

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-7399

Appellate Case No. 2014-002118

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S.C. SUPREME COURT

Lynne Vicary, Kent Prause, and South Carolina
Coastal Conservation League Petitioners,

v.

Town of Awendaw, and EBC, LLC..... Respondents,
Of Whom Town of Awendaw is Appellant.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas

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Lynne Vicary, Kent Prause, and South Carolina Coastal
Conservation League, ... Respondents,
v.
Town of Awendaw, and EBC, LLC
Of whom Town of Awendaw is the Appellant..... Defendants

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

LYNNE VICARY, KENT PRAUSE, and
SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,

CASE NO. 09-CP-10-7399

Plaintiffs,

vs.

TOWN OF AWENDAW, and EBC, LLC,

Defendants.

ORDER

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter came before the Court for a hearing on March 23, 2011, upon a Motion by the Defendants for Partial Summary Judgment pursuant to South Carolina Rule of Civil Procedure 56. Defendants seek partial summary judgment on Plaintiffs' annexation claims, Counts I-III of Plaintiffs' Second Amended Complaint, on standing and limitations grounds. For the foregoing reasons, Defendants' Motion is denied.

FINDINGS OF FACT

In this action, Plaintiffs seek a declaration under the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 to 15-53-140, that the alleged annexation of a Ten-Foot Strip of the Francis Marion (the "Ten-Foot Strip") never happened – a fact uncontroverted at the hearing or in any papers – because the United States Forest Service ("Forest Service") did not submit to the Town a petition for annexation as required by law. See S.C. Code Ann. § 5-3-150 (2010). Although the Town represented to the public that it received a 100% petition from the Forest Service, it never did. Wallace Dep. at 40:9-11 (admitting that "it turned out that they [the Forest

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Service] would not give us anything in writing saying that they desired to be annexed"). In fact, an affidavit from Paul L. Bradley of the Forest Service provides that the "[Forest Service] did not intend for its letter of May 3, 1994 [a document the Town claimed it could substitute for an annexation petition] to constitute a petition of the federal government to annex National Forest lands." Bradley Aff. at ¶ 5. By manufacturing the annexation of the Ten-Foot Strip, the Town attempted to create contiguity with two other properties, including the "Nebo Church Tract" and the "Nebo Tract," a 359.51-acre, private in-holding owned by Defendant EBC that is virtually encircled by the Francis Marion National Forest ("Francis Marion," "National Forest," or "Forest"). E.g. Porcher Aff. at ¶ 2. Uncontroverted evidence at the hearing demonstrated that these actions by the Town and the resulting development of the Nebo Tract would result in significant harm to the National Forest – one of the most important natural resources in South Carolina (if not the entire East Coast) – and would undermine the Forest Service's ability to manage the Forest for the benefit of the public. Everett Aff. at ¶¶ 5, 10-12; Porcher Aff. at ¶¶ 4-5, 9-12; Bradley Aff. at ¶ 8.

CONCLUSIONS OF LAW

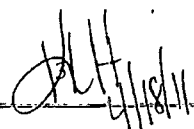
As provided in Rule 56(c), summary judgment is proper only when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. When considering a motion for summary judgment the court must construe all ambiguities, conclusions, and inferences arising from the evidence most strongly against the moving party. Wade v. Berkeley County, 339 S.C. 513, 529 S.E.2d 743 (2000); Vermeer Carolina's, Inc., v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). The movant "has the burden of clearly establishing" the

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lack of any triable issue of fact. Brandt v. Gooding, 368 S.C. 618, 626, 630 S.E.2d 259, 263 (2006).

Defendants premise both their standing and statute of limitations arguments on two decisions — St. Andrews Public Service District v. City Council of the City of Charleston, 349 S.C. 602, 64 S.E.2d 647 (2002), and Ex Parte: State of South Carolina ex. Rel. Wilson v. Town of Yemassee, Op. No. 26938 (S.C. Sup. Ct. filed Mar. 7, 2011) (Shearouse Adv. Sh. No. 8). Both of these decisions are of limited utility, as they involve fundamentally different circumstances. Defendants' argument is that the Court's standing and statute-of-limitations analysis must presume that all annexations are legitimate, good-faith exercises of municipal authority and should ignore evidence that the Town misrepresented to the public that it had received a signed, 100% annexation petition when it received no annexation petition at all. Plaintiffs argue that the Court need not resolve the *merits* of their claims that the challenged annexation is invalid in order to take into account that the *nature* of their claims is fundamentally different than those at issue in St. Andrews and Town of Yemassee.

The Court agrees with Plaintiffs. Indeed, Town of Yemassee took care to note the absence of a nefarious motive on the part of the municipality, see Town of Yemassee, Shearouse Adv. Sh. No. 8, Op. No. 26938, at 12 n.7, and case law on standing emphasizes the relevance of *ultra vires* activity and abuses of authority to the standing inquiry, see ATC South, Inc. v. Charleston County, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008); Baird v. Charleston County, 333 S.C. 519; 511 S.E.2d 69 (1999). The statutory provisions governing standing and timing exist to serve as shields for legitimate annexation attempts. No case supports Defendants' efforts to transform them instead into a sword that municipalities can wield to eviscerate the strict limitations on municipal authority delineated by the General Assembly.


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I. Standing

A Plaintiff may establish standing in any one of three ways: "(1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception." ATC South, Inc., 380 S.C. at 195, 669 S.E.2d at 339. The depositions and affidavits in this case support standing under each theory. Indeed, it is difficult to imagine circumstances more precisely tailored to application of the public interest exception.

A. Plaintiffs Have Standing Under the Public Interest Exception.

"Standing is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." ATC South, Inc., 380 S.C. at 198, 669 S.E.2d at 341 (quoting Davis v. Richland County Council, 327 S.C. 497, 500, 642 S.E.2d 740, 741 (2007)). The "public importance exception" recognizes that "citizens must be afforded access to the judicial process to address alleged injustices." Id. (quoting Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)). It entails a careful, case-by-case balancing of the interests of judicial economy on the one hand and the need to ensure checks against abuses of government power on the other. Id. The "key" to this balancing is "whether a resolution is needed for future guidance." Id.

Defendants' claim that annexation cases are too inherently unimportant to support application of the exception ignores the relevant inquiry and the analysis dictated in ATC South. The ATC South decision cited St. Andrews in clarifying that application of the public importance exception turns on the context of each case, not preconceived notions about the importance of the type of claim asserted. See ATC South, Inc., 380 S.C. at 199, 669 S.E.2d at 341 (explaining that although "[o]f course zoning is a matter of public importance," as is most government action, the exception becomes available only if a particular dispute meets the

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relevant criteria and stating that the exception by its "very nature . . . resists a formulaic approach"). The required showing is that an issue "must, *in the context of the case*, be inextricably connected to the public need for court resolution for future guidance." *Id.* (emphasis added). Moreover, the cases cited by Defendants in no way purport to make this important exception uniquely unavailable in the annexation context. Neither St. Andrews nor Town of Yemassee addressed the exception. Those decisions merely articulate and apply the general rules to which the exception may apply. See St. Andrews Pub. Serv. Comm'n, 349 S.C. at 605-606, 564 S.E.2d at 647-48 (overruling earlier case broadly granting standing to anyone regardless of circumstance or need for future guidance); Town of Yemassee, Op. No. 26938 (Shearouse Adv. Sh. No. 8) (applying general rules).

Plaintiffs have submitted an affidavit from Paul L. Bradley of the United States Forest Service, the agency responsible for managing the Francis Marion, explaining that "as communities approve denser development to occur adjacent to the Forest, it becomes increasingly difficult for the USFS to utilize important natural resource and wildlife habitat management tools, such as prescribed fire, to attain its mission to effectively manage the Forest for the benefit of the public." Bradley Aff. at ¶ 8. For this reason and others, the Forest Service "considers the issues and claims raised in this lawsuit to be of significant public importance." *Id.* Plaintiffs have also submitted additional affidavits establishing, among other things, that the challenged actions present a "major threat" to the ecological integrity of the Francis Marion and are "critically important" to review. Porcher Aff. at ¶ 12 (affidavit of a Professor Emeritus at the Citadel); Everett Aff. at ¶ 8 (affidavit of Senior Instructor within the Department of Biology at the College of Charleston). Based on the uncontested facts, the Court finds that Plaintiffs' annexation claims present issues of overriding public concern.

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The testimony of William Wallace, both by affidavit and deposition as Defendant Town's 30(b)(6) representative, shows that the Town has engaged in the same pattern of activity challenged as knowingly *ultra vires* here on multiple past occasions and apparently intends to continue the practice. See Wallace Dep. at 73:23-25 (stating that "[t]he Town has done this on several occasions"); Wallace Dep., Ex. 10 (letter requesting use of the Ten-Foot Strip to annex the Nebo Church Tract and to enable "other future annexations"); Wallace Aff. at ¶ 8 (claiming authority to annex other Forest strips intervening between the Nebo Tract and the Town as a means of creating contiguity with the Nebo Tract). Based on the undisputed facts, the Court finds that future guidance is needed to resolve the longstanding and recurrent controversy over the Town's practice of annexing National Forest lands without a petition from the Forest Service and provide clarity to the Town and other local governments concerning the scope of their annexation authority. The "key" to the public importance exception's applicability, the need for future guidance, therefore turns in Plaintiffs' favor. ATC South, Inc., 380 S.C. at 198, 669 S.E.2d at 341.

