. DAWSON: That's the position of
13 the parties, Your Honor. We're hoping that
14 you can help us out.

15 THE COURT: I understand. The
16 reason that I say this is because in 1997 we
17 used to do Motions for summary judgment in
18 chambers because the record isn't -- your
19 arguments aren't really the record, it's what
20 you submit. Two attorneys said 'yeah, I
21 agree, Judge.' So I ruled in favor of one
22 and they appealed it, said there was a
23 genuine issue of fact. The Court said
24 'you're right.' So I'm not going to get
25 caught in that trap again. Y'all agree

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Case No. 14-CP-10-6613

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1 I've got to rule one way or the other?

2 MR. DAWSON: That's what we are
3 hoping you will do, sir.

4 THE COURT: All right, which one
5 do you want to hear first? You've got the
6 floor.

7 MR. BOOKER: This is a lawsuit for
8 a declaratory judgment, Charleston County
9 against the Department of Transportation.
10 Under their tree cutting ordinance, which I
11 believe is to preserve trees, and that if you
12 do have to cut a tree you have to comply with
13 the tree cutting ordinance that they have in
14 the county.

15 We cut three trees on Bohicket, uh,
16 Parkway -- or Road, I think it is -- or road,
17 I guess, and received a notice of violation
18 of the tree ordinance. May I -- we, uh,
19 whatever.

20 We refuted it on the grounds -- of
21 course, the Constitution because it's the
22 State highway system. The Constitution draws
23 that State function from the -- I think that
24 is well settled in the Horatio (phonetic)
25 case, saying that the State Highway draws

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1 from local control, it has to do with
2 planning. I think that has been fairly well
3 settled by our Supreme Court. There are good
4 reasons for that. We have to follow all
5 kinds of environmental rules of the Federal
6 government under the instructions of the
7 General Assembly preserving the quality of
8 the Federal government, need for process and
9 whatnot.

10 THE COURT: Follow the supremacy
11 clause.

12 MR. BOOKER: Right.

13 THE COURT: Okay.

14 MR. BOOKER: It's called something
15 else other than the supremacy clause.

16 THE COURT: Well, the bottom line
17 is that if the Federal government says
18 something applies to you and everybody else,
19 then you have to give deference to the
20 Federal government, don't you? We tried that
21 once before and that didn't work so well.

22 MR. BOOKER: No, we can't refuse
23 that, Your Honor.

24 THE COURT: Exactly.

25 MR. BOOKER: So, uh, in short, Your

1 Honor, the staff -- I mean the Horatio
2 (phonetic) case says that the State Highway
3 Department, the State highway system, is
4 drawn from local control. This goes to
5 planning, routing. If we were required to
6 follow the zoning ordinances of a hundred and
7 seventy-eight municipalities in forty-six
8 counties, it would just be impossible. We
9 just couldn't do that. I will let the County
10 ---

11 THE COURT: That will be fine,
12 then you can respond to them. Mr. Dawson?

13 MR. DAWSON: Your Honor, we sent
14 you a copy of our memoranda.

15 THE COURT: I have it. All
16 memoranda submitted are certainly
17 incorporated for the purposes of review
18 should that become necessary.

19 MR. DAWSON: Thank you, Your Honor,
20 we believe obviously that the Department of
21 Transportation is subject to local zoning.
22 There is a statute that provides that State
23 agencies are not exempt from the powers of --
24 Section 6-29-770 specifically says the
25 Department shall set the zoning. We adopted

1 the zoning ordinance and that regulates
2 trees.

3 We do not believe that there is a
4 conflict in the statutes that are described
5 here today.

6 The DOT, we do not dispute, has the
7 authority to maintain, plan and build
8 highways. What we are talking about is an
9 area that they are not regulating, and that
10 is tree protection and preservation.

11 Your Honor, our ordinance exempts in
12 part the Department of Transportation for a
13 certain class of trees. The trees that are
14 in question today do not fit within that
15 class.

16 Secondly, Your Honor, our ordinance
17 specifics that if the purpose of tree removal
18 is for safety of vehicular traffic, it
19 equally is exempt if the Department shows
20 that it is for safety reasons that the trees
21 be removed.

22 THE COURT: Sounds like to me that
23 y'all have told me at least two issues of
24 fact right now.

25 MR. DAWSON: Your Honor, we don't

1 disagree that in fact the ordinance, the law
2 says what I just described in that they
3 simply believe ---

4 THE COURT: I understand that, but
5 you believe that it is not exempt.

6 MR. DAWSON: Yes, sir.

7 THE COURT: They believe that it
8 is.

9 MR. DAWSON: Yes, sir.

10 THE COURT: Isn't that an issue of
11 fact?

12 MR. DAWSON: It is an issue of
13 statutory interpretation.

14 THE COURT: Oh, I beg your pardon.
15 I think you've said that there are certain
16 trees that you agree if it falls within a
17 certain category that they are entitled to do
18 it without being subject to the fine.

19 MR. DAWSON: That's correct, Your
20 Honor. The trees in question have nothing to
21 do with ---

22 THE COURT: And who determined
23 that?

24 MR. DAWSON: Your Honor, the fact
25 that the trees cut were greater than twenty-

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1 four inches. If they had not been, we would
2 not be here today because as a matter of
3 right, under our local law, if it is less
4 than twenty-four ---

5 THE COURT: Let me ask you a
6 question. Where does the money go? Assuming
7 that there is a fine imposed, where does that
8 money go?

9 MR. DAWSON: It goes to a tree
10 fund.

11 THE COURT: And what's the -- the
12 tree fund is managed by, whom?

13 MR. DAWSON: By the County, Your
14 Honor.

15 THE COURT: By the County?

16 MR. DAWSON: Yes, sir, Your Honor.
17 What happens, Your Honor, with that fund,
18 it's an option to either replant pursuant to
19 a schedule under the ordinance or if it is
20 impractical to replant trees, based on what
21 was cut, then the option is to place money
22 into a tree fund. But, Your Honor, you only
23 get to ---

24 THE COURT: What happens to the
25 tree fund?

1 MR. DAWSON: What happens to the
2 tree fund, Your Honor?

3 THE COURT: Yes. If the -- does
4 the County get the benefit of deciding how to
5 use that money?

6 MR. DAWSON: That's correct, Your
7 Honor; (affirmative nod), for the purpose of
8 replanting trees. The tree fund has a
9 limited application in county government for
10 the purpose of fulfilling the legislative
11 intent in the ordinance, which is tree
12 protection and preservation. So what is not
13 in dispute is the fact that there is an
14 ordinance that, generally speaking, exempts
15 the Department except for, as I say, a
16 certain class of trees.

17 THE COURT: Well, let me ask a
18 silly question. Maybe Charleston is -- and
19 Charleston is unique in many ways.

20 MR. DAWSON: Yes, sir.

21 THE COURT: Those of us who are
22 blessed to live in this area know that, and
23 that's not -- those aren't -- that is not
24 facetious. But are you telling me that in
25 the history of this state -- is Charleston

1 the only person that has a tree cutting
2 ordinance?

3 MR. DAWSON: I do not. I suspect
4 that most jurisdictions equally have
5 provisions that protect trees.

6 THE COURT: Do you encounter those
7 elsewhere in the state? The reason that I am
8 asking is because it might be a novel issue
9 and we need to set it up. It sounds like to
10 me that we're really saying that Charleston
11 says 'we get to pick and choose when the law
12 applies or doesn't apply.' Because that's
13 what you're saying.

14 MR. DAWSON: Yes, Your Honor.

15 THE COURT: 'We agree that you can
16 do it sometimes but only when we tell you
17 that you can.'

18 MR. BOOKER: Your Honor, I think
19 that's a ---

20 THE COURT: I understand that but
21 you -- I think Charleston is still part of
22 the state of South Carolina. I could be
23 wrong. When I was in school we called it
24 Charleston USA, because we'd drive down here
25 to go to open bars, which were not permitted

1 at that time.

2 MR. DAWSON: Your Honor, we started
3 the hearing out by stating that there clearly
4 is a dispute; we believe that the law
5 applies, they don't.

6 THE COURT: I tell you what let's
7 do. Y'all agree ---

8 MR. DAWSON: Yes, sir.

9 MR. BOOKER: I don't disagree but
10 there are two points that I'd ---

11 THE COURT: I will let you respond
12 and then I will let Mr. Dawson have the
13 closing remarks.

14 MR. DAWSON: Your Honor, my purpose
15 really is reiterate -- if you've got my memo
16 ---

17 THE COURT: I got your memo.

18 MR. DAWSON: It says everything
19 that I would ever want to say in life and my
20 hope is that if you disagree with me that you
21 will reject all my legal arguments and
22 positions in here so that I can continue to
23 make my same claims about how great
24 Charleston is.

25 THE COURT: You -- whether I

1 reject it or not, you can still make those
2 claims, my friend.

3 MR. DAWSON: Thank you, I
4 appreciate it.

5 THE COURT: Rightly so.

6 MR. BROOKER: Your Honor, one
7 important point to understand is that we do
8 not disagree that the Department of
9 Transportation, as a State agency, is subject
10 to the statute that says that State Highway
11 system controls. We have to have uniformity
12 and we just can't be subject to all the local
13 ordinances and so forth.

14 Secondly, we would have to -- if in
15 fact planning for this -- if Charleston
16 County don't cut these trees, then we'd have
17 to find another route for the highway and go
18 through the valley of all sorts of things,
19 such as routing through minority neighbors,
20 so it would be very damaging thing. I think
21 this disagreement can be decided on by the
22 law, Your Honor.

23 THE COURT: Okay. I will decide
24 it and then I am sure that I will have a
25 chance to read about it. Thank you very

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Hearing of April 7, 2015
Before The Honorable R. Markley Dennis, Jr.

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1 much. I appreciate it. Good to see you.

2 (HEARING CONCLUDED)
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County of Charleston v South Carolina DOT

14

Case No. 14-CP-10-6613

Hearing of April 7, 2015

Before The Honorable R. Markley Dennis, Jr.

STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF CHARLESTON)

I, the undersigned Deborah Garrison, Circuit Court Reporter for the 9th Judicial Circuit, hereby certify that the foregoing is a complete and accurate transcript of the hearing held in the within action heard on April 7th, 2015, before The Honorable R. Markley Dennis, Jr.;

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.



Deborah Garrison

Charleston, South Carolina
July 10, 2015

14-6613

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
County of Charleston, South Carolina,)
Plaintiff,)
vs.)
South Carolina Department of)
Transportation)
Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NUMBER: 2014-CP-10-6613

CLERK OF COURT
JULIE ARMSTRONG
JUL 15 2 14 PM '14

Memorandum of Law
In support of the County's Motion for
Summary Judgment and in Opposition to
the South Carolina Department of
Transportation's Motion for
Summary Judgment

INTRODUCTION

Charleston County (the "County") submits this memorandum of law in support of its motion for summary judgment and in opposition to the South Carolina Department of Transportation (the "SCDOT") motion for summary judgment pursuant to Rule 56, SCRPC. The County asks this Court to find that the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 ("Planning Act") requires the SCDOT to comply with Charleston County Zoning and Land Development Regulation (ZLDR) Article 9.4, Tree Protection and Preservation. The County contends that since it had the power to adopt ZLDR, Art. 9.4 Tree Protection and Preservation and the provision is not inconsistent with the Constitution and general laws of the State, the SCDOT must comply with the regulatory provision of Art. 9.4.

This Court should find that there are no genuine issues as to any material fact in dispute, and therefore, it should grant the County's Motion, because the SCDOT is not exempt from complying with local zoning under the Planning Act or any other laws of this State.

FACTS

On November 20, 2001, Charleston County Council adopted Ordinance No. 1202, as amended, referred to as the Charleston County Zoning and Land Development Regulations Ordinance to regulate land use in the unincorporated areas of the County pursuant to the Planning Act. Among other things, the ZLDR regulates tree removal and protection in the unincorporated areas of the County. See Exhibit A, Art. 9.4, § 1 through § 7, Tree Protection and Preservation. The County determined as part of its legislative finding that:

Trees are an essential natural resource, an invaluable economic resource, and a priceless aesthetic resource. Trees play a critical role in purifying air and water, providing wildlife habitat, and enhancing natural drainage of stormwater and sediment control. They also help conserve energy by providing shade and shield against noise and glare. Trees promote commerce and tourism by buffering different land uses and beautifying the landscape. The Tree Protection and Preservation regulations of this Article are intended to enhance the health, safety and welfare of Charleston County citizens.

ZLDR Art. 9.4, Tree Protection and Preservation, § 9.4.1.

Consistent with the County's legislative intent, the ZLDR prohibits the removal of trees prior to the issuance of a zoning permit by the Planning Director. See ZLDR Art. 9.4, § 9.4.2 and § 9.4.5. Furthermore, [t]he provisions of this Article in their entirety shall apply to all real property in unincorporated Charleston County, except as otherwise expressly exempted." ZLDR Art. 9.4, § 9.4.1(B)(1). Notwithstanding this bar to tree removal, the ZLDR provides a partial exemption for the SCDOT allowing it to remove trees without prior permission or a zoning permit, except for the following:

- a. All trees species measuring 6 inches or greater DBH located in right-of-ways along Scenic Highways as designated in this Ordinance shall be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5B and 9.4.6.

- b. Grand Tree Live Oak species in all present and proposed right-of-ways and easements shall be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5.B and 9.4.6.
- c. All Grand Trees other than Live Oak species in all present and proposed right-of-ways and easements not located on a Scenic Highway are protected but may be permitted to be removed administratively when mitigated per Article 9.4.6.

ZLDR, Art. 9.4, § 9.4.1(B)(3).¹

On or about July 18, 2012, the County sent the SCDOT a Notice of Tree Violation regarding work the SCDOT was performing on Maybank Highway (SC 700) in Charleston County. See, Exhibit B, Ltr. Brooks, Code Enforcement Officer, July 18, 2012. The SCDOT removed three Grand Trees measuring 24-inches or greater within its right of way on Maybank Highway without a zoning permit. The Grand Trees removed were part of the SCDOT's ongoing maintenance of Maybank Highway. The County notified the SCDOT that it must either replace trees pursuant to the schedule in the ZLDR or pay a mitigation fee to the Tree Fund as mitigation if "planting of the required trees is determined to be detrimental to the overall health of existing trees or impractical for the intended site design." ZLDR, Art. 9.4, § 9.4.6(E). On August 31, 2012, the SCDOT responded to the County's Notice of Tree Violation stating that it "respectfully refuses to comply with the County's requests as set forth in the letter." Exhibit C, Ltr. McDonald, General Counsel, August 31, 2012.

The SCDOT claims that the County has no legal authority to order the SCDOT to comply with its local tree ordinance concerning maintenance work within the SCDOT highway right of way. The SCDOT contends that pursuant to S.C. Code Ann. § 57-5-10 it is charged with the duty to construct and maintain the state highway system in a safe

¹ A Grand Tree is "[a]ny tree measuring 24 inches or greater diameter breast height (DBH) except pine tree and Sweet Gum tree (*Liquidambar styraciflua*) species." ZLDR, Art. 9.4, § 9.4.1(B)(3).

and serviceable condition. In addition, the SCDOT believes that S.C. Code Ann § 57-3-110(1) grants it exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges. Therefore, the SCDOT has stated that it will continue to construct and maintain the highway system, without due regard to or compliance with the ZLDR, in particular Art. 9.4, Tree Protection and Preservation. See, Exhibit C, Ltr. McDonald, General Counsel, August 31, 2012.

On November 14, 2012, the County responded to the SCDOT's letter indicating that it disagreed with the SCDOT's position that the County was without authority to order the SCDOT to comply with its zoning ordinance. The County relied on the Planning Act, which provides that "[a]gencies, departments, and subdivisions of this State that use real property as owner or tenant, in any county or municipality in this State are subject to the zoning ordinances." See, Exhibit D, Ltr. Pennick, Zoning and Planning Director, November 14, 2012, citing, S.C. Code Ann. § 6-29-770. The County contends that the SCDOT is not exempt from the County's Tree Protection and Preservation ordinance; and therefore, this Court should find that the SCDOT must comply with ZLDR Art. 9.4, Tree Protection and Preservation, for the following reasons.

LAW / ANALYSIS

STANDARD OF REVIEW

Summary judgment should be granted when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Knight v. Austin, 396 S.C. 518, 521-22, 722 S.E.2d 802, 804 (2012); Rule 56(c), S.C.R.C.P. "The evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving

party.” Id. (citing Fleming v. Rose, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002)).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct.App.2005).

When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Id. Once the moving party meets the initial burden of clearly establishing the absence of a genuine issue of material fact, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Id. Furthermore, the purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder, but summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Id.

I. ZLDR ART. 9.4, TREE PROTECTION AND PRESERVATION, IS A VALID LOCAL ORDINANCE.

Charleston County has the power to regulate and protect trees in the unincorporated county, and this exercise of power is not in direct conflict with State law. "Determining whether a local ordinance is valid is a two-step process. The first step is to determine whether the [county] had the power to adopt the ordinance. If no power existed, the ordinance is invalid. If the [county] had the power to enact the ordinance, the second step is to determine whether the ordinance is consistent with the Constitution and general law of the State." McKeown v. Charleston County Bd. of Zoning Appeals, 347 S.C. 203, 207, 553 S.E.2d 484, 486 (Ct. App. 2001). Charleston County has the power to adopt the provisions in dispute here. The Planning Act provides in pertinent part that:

Zoning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare. To these ends, zoning ordinances must be made with reasonable consideration of the following purposes, where applicable: . . . (3) to facilitate the creation of a convenient, attractive, and harmonious community; (4) to protect and preserve scenic, historic, or ecologically sensitive areas; . . . and (8) to further the public welfare in any other regard specified by a local governing body.

S.C. Code Ann. § 6-29-710 (2015).

Generally, the SCDOT does not challenge whether the County had the power to adopt Art. 9.4, Tree Protection and Preservation, rather the SCDOT challenges its application to it. Even if the SCDOT believed that the County was without authority to adopt the ZLDR and regulate land use, the McKeown Court held that "[i]n any event, Charleston County is specifically authorized to regulate land uses and to promote 'the public welfare in any other regard specified.'" McKeown, 347 S.C. 203, 207, 553 S.E.2d 484, 486 (Ct. App. 2001). In McKeown, the landowner challenged the validity of the ZLDR where it prohibited the landowner from serving beer or alcoholic beverages within 500 feet of residential areas, even though the state issued a permit allowing it to do the same. The McKeown Court found that:

In regard to specific restrictions on distance from residential areas, the County's ordinance clearly speaks where State law is silent. The County's ordinance does not contain express conditions which are either inconsistent with or irreconcilable with State law. Because there is no conflict between State law and the County's ordinance, the ordinance is p
However, the SCDOT does challenge the second prong of the test, questioning

whether Art. 9.4, Tree Protection and Preservation is consistent with the Constitution and general law of the State. As a threshold matter, the Legislature has determined in adopting the Planning Act that "(A) [a]gencies, departments, and subdivisions of this State that use real property, as owner or tenant, in any county or municipality in this

State are subject to the zoning ordinances." S.C. Code Ann. § 6-29-770. Prior to the adoption of the Planning Act, S.C. Code Ann. § 6-29-770(A) was codified as S.C. Code Ann. § 6-7-830 (Supp. 1991). The South Carolina State Ports Authority challenged whether it had to comply with the City of Charleston's Zoning Ordinance claiming an exemption as a State agency. The South Carolina Supreme Court opined in City of Charleston v. S.C. State Ports Auth. that:

we clarify any earlier intimations we may have made previously on this issue and explicitly hold that we know of no law allowing a school district or other similar agency to ignore valid, local zoning requirements and therefore they may not ignore such.' Under S.C. Code Ann. § 6-7-830 (Supp. 1991) and Charleston County School District, *supra*, the Ports Authority must comply with local zoning ordinances; and, if the Ports Authority refuses to comply, the City may seek injunction through the Circuit Court.

City of Charleston v. S.C. Ports Auth., 309 S.C. 118, 120-121, 420 S.E.2d 497, 499 (1992).

Here, the SCDOT does not dispute that it has to comply with local zoning regarding the use of its facilities.² Instead, the SCDOT suggests, "with respect to the State Highway System, it is entitled to the exemption contained in article 8, section 14 of the Constitution as governmental service or function, responsibility for which rests with the State government or requires statewide uniformity." (Def.'s Mot. Summ. J. p.4, January 21, 2015). No such exemption exists in the South Carolina Constitution. The South Carolina Constitution provides that:

In enacting provisions required or authorized by this article, general law provisions applicable to the following matters **shall not be set aside:** (1)

² The SCDOT in its brief states that it fully complies with all local zoning ordinances as owner or tenant with respect to section sheds, district headquarters, equipment depots, and other non-highway uses of real property. (Def.'s Mot. Summ. J. p.4, January 21, 2015). However, the SCDOT claims that it is unconstitutional for the County to require it to obtain a permit and/or pay a fine or mitigation for tree removal citing S.C. Const. art. X, 3. Permit fees and fines/mitigation costs are not taxes, and therefore are not applicable to the constitutional prohibition cited by the SCDOT. *See* Def.'s Mot. Summ. J. p.8, January 21, 2015.

The freedoms guaranteed every person; . . . and (6) the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity.

S.C. Const. art. VIII, 14.