B. Plaintiffs Have Statutory Standing.

Plaintiffs seek a declaration that as a matter of law, the Town's authority to annex the properties at issue was never invoked. Specifically, they claim that after trying and failing to persuade the Forest Service to petition for annexation, the Town sought to manufacture an annexation by falsely claiming to have received an annexation petition and then waiting out the 90-day window for the supposed petitioner to assume the burden of having a court correct the illegal act and set the record straight. The proper analysis is therefore under the Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 to 15-53-140, which requires only a justiciable controversy. See, e.g., Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462,

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465 (2004). Because Plaintiffs' claims present "a real and substantial controversy which is appropriate for judicial determination," *id.*, they have satisfied this requirement.

C. Plaintiffs Have Constitutional Standing.

South Carolina Courts have applied the three-part test for constitutional standing articulated by the U.S. Supreme Court. Smiley v. S.C. Dep't of Health & Envtl. Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007). Here, Defendants argue that only one prong of the test, existence of a concrete and particularized injury in fact, is unmet. Although Defendants cite Town of Yemassee for support, this case, as previously stated, arises in a fundamentally different context. Moreover, "South Carolina case law has specifically recognized an injury to one's aesthetic and recreational interests in enjoying and observing wildlife is a judicially cognizable injury in fact." Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 23, 698 S.E.2d 612, 623 (2010) (internal quotation marks omitted); see also Smiley v. S.C. Dep't of Health & Envtl. Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (finding sufficient injury where plaintiff's interest in walking, running, and enjoying nature at a public beach was diminished by challenged activity). Plaintiffs have set forth not only specific, but undisputed facts showing, among other things, that the individual plaintiffs and members of the Coastal Conservation League personally use and enjoy natural resources that the Town's illegal acts threaten to destroy. Under the applicable precedent, these injuries support constitutional standing.

II. Statute of Limitations

Defendants argue that Plaintiffs have failed to challenge the 2004 annexations of the Ten-Foot Strip and the Nebo Church Tract within the 90 days provided by statute. See S.C. Code Ann. § 5-3-270. However, as the Supreme Court has explained, the passage of time cannot transform a void and unauthorized annexation into a valid one. See Bostick v. Beaufort, 307

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S.C. 347, 350, 415 S.E.2d 389, 391 (1992) (holding that a “fatally flawed” annexation petition renders an annexation ordinance “a nullity upon origination” that cannot be retroactively validated).

Furthermore, a statute of limitations is not an automatic bar to a claim, but rather an affirmative defense that can be waived and is subject to equitable doctrines such as estoppel and tolling. See, e.g., Republic Contracting Corp. v. S.C. Dep’t of Highways & Pub. Transp., 332 S.C. 197, 503 S.E.2d 761 (Ct. App. 1998). The Court finds that both doctrines apply here. The Town has unclean hands in issuing an ordinance that wrongly claims that the Forest Service had “filed” a “proper petition” for annexation of the Ten-Foot Strip. See Plfs.’ Supp. Ex. 15 at 3. Moreover, equitable considerations require the time-period for challenging the 2004 annexations to be tolled in light of the misleading ordinance and the Town’s own failure to provide statutorily-mandated notice of the 2004 annexation until the controversy over the Nebo Tract stirred in 2009. See Plfs.’ Supp. Ex. 14 (letter from Carolyn Hatcher (Secretary of State) to Samuel Brown (Town) (Oct. 2, 2009); Wallace Dep. at 49:1-6. Finally, the evidence is uncontroverted that Plaintiffs challenged the Nebo Tract annexation within 90 days, and there was no reason for Plaintiffs to look behind the veil of the Ten-Foot-Strip and Nebo-Church-Tract annexations in 2004 because Plaintiffs did not face the same injury to their use and enjoyment of rare and valuable natural resources, increased tax burdens, and other harms occurring as a result of the Nebo Tract annexation.

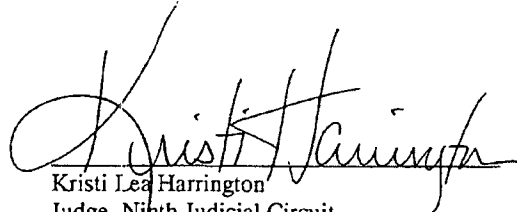
CONCLUSION

The evidence, viewed in the light most favorable to the Plaintiffs, shows that Plaintiffs have standing to assert Counts I-III of their Second Amended Complaint and that no statute of

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limitations bar exists to these claims. Therefore, the Defendants' Motion for Partial Summary Judgment is hereby **DENIED** and

IT IS SO ORDERED.


Kristi Lea Harrington
Judge, Ninth Judicial Circuit

Charleston, South Carolina

Date: 4-18-11

2011-7399



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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July 09, 2012

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Vicary, Lynne v. Town of Awendaw
Lower Court Case No. 2009CP1007399
Appellate Case No. 2011-196388

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: W. Jefferson Leath, Jr.
Ian Scott Ford
Dwayne Marvin Green
Christopher Kaltman DeScherer

FILED
2012 JUL 10 PM 2:36
JULIE J. ARMSTRONG
CLERK OF COURT

Thomas S. Tisdale, Jr.
Stephen Peterson Groves, Sr.

The Supreme Court of South Carolina

Lynne Vicary, Kent Prause, and South Carolina Coastal
Conservation League, Respondents,

v.

Town of Awendaw and EBC, LLC, Petitioners.

Appellate Case No. 2012-211590

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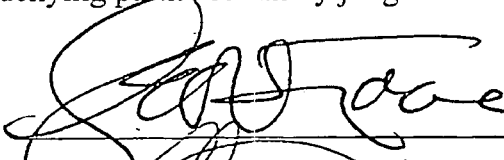
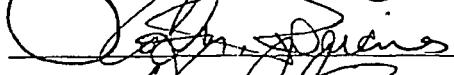
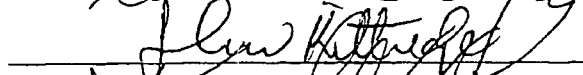
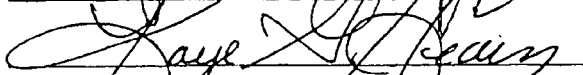
ORDER

This matter is before the Court by way of a petition for a writ of certiorari seeking review of the Court of Appeals' order dismissing petitioners' notice of appeal from an order of the circuit court denying petitioners' motion for partial summary judgment. Petitioners contend the order denying partial summary judgment in this case is appealable because it is so detailed and comprehensive as to effectively grant respondents summary judgment, it contains findings of fact and conclusions of law on issues never presented to the trial court, and it contains unnecessary findings of fact and conclusions of law.

Generally, the denial of a motion for summary judgment is not immediately appealable. *Willis v. Bishop*, 276 S.C. 156, 276 S.E.2d 310 (1981); *Mitchell v. Mitchell*, 276 S.C. 44, 275 S.E.2d 1 (1981); *Neal v. Carolina Power & Light*, 274 S.C. 552, 265 S.E.2d 681 (1980); *United States Fidelity & Guaranty Co. v. Spartanburg*, 267 S.C. 210, 227 S.E.2d 188 (1976); *Medlin v. W. T. Grant, Inc.*, 262 S.C. 185, 203 S.E.2d 426 (1974); *Greenwich Savings Bank v. Jones*, 261 S.C. 515, 201 S.E.2d 244 (1973); *Geiger v. Carolina Pool Equipment Distributors, Inc.*, 257 S.C. 112, 184 S.E.2d 446 (1971); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986); *Associates Financial Services Co. of South Carolina, Inc. v. Gordon's Auto Sales*, 283 S.C. 53, 320 S.E.2d 501 (Ct. App. 1984). A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial. *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994). The denial of summary judgment does not establish the

law of the case; and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict. *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993); *PPG Industries v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331 (Ct.App.1988). This is so regardless of what may be said in the order denying summary judgment. *Weil v. Weil*, 299 S.C. 84, 382 S.E.2d 471 (Ct.App.1989)(statement made while denying summary judgment is not the law of the case). Indeed, we have reminded the trial bench that it is unnecessary to make findings of fact and conclusions of law in denying motions for summary judgment. *See Ballenger, supra*.

While we agree that the order at issue contains inappropriate and unnecessary findings of fact and conclusions of law, as the cases cited above hold, the denial of summary judgment does not finally determine anything about the merits of the case; therefore, the unnecessary findings and conclusions made in the order denying partial summary judgment in the case at hand do not establish the law of the case and are not binding. The issues addressed by those findings and conclusions may be raised again at trial. Accordingly, we deny the petition for a writ of certiorari to review the Court of Appeals' order dismissing petitioners' notice of appeal from the order denying partial summary judgment.

 C.J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

May 25, 2012

cc: Thomas S. Tisdale, Jr.
Stephen Peterson Groves, Sr.
Christopher Kaltman DeScherer
Ian Scott Ford
W. Jefferson Leath, Jr.
Dwayne Marvin Green
The Honorable Jenny Kitchings

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

LYNNE VICARY, KENT PRAUSE, and
SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,

Plaintiffs,

v.

TOWN OF AWENDAW, and EBC, LLC,

Defendants.

CASE NO. 09-CP-10-7399

FILED
2014 JUL 28 AM 11:29
JULIE J. ARMSTRONG
CLERK OF COURT
BY 2

ORDER

9cm
This matter was tried before the Court on April 16, 2014. For the foregoing reasons, this Court declares (1) that plaintiffs have standing to bring this challenge; (2) that this action was timely filed; and (3) that the defendant Town of Awendaw's (the "Town") purported annexation of the Ten-foot Strip of the Francis Marion National Forest (the "Ten-Foot Strip") was *void ab initio* and did not occur as a matter of law. Because the annexation of the Ten-Foot Strip did not occur as a matter of law, it follows that the Town's purported annexation on October 1, 2009 of a private in-holding in the Francis Marion National Forest known as the Nebo Tract was also *ultra vires* acts and *void ab initio*.

INTRODUCTION

In this case, the Town purported to make a series of annexations beginning in 2004 with an annexation of property within the Francis Marion National Forest and culminating in October 2009 with the annexation of a 359.51-acre, privately-owned in-holding known as the "Nebo Tract," which is virtually encircled by the National Forest. The Town attempted to create the

required contiguity between its own border and the Nebo Tract – the third domino in a string of three annexations – by annexing a ten-foot wide strip of the Francis Marion. The Ten-Foot Strip, the first domino in this chain, is allegedly contiguous with the second domino in the chain – the “Nebo Church Tract” – which purportedly connects the Nebo Tract to the Ten-Foot Strip. *See* Plaintiffs’ Exhibit 11 (map depicting area and relevant tracts). The Ten-Foot Strip is part of the National Forest and is actively managed for the benefit of the public by the United States Forest Service. On October 1, 2009 – the same day the Town purported to annex the Nebo Tract – the Town also enacted ordinances to approve a development agreement for the Nebo Tract, amend the Town’s Comprehensive Plan to include the agreed-upon development, and rezone the Nebo Tract for substantial residential and commercial development. *See* Plaintiffs’ Exhibit 10.

gm On April 18, 2011, this Court denied the Town’s motion for summary judgment, finding that plaintiffs had standing to bring this challenge and that no statute of limitations bar exists to preclude plaintiffs’ claims. Order at 4-6 (Harrington, K.L. Apr. 19, 2011) (the “Harrington Order”). Subsequent to this ruling, the Town filed a petition for certiorari in the Supreme Court. On May 25, 2012, the Supreme Court dismissed the Town’s petition as premature, saying that, generally, the denial of a motion for summary judgment is not immediately appealable. *Vicary, et al. v. Town of Awendaw, et al.*, Appellate Case No. 2012-211590 (2012). The Court explained further that the issues raised in the motion may be raised again later and reconsidered at trial. *Id.* at 1-2. At trial, the Town did raise these same issues of standing and timeliness again via two separate motions for directed verdicts.¹

¹ Pursuant to the Supreme Court’s ruling in this matter, this Court has reexamined the Harrington Order with respect to the issues of standing and timeliness. Although this Court, in its discretion, considers the evidence submitted by the plaintiffs and the defendant to Judge Harrington on standing and timeliness to be part of its record for this case, this Court does not rely on such evidence in rendering its decision here. This Court finds that the evidence submitted at trial

FINDINGS OF FACT

The individual plaintiffs Lynne Vicary and Kent Prause are residents of the Town of Awendaw. Tr. at 55:14 – 56:1; 76:14-16. These individual plaintiffs brought this challenge because they are concerned that the Town's actions will degrade the quality of life in Awendaw, harm unique natural resources, including the Francis Marion National Forest, and result in higher taxes. Tr. at 82:11 – 84:1; Defendant Exhibit 6 (Vicary Dep.) at 37:15-25. Plaintiff South Carolina Coastal Conservation League (the "League") is a 501(c)(3) organization, which has members who live in the Town. Defendant Exhibit 4 (Desrosiers Dep.) at 114:25 – 115:2. The League brought this challenge because it too is concerned about how the challenged actions of the Town would affect the environment, including the National Forest. Defendant Exhibit 4 (Desrosiers Dep.) at 33:24 – 34:17.

After it was unable to secure a petition for annexation for the Ten-Foot Strip from the U.S. Forest Service, the Town decided to make use of a decade-old letter from a U.S. Forest Service representative in South Carolina stating that the agency had "no objection" to the annexation of ambiguously-described property referenced as Forest strips. Plaintiffs' Exhibit 1 (letter dated May 3, 1994 from David W. Wilson (U.S. Forest Service) to The Honorable William E. Alston (Town)).

According to the U.S. Forest Service, the agency did not intend for its letter of May 3, 1994 to constitute a petition of the federal government to annex National Forest lands, which are owned in their entirety by the federal government and administered by the Forest Service. Plaintiffs' Exhibit 14 (letter dated Feb. 16, 2011 from Paul L. Bradley (U.S. Forest Service) to

provides ample support for this Court's findings on standing and timeliness. Moreover, consistent with these findings, this Court hereby denies the Town's motions for directed verdicts.

Mayor Samuel N. Robinson (Town)). Further, the Town failed to establish that the strips of National Forest land described in the May 3, 1994 letter include the Ten-Foot Strip at issue in this case. According to the testimony of Robert Lee Frank, a registered land surveyor, the location of the strips described in the 1994 letter is unclear, as the letter is too vague to provide a valid legal description of any property. Tr. at 40:21 – 41:21.

Even though the Forest Service never submitted a petition for annexation relating to the Ten-Foot Strip, the Town passed an annexation ordinance anyway stating that “a proper petition has been filed” for annexation of the Ten-Foot Strip of the Francis Marion and purporting to accept an annexation petition. Plaintiffs’ Exhibit 8 at 3 (Annexation Ordinance dated May 10, 2004). Although the Town represented to the public that it received a 100% petition from the Forest Service, it never did. See Plaintiff Exhibit 9 (Town Dep.) at 40:9-11 (admitting that “it turned out that they [the Forest Service] would not give us anything in writing saying that they desired to be annexed”)).

CONCLUSIONS OF LAW

I. Plaintiffs have Standing

The Town argues that the plaintiffs in trying to establish standing have “put the cart before the horse” by arguing about substantive defects in the annexation of the properties at issue “while ignoring the threshold issue” of standing. Defendant Town of Awendaw’s Motion for Directed Verdict on the Issue of Standing at 3. Citing *State ex rel. Wilson v. Town of Yemassee*, 391 S.C. 565, 707 S.E.2d 402 (2011), the Town asserts under South Carolina law that annexation ordinances have the presumption of validity and that plaintiffs have wrongly asked this Court to look beyond the ordinances and weigh their validity. The Town also argues under *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 753 S.E.2d 846 (2014) that plaintiffs lack

standing because they allege injuries that are not particular to any one individual and instead describe general grievances suffered by the public as a whole. Defendant Town of Awendaw's Supplemental Memorandum of Law on Issue of Injury/Standing at 3.



Plaintiffs, on the other hand, assert that this case is not about a defective annexation petition; rather, plaintiffs contend this case is about a pattern of municipal deception in which the Town has admittedly engaged in for years and intends to continue doing so. Plaintiffs argue that they do not seek to prove that annexations made by the Town in good faith are defective; rather, plaintiffs seek a declaration under the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 to 15-53-140, that the alleged annexation of the Ten-Foot Strip of the National Forest never happened as a matter of law because the Town never received – despite its representations to the contrary – the required petition for annexation. *See* Second Amended Compl., Prayer for Relief. As such, plaintiffs contend they have statutory standing under the South Carolina Declaratory Judgment Act and public interest standing in light of the unique nature of this case.

In support of standing, plaintiffs rely on the line of cases authorizing taxpayer challenges to government action, which have been upheld under the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 to 15-53-140. *See* S.C. Code Ann. § 15-53-30 (“Any person ... whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder”) (emphasis added); *see also Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) (holding that taxpaying citizen of Greenville County had a direct interest in the County abiding by procurement procedures set out in the County code); *Sloan v. School District of Greenville County*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000)

(finding taxpayer in Greenville County had standing to sue as an individual taxpayer who had interest in the proper use and allocation of tax receipts by the school district and saying “[a] taxpayer’s standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina,” and taxpayers in the past have been held to “constitute a class specially damaged” by illegal, *ultra vires* acts).

This Court finds that the plaintiffs have standing to bring this action because this case is more in line with *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. School District of Greenville County*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000); and *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004), than those cited by the Town. See *Wilson v. Town of Yemassee*, 391 S.C. 565, 707 S.E.2d 402 (2011) and *Carnival Corp. v. Historic Ansonborough Neighborhood Assoc.*, 407 S.C. 67, 753 S.E.2d 846 (2014).