While it is true that pursuant to S.C. Code Ann. § 57-5-10 the SCDOT is charged with the duty to construct and maintain the state highway system in a safe and serviceable condition, construction and maintenance of a highway is inherently different than abiding by a local government's tree regulations. In addition, S.C. Code Ann § 57-3-110(1) grants the SCDOT exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges. These statutory provisions do not create a tree preservation exemption for the SCDOT. Nevertheless, the SCDOT asserts that ZLDR Art. 9.4, Tree Protection and Preservation and by extension S.C. Code Ann. § 6-29-770 are in violation of S.C. Const. art. VIII, 14, S.C. Code Ann § 57-3-110(1), and S.C. Code Ann. § 57-5-10, and therefore, unconstitutional. The SCDOT cites Brashier v. S.C. DOT, 327 S.C. 179, 490 S.E.2d 8 (1997) (overruled on other grounds) and Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 415 S.E.2d 801 (1992)³ for this proposition. In

³ In Town of Hilton Head Island, proponents of the cross-island expressway sought to limit the Town and SCDOT's authority to plan, construct, and finance the expressway by requiring a referendum before a toll road could be considered. The Town of Hilton Head Court held that:

The legislature has declared that collecting tolls is an appropriate method of financing highways and appurtenant facilities. See S.C. Code Ann. § 12-27-1290 (Supp. 1991); see also S.C. Code Ann §§ 57-5-1310 to -1490 (1991). We find that the initiated ordinance is facially defective in its entirety because it sets aside the structure and administration of the statewide highway scheme by attempting to limit the authority granted to the SCDHPT to consider the collection of tolls as a method of financing the construction of state roads. When a municipality enacts an ordinance which conflicts with state law, the ordinance is invalid. State v. Solomon, 245 S.C. 550, 141 S.E.2d 818 (1965). An electorate has no greater power to legislate than the municipality itself. City & County of San Francisco v. Patterson, 202 Cal. App. 3d 95, 248 Cal. Rptr. 290 (1988). An initiated ordinance which is facially defective cannot be cured by adoption by the electorate. [citation omitted]

Brashier, the opponents of a toll road argued that the SCDOT failed to comply with S.C. Code Ann. § 57-3-615 which required certain toll projects to be initiated by counties pursuant to S.C. Code Ann. § 4-37-10 et. seq. The Brashier, Court held that,

Article VIII, section 14 'precludes the legislature from delegating to counties the responsibility for enacting legislation relating to the subjects encompassed by that section.' Robinson v. Richland County Council, 293 S.C. 27, 30, 358 S.E.2d 392, 395 (1987). When construing Article VIII, section 14, this Court has consistently held a subject requiring statewide uniformity is effectively withdrawn from the field of local concern. See, e.g., Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94, 96 (1996) ("Article VIII, § 14 limits the powers local governments may be granted"); Kramer v. County Council, 277 S.C. 71, 282 S.E.2d 850 (1981) (per curiam); Douglas v. McLeod 277 S.C. 76, 282 S.E.2d 604 (1981). We have already held that "the planning, construction, and financing of state roads is a governmental service which requires statewide uniformity.

Brashier v. S.C. DOT, 327 S.C. 179, 185, 490 S.E.2d 8, 11 (1997).

The Brashier Court found that S.C. Code Ann. § 57-3-615 was an unconstitutional delegation of authority pursuant to S.C. Const. art. VIII, 14 and struck down the statute.

It is unquestioned that the County has no power to regulate the planning, construction, and financing of the State Highway System for which the County has no interest or funding to assume said responsibility. However, state roads are not at issue here, rather what is at issue is the preservation and protection of trees along scenic highways and tree that are greater than 24 inches in diameter, which is not within the SCDOT's power to regulate. The S.C. Const. art. VIII, 14, "preclude the legislature from delegating to counties the responsibility for enacting legislation relating to the subjects encompassed by that section." Robinson v. Richland County Council, 293 S.C. 27, 30, 358 S.E.2d 392, 394 (1987). "It does not limit the power of the legislature to create

Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992).

alternate means, by general law, for counties to exercise constitutional powers. Id.

Under Home Rule:

All counties of the State . . . have authority to enact regulations, resolutions, and ordinances . . . respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them.

This broad grant of power is "in addition to the powers conferred to [a county's] specific form of government [under S.C. Code Ann. § 4-9-30], and is limited only by the requirement that the regulation, resolution, or ordinance be consistent with the Constitution and general law of this State.

Hospitality Ass'n v. County of Charleston, 320 S.C. 219, 226, 464 S.E.2d 113, 118 (1995).

"A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. [Citation Omitted]. A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the constitution." Robinson, 293 S.C. 27, 30, 358 S.E.2d 392, 394. Charleston County's enactment of ZLDR Art. 9.4, pursuant to the Planning Act is not repugnant to the South Carolina Constitution. ZLDR Art. 9.4 simply advances the goals of the Planning Act and the legislative intent of Charleston County Council regarding tree protection and preservation.

It is undisputed that the SCDOT is charged with the duty to construct and maintain the state highway system in a safe and serviceable condition. See, S.C. Code Ann. § 57-5-10. In addition, it is undisputed that the SCDOT has exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges. See, S.C. Code Ann. § 57-3-110(1). However, the

services and functions enumerated here do not expressly include tree protection and preservation. Tree protection and preservation are not subjects encompassed by SC. Code Ann. § 57-3-110(1) and S.C. Code Ann. § 57-5-10. The County is not attempting to set aside the SCDOT's state road maintenance responsibilities. Rather, it is regulating trees within the right-of-way. "A local government ordinance conflicts with a State law when its conditions, express or implied, are inconsistent and irreconcilable with the State law." Hospitality Ass'n v. County of Charleston, 320 S.C. 219, 228, 464 S.E.2d 113, 119 (1995).

What is at issue here is the SCDOT's unwillingness to seek review and approval prior to removal of a certain class of trees and the mitigation (replanting or mitigation fee) of the same. Nothing in State law gives the SCDOT exclusive authority over tree protection and removal. Instead, the Planning Act specifically mandates that the SCDOT comply with local zoning. In fact, the SCDOT routinely applies for and receives permits from other state and federal regulatory agencies when planning, designing, and constructing roads.⁴ "Where an ordinance is not preempted by State law, the ordinance is valid if there is no conflict with State law. In order for there to be a conflict between a State law and a municipal ordinance, both must contain either express or implied conditions that are inconsistent and irreconcilable with each other. If either is silent where the other speaks, there is no conflict." McKeown, 347 S.C. 203, 207, 553 S.E.2d 484, 486 (Ct. App. 2001). Since, ZLDR Art. 9.4 is not inconsistent with State law, this

⁴ The SCDOT must coordinate with and receive approval from a variety of entities prior to constructing a road. These entities can include: the Department of Health and Environmental Control, Ocean and Coastal Resource Management, local governments, landowners, the Army Corps of Engineers, the State Highway Commission, the State Historic Preservation Office, railroad companies, and utility companies. While the SCDOT is charged with building and maintaining highways, they do not have carte blanche to do so.

Court should find that the SCDOT must comply with its provisions and reject its unconstitutionality defense.

II. THE LEGISLATURE HAS NOT PREEMPTED THE FIELD OF STATE ROAD MAINTENANCE TO PRECLUDE LOCAL TREE PRESERVATION AND PROTECTION LAWS WITHIN THE RIGHT-OF-WAY.

Assuming ZLDR Art. 9.4 Tree Protection and Preservation can be harmonized with S.C. Const. art. VIII, 14, the SCDOT does not have exclusive jurisdiction over the rights-of-way under the State Highway System to preclude the County's tree protection and preservation initiatives. To preempt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way. S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 395, 629 S.E.2d 624, 627 (2006). "In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect. [Citation Omitted] A statute should not be construed by concentrating on an isolated phrase." Id. South Carolina courts have generally followed the same preemption analysis in deciding whether a state law preempts a local law as it has applied in deciding whether a federal law preempts a state law or regulation. Id. For example:

[F]ederal law may preempt a state law as follows: (1) Congress may explicitly define the extent to which it intends to preempt state law, (2) Congress may indicate an intent to occupy an entire field of regulation, or (3) federal law may preempt state law to the extent the state law actually conflicts with the federal law, such that compliance with both is impossible or the state law hinders the accomplishment of the federal law's purpose. . . . We find it appropriate to address the SCSPA's preemption arguments using the three categories previously recognized when discussing federal law preemption, any of which is a method by which the General Assembly's intent may be made manifest.

S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 395-396, 629 S.E.2d 624, 627-628 (2006).

A. Expressed/Implied Preemption

The Legislature has not manifested intent to preempt the entire field of the SCDOT's planning, construction and maintenance of the State Highway System. "Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area." Id. Equally, "[u]nder implied preemption, an ordinance is preempted when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity." Id. Neither doctrine is applicable in this case. Although State law provides that "[t]he state highway system shall consist of a statewide system of connecting highways that shall be constructed to the Department of Transportation's standards and that shall be maintained by the department in a safe and serviceable condition as state highways." S.C. Code Ann. § 57-5-10. Nowhere does the Act refer to tree protection or exclusivity over any area that touches the road system. More compelling is the fact that the Legislature has adopted provisions requiring the review and approval of local governments before work can begin on roads within their jurisdictions. For instance, South Carolina law provides that:

All work to be performed by the Department on state highways within a municipality **must be with the consent and approval** of the proper municipal authorities, except that work performed or to be performed on a bridge and its approaches, certified by the Department as functionally obsolete or structurally deficient, to remove, replace, or improve such bridge and its approaches shall not require prior consent and approval of a municipal authority if the bridge crosses the intracoastal waterway.

S.C. Code Ann. § 57-5-820 (emphasis added); see also, S.C. Code Ann. § 57-5-830 (where a municipal authority may review and approve proposed permanent improvement, construction, reconstruction, or alteration by the Department of any highway within a municipality).

It is clear that the Legislature did not intend expressly or impliedly to preempt the

entire field of maintenance of the State Highway System by mandating that all work on State highways must be done with municipal consent and approval. Moreover, State law does not mention tree protection as part of those duties. Therefore, this Court should not construe the State Highway System statute to do the same.

B. No Conflicts with State Law

As stated above, the State Highway System statutes do not regulate tree protection and preservation, and therefore, ZLDR Art. 9.4 does not conflict with it. "A local government ordinance conflicts with a State law when its conditions, express or implied, are inconsistent and irreconcilable with the State law." Hospitality Ass'n v. County of Charleston, 320 S.C. 219, 228, 464 S.E.2d 113, 119 (1995). SCDOT's maintenance responsibilities on Maybank Highway are not prohibited by ZLDR, Art. 9.4, but they are regulated by it.

Where an ordinance is not preempted by State law, the ordinance is valid if there is no conflict with State law. In order for there to be a conflict between a State law and a municipal ordinance, both must contain either express or implied conditions that are inconsistent and irreconcilable with each other. If either is silent where the other speaks, there is no conflict. [Citations Omitted] As a general rule, 'additional regulation to that of [the] State law does not constitute a conflict therewith.'

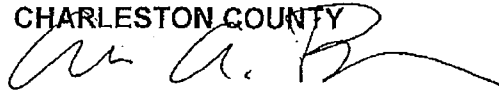
McKeown v. Charleston County Bd. of Zoning Appeals, 347 S.C. 203, 207, 553 S.E.2d 484, 486 (Ct. App. 2001).

CONCLUSION

This Court should grant the County's motion for summary judgment finding that there is no genuine issue of material fact in dispute, that ZLDR Art. 9.4 Tree Protection and Preservation is a valid exercise of power by the County under the Planning Act, with which the SCDOT must comply, and that the SCDOT is not exempt from its application.

Respectfully submitted,

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Charleston, South Carolina
April 7, 2015

EXHIBIT "A"

**Charleston County Zoning and Land Development Regulations Ordinance (ZLDR)
Art. 9.4 §1 through §7**

be used outside of right-of-ways when deemed appropriate to surrounding development characteristics by the Planning Director.

ARTICLE 9.4. TREE PROTECTION AND PRESERVATION

§9.4.1 GENERAL

A. Findings

Trees are an essential natural resource, an invaluable economic resource, and a priceless aesthetic resource. Trees play a critical role in purifying air and water, providing wildlife habitat, and enhancing natural drainage of stormwater and sediment control. They also help conserve energy by providing shade and shield against noise and glare. Trees promote commerce and tourism by buffering different land uses and beautifying the landscape. The Tree Protection and Preservation regulations of this Article are intended to enhance the health, safety and welfare of Charleston County citizens.

B. Applicability and Exemptions

1. Applicability

The provisions of this Article in their entirety shall apply to all real property in unincorporated Charleston County, except as otherwise expressly exempted.

2. Exemptions

- a. Single family detached residential lots of record shall be exempt from all provisions in this Article except for the Grand Tree documentation, protection and replacement provisions. This exemption does not include applications for Major or Minor Subdivisions for which landscape buffers may be required per Section 9.5.4.
- b. The Planning Director shall be authorized to modify or reduce the standards of this Article for commercial nursery operations.
- c. This Article shall not restrict public utilities and electric suppliers from maintaining safe clearance around existing utility lines, and existing easements in accordance with applicable state laws. Siting and construction of future gas, telephone, communications, electrical lines or other easements shall not be exempt from the provisions of this Article.
- d. Removal of trees for the purpose of conducting "bona fide forestry operations" shall be exempt from the provisions of this Article except for removal of Live Oak species of Grand trees.

- e. Removal of trees for the purpose of establishing bona fide agricultural uses, as specified in Section 3.8.2A of this Ordinance, shall be exempt from the provisions of this Article except for the Grand Tree documentation, protection and replacement provisions.
- f. Removal of trees for the purposes of maintaining safe clearance for aircraft as required by federal law or the establishment of facilities exclusively dedicated to aviation operations are exempt from this Article.
- g. Removal of trees on properties in the Industrial Zoning District is permitted pursuant to the following conditions:
 - i. Tree removal cannot occur prior to site plan approval;
 - ii. This exemption shall not apply to Live Oak species of Grand Trees or any protected trees within required buffers and parking lots; and
 - iii. Mitigation of removed trees, as stated in this Section, is required. Staff shall approve the mitigation of such trees in accordance with Section 9.4.6 of this Ordinance.

3. Partial Exemptions for SCDOT and CCPW

The South Carolina Department of Transportation (SCDOT) and Charleston County Public Works (CCPW) shall be exempt from the provisions of this Article except the following:

- a. All trees species measuring 6 inches or greater DBH located in right-of-ways along Scenic Highways as designated in this Ordinance shall be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5B and 9.4.6.
- b. Grand Tree Live Oak species in all present and proposed right-of-ways and easements shall be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5.B and 9.4.6.
- c. All Grand Trees other than Live Oak species in all present and proposed right-of-ways and easements not located on a Scenic Highway are protected but may be permitted to be removed administratively when mitigated per Article 9.4.6.

C. DEFINITION OF "TREE REMOVAL"

For the purpose of this Article, the term "tree removal" shall include, but not be limited to, damage inflicted to the root system by machinery; girdling; storage of materials and soil compaction, changing the natural grade above or below the root system or around the trunk; damage inflicted on the tree permitting fungus infection or pest infestation; excessive pruning; excessive thinning; paving with concrete, asphalt or other impervious material within such proximity as to be

harmful to the tree; or any act of malicious damage to a tree. Excessive pruning or thinning shall be pruning or thinning that exceeds more than 25 percent of the leaf surface on both the lateral branch and the overall foliage of a mature tree that is pruned within a growing season. Additionally, one-half of the foliage of a mature tree is to remain evenly distributed in the lower two thirds of the crown and individual limbs upon completion of any pruning.

D. MEASUREMENTS AND DEFINITIONS

1. Diameter Breast Height

Diameter Breast Height is used for measuring all trees greater than 12-inch caliper. The Diameter Breast Height (DBH) of a tree is the total diameter, in inches, of a tree trunk or trunks measured 4½ feet above existing grade (at the base of the tree). In measuring DBH, the circumference of the tree shall be measured with a measuring tape designed specifically to calculate diameter. A standard measuring tape may be used to measure diameter when the circumference is divided by 3.14. If a tree trunk splits at ground level and the trunks do not share a common base (separated by earth at natural grade), then each trunk shall be measured as a separate tree. If a multi-trunk tree splits below the 4.5 foot mark and the trunks share a common base, all trunks shall be measured separately, added together, and count as one tree. Any trunk measuring less than 8 inches DBH is not included in the calculation.

2. Caliper

Caliper is the diameter of a tree trunk measured six inches above the ground on trees with calipers of four inches or less. For trees between four-inch and 12-inch caliper, the trunk is measured 12 inches above the ground.

3. Grand Tree

Any tree measuring 24 inches or greater diameter breast height (DBH) except pine tree and Sweet Gum tree (*Liquidamber styraciflua*) species. All Grand Trees are prohibited from removal unless a Grand Tree Removal Permit is issued or if the removal is part of an approved Bona Fide Forestry Operation.

4. Protected Trees

Any tree on a parcel with a diameter breast height of eight inches or greater prior to development and all trees within required buffers or required landscape areas. Limited removal is allowed only when specified by the provisions of this Ordinance.

§9.4.2

ADMINISTRATION

A. Zoning Permit Required

1. Tree Removal

Removal of required trees is prohibited prior to the issuance of a Zoning Permit by the Planning Director. Zoning Permits will be issued only after

a tree plan is approved by the Planning Director, as outlined below.

2. Excess Canopy (Limb) Removal

- a. Removal of three or more limbs with an individual diameter of six inches or greater shall require a Zoning Permit.
- b. Removal of any size limbs which contribute to more than one hundred continuous linear feet of canopy over public roadways shall require Variance approval from the Board of Zoning Appeals. This requirement shall not preclude the SCDOT, CCPW or other entities from maintaining height clearances of 14' or less and width clearances within designated travel ways and from removing unprotected trees along right-of-ways for road widening projects.

B. Documentation

Tree plans, prepared by a licensed registered surveyor, civil engineer or landscape architect shall be required on all non-exempt parcels before any zoning permits are issued.

§9.4.3

TREE PLANS AND SURVEYS

A. General

Tree plans of the same scale as, and superimposed on, a development site plan or preliminary plat shall include location, number, size (DBH), and species with a scaled graphic representation of each Grand Tree, canopy size and shape, and the trunk location. All required tree surveys shall include the name, phone number, address, signature, and seal of a licensed surveyor, landscape architect, or civil engineer registered in the State of South Carolina. The survey shall include all trees to be protected or preserved, and those scheduled to be removed, including dead and damaged trees. In cases where a previously approved recorded plat is utilized for the purpose of tree plans the name, address, phone number, signature and seal of the licensed landscape architect, civil engineer, forester or surveyor, registered in the State of South Carolina shall be provided. A scaled infrared or high resolution black and white aerial photograph or print of equal quality may be substituted in cases where the Planning Director determines that it would provide the same information as a tree plan. However, all Grand Trees within 40 feet of proposed construction and land disturbance areas and trees within required buffers must be surveyed and mapped.

B. Major and Minor Subdivision Preliminary Plats

Refer to Section 8.4.2.A.4 Preliminary Plat Application in the Subdivision Regulations of Chapter 8 of this Ordinance.

C. Commercial, Industrial and Multi-Family Parcels

1. All tree surveys must show the location, number, size and species of all trees 8 inches or greater DBH (Diameter Breast Height) including those scheduled to be removed.

2. When there are no trees 8 inches or greater DBH, documentation of this fact shall be provided from a registered surveyor, engineer or landscape architect.

[Commentary: Assistance in tree identification and condition should be provided by a forester or qualified arborist.]

D. Single Family Detached Residential Parcels

1. Single family detached residential parcels shall show all Grand Trees within the area of construction and land disturbance and in conjunction with the subdivision regulations of this Ordinance at the time a zoning or building permit application is made.

§9.4.4

REQUIRED TREE PROTECTION

A. General

All Grand Trees and any other trees required to remain on a site as outlined in this Ordinance must be protected during construction and development of the parcel. Tree protection must be shown on all development plans prior to site plan approval. A site inspection of the tree barricades must be scheduled by the applicant with the Planning Department for approval prior to the issuance of permits or the start of development activities.

Prior to issuance of a zoning permit, a pre-construction planning conference for tree preservation is required on site with the Planning Director's representative, the applicants, and any parties deemed appropriate for the purpose of determining if there is a need for additional tree protection techniques and for designating placement of tree barricades, construction employee parking, temporary construction office and dumpsters.

B. Tree Protection During Development and Construction

Protective barricades shall be placed around all required trees in or near development areas on all zoning parcels, prior to the start of development activities. These barricades, constructed of wood or plastic fencing or other approved materials shall be erected in accordance with standards by the Planning Director and placed beneath the canopy drip line or one and one-half feet times the DBH of the tree. Other protective devices or construction techniques may be used as approved by the Planning Director. The barricades shall remain in place until development activities are complete. The area within the protective barricade shall remain free of all building materials, dirt, fill, or other construction debris, vehicles, and development activities. All required trees are also subject to the provisions of Section 9.5.6 of this Chapter and subject to the enforcement criteria of Chapter 11.

C. Partial Exception for Limited Clearing

Limited clearing and grubbing may be authorized by the Planning Director prior to the installation of protective tree barricades on sites that exhibit unusually heavy undergrowth where access to the interior of the site and its protected trees would be otherwise highly impractical. Limited clearing shall be for the

express purpose of accessing the property and protected trees to erect the required tree protection and silt fencing. For the purposes of this Article, limited clearing shall be clearing done with hand tools, push or walk behind equipment or lightweight bush-hog type equipment designed specifically for brush and undergrowth clearing that is not capable of removing vegetation greater than 3 inches in diameter. Under no circumstances will metal tracked bulldozers, loaders, or similar rider/operator types of equipment be allowed on the site until the protective barricades are erected and a zoning permit is issued.

D. Separation of Trees from Pavement, Grading and Structures

Paved areas shall be separated from trees by a minimum distance of the drip line or one and one-half feet times the DBH or as modified by the Planning Director as deemed necessary to protect the root system of the tree. Paved areas shall not constitute more than 25 percent of the protected area beneath a tree. Any paving, grading, trenching, or filling within the remaining 75 percent of the protected area must be approved by the Planning Director and may require specific construction techniques be used in order to preserve the health of the tree. Refer to Chapter 9 exhibits for examples. When grading and construction within the protected area of a tree has been approved, all damaged roots shall be severed clean and inspected by the County Landscape Architect or Inspector prior to the receipt of a Zoning Permit.

E. Quantity and Location of Trees to be Protected

Before the issuance of a Zoning Permit for Commercial, Industrial, Multi-Family, and Civic/Institutional uses, the following number of trees with a diameter breast height of 8 inches or greater shall be preserved and protected in accordance with the provisions of Section 9.4.4.B of this Ordinance. All trees located within required buffers as outlined in Article 9.5 shall be protected.

1. 20 trees per acre; or
2. Any number of trees with a combined diameter breast height of at least 160 inches per acre.
3. Required drainage improvements such as detention and retention ponds and wetlands may be subtracted from the area used to calculate tree preservation requirements.

§9.4.5

TREE REMOVAL

A. Generally

Permits for tree removal may be approved where one or more of the following conditions are deemed to exist by the Planning Director:

1. Trees are not required to be retained by the provisions of this Article.
2. Trees are diseased, dead or dying (as determined by the Planning Director or a qualified arborist);

3. Trees pose an imminent safety hazard to nearby buildings, or pedestrian or vehicular traffic (as determined by the Planning Director or a qualified arborist); or
4. Removal of required trees has been approved by the Board of Zoning Appeals.

B. Variances

Grand Trees and protected trees that do not meet the above criteria may be removed only where approved by the Board of Zoning Appeals, and shall be replaced according to a schedule determined by the Board. The Planning Director will make recommendations to the Board concerning the number, species, DBH or caliper, and placement of such trees.