First, like the plaintiffs in the taxpayer line of cases, the individual plaintiffs and members of the League are municipal taxpayers who will be called upon to pay for expanded services required to serve the Nebo development that the Town has purportedly annexed and rezoned. The Supreme Court has confirmed that there is a strong public interest in allowing taxpayers, just like the plaintiffs here, to bring suit to prevent the expenditure of public funds to support *ultra vires* acts. *Sloan*, 356 S.C. at 547-51, 590 S.E.2d at 346-48. Moreover, unlike the *Carnival* case, in which the Court found within the specialized pleadings context of nuisance and ordinance enforcement claims that plaintiffs failed to set forth an injury that was different from the injury suffered by the public generally, the injury to the individual plaintiffs here as taxpayers is peculiar to a class of persons within the Town, as opposed to the public at large. *Id.* at 550, 590 S.E.2d at 348.

Second, unlike the *Town of Yemassee* decision, which involved a challenge to an irregularity or good-faith error in accepting an annexation petition or quibbling over whether an annexation was made through the 75% or 100% petition method, there was no annexation ever completed in the case at bar because the owner of the Ten-Foot Strip – the U.S. Forest Service – never took the action necessary to initiate the process. Instead of a 100% petition method, there was in effect a 0% petition method. See Plaintiffs' Exhibit 14 (letter dated Feb. 16, 2011 from Paul Bradley (Forest Service) to Mayor Robinson (Town) ("the Forest Service did not intend for the letter of May 3, 1994, to constitute 'a petition of the federal government' to annex National Forest lands").

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Third, this case is further distinguishable from the *Town of Yemassee* decision because plaintiffs here have alleged intentional bad faith on the part of the Town. According to plaintiffs here, not only did the Forest Service not submit a petition for the Ten-Foot Strip, but the Town – after failing to convince the Forest Service to give it what it wanted – turned around and issued an ordinance that falsely stated that the Town had received a petition. See Plaintiffs' Exhibit 8 at 3 (Annexation Ordinance dated May 10, 2004 saying "a proper petition has been filed with the Town Council by 100 percent of the freeholders owning 100 percent" of the Ten-Foot Strip). This case thus stands in sharp contrast to *Town of Yemassee* where there was no intentional deceit alleged.

Finally, as in the *Sloan* line of cases, plaintiffs here also meet the test for public importance standing. According to the South Carolina Supreme Court, "[s]tanding is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). The public importance exception

recognizes that “citizens must be afforded access to the judicial process to address alleged injustices.” *Id.* (quoting *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)). It entails a careful, case-by-case balancing of the interests of judicial economy on the one hand and the need to ensure checks against abuses of government power on the other. *Id.* (cautioning against overly formalistic standing analysis).

In *ATC South*, the Supreme Court addressed the public interest exception in the zoning context and explained that the “key” to this balancing is “whether a resolution is needed for future guidance.” *Id.* Here, resolution of plaintiffs’ claims is necessary to protect unique flora and fauna contained in the National Forest, which is owned, maintained, and conserved for the benefit of all Americans. Tr. at 83:12-14.

Moreover, plaintiffs’ claims also concern a recurring controversy likely to continue resurfacing in the future. In fact, the Town admits to having annexed other National Forest strips in the past without a petition requesting their annexation. See Plaintiffs’ Exhibit 9 (Town Dep.) at 73:23-25 (stating that “the Town has done this on several occasions.”). And, its correspondence with the Forest Service indicates an intent to do so again. See Plaintiffs’ Exhibit 3 (letter dated Jan. 23, 2004 from Mayor Alston to Forest Service requesting use of Ten-Foot Strip to annex Nebo Church and enable “other future annexation[s]”). Perhaps more importantly, the Town defends this practice on the grounds that a court has not yet ruled it illegal. Plaintiffs’ Exhibit 9 (Town Dep.) at 74:1-7. For these reasons, plaintiffs have established they meet the public importance exception to maintain an action to ask this Court to declare whether the Town’s practice of expanding its municipal limits into the National Forest

is *ultra vires*. See, e.g., *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69 (1999) (applying exception due to public interest in resolving challenge to *ultra vires* acts).²

For these reasons, this Court finds that plaintiffs have standing to seek a declaration regarding the legality of the challenged actions as this is a matter that is of such public importance as to require resolution for future guidance.

II. Plaintiffs' Action was Timely Filed

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In addition to arguing lack of standing, the Town also argued at trial that plaintiffs missed the 90-day deadline to challenge the 2004 annexations of the Ten-Foot Strip and the Nebo Church Tract. Defendant Town of Awendaw's Motion for Directed Verdict on the Issue of Statute of Limitations at 1. As an initial matter, there is no dispute that plaintiffs timely challenged the purported annexation of the Nebo Tract. As required by statute, plaintiffs filed a Notice of Intention to Contest Extension of Town of Awendaw's Municipal Limits on November 25, 2009, within 60 days of the purported annexation of the Nebo Tract on October 1, 2009, and also filed their First Amended Complaint to add plaintiffs' annexation claims on December 22, 2009, within 90 days of the purported Nebo Tract annexation. See S.C. Code Ann. § 5-3-270.

Further, with respect to the purported annexations of the Ten-Foot Strip and the Nebo Church Tract, it is axiomatic that the passage of time cannot transform a void and unauthorized annexation into a valid one. *Bostick v. Beaufort*, 307 S.C. 347, 350, 415 S.E.2d 389, 391 (1992)

² The *Carnival* decision is distinguishable on this point as well. In *Carnival*, the Supreme Court found that the plaintiffs did not have public importance standing. That conclusion was premised largely on the Court's view that the *Carnival* case "presents no issue of the constitutionality or legality of government action." *Carnival Corp.*, 753 S.E.2d at 853. That is not the situation here where the crux of plaintiffs' case is that the Town is engaged in illegal government action involving the National Forest, which the Town says it will continue.

(holding that a “fatally flawed” annexation petition renders an annexation ordinance “a nullity upon origination,” and cannot be retroactively validated).

Further, statutes of limitation are not automatic bars to claims, but rather, they are affirmative defenses that can be waived and are subject to equitable doctrines, including estoppel and tolling. *See, e.g., Republic Contracting Corp. v. S.C. Dep’t of Highways & Pub. Transp.*, 332 S.C. 197, 503 S.E.2d 761 (Ct. App. 1998). Both doctrines apply here. Here, plaintiffs have shown that the Town has unclean hands in issuing the annexation ordinance for the Ten-Foot Strip because the Town falsely claimed that the U.S. Forest Service had “filed” a “proper petition” for annexation. Plaintiffs’ Exhibit 8 at 3 (Annexation Ordinance dated May 10, 2004). Moreover, the Town itself did not even notify Charleston County that it had assumed control over the Ten-Foot Strip and Nebo Church Tract *until October 2009* – a full five years after the alleged annexations were consummated. *See* Plaintiffs’ Exhibit 8 (letter dated Sept. 30, 2009 from Samuel Brown (Town) to Cathy Franks (Charleston County Planning Department)). As a result, as of October 2009, Charleston County had not removed the Ten-Foot Strip or Nebo Church Tract from its maps. Plaintiffs Exhibit 9 (Town Depo.) at 55:7-19. Given the Town’s misrepresentation and failure to provide notice regarding these annexations, this Court finds that the Town is estopped from asserting a statute of limitations defense and the time period for challenging the 2004 annexations is tolled.

III. Merits

Because this Court finds that plaintiffs have standing to bring this action and that this action was timely filed, the Court reaches the merits of this case.

Municipalities like the Town have only the powers granted them by Article VIII of the South Carolina Constitution and by state legislation. *Hospitality Ass’n v. Cnty. of Charleston*,

320 S.C. 219, 225-26, 464 S.E.2d 113, 117-18 (S.C. 1995). Actions outside these powers are void and have no effect. See *Bostick*, 307 S.C. at 350, 415 S.E.2d at 391 (“If an ordinance enacted by a municipality is beyond its powers, no subsequent action in relation thereto by the municipality can give it validity.”).

The Town lacks the authority to annex non-contiguous property. S.C. Code Ann §§ 5-3-150 and -305 (allowing annexation of only contiguous property and defining contiguity). Because the Nebo Tract is not contiguous with the Town, the Town lacked authority to annex it, and its attempt to do so is void. The same is true with respect to Nebo Church. The Town could topple both of these “dominos” and bring them within its bounds only by jumping across the Forest, and it proved unable to obtain the cooperation from the Forest Service necessary to annex the intervening National Forest land. Its intentional misconduct in claiming to have received a petition that did not exist was *ultra vires*. Accordingly, the ordinance purporting to annex the Ten-Foot Strip was void *ab initio*.

As a matter of law, the annexation of the Ten-Foot strip never occurred because it could not be accomplished without a petition. Under Section 5-3-150, an annexation can become “complete” only upon acceptance of a petition “*requesting annexation*.” S.C. Code Ann. § 5-3-150(3) (emphasis added). It is undisputed that the Town never received anything from the Forest Service requesting annexation of the Ten-Foot Strip. The 1994 letter the Town tried to use as a “petition” is no such thing. The term “petition” is commonly understood and construed by legal authorities to mean “[a] formal written request addressed to some governmental authority” or “[a] written address, embodying an application or prayer” from the submitter to some authority. Blacks Law Dictionary 1145 (6th ed. 1990).

Because Section 5-3-150 authorizes the Town only to accept annexation petitions and does not allow involuntary annexations, the Town had no authority to reach out of its own accord and grab the Ten-Foot Strip. As the Town itself has explained, "That's not the way the process works. The town does not send people a request and say, we want you to annex. The person who owns the property *asks* [through] a petition to the town to annex their property." Plaintiffs' Exhibit 9 (Town Dep.) at 29:10-13 (emphasis added).



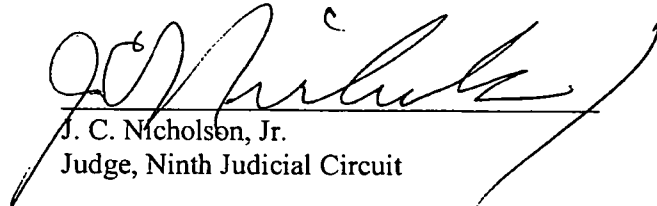
Further, the 1994 letter does not even contain a valid legal description of any property and is too vague to describe any identifiable strip. What description it does contain is too unclear to be reasonably relied on in any event. Tr. at 40:21 – 41:21. And, the Town admits that in 2004, the Forest Service declined to provide "anything in writing" documenting an official position on annexation of the Ten-Foot Strip. Plaintiffs' Exhibit 9 (Town Dep.) at 42:15. The Town also understood that anything authoritative would need to come from Washington D.C., not the South Carolina representative who authored the 1994 letter. *Id.* at 42:16. The Town was thus aware that it could not legitimately rely on the decade-old letter as authoritative or reflective of the Forest Service's 2004 position.

CONCLUSION

This Court declares pursuant to the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 to 15-53-140, that the annexation of the Ten-Foot Strip was void and of no effect because the Town never received a petition of annexation from the United States Forest Service. Because the annexation of the Ten-Foot Strip was *ultra vires* of the Town's authority, the subsequent annexations of the Nebo Church Tract and the Nebo Tract fail because these tracts lack contiguity with the Town. And finally, this Court declares further that because the annexation of the Nebo Tract did not occur as a matter of law, it follows that the other

ordinances enacted by the Town on October 1, 2009 to (1) approve a development agreement for the Nebo Tract, (2) amend the Town's Comprehensive Plan to include the agreed-upon development, and (3) rezone the Nebo Tract are each *ultra vires* acts and *void ab initio*.

IT IS SO ORDERED.


J. C. Nicholson, Jr.
Judge, Ninth Judicial Circuit

Charleston, South Carolina

Date: 7/24/14

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

LYNNE VICARY, KENT PRAUSE, and
SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,

Plaintiffs,

v.

TOWN OF AWENDAW, and EBC, LLC,

Defendants.

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CA. NO. 09-CP-10-7399

ORDER ON DEFENDANT
AWENDAW'S MOTION FOR
RECONSIDERATION

FILED
2014 SEP 22 AM 9:34
JULIE J. ARMSTRONG
CLERK OF COURT
BY

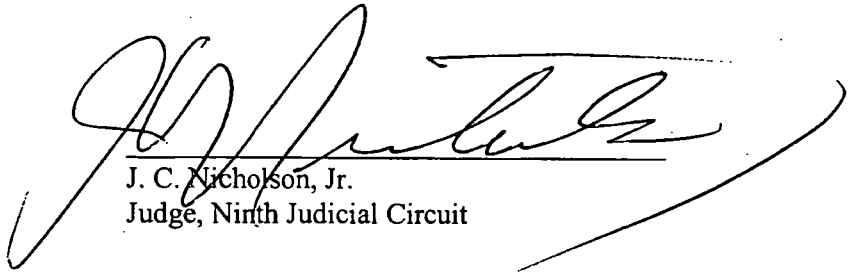
This matter was tried before the Court on April 16, 2014. On July 24, 2014, this Court issued an order in favor of Plaintiffs, declaring, among other things, (1) that Plaintiffs had standing to bring this challenge; (2) that this action was timely filed; and (3) that the Defendant Town of Awendaw's (the "Town") purported annexation of the Ten-foot Strip of the Francis Marion National Forest was *void ab initio* and did not occur as a matter of law. On August 4, 2014, the Town filed a motion for reconsideration pursuant to Rules 59(e) and 62 of the South Carolina Rules of Civil Procedure.

In its motion for reconsideration, the Town requests that the Court reconsider its order invalidating the annexation of the Ten Foot Strip because the Town alleges that Plaintiffs challenge was not timely. Motion at 1. The Town also asks this Court to reconsider whether Plaintiffs have standing to mount this challenge. *Id.*

Having considered the papers filed by the parties, the Court finds that the arguments raised by the Town in its motion for reconsideration have been considered by this Court and are addressed in this Court's prior Order. There is nothing in the Town's motion that weighs in

favor of disturbing this Court's prior ruling; and therefore, the Town's motion for reconsideration is hereby denied.

IT IS SO ORDERED.



J. C. Nicholson, Jr.
Judge, Ninth Judicial Circuit

Charleston, South Carolina 29401

Date: 9/18/14

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

LYNNE VICARY, KENT PRAUSE, and
SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,

Plaintiffs,

v.

TOWN OF AWENDAW, and EBC, LLC,

Defendants.

CASE NO. 09-CP-10-7399

SECOND AMENDED COMPLAINT
(Declaratory and Injunctive Relief Sought)

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2010 APR 23 AM 10:54

FILED

SUMMARY OF CLAIMS

1. In this Complaint, Plaintiffs challenge four actions undertaken by the Town of Awendaw (the "Town") through four separate ordinances to (1) annex a private in-holding in the Francis Marion National Forest known as the "Nebo Tract," (2) approve a development agreement for the Nebo Tract, (3) amend the Town's Comprehensive Plan to include the agreed-upon development, and (4) rezone the Nebo Tract. The Town approved all four actions at an October 1, 2009 Town Council Meeting, but it had no authority to do so for several reasons, each of which is fatal to the actions complained of by the Plaintiffs. First, the Town has no authority to annex the Nebo Tract, which is not contiguous to the Town. The Town also lacks authority to annex more land than the Nebo Tract's owner, EBC, LLC, petitioned to have annexed. The purported annexation is therefore void and of no effect. And, having no jurisdiction over the property, the Town cannot lawfully rezone it, or authorize its development. Second, approval of the development agreement, rezoning, and comprehensive-plan amendment violated the specific substantive laws governing each action and was arbitrary and unreasonable. Finally, the Town

deprived the public of the opportunity to provide meaningful input and to fully use the public process to stop its illegal actions by failing to follow the notice-and-hearing procedures required by statute to precede approval of the development agreement and the amendment of the Comprehensive Plan.

INTRODUCTION

2. In this Complaint, Plaintiffs Lynne Vicary, Kent Prause, and the South Carolina Coastal Conservation League ("League") allege that actions taken by Defendant Town of Awendaw, including but not limited to, the annexation of the Nebo Tract – an in-holding in the Francis Marion National Forest owned by Defendant EBC, LLC D/B/A EBCSC, LLC ("EBC"); entering into the development agreement (the "Development Agreement") relating to the Nebo Tract; the amendment of the Town's Comprehensive Plan (the "Plan"); and the rezoning of the Nebo Tract violate the South Carolina Local Development Agreement Act, S.C. Code Ann. § 6-31-10 *et seq.*; Title 5, Chapter 3 of the S.C. Code; Title 6, Chapter 29 of the S.C. Code; and other applicable South Carolina laws and regulations. The Town of Awendaw, South Carolina, is located about 20 miles north of Charleston and is sandwiched between two federally-protected areas, the Francis Marion National Forest and Cape Romain National Wildlife Refuge. This area is one of the most valuable ecological zones remaining on the Atlantic coast. The Francis Marion National Forest is comprised of many important natural habitats, including longleaf pine forests, freshwater swamps, pitcher plant flats, and rare Carolina Bays. As well as providing habitat for a number of uncommon species, such as the Swallow-tailed Kite, it is, most significantly, home to one of the world's largest populations of the federally-protected red-cockaded woodpecker and is designated as one of the species' core recovery populations. In addition, this unique area supports a number of other federally-protected and sensitive species,

including the Flatwoods salamander, which has been nearly extirpated from South Carolina but was last documented in the Francis Marion. Not only is the Nebo Tract mostly surrounded by the Francis Marion, it is also close to Cape Romain National Wildlife Refuge, which provides habitat for federally protected species and has been classified as an Outstanding Resource Water by the state of South Carolina. By purporting to annex the Nebo Tract and allowing for intensive residential and commercial development of the property, the violations of law alleged herein have negatively impacted and will continue to harm one of the most important ecological areas on the Atlantic coast, including the Francis Marion, a sensitive resource of national significance that is owned and managed for the benefit of the public.

JURISDICTIONAL FACTS AND PARTIES

3. This Court, pursuant to S.C. Code Ann. § 5-3-150, *et seq.*, § 6-29-760, and other law, has jurisdiction over the Plaintiffs' claims; and venue for this action is proper in Charleston County.

4. Plaintiffs Lynne Vicary and Kent Prause are residents and owners of real property in Awendaw, South Carolina. Ms. Vicary owns property bearing Charleston County Parcel Identification Numbers 700-00-00-178 and 700-00-00-050. Mr. Prause owns property bearing Charleston County Parcel Identification Number 680-00-00-076.