C. Emergency Provisions

In the event that a tree poses a serious and imminent threat to public safety due to death, disease or damage resulting from emergencies including, but not limited to, fires, flooding, storms, and natural disasters, the Planning Director may waive requirements of this Article. Documentation must later be submitted for review outlining the threat to public safety which initiated the removal. Documentation must include any written findings by a qualified arborist and photographs supporting the tree removal emergency. The Planning Director may require replacement of required trees that are removed where it is determined that death or disease resulted from negligence.

D. Violations and Penalties

Violations and penalties are specified in Chapter 11 of this Ordinance.

§9.4.6 TREE REPLACEMENT

A. Generally

Tree replacement shall be required accompanying development on all non-exempt properties in the manner described below:

1. When replacement canopy trees are required in fulfillment of the requirements of this Article, they shall be no smaller than two and one-half-inch caliper.
2. The Planning Director or Board of Zoning Appeals is empowered to require trees of larger caliper as determined appropriate for site-specific conditions and the circumstances, lawful or illegal, under which removal occurred.

B. Protected Trees Removed in Violation

When trees of 8 inches DBH or greater have been removed in violation of this Ordinance, replacement trees shall be planted in the same general area according to a replacement schedule approved by the Planning Director.

C. Sites with Less Than 160 Inches per Acre Combined DBH

When lots lack a sufficient number of trees to meet the requirement for DBH/number of trees per acre, all trees six inches DBH or greater shall be

preserved and protected in accordance with Section 9.4.4.B of this Chapter during development and must equal no less than 40 inches per acre combined DBH. On lots with less than 40 inches per acre combined DBH, additional trees shall be planted on the lot equaling or exceeding 40 inches per acre combined DBH. Planting schedules shall be approved by the Planning Director.

D. Previously Cleared Sites

Where sites were completely cleared of trees prior to adoption of this Article or have been cleared subsequently for activities exempted from this Article, replacement trees shall be planted, the combined caliper of which equals or exceeds 40 inches per acre. Replacement schedules, including number, species, caliper and placement shall be approved by the Planning Director.

E. Tree Fund

The Tree Fund is a fund established to receive monies exacted from tree removal violation fines to include, but not be limited to, removal, damage, destruction, or as defined in Section 9.4.1.C of this Chapter, and as a form of mitigation when planting of the required trees is determined to be detrimental to the overall health of existing trees or impractical for the intended site design. The Planning Director shall impose a Tree Mitigation fee based on the current market retail value of two- to three-inch caliper trees installed to the American Association of Nurserymen Standards. If the applicant disagrees with the amount of the Tree Mitigation fee imposed, they may file appeal with the Board of Zoning Appeals in accordance with the provisions contained in this Ordinance. All Tree Mitigation fees collected shall be paid to the County Treasurer and placed in an account established exclusively for public beautification through the planting of trees in Charleston County.

F. Bankruptcy or Abandonment of Site

When trees have been removed through an approved mitigation program and the project will not be completed for any reason (i.e., bankruptcy, abandonment, change in ownership, etc.), the owners of the subject property are responsible for the mitigation of the removed trees as outlined and agreed or subject to Section 9.4.6E of this Chapter.

§9.4.7 INSPECTIONS AND FINAL APPROVAL

- A.** The Planning Director shall periodically visit development sites prior to completion to monitor compliance with the tree plan approved for a project.
- B.** Prior to issuance of a Certificate of Occupancy for a completed structure by the Director of Building Services, the Planning Director shall issue a statement of approval attesting to the developer's compliance with the site plan approved for the project (including landscaping, parking, drainage, etc.). The Director of Building Services shall withhold certificates of occupancy pending verification of compliance. It is the responsibility of the owner or agent to contact the Planning Director regarding the compliance inspection. Such inspections will occur within five working days of contact. Failure to obtain a Certificate of Occupancy prior to occupying or using the building for its intended purpose will result in ticketing and fines. However, the Planning Director shall approve a

delayed schedule for planting materials (provided by the applicant's contractor) when the immediate planting schedule would impair the health of the plants. When a delayed planting schedule is approved, the applicant shall provide a bond equivalent to one and one-half times the projected cost of the planting materials. This is designed to include severe weather, such as droughts, heat waves, and floods.

- C. Within three years of the issuance of the Certificate of Occupancy, the Planning Director shall perform a site inspection to verify the health of trees which were retained to meet the requirements of this Article and which may have suffered damage due to insufficient protective measures during development.
- D. Each required tree that is determined by the Planning Director to be diseased or injured to the extent it is irreparably damaged shall be approved for removal. The burden of proof of the extent of the disease or injury shall rest with the applicant, who must provide documentation from a qualified arborist. Any tree damaged during or as a result of construction shall be repaired to the satisfaction of the Planning Director and in accordance with accepted ANSI A300 or International Society of Arboriculture practices. Tree damage must be repaired prior to issuance of a Certificate of Occupancy.
- E. The owners of a non-exempt property or properties shall be responsible for the maintenance of all required trees. No department or agent of the County of Charleston is in any way responsible for the maintenance of required trees on private property.

ARTICLE 9.5 LANDSCAPING, SCREENING AND BUFFERS

§9.5.1 APPLICABILITY

Unless expressly exempted, the landscaping, screening and buffering standards of this Article shall apply to all new non-residential development and all new major roadways that serve Residential Major Subdivisions (ten or more lots). Minor Subdivisions (those with fewer than ten lots) may be required to provide landscaping, screening or buffering on major roadways when the Planning Director determines that such landscaping, screening or buffering is necessary to ensure that the purposes of this Ordinance are met. When modifications or additions are being made to an existing non-residential building or site, the standards of this Article shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning Director, provided that when modifications or additions are proposed that would increase the number of parking spaces, the area of vehicular use areas or gross floor area of buildings by more than 25 percent (above existing), then the entire parcel shall be brought into compliance with all applicable standards of this Article. Before calculating the percentage of area for re-development and improvement, any proposed demolition of structures and parking is subtracted from the existing gross floor area of buildings and number of parking spaces.

§9.5.2 EXHIBITS

Drawings included as exhibits at the end of this Chapter are meant to compliment the language of the Ordinance. In the event of a conflict with the text of the Ordinance, the text shall apply.

EXHIBIT "B"

Ltr. Brooks, Code Enforcement Officer,

July 18, 2012

Daniel C. Pennick, AICP
Director



Phone: 843.202.7200
Fax: 843.202.7222
Lonnie Hamilton III Public Services Building
4045 Bridge View Drive
North Charleston, SC 29405

July 18, 2012

South Carolina Department of Transportation
Attn: Marcie Timmons
6355 Frontage Road
North Charleston, SC 29405

Re: Tree Violation Notice – Maybank Highway (SC 700)

Dear Ms. Timmons:

Based on a recent inspection of tree removal performed by the South Carolina Department of Transportation (SCDOT) within the Maybank Highway right-of-way on Wadmalaw Island, three Grand Trees were documented as being removed in violation of the *Charleston County Zoning and Land Development Regulations Ordinance*. The *Ordinance* defines a Grand Tree as, "Any tree measuring 24 inches or greater diameter breast height (DBH) except pines. All Grand Trees are prohibited from removal unless a Grand Tree Removal Permit is issued." A Grand Tree Removal Permit was not issued for the following trees:

- 1) 42 inches stump diameter at 18 inches stump height
- 2) 34 inches stump diameter at 12 inches stump height
- 3) 34 inches stump diameter at 18 inches stump height

Please see the attached reference regarding tree DBH in relation to stump diameter at various heights. Utilizing the calculations per this reference, each of these trees would have been a minimum of 24 inches DBH.

Article 11.6 Tree Protection and Preservation Violations, §11.6.1 Trees Removed Without Permits, B. Grand Trees states, "1. Where Grand Trees have been removed in violation of this Ordinance or where removal is necessitated at any time due to acts of negligence, trees shall be replaced in accordance with a replacement schedule approved by the Planning Director. The replacement schedule shall establish the number, species, caliper, and location of replacement trees, and at a minimum shall require: a. That the combined caliper of replacement trees is equal to or greater than three times the caliper of the Grand Tree removed; and b.

Individual replacements of trees are of the largest transplantable caliper available or equal to the loss of DBH inches." Based on this requirement, the replacement schedule shall be calculated as follows:

3 trees x 24 inches = 72 inches; therefore

72 inches x 3 due to violation requirements = 216 inches of replacement trees; therefore

216 inches / 2.5 inches minimum tree caliper = 86.4 total replacement trees

The SCDOT may opt to use trees of a larger caliper resulting in the reduction of the number of replacement trees. Additionally, the SCDOT may opt to donate money to the Charleston County Tree Fund in lieu of planting replacement trees. The *Ordinance* explains, "*The Tree Fund is a fund established to receive monies exacted from tree removal violation fines to include, but not be limited to, removal, damage, destruction, or as defined in Section 9.4.1.C of this Chapter, and as a form of mitigation when planting of the required trees is determined to be detrimental to the overall health of existing trees or impractical for the intended site design. The Planning Director shall impose a Tree Mitigation fee based on the current market retail value of two- to three-inch caliper trees installed to the American Association of Nurserymen Standards. If the applicant disagrees with the amount of the Tree Mitigation fee imposed, they may file appeal with the Board of Zoning Appeals in accordance with the provisions contained in this Ordinance. All Tree Mitigation fees collected shall be paid to the County Treasurer and placed in an account established exclusively for public beautification through the planting of trees in Charleston County.*"

The County continues to receive multiple complaints from the citizens of Wadmalaw Island regarding this violation. Based on the *Ordinance*, the County must require the SCDOT to replant trees as mitigation for the removal of the three Grand Trees. The County will work with the SCDOT on the placement and location of the replacement trees within the Maybank Highway right-of-way. Please submit a timeline and replacement schedule proposal to the Charleston County Zoning/Planning Department no later than August 31, 2012. Thank you for your cooperation and community spirit in resolving this violation.

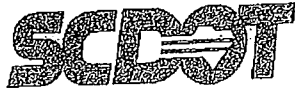
Sincerely,

Sally Brooks, ISA
Charleston County Code Enforcement Officer

CC: Joel Evans, Planner IV
Daniel Pennick, Zoning/Planning Director
Walter Smalls, Deputy Administrator for General Services

EXHIBIT "C"

**Ltr. McDonald, General Counsel,
August 31, 2012**



South Carolina
Department of Transportation
Office of Chief Counsel

FILE COPY

August 31, 2012

Linda C. McDonald
Chief Counsel

Assistant Chief Counsel
Natalie J. Moore
Barbara M. Wessinger
Beacham O. Brooker, Jr.
Amanda T. Taylor, Claims
Glennith C. Johnson

Claims Office
737-1200

Mr. Daniel Pennick
Director
Zoning and Planning Department
Charleston County
4045 Bridge View Drive
North Charleston, SC 29405

Re: Tree Violation Notice – Maybank Highway (SC 700)

Dear Mr. Pennick:

This is in response to the July 18, 2012 letter to Marcie Timmons of South Carolina Department of Transportation (SCDOT) from Sally Brooks, ISA, Charleston County Code Enforcement Officer, in regard to the referenced matter. The letter has been referred to this office for response.

SCDOT respectfully refuses to comply with the County's requests as set forth in the letter. Charleston County has no legal authority to order SCDOT to comply with its local tree ordinances in regard to maintenance work within the SCDOT highway right of way.