5. Plaintiff Coastal Conservation League is a not-for-profit corporation organized and existing under the laws of South Carolina with approximately five thousand members, including members who reside and own property in the Town of Awendaw.

6. The Defendant Town of Awendaw is a municipality incorporated under the laws of South Carolina and is located in Charleston County.

7. The Defendant EBC, LLC D/B/A EBCSC, LLC is, upon information and belief, a limited liability company organized under the laws of Illinois that owns a private in-holding that is

surrounded on three sides by the Francis Marion National Forest. This property is approximately 359.51 acres in size and is known as the Nebo Tract. The property can be identified by Charleston County Parcel Identification Numbers 625-00-00-004, -006, & a portion of -041.

.BACKGROUND

8. On July 10, 2009, EBC filed two petitions with the Town of Awendaw to annex two portions of the Nebo Tract (Charleston County Parcel Identification Numbers 625-00-00-004 and 006) into the Town. On or about September 14, 2009, EBC filed a third petition seeking annexation of another piece of the Nebo Tract (a portion of the property bearing Charleston County Parcel Identification Number 625-00-00-041). Upon information and belief, these petitions were made on the theory that the Nebo Tract was contiguous with parcels that had been the subject of previous annexation attempts by the Town: a ten-foot wide strip of the Francis Marion National Forest (extending along the frontage of Charleston County Parcel Identification Numbers 629-00-00-224, 303, & 305 and continuing to Number 625-00-00-005) (hereinafter the "Ten-Foot Strip of the Francis Marion" or the "Ten-Foot Strip") and the Nebo Church tract (Charleston County Parcel Identification Number 625-00-00-005) (hereinafter the "Nebo Church Tract").

9. In 2004, the Town attempted annexations of the Ten-Foot Strip of the Francis Marion and of the Nebo Church Tract. On or about January 23, 2004, the Town sent the United States Forest Service a letter requesting that the Forest Service grant the Town use of the Ten-Foot Strip of the Francis Marion for annexation by the Town. The January 23, 2004 letter explained that the Town needed the Forest Service's assistance in this regard to establish the contiguity required to annex the Nebo Church Tract and for other future annexations of property. Upon information and belief, the Forest Service never agreed to provide the assistance requested; it did not petition

for annexation of its property, nor did it so much as return correspondence acquiescing to the Town's proposal to annex the National Forest land at issue without a petition. Nevertheless, the Town passed an annexation ordinance stating that a proper petition had been filed for annexation of the Ten-Foot Strip of the Francis Marion and purporting to accept an annexation petition.

10. Upon information and belief, this is not the first time that the Town has attempted to annex a strip of the Francis Marion National Forest without having received an annexation petition as required under Title 5, Chapter 3 of the S.C. Code. Upon information and belief, as far back as 1994, the Town began annexing strips of National Forest land to reach other properties adjacent to the Francis Marion but separated from the Town's incorporated limits, allowing for pockets of development divided by expanses of undeveloped forest land.

11. The Town's annexation of the Ten-Foot Strip of the Francis Marion was void and of no effect because the Town never received a petition of annexation from the owner of the Ten-Foot Strip of the Francis Marion, the federal government. Because the annexation of the Ten-Foot Strip was *ultra vires* of the Town's authority, the subsequent annexations of the Nebo Church Tract and the Nebo Tract fail because these tracts lack contiguity with the Town. As such, on November 25, 2009, Plaintiffs filed a Notice of Intention to Contest Extension of Town of Awendaw's Municipal Limits with the clerk of the Town of Awendaw and the clerk of this Court pursuant to S.C. Code Ann. § 5-3-270.

12. Up until October 1, 2009, the Nebo Tract was subject to the zoning and other ordinances of the County of Charleston. The Nebo Tract was zoned Agricultural Preservation District (AG-10), which permitted no more than one house per every ten acres of land or one house per every five acres of land under a Planned Development. This Agricultural Preservation zoning

designation helped to preserve the rural character of this property while allowing a limited amount of development.

13. On or about October 1, 2009, the Town of Awendaw adopted a series of ordinances pursuant to which the Town allegedly annexed the Nebo Tract, entered into the Development Agreement with EBC, amended the Town's comprehensive plan, and rezoned the property. Together these actions sought to authorize extensive residential and commercial development of the Nebo Tract (e.g., the Development Agreement allows for up to 360 residential units and up to ninety thousand (90,000) square feet of gross floor area for commercial uses and eighty thousand (80,000) square feet of gross floor area for office uses).

14. As a direct result of the adoption of the ordinances just described, Plaintiffs are aggrieved and have suffered an injury in fact which is concrete and particularized, actual or imminent, and is directly traceable to the ordinances. Plaintiffs' injuries will be redressed by a decision in their favor in this matter.

15. Plaintiffs Lynne Vicary and Kent Prause reside and own property in Awendaw and use the Francis Marion National Forest for recreation and other outdoor pursuits, which are and will be adversely affected by the purported annexation and rezoning of the Nebo Tract, its purported exclusion from the zoning imposed by the County of Charleston, its purported new zoning as established by the Development Agreement, and the purported amendment to the Town's Comprehensive Plan to include the rezoned development.

16. The League is an environmental organization dedicated to protecting the natural environment of the South Carolina coastal plain and enhancing the quality of life of South Carolina communities by working with individuals, businesses, and government to ensure balanced solutions. The League advocates sound growth management that is the product of

environmentally aware regional planning that designates areas for rural preservation and other areas for suburban growth to prevent needless urban sprawl into rural areas. Among the many hazards and costs of needless and ill-considered suburban sprawl into remote areas are that (a) lands rural in character with their traditional communities and culture are irrevocably altered forever, (b) important and irreplaceable natural resources and habitat, such as the Francis Marion National Forest, are degraded or destroyed, (c) wildlife is displaced and wildlife populations diminished, (d) public wetland resources, such as oysterbeds and fisheries, are damaged, (e) the cost of providing public facilities, infrastructure, and services exceeds the public revenues derived from the developed areas, and (f) taxpayers' monies are used to subsidize private development. The members of the League, especially those in the Town and Charleston County, are taxpayers who participate in the observance of wildlife and enjoyment of the outdoors, including recreation in the Francis Marion, and believe in sound municipal fiscal and development policies. The League's members within the Town and the individual Plaintiffs will suffer an individualized injury from the conduct at issue in this action.

17. The Forest Service manages the Francis Marion National Forest according to a multiple-use plan to preserve the health of these public lands for the benefit of present and future generations. As members of the public who use and enjoy the public land which is managed for their benefit and which largely surrounds the Nebo Tract, Plaintiffs are adjoining landowners and representatives under S.C. Code Ann. § 6-29-760(C).

18. The individual Plaintiffs and members of the League are taxpayers who will suffer a concrete and individualized injury from the conduct at issue in this action, which requires the Town to expend taxpayer funds to maintain and construct infrastructure and provide services,

necessary to support a development outside its bounds and without complying with applicable law.

19. Plaintiffs are acting within the public interest by challenging an unprecedented development in the heart of a National Forest, which is premised on illegal and *ultra vires* acts and stands to severely impact the Forest and the public's use and enjoyment thereof. The actions complained of impact public lands and a uniquely biodiverse area that is home to natural resources of state and national significance. In addition, the Town's actions raise important issues regarding annexations throughout South Carolina, Comprehensive Planning, zoning, and development agreements that require resolution for future guidance. The Town is required by law to review and amend its Comprehensive Plan pursuant to a systematic process and in keeping with the strictures of S.C. Code Title 6, Chpt. 29, Art. 3. By purporting to annex a strip of a national forest without the owner of the property – the federal government – having first filed a petition for annexation with the town undermines the laws governing annexation in this state. The purported annexation further undermines the annexation statutes because a narrow strip of undeveloped land unfit for municipal purposes cannot provide the "continuous border" necessary for contiguity under S.C. Code Ann. §5-3-305 in any event. Moreover, if permitted to bypass the statutory requirements for the Comprehensive Planning Process by suddenly and arbitrarily declaring its Plan inclusive of a development that will fundamentally alter the Town without following or establishing the procedures required by statute, without undertaking any planning concerning the effects of the development at issue, and without considering any of the factors the statute mandates that a Comprehensive Plan address, the Plan becomes a meaningless formality; the effort put into its development is therefore wasted. Worse, the purported amendment then becomes the vehicle for arbitrary and unreasonable rezoning. Similarly, a

Town should not be permitted to evade the requirements of the Development Agreement Act by failing to provide required notice and purporting to establish an agreement with respect to responsibilities for necessary infrastructure by designating an “either or” of the only available options that provides no more clarity or certainty for the Town and its residents and taxpayers than if no agreement had been entered into at all.

20. The Nebo Tract forms part of a larger in-holding, the “Fairlawn Plantation,” mostly surrounded by the Francis Marion National Forest. Upon information and belief, the Town plans to continue using the Ten-Foot Strip of the Francis Marion to establish contiguity needed for the Town to pass ordinances annexing and enabling development of additional tracts of the Fairlawn Plantation. Resolution of the issues raised in this action is especially warranted for future guidance concerning this anticipated development and impacts to public lands with unique ecological importance.