Pursuant to S. C. Code Section 57-5-10 SCDOT is charged with the duty to construct and maintain the state highway system in safe and serviceable condition. Pursuant to S. C. Code Section 57-3-110(1) SCDOT is granted the exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges. SCDOT's removal of the trees within the Maybank Highway right of way was deemed necessary for maintenance purposes and the safety of the travelling public.

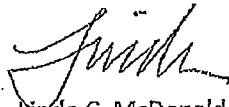
Zoning ordinances passed by local governments which conflict with a state agency's authority are void. See Law vs. City of Spartanburg, 148 S.C. 299, 146 S. E. 12 (1928); Colyer vs. Thomas, 268 S. C. 455, 234 S. E. 2d 862 (1977). See also South Carolina Attorney General's Opinion dated June 16, 1981 [1981 WL 96582 (S.C.A.G.)] wherein the Attorney General concluded that "any local ordinance which prohibits removal of trees by the South Carolina Department of Highways and Public Transportation pursuant to its authority to construct or maintain state highways would be in violation of the Constitution and law of this State."

EXHIBIT 2

Page Two
Letter to Pennick
August 31, 2012

We understand that Charleston County has a strong interest in preserving the beautiful low country environment and trees are certainly part of that environment. SCDOT will work with the County to promote this interest insofar as it does not impair SCDOT's statutory duty to maintain the highways in the State system for the safety of the travelling public.

Sincerely,



Linda C. McDonald
Chief Counsel

LCM/lm

cc: John Walsh, Deputy Secretary of Engineering
Robert Clark, District Six Engineering Administrator
Beacham O. Brooker, Assistant Chief Counsel

EXHIBIT "D"

Ltr. Pennick, Zoning and Planning Director,

November 14, 2012



Daniel C. Pennick, AICP
Zoning/Planning Director

843.202.7200
Fax: 843.202.7218
Lonnie Hamilton III Public Services Building
4045 Bridge View Drive
North Charleston, SC 29405

November 14, 2012

Linda C. McDonald, Esquire
South Carolina Department of Transportation
Office of Chief Counsel
955 Park Street- Suite 343, Post Office Box 191
Columbia, South Carolina, 29202-0191

Re: Tree Violation Notice – Maybank Highway (SC 700)

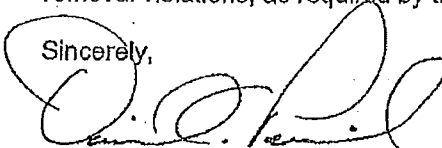
Dear Ms. McDonald:

The Charleston County Zoning/Planning Department has reviewed your letter dated August 31, 2012 in response to a Tree Violation Notice on Maybank Highway sent by Sally Brooks from the Zoning & Planning Department to Marcie Timmons of the South Carolina Department of Transportation (SCDOT) dated July 18, 2012. We respectfully disagree with your assessment that the SCDOT is not required to comply with the *Charleston County Zoning and Land Development Regulations Ordinance*, specifically: *Article 9.4, Tree Protection and Preservation*; and *Article 11.6, Tree Protection and Preservation Violations*.

Title 6, Chapter 29, Section 6-29-770(A) of the Code of Laws of South Carolina, 1976, as amended, provides that "*Agencies, departments, and subdivisions of the State that use real property, as owner, or tenant, in any county or municipality in this State are subject to the zoning ordinances.*" Therefore, The Charleston County Zoning and Planning Department requires the SCDOT to comply with all applicable provisions contained in the *Zoning and Land Development Regulations Ordinance*.

The Charleston County Zoning and Planning Department staff will assist the SCDOT in the processing of any request for tree removal, and will answer any questions regarding tree removal violations, as required by the County's Ordinance.

Sincerely,


Daniel C. Pennick, AICP
Zoning and Planning Director

cc: Kurt Taylor, County Administrator
Walt Smalls, Deputy County Administer for General Services
Joe Dawson, County Attorney
File

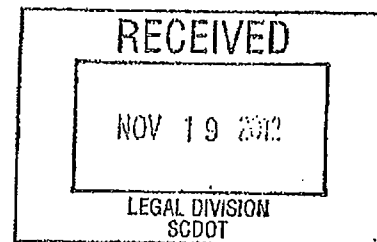


EXHIBIT 3

be used outside of right-of-ways when deemed appropriate to surrounding development characteristics by the Planning Director.

ARTICLE 9.4. TREE PROTECTION AND PRESERVATION

§9.4.1

GENERAL

A. Findings

Trees are an essential natural resource, an invaluable economic resource, and a priceless aesthetic resource. Trees play a critical role in purifying air and water, providing wildlife habitat, and enhancing natural drainage of stormwater and sediment control. They also help conserve energy by providing shade and shield against noise and glare. Trees promote commerce and tourism by buffering different land uses and beautifying the landscape. The Tree Protection and Preservation regulations of this Article are intended to enhance the health, safety and welfare of Charleston County citizens.

B. Applicability and Exemptions

1. Applicability

The provisions of this Article in their entirety shall apply to all real property in unincorporated Charleston County, except as otherwise expressly exempted.

2. Exemptions

- a. Single family detached residential lots of record shall be exempt from all provisions in this Article except for the Grand Tree documentation, protection and replacement provisions. This exemption does not include applications for Major or Minor Subdivisions for which landscape buffers may be required per Section 9.5.4.
- b. The Planning Director shall be authorized to modify or reduce the standards of this Article for commercial nursery operations.
- c. This Article shall not restrict public utilities and electric suppliers from maintaining safe clearance around existing utility lines, and existing easements in accordance with applicable state laws. Siting and construction of future gas, telephone, communications, electrical lines or other easements shall not be exempt from the provisions of this Article.
- d. Removal of trees for the purpose of conducting "bona fide forestry operations" shall be exempt from the provisions of this Article except for removal of Live Oak species of Grand trees.

- e. Removal of trees for the purpose of establishing bona fide agricultural uses, as specified in Section 3.8.2A of this Ordinance, shall be exempt from the provisions of this Article except for the Grand Tree documentation, protection and replacement provisions.
- f. Removal of trees for the purposes of maintaining safe clearance for aircraft as required by federal law or the establishment of facilities exclusively dedicated to aviation operations are exempt from this Article.
- g. Removal of trees on properties in the Industrial Zoning District is permitted pursuant to the following conditions:
 - i. Tree removal cannot occur prior to site plan approval;
 - ii. This exemption shall not apply to Live Oak species of Grand Trees or any protected trees within required buffers and parking lots; and
 - iii. Mitigation of removed trees, as stated in this Section, is required. Staff shall approve the mitigation of such trees in accordance with Section 9.4.6 of this Ordinance.

3. Partial Exemptions for SCDOT and CCPW

The South Carolina Department of Transportation (SCDOT) and Charleston County Public Works (CCPW) shall be exempt from the provisions of this Article except the following:

- a. All trees species measuring 6 inches or greater DBH located in right-of-ways along Scenic Highways as designated in this Ordinance shall be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5B and 9.4.6.
- b. Grand Tree Live Oak species in all present and proposed right-of-ways and easements shall be protected and require a variance from the Charleston County Board of Zoning Appeals for removal per Article 9.4.5.B and 9.4.6.
- c. All Grand Trees other than Live Oak species in all present and proposed right-of-ways and easements not located on a Scenic Highway are protected but may be permitted to be removed administratively when mitigated per Article 9.4.6.

C. DEFINITION OF "TREE REMOVAL"

For the purpose of this Article, the term "tree removal" shall include, but not be limited to, damage inflicted to the root system by machinery; girdling; storage of materials and soil compaction, changing the natural grade above or below the root system or around the trunk; damage inflicted on the tree permitting fungus infection or pest infestation; excessive pruning; excessive thinning; paving with concrete, asphalt or other impervious material within such proximity as to be

harmful to the tree; or any act of malicious damage to a tree. Excessive pruning or thinning shall be pruning or thinning that exceeds more than 25 percent of the leaf surface on both the lateral branch and the overall foliage of a mature tree that is pruned within a growing season. Additionally, one-half of the foliage of a mature tree is to remain evenly distributed in the lower two thirds of the crown and individual limbs upon completion of any pruning.

D. MEASUREMENTS AND DEFINITIONS

1. Diameter Breast Height

Diameter Breast Height is used for measuring all trees greater than 12-inch caliper. The Diameter Breast Height (DBH) of a tree is the total diameter, in inches, of a tree trunk or trunks measured 4½ feet above existing grade (at the base of the tree). In measuring DBH, the circumference of the tree shall be measured with a measuring tape designed specifically to calculate diameter. A standard measuring tape may be used to measure diameter when the circumference is divided by 3.14. If a tree trunk splits at ground level and the trunks do not share a common base (separated by earth at natural grade), then each trunk shall be measured as a separate tree. If a multi-trunk tree splits below the 4.5 foot mark and the trunks share a common base, all trunks shall be measured separately, added together, and count as one tree. Any trunk measuring less than 8 inches DBH is not included in the calculation.

2. Caliper

Caliper is the diameter of a tree trunk measured six inches above the ground on trees with calipers of four inches or less. For trees between four-inch and 12-inch caliper, the trunk is measured 12 inches above the ground.

3. Grand Tree

Any tree measuring 24 inches or greater diameter breast height (DBH) except pine tree and Sweet Gum tree (*Liquidambar styraciflua*) species. All Grand Trees are prohibited from removal unless a Grand Tree Removal Permit is issued or if the removal is part of an approved Bona Fide Forestry Operation.

4. Protected Trees

Any tree on a parcel with a diameter breast height of eight inches or greater prior to development and all trees within required buffers or required landscape areas. Limited removal is allowed only when specified by the provisions of this Ordinance.

§9.4.2

ADMINISTRATION

A. Zoning Permit Required

1. Tree Removal

Removal of required trees is prohibited prior to the issuance of a Zoning Permit by the Planning Director. Zoning Permits will be issued only after

a tree plan is approved by the Planning Director, as outlined below.

2. Excess Canopy (Limb) Removal

- a. Removal of three or more limbs with an individual diameter of six inches or greater shall require a Zoning Permit.
- b. Removal of any size limbs which contribute to more than one hundred continuous linear feet of canopy over public roadways shall require Variance approval from the Board of Zoning Appeals. This requirement shall not preclude the SCDOT, CCPW or other entities from maintaining height clearances of 14' or less and width clearances within designated travel ways and from removing unprotected trees along right-of-ways for road widening projects.

B. Documentation

Tree plans, prepared by a licensed registered surveyor, civil engineer or landscape architect shall be required on all non-exempt parcels before any zoning permits are issued.

§9.4.3

TREE PLANS AND SURVEYS

A. General

Tree plans of the same scale as, and superimposed on, a development site plan or preliminary plat shall include location, number, size (DBH), and species with a scaled graphic representation of each Grand Tree, canopy size and shape, and the trunk location. All required tree surveys shall include the name, phone number, address, signature, and seal of a licensed surveyor, landscape architect, or civil engineer registered in the State of South Carolina. The survey shall include all trees to be protected or preserved, and those scheduled to be removed, including dead and damaged trees. In cases where a previously approved recorded plat is utilized for the purpose of tree plans the name, address, phone number, signature and seal of the licensed landscape architect, civil engineer, forester or surveyor, registered in the State of South Carolina shall be provided. A scaled infrared or high resolution black and white aerial photograph or print of equal quality may be substituted in cases where the Planning Director determines that it would provide the same information as a tree plan. However, all Grand Trees within 40 feet of proposed construction and land disturbance areas and trees within required buffers must be surveyed and mapped.

B. Major and Minor Subdivision Preliminary Plats

Refer to Section 8.4.2.A.4 Preliminary Plat Application in the Subdivision Regulations of Chapter 8 of this Ordinance.

C. Commercial, Industrial and Multi-Family Parcels

1. All tree surveys must show the location, number, size and species of all trees 8 inches or greater DBH (Diameter Breast Height) including those scheduled to be removed.

2. When there are no trees 8 inches or greater DBH, documentation of this fact shall be provided from a registered surveyor, engineer or landscape architect.

[Commentary: Assistance in tree identification and condition should be provided by a forester or qualified arborist.]

D. Single Family Detached Residential Parcels

1. Single-family detached residential parcels shall show all Grand Trees within the area of construction and land disturbance and in conjunction with the subdivision regulations of this Ordinance at the time a zoning or building permit application is made.

§9.4.4

REQUIRED TREE PROTECTION

A. General

All Grand Trees and any other trees required to remain on a site as outlined in this Ordinance must be protected during construction and development of the parcel. Tree protection must be shown on all development plans prior to site plan approval. A site inspection of the tree barricades must be scheduled by the applicant with the Planning Department for approval prior to the issuance of permits or the start of development activities.

Prior to issuance of a zoning permit, a pre-construction planning conference for tree preservation is required on site with the Planning Director's representative, the applicants, and any parties deemed appropriate for the purpose of determining if there is a need for additional tree protection techniques and for designating placement of tree barricades, construction employee parking, temporary construction office and dumpsters.

B. Tree Protection During Development and Construction

Protective barricades shall be placed around all required trees in or near development areas on all zoning parcels, prior to the start of development activities. These barricades, constructed of wood or plastic fencing or other approved materials shall be erected in accordance with standards by the Planning Director and placed beneath the canopy drip line or one and one-half feet times the DBH of the tree. Other protective devices or construction techniques may be used as approved by the Planning Director. The barricades shall remain in place until development activities are complete. The area within the protective barricade shall remain free of all building materials, dirt, fill, or other construction debris, vehicles, and development activities. All required trees are also subject to the provisions of Section 9.5.6 of this Chapter and subject to the enforcement criteria of Chapter 11.

C. Partial Exception for Limited Clearing

Limited clearing and grubbing may be authorized by the Planning Director prior to the installation of protective tree barricades on sites that exhibit unusually heavy undergrowth where access to the interior of the site and its protected trees would be otherwise highly impractical. Limited clearing shall be for the

express purpose of accessing the property and protected trees to erect the required tree protection and silt fencing. For the purposes of this Article, limited clearing shall be clearing done with hand tools, push or walk behind equipment or lightweight bush-hog type equipment designed specifically for brush and undergrowth clearing that is not capable of removing vegetation greater than 3 inches in diameter. Under no circumstances will metal tracked bulldozers, loaders, or similar rider/operator types of equipment be allowed on the site until the protective barricades are erected and a zoning permit is issued.

- D. Separation of Trees from Pavement, Grading and Structures**
Paved areas shall be separated from trees by a minimum distance of the drip line or one and one-half feet times the DBH or as modified by the Planning Director as deemed necessary to protect the root system of the tree. Paved areas shall not constitute more than 25 percent of the protected area beneath a tree. Any paving, grading, trenching, or filling within the remaining 75 percent of the protected area must be approved by the Planning Director and may require specific construction techniques be used in order to preserve the health of the tree. Refer to Chapter 9 exhibits for examples. When grading and construction within the protected area of a tree has been approved, all damaged roots shall be severed, clean and inspected by the County Landscape Architect or Inspector prior to the receipt of a Zoning Permit.

- E. Quantity and Location of Trees to be Protected**
Before the issuance of a Zoning Permit for Commercial, Industrial, Multi-Family, and Civic/Institutional uses, the following number of trees with a diameter breast height of 8 inches or greater shall be preserved and protected in accordance with the provisions of Section 9.4.4.B of this Ordinance. All trees located within required buffers as outlined in Article 9.5 shall be protected.

1. 20 trees per acre; or
2. Any number of trees with a combined diameter breast height of at least 160 inches per acre.
3. Required drainage improvements such as detention and retention ponds and wetlands may be subtracted from the area used to calculate tree preservation requirements.

§9.4.5

TREE REMOVAL

- A. Generally**
Permits for tree removal may be approved where one or more of the following conditions are deemed to exist by the Planning Director:
1. Trees are not required to be retained by the provisions of this Article.
 2. Trees are diseased, dead or dying (as determined by the Planning Director or a qualified arborist);

3. Trees pose an imminent safety hazard to nearby buildings, or pedestrian or vehicular traffic (as determined by the Planning Director or a qualified arborist); or
4. Removal of required trees has been approved by the Board of Zoning Appeals.

B. Variances

Grand Trees and protected trees that do not meet the above criteria may be removed only where approved by the Board of Zoning Appeals, and shall be replaced according to a schedule determined by the Board. The Planning Director will make recommendations to the Board concerning the number, species, DBH or caliper, and placement of such trees.

C. Emergency Provisions

In the event that a tree poses a serious and imminent threat to public safety due to death, disease or damage resulting from emergencies including, but not limited to, fires, flooding, storms, and natural disasters, the Planning Director may waive requirements of this Article. Documentation must later be submitted for review outlining the threat to public safety which initiated the removal. Documentation must include any written findings by a qualified arborist and photographs supporting the tree removal emergency. The Planning Director may require replacement of required trees that are removed where it is determined that death or disease resulted from negligence.

D. Violations and Penalties

Violations and penalties are specified in Chapter 11 of this Ordinance.

§9.4.6 TREE REPLACEMENT

A. Generally

Tree replacement shall be required accompanying development on all non-exempt properties in the manner described below:

1. When replacement canopy trees are required in fulfillment of the requirements of this Article, they shall be no smaller than two and one-half-inch caliper.
2. The Planning Director or Board of Zoning Appeals is empowered to require trees of larger caliper as determined appropriate for site-specific conditions and the circumstances, lawful or illegal, under which removal occurred.

B. Protected Trees Removed in Violation

When trees of 8 inches DBH or greater have been removed in violation of this Ordinance, replacement trees shall be planted in the same general area according to a replacement schedule approved by the Planning Director.

C. Sites with Less Than 160 Inches per Acre Combined DBH

When lots lack a sufficient number of trees to meet the requirement for DBH/number of trees per acre, all trees six inches DBH or greater shall be

preserved and protected in accordance with Section 9.4.4.B of this Chapter during development and must equal no less than 40 inches per acre combined DBH. On lots with less than 40 inches per acre combined DBH, additional trees shall be planted on the lot equaling or exceeding 40 inches per acre combined DBH. Planting schedules shall be approved by the Planning Director.

D. Previously Cleared Sites

Where sites were completely cleared of trees prior to adoption of this Article or have been cleared subsequently for activities exempted from this Article, replacement trees shall be planted, the combined caliper of which equals or exceeds 40 inches per acre. Replacement schedules, including number, species, caliper and placement shall be approved by the Planning Director.

E. Tree Fund

The Tree Fund is a fund established to receive monies exacted from tree removal violation fines to include, but not be limited to, removal, damage, destruction, or as defined in Section 9.4.1.C of this Chapter, and as a form of mitigation when planting of the required trees is determined to be detrimental to the overall health of existing trees or impractical for the intended site design. The Planning Director shall impose a Tree Mitigation fee based on the current market retail value of two- to three-inch caliper trees installed to the American Association of Nurserymen Standards. If the applicant disagrees with the amount of the Tree Mitigation fee imposed, they may file appeal with the Board of Zoning Appeals in accordance with the provisions contained in this Ordinance. All Tree Mitigation fees collected shall be paid to the County Treasurer and placed in an account established exclusively for public beautification through the planting of trees in Charleston County.

F. Bankruptcy or Abandonment of Site

When trees have been removed through an approved mitigation program and the project will not be completed for any reason (i.e., bankruptcy, abandonment, change in ownership, etc.), the owners of the subject property are responsible for the mitigation of the removed trees as outlined and agreed or subject to Section 9.4.6E of this Chapter.

§9.4.7 INSPECTIONS AND FINAL APPROVAL

A. The Planning Director shall periodically visit development sites prior to completion to monitor compliance with the tree plan approved for a project.

B. Prior to issuance of a Certificate of Occupancy for a completed structure by the Director of Building Services, the Planning Director shall issue a statement of approval attesting to the developer's compliance with the site plan approved for the project (including landscaping, parking, drainage, etc.). The Director of Building Services shall withhold certificates of occupancy pending verification of compliance. It is the responsibility of the owner or agent to contact the Planning Director regarding the compliance inspection. Such inspections will occur within five working days of contact. Failure to obtain a Certificate of Occupancy prior to occupying or using the building for its intended purpose will result in ticketing and fines. However, the Planning Director shall approve a

delayed schedule for planting materials (provided by the applicant's contractor) when the immediate planting schedule would impair the health of the plants. When a delayed planting schedule is approved, the applicant shall provide a bond equivalent to one and one-half times the projected cost of the planting materials. This is designed to include severe weather, such as droughts, heat waves, and floods.

- C. Within three years of the issuance of the Certificate of Occupancy, the Planning Director shall perform a site inspection to verify the health of trees which were retained to meet the requirements of this Article and which may have suffered damage due to insufficient protective measures during development.
- D. Each required tree that is determined by the Planning Director to be diseased or injured to the extent it is irreparably damaged shall be approved for removal. The burden of proof of the extent of the disease or injury shall rest with the applicant, who must provide documentation from a qualified arborist. Any tree damaged during or as a result of construction shall be repaired to the satisfaction of the Planning Director and in accordance with accepted ANSI A300 or International Society of Arboriculture practices. Tree damage must be repaired prior to issuance of a Certificate of Occupancy.
- E. The owners of a non-exempt property or properties shall be responsible for the maintenance of all required trees. No department or agent of the County of Charleston is in any way responsible for the maintenance of required trees on private property.

ARTICLE 9.5 LANDSCAPING, SCREENING AND BUFFERS

§9.5.1 APPLICABILITY

Unless expressly exempted, the landscaping, screening and buffering standards of this Article shall apply to all new non-residential development and all new major roadways that serve Residential Major Subdivisions (ten or more lots). Minor Subdivisions (those with fewer than ten lots) may be required to provide landscaping, screening or buffering on major roadways when the Planning Director determines that such landscaping, screening or buffering is necessary to ensure that the purposes of this Ordinance are met. When modifications or additions are being made to an existing non-residential building or site, the standards of this Article shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning Director, provided that when modifications or additions are proposed that would increase the number of parking spaces, the area of vehicular use areas or gross floor area of buildings by more than 25 percent (above existing), then the entire parcel shall be brought into compliance with all applicable standards of this Article. Before calculating the percentage of area for re-development and improvement, any proposed demolition of structures and parking is subtracted from the existing gross floor area of buildings and number of parking spaces.

§9.5.2 EXHIBITS

Drawings included as exhibits at the end of this Chapter are meant to compliment the language of the Ordinance. In the event of a conflict with the text of the Ordinance, the text shall apply.