21. The portion of the Fairlawn Plantation devoted to the Nebo Tract initially included only TMS. Nos. 625-00-00-006 and -004. EBC subsequently expanded that acreage to include 16 acres of TMS No. 625-00-00-041. Then, the Town further expanded the size of the Nebo Tract through the ordinances approving the actions challenged in this case.

22. The purported annexation of the Nebo Tract, the amendment to the Comprehensive Plan of the Town of Awendaw, and the purported rezoning of the Nebo Tract to permit the residential and commercial development specified in the adopted Development Agreement violated state law and applicable ordinances in that these actions were contrary to the wise and efficient use of public funds, failed to consider the impact on other property owners in the Town, and were in violation of the following purposes established by statute: the prevention of the overcrowding of land; the protection and preservation of scenic, historic, or ecologically sensitive areas; the

facilitation of adequate provision or availability of transportation, police and fire protection, water, sewage, schools, parks and other recreational facilities; and other public services and requirements.

PROCEDURAL BACKGROUND

23. On July 15, 2009, the Town received a "100 Percent Petition Form" requesting annexation of TMS. No. 625-00-00-006 and a "100 Percent Petition Form" requesting annexation of TMS. No. 625-00-00-004. Both forms were signed on behalf of EBC on July 19, 2009.

24. On August 13, 2009, the Town provided public notice of a planning commission meeting on August 24, 2009. The notice stated that the agenda for the meeting would include a public hearing on the Nebo Tract Development Agreement and rezoning of the Nebo Tract, which was described as encompassing only parcels -004 & -006. The public notice failed to state if or where documents related to the Development Agreement or the rezoning could be reviewed by the public, as required by statute. S.C. Code Ann. § 6-31-50.

25. On August 24, 2009, the planning commission held a public hearing on the Development Agreement, and a motion to approve the development agreement passed.

26. On August 29, 2009, the Town provided notice of a September 8, 2009 public hearing on rezoning the Nebo Tract (still described as only -004 and -006) and on the Development Agreement for the same area.

27. On August 29, 2009, the Town also published a notice of an October 1, 2009 hearing on an ordinance to amend the Town's Comprehensive Plan to include the Nebo Tract Planned Development. The Town published this notice although no such amendment had yet been proposed to the Town Council by the Town's Planning Commission. The notice did not give

any description of the Tract or the Planned Development.

28. On September 8, 2009, first readings of ordinances for the Development Agreement, rezoning, annexation, and comprehensive plan amendment occurred, and motions in favor of each were approved. There had been no notice provided that the amendment to the Comprehensive Plan, which still had not been recommended to the Town Council by the Town's Planning Commission, would be discussed at the September 8, 2009 meeting in which the Town Council conducted the first reading of the ordinance to pass the amendment and allowed comments on the amendment.

29. On September 13, 2009, the Town provided a public notice of a Planning Commission meeting that would include a resolution to amend the Comprehensive Plan to include the Nebo Tract. The same notice also listed as a separate matter the discussion of recommendations made as part of the Town's ongoing review of its Comprehensive Plan, last revised in 2004.

30. On September 14, 2009, the Town received a "100 Percent Petition Form" requesting annexation of a total of 16 acres of TMS. No. 625-00-00-041 at U.S. Hwy. 17 adjacent to the northwest corner of TMS 625-00-00-006. That petition form was signed but not dated.

31. On September 15, 2009, the Town provided public notice regarding an October 1, 2009 Town Council Meeting at which time public hearings on rezoning and the Development Agreement for the Nebo Tract (which now included part of -041) would occur. The notice did not describe which part of -041 was now included, nor did it indicate what use would be made of the property or why it had been added to the Tract.

32. On September 28, 2009, the Town's Planning Commission passed a resolution to amend the Town's Comprehensive Plan to include the Nebo Tract. The resolution did not indicate that the Planning Commission considered whether the Tract was appropriate for intensive

development or the impact of such development on the planning elements that must be considered under S.C. Code Ann. § 6-29-510. Instead, it simply noted that because the Planning Commission approved of the “Development Standards” laying out the design of the planned development, the Tract should be added to the Comprehensive Plan.

33. On October 1, 2009, the Town Council held a hearing on the rezoning and Development Agreement and conducted second readings of the ordinances approving the annexation, the rezoning, and the Development Agreement. Despite the August 29, 2009 notice of an October 1, 2009 public hearing on the Comprehensive Plan amendment, no public hearing was held on that amendment. The Town Council did, however, conduct a second reading of the ordinance to amend the Comprehensive Plan.

34. Also on October 1, 2009, the Town adopted ordinance No. 09- 08 purporting to annex the Nebo Tract, which the ordinance describes as a 359.51-acre property owned by EBC and comprised of TMS. No. 625-00-00-004, TMS. No. 625-00-00-006, and approximately 21 acres of TMS. No. 625-00-00-041.

35. Also on October 1, 2009, the Town passed Ordinance No. 09-09 purporting to rezone the entire 359.51 –acre Nebo Tract from unzoned to Planned Development zoning classification.

36. Also on October 1, 2009, the Town passed Ordinance No. 09-10 approving the Development Agreement for the Nebo Tract, which it described as comprising TMS. Nos. 625-00-00-004, -006, and part of -041, and authorizing the Town to execute the Development Agreement.

37. Also on October 1, 2009, the Town passed Ordinance No. 09-11, purporting to amend the Town’s Comprehensive Plan to include the 359.51-acre Nebo Tract as a mixed-use Planned Development. Although the Town had noticed the never-held hearing on the amendment and

conducted a first reading of the ordinance to approve it ahead of the Planning Commission resolution recommending that amendment to the Town, the ordinance to amend the Comprehensive Plan purported to act on the Planning Commission's recommendation.

38. In November 2009, members of the League reviewed public records requested by the Southern Environmental Law Center under the S.C. Freedom of Information Act. Although the requested materials encompassed the most recent version of the Town's Comprehensive Plan, the Town was unable to provide an amended Plan that reflected the addition of the Nebo Tract; instead, the Town continues to use and to supply to the public the 2004 version of the Plan that it is currently updating. According to the 2004 Plan, the most recent survey of housing units indicated 464 to 466 units within the Town; the 360 planned for the Nebo Tract would represent a 77 percent increase in this number of residences. The 2004 Plan also cautions that a town the size of Awendaw does not need an overabundance of commercial development and calls for such development to be channeled into a pedestrian-friendly Town Center near the intersection of Hwy 17, Doar Road, and Sewee Road.

FIRST CLAIM FOR RELIEF
(Purported Annexation of Nebo Tract Is Void Because It Is Not Contiguous with
Awendaw's Boundary)

39. Plaintiffs incorporate the allegations of the preceding paragraphs as if set forth in full.

40. On July 10, 2009, EBC filed petitions with the Town of Awendaw to annex two portions of the Nebo Tract (Charleston County Parcel Identification Numbers 625-00-00-004 and 006) into the Town. On September 14, 2009, EBC filed a third petition seeking annexation of another piece of the Nebo Tract (a portion of the property bearing Charleston County Parcel Identification Number 625-00-00-041).

41. Upon information and belief, these petitions were made on the theory that the Nebo Tract was contiguous with the Town due to the Town's earlier attempted annexations of the Ten-Foot Strip of the Francis Marion and the Nebo Church Tract.

42. In 2004, the Town attempted to annex the Ten-Foot Strip of the Francis Marion in order to create contiguity with the Nebo Church Tract. Upon information and belief, the Forest Service never filed a petition to request that its property be brought within the municipal limits of the Town. Nevertheless, the Town passed an annexation ordinance stating that a proper petition had been filed for annexation of the Ten-Foot Strip of the Francis Marion and purporting to accept an annexation petition.

43. The Town's annexation of the Ten-Foot Strip of the Francis Marion was void and of no effect because the Town never received a petition of annexation from the United States Forest Service. Because the annexation of the Ten-Foot Strip was *ultra vires* of the Town's authority, the subsequent annexations of the Nebo Church Tract and the Nebo Tract fail because these tracts lack contiguity with the Town.

44. Upon information and belief, the U.S. Forest Service has not filed a petition for annexation with the Town relating to any other part of the Francis Marion National Forest. In the event the Town claims it established contiguity with the Nebo Tract via a strip of the Francis Marion other than the Ten-Foot Strip, such argument fails because, upon information and belief, no petition relating to any other strip of the forest has been filed with the Town by the Forest Service and the Town lacked authority to annex any other strip of the Francis Marion National Forest that could have established contiguity with the Nebo Tract.

45. The purported annexation of the Nebo Tract to allow high density and intense suburban and commercial development, especially when compared to that allowed by the County, harms

the Plaintiffs' distinct individualized interests as previously alleged and the interests of the League. Further, the purported annexation will require the provision of municipal services, facilities, and infrastructure to a remote location, thereby imposing an additional tax burden on the individual Plaintiffs and members of the League.