Daniel C. Pennick, AICP
Director



Phone: 843.202.7200
Fax: 843.202.7222
Lonnie Hamilton III, Public Services Building
4045 Bridge View Drive
North Charleston, SC 29405

July 18, 2012

South Carolina Department of Transportation
Attn: Marcie Timmons
6355 Frontage Road
North Charleston, SC 29405

Re: Tree Violation Notice -- Maybank Highway (SC 700)

Dear Ms. Timmons:

Based on a recent inspection of tree removal performed by the South Carolina Department of Transportation (SCDOT) within the Maybank Highway right-of-way on Wadmalaw Island, three Grand Trees were documented as being removed in violation of the *Charleston County Zoning and Land Development Regulations Ordinance*. The Ordinance defines a Grand Tree as, "Any tree measuring 24 inches or greater diameter breast height (DBH) except pines. All Grand Trees are prohibited from removal unless a Grand Tree Removal Permit is issued." A Grand Tree Removal Permit was not issued for the following trees:

- 1) 42 inches stump diameter at 18 inches stump height
- 2) 34 inches stump diameter at 12 inches stump height
- 3) 34 inches stump diameter at 18 inches stump height

Please see the attached reference regarding tree DBH in relation to stump diameter at various heights. Utilizing the calculations per this reference, each of these trees would have been a minimum of 24 inches DBH.

Article 11.6 Tree Protection and Preservation Violations, §11.6.1 Trees Removed Without Permits, B. Grand Trees states, "1. Where Grand Trees have been removed in violation of this Ordinance or where removal is necessitated at any time due to acts of negligence, trees shall be replaced in accordance with a replacement schedule approved by the Planning Director. The replacement schedule shall establish the number, species, caliper, and location of replacement trees, and at a minimum shall require: a. That the combined caliper of replacement trees is equal to or greater than three times the caliper of the Grand Tree removed; and b.

EXHIBIT 1

Individual replacements of trees are of the largest transplantable caliper available or equal to the loss of DBH inches." Based on this requirement, the replacement schedule shall be calculated as follows:

3 trees x 24 inches = 72 inches; therefore

72 inches x 3 due to violation requirements = 216 inches of replacement trees; therefore

216 inches / 2.5 inches minimum tree caliper = 86.4 total replacement trees

The SCDOT may opt to use trees of a larger caliper resulting in the reduction of the number of replacement trees. Additionally, the SCDOT may opt to donate money to the Charleston County Tree Fund in lieu of planting replacement trees. The *Ordinance* explains, "*The Tree Fund is a fund established to receive monies exacted from tree removal violation fines to include, but not be limited to, removal, damage, destruction, or as defined in Section 9.4.1.C of this Chapter, and as a form of mitigation when planting of the required trees is determined to be detrimental to the overall health of existing trees or impractical for the intended site design. The Planning Director shall impose a Tree Mitigation fee based on the current market retail value of two- to three-inch caliper trees installed to the American Association of Nurserymen Standards. If the applicant disagrees with the amount of the Tree Mitigation fee imposed, they may file appeal with the Board of Zoning Appeals in accordance with the provisions contained in this Ordinance. All Tree Mitigation fees collected shall be paid to the County Treasurer and placed in an account established exclusively for public beautification through the planting of trees in Charleston County.*"

The County continues to receive multiple complaints from the citizens of Wadmalaw Island regarding this violation. Based on the *Ordinance*, the County must require the SCDOT to replant trees as mitigation for the removal of the three Grand Trees. The County will work with the SCDOT on the placement and location of the replacement trees within the Maybank Highway right-of-way. Please submit a timeline and replacement schedule proposal to the Charleston County Zoning/Planning Department no later than August 31, 2012. Thank you for your cooperation and community spirit in resolving this violation.

Sincerely,



Sally Brooks, ISA
Charleston County Code Enforcement Officer

CC: Joel Evans, Planner IV
Daniel Pennick, Zoning/Planning Director
Walter Smalls, Deputy Administrator for General Services



South Carolina
Department of Transportation
Office of Chief Counsel

FILE COPY

August 31, 2012

Linda C. McDonald
Chief Counsel

Assistant Chief Counsel
Natalie J. Moore
Barbara M. Weesinger
Bertram O. Brooker, Jr.
Amanda T. Taylor, Claims
Glennith C. Johnson

Claims Office
737-1280

Mr. Daniel Pennick
Director
Zoning and Planning Department
Charleston County
4045 Bridge View Drive
North Charleston, SC 29405

Re: Tree Violation Notice – Maybank Highway (SC 700)

Dear Mr. Pennick:

This is in response to the July 18, 2012 letter to Marcie Timmons of South Carolina Department of Transportation (SCDOT) from Sally Brooks, ISA, Charleston County Code Enforcement Officer, in regard to the referenced matter. The letter has been referred to this office for response.

SCDOT respectfully refuses to comply with the County's requests as set forth in the letter. Charleston County has no legal authority to order SCDOT to comply with its local tree ordinances in regard to maintenance work within the SCDOT highway right of way.

Pursuant to S. C. Code Section 57-5-10 SCDOT is charged with the duty to construct and maintain the state highway system in safe and serviceable condition. Pursuant to S. C. Code Section 57-3-110(1) SCDOT is granted the exclusive authority to establish design criteria, construction specifications, and standards required to construct and maintain highways and bridges. SCDOT's removal of the trees within the Maybank Highway right of way was deemed necessary for maintenance purposes and the safety of the travelling public.

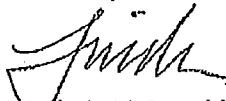
Zoning ordinances passed by local governments which conflict with a state agency's authority are void. See Law vs. City of Spartanburg, 148 S.C. 299, 146 S. E. 12 (1928); Colyer vs. Thomas, 268 S. C. 455, 234 S. E. 2d 862 (1977). See also South Carolina Attorney General's Opinion dated June 16, 1981 [1981 WL 96582 (S.C.A.G.)] wherein the Attorney General concluded that "any local ordinance which prohibits removal of trees by the South Carolina Department of Highways and Public Transportation pursuant to its authority to construct or maintain state highways would be in violation of the Constitution and law of this State."

EXHIBIT 2

Page Two
Letter to Pennick
August 31, 2012

We understand that Charleston County has a strong interest in preserving the beautiful low country environment and trees are certainly part of that environment. SCDOT will work with the County to promote this interest insofar as it does not impair SCDOT's statutory duty to maintain the highways in the State system for the safety of the travelling public.

Sincerely,



Linda C. McDonald
Chief Counsel

LCM/lm

cc: John Walsh, Deputy Secretary of Engineering
Robert Clark, District Six Engineering Administrator
Beacham O. Brooker, Assistant Chief Counsel



Daniel C. Pennick, AICP
Zoning/Planning Director

843.202.7200
Fax: 843.202.7218
Lonnie Hamilton III Public Services Building
4045 Bridge View Drive
North Charleston, SC 29405

November 14, 2012

Linda C. McDonald, Esquire
South Carolina Department of Transportation
Office of Chief Counsel
955 Park Street- Suite 343, Post Office Box 191
Columbia, South Carolina, 29202-0191

Re: Tree Violation Notice – Maybank Highway (SC 700)

Dear Ms. McDonald:

The Charleston County Zoning/Planning Department has reviewed your letter dated August 31, 2012 in response to a Tree Violation Notice on Maybank Highway sent by Sally Brooks from the Zoning & Planning Department to Marcle Timmons of the South Carolina Department of Transportation (SCDOT) dated July 18, 2012. We respectfully disagree with your assessment that the SCDOT is not required to comply with the *Charleston County Zoning and Land Development Regulations Ordinance*, specifically: *Article 9.4, Tree Protection and Preservation*; and *Article 11.6, Tree Protection and Preservation Violations*.

Title 6, Chapter 29, Section 6-29-770(A) of the Code of Laws of South Carolina, 1976, as amended, provides that ***"Agencies, departments, and subdivisions of the State that use real property, as owner or tenant, in any county or municipality in this State are subject to the zoning ordinances."*** Therefore, The Charleston County Zoning and Planning Department requires the SCDOT to comply with all applicable provisions contained in the *Zoning and Land Development Regulations Ordinance*.

The Charleston County Zoning and Planning Department staff will assist the SCDOT in the processing of any request for tree removal, and will answer any questions regarding tree removal violations, as required by the County's Ordinance.

Sincerely,

Daniel C. Pennick, AICP
Zoning and Planning Director

cc: Kurt Taylor, County Administrator
Walt Smalls, Deputy County Administrator for General Services
Joe Dawson, County Attorney
File

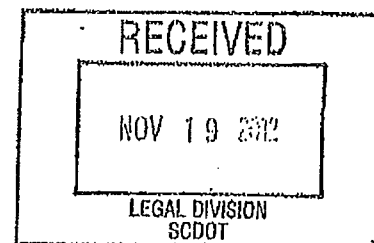
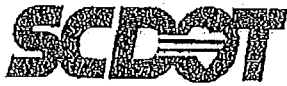


EXHIBIT 3



South Carolina
Department of Transportation
Office of Chief Counsel

January 16, 2013

Linda C. McDonald
Chief Counsel

Assistant Chief Counsel
Natalie J. Moore
Barbara M. Wessinger
Beacham O. Brooker, Jr.
Amanda T. Taylor, Claims
Glennith O. Johnson

Claims Office
737-1200

Mr. Daniel Pennick, AICP
Director
Zoning and Planning Department
Charleston County
4045 Bridge View Drive
North Charleston, SC 29405

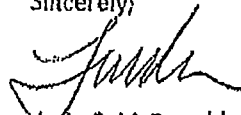
Re: Tree Violation Notice – Maybank Highway (SC 700)

Dear Mr. Pennick:

Thank you for your letter of November 14, 2012. Unfortunately, we still disagree that the County has authority to override SCDOT's statutory duty to construct and maintain highways in the state highway system and to set the standards for constructing and maintaining those highways. Therefore, SCDOT respectfully reiterates its refusal to comply with the demands of the County set forth in its July 18, 2012 letter.

SCDOT's Deputy Secretary of Engineering John Walsh, Assistant Deputy Secretary Clem Watson, District Engineering Administrator Robert Clark and I met with County attorneys Joe Dawson, Austin Bruner and Bradley Mitchell last week to discuss this issue. Both SCDOT and the County want to comply with the law, but we disagree on its application. Therefore, it appears that the best way to proceed is to obtain a judicial resolution of this matter. We stand ready to respond to such action as the County deems appropriate.

Sincerely,



Linda C. McDonald
Chief Counsel

LCM/lm

cc: John Walsh, Deputy Secretary of Engineering
Robert Clark, District Six Engineering Administrator
Beacham O. Brooker, Assistant Chief Counsel
Joseph Dawson, III, Attorney

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

OCT 26 2015

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001309

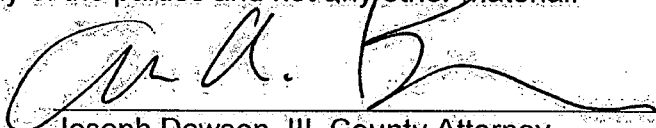
County of Charleston, South Carolina, ...Appellant,

v.

South Carolina Department of Transportation, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



Joseph Dawson, III, County Attorney
Bernard E. Ferrara, Jr., Deputy County Attorney
Austin A. Bruner, Assistant County Attorney
Johanna S. Gardner, Assistant County Attorney
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Attorneys for Appellant

Charleston, South Carolina
October 23, 2015