SECOND CLAIM FOR RELIEF
(Purported Annexation of Nebo Tract Is Void Because It is Not Adjacent and Continuous with the Boundary of the Town)

46. Plaintiffs incorporate the allegations of the preceding paragraphs as if set forth in full.

47. By law, a municipality may annex property and increase its boundaries only if the tract of land to be annexed is contiguous with the town. In 2000, the South Carolina General Assembly codified the definition of contiguous for purposes of annexation as follows:

For purposes of this chapter, "contiguous" means property which is **adjacent to a municipality and shares a continuous border. Contiguity is not established by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line which connects one property to another;** however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, **which but for the intervening connector would be adjacent and share a continuous border,** the intervening connector does not destroy contiguity.

S.C. Code Ann. § 5-3-305 (emphasis added).

48. Section 5-3-305 altered the prior law as it had been judicially interpreted and applied, which had considered lands to be contiguous and subject to annexation even though they were separated by significant distances as long as any connecting right of way, road, or other strip of land in between was annexed as well. Section 5-3-305 now requires that the border of the annexed land be both adjacent *and* continuous to the boundaries of the annexing municipality.

49. The Nebo Tract is not contiguous with the municipal limits of the Town of Awendaw, as provided by Section 5-3-305. Because the Ten-Foot Strip of the Francis Marion is not adjacent *and* continuous with the limits of the Town, it cannot provide contiguity with the Nebo Church

Tract and, in turn, the Nebo Tract. As such, the purported annexation of the Nebo Tract is void, not authorized by law, and is an *ultra vires* act of the Town.

50. The question of whether the annexation satisfies the requirements of Section 5-3-305 and other requirements of law is of considerable public importance and will arise again in similar contexts but continuously avoid review if not answered in this case. It is further of individual and public importance that local governments not exceed their authority as empowered by the General Assembly. In annexing the property, the Town exceeded its authority. The Plaintiffs have a right by statute and constitution to have governmental entities abide by the laws so as to not injure them, and the individual Plaintiffs have a right to have their tax revenues expended only in a legal manner. Further, this and other similar purported annexations are greatly expanding the boundaries of municipalities into remote rural areas through an illegal interpretation of Section 5-3-305 by pretending there is contiguity when there is none and creating imaginary corridors that are not separately platted parcels and are solely the contrivance of municipalities. A ruling in this case on this important public issue is necessary for guidance in this case and for future guidance in other similar cases.

THIRD CLAIM FOR RELIEF

(Purported Annexation of a Portion of TMS. No. 625-00-00-041 is Void as Ultra Vires of the Town's Authority)

51. Plaintiffs incorporate the allegations of the preceding paragraphs as if set forth in full.

52. On September 14, 2009, the Town received from EBC a petition for the annexation of "a total of 16 acres" in the northwest corner of TMS. No. 625-00-00-041.

53. The Town purported to accept EBC's petition, but annexed more property than EBC petitioned for and did so without providing a means of identifying the property annexed.

Specifically, through Town Ordinance No. 09-08, the Town annexed "approximately 21 acres"

of TMS. No. 625-00-00-041, without specifying which portion of the parcel it was purporting to annex into the Town.

54. The Town's annexation of TMS. No. 625-00-00-041 is void and of no effect because the Town never received a petition to annex 21 unspecified acres of that parcel and the Town lacks the authority to annex property without a petition.

55. EBC petitioned for the Town to annex a total of 16 acres of TMS. No. 625-00-00-041. The Town has no authority to annex additional acreage not encompassed by the petition.

56. Additionally, the ordinance is unlawful and void because it is too vague to be given effect. The ordinance does not specify where the additional approximately 5 acres are located or even whether the "approximately 21 acres" annexed overlap with the 16 acres encompassed by EBC's petition. Accordingly, there is no way to delineate the boundaries of the portion of TMS No. 625-00-00-041 purportedly annexed, to establish its contiguity with the Town, or to establish that any part of the 21 acres annexed was the subject of an annexation petition.

FOURTH CLAIM FOR RELIEF
(Failure to Comply with Procedural Requirements of the South Carolina Local Development Agreement Act)

57. Plaintiffs incorporate the allegations of the preceding paragraphs as if set forth in full.

58. S.C. Code Ann § 6-31-50(A) provides that prior to entering into a development agreement, a local government shall conduct at least two public hearings. One of these two meetings can be held by the planning commission.

59. Section 6-31-50(B)(1) provides that notice of intent to enter into a development agreement must be advertised in a newspaper of general circulation. If more than one hearing is to be held, the day, time, and place of the second hearing must be announced at the first.

60. Section 6-31-50(B)(2) provides that notice must specify the location of the property

subject to the development agreement, the uses proposed, and must specify a place where a copy of the proposed development agreement can be obtained.

61. The Town failed to follow required procedures regulating adoption of development agreements in several respects. First, the August 13, 2009 notice does not contain information required by Section 6-31-50(B)(2) because (a) it did not state the uses proposed for the property and (b) it did not state where a copy of the Development Agreement could be viewed. The notice provided only that there would be a public hearing on the Development Agreement, which fails to provide sufficient information or notice for the public to meaningfully participate. The August 13 notice also failed to correctly identify the entire property subject to the Development Agreement since it did not include the portion of the Nebo Tract that is located in Charleston County Parcel Identification Number -041.

62. Upon information and belief, the first of the two required public hearings (conducted by the Planning Commission on August 24) did not announce the date, time, and place of the second meeting, as required by Section 6-31-50(B)(1).

63. The September 15 notice of the October 1 Town Council meeting listed all three parcel numbers, but it failed to state what uses are proposed for the additional acreage or where a copy of the modified agreement could be obtained. The notice just lists the Development Agreement for Nebo Tract as up for a hearing and gives the acreage, parcel numbers, and name of the applicant.

FIFTH CLAIM FOR RELIEF

(Failure to Comply with Procedural Requirements for Amending Comprehensive Plan)

64. Plaintiffs incorporate the allegations of the preceding paragraphs as if set forth in full.

65. Under S.C. Code Ann. § 6-29-530, before adopting the Comprehensive Plan or any element thereof, the Town must hold a public hearing after not less than thirty day's notice of the

time and place of the hearing.

66. The Town failed to comply with S.C. Code Ann. § 6-29-530 in amending its Comprehensive Plan to include the Nebo Tract. It provided no notice whatsoever that it would conduct the first reading of the ordinance to approve the amendment and spontaneously allow comments on the amendment at the September 8, 2009 Town Council meeting. Although the August 29, 2009 notice purported to provide notice of an October 1, 2009 public hearing on the amendment, no such hearing was conducted.

67. S.C. Code Ann. § 6-29-520 provides that any amendment to the Plan must be made by recommendation of the Planning Commission. S.C. Code Ann. § 6-29-520 further provides that this recommendation must take the form of a resolution referring expressly to maps and other descriptive matter, as well as that a copy of the recommended plan or element(s) be transmitted to the Town's governing authority.

68. The amendment to the Comprehensive Plan failed to comply with S.C. Code Ann. § 6-29-520 in multiple respects. First, the Town Council did not await the recommendation of the Planning Commission before conducting its fundamentally flawed notice and hearing procedure, indicating that the Town Council was acting on its own initiative, not on the yet-to-be-made recommendation of the Planning Commission, which was not made until three days before the Town approved the amendment and was not subjected to the required notice-and-hearing procedures by the Town Council before being approved. Second, the Planning Commission's recommendation does not refer to any map that would delineate the portion of TMS No. 625-00-00-041 to be included in the amendment and does not include a copy of the recommended element to be included in the Plan. Third, a copy of the recommended Plan, as amended by the addition of the large-scale planned development, which would dramatically increase the size of

the Town, does not appear to have accompanied the recommendation or to have ever been produced. Rather, the recommendation was simply to declare the Plan amended to include the planned development agreed upon by the Town and EBC. Finally, S.C. Code Ann. § 6-29-520 provides for periodic and systematic revision and updating of the Plan; it does not provide a means of short-circuiting an on-going revision and updating of the Town's Comprehensive Plan through the sudden interjection of an amendment not made pursuant to any established amendment procedure.

69. Pursuant to S.C. Code Ann. § 6-29-510, local planning commissions must develop and maintain a systematic process for updating and amending their Comprehensive Plans. The Town's Planning Commission is authorized to adopt rules of procedure by the Town of Awendaw Zoning Ordinance § 1.3.2.3. Upon information and belief, the Town's Planning Commission has not established any generally applicable or systematic process for proposing, reviewing, and considering amendments to the Town's Comprehensive Plan. Due to this procedural void, the Planning Commission and the Town Council haphazardly created an individualized process for the amendment at issue that failed to satisfy even the minimum requirements of S.C. Code Ann. § 6-29-510 & -530.

70. In sum, the purported amendment of the Comprehensive Plan violates applicable procedural requirements and amounts to nothing more than an arbitrary declaration that the Town's Comprehensive Plan will include the Nebo Tract Planned Development approved on October 1, 2009 so that the Development Agreement and Rezoning approved on that same date can be reciprocally declared consistent with the simultaneously-amended Plan.

SIXTH CLAIM FOR RELIEF
(Failure to Comply with the South Carolina Local Development Agreement Act)

71. Plaintiffs incorporate the allegations of the preceding paragraphs as if set forth in full.

72. The Development Agreement is invalid in that it does not satisfy the requirements of the South Carolina Local Development Agreement Act, S.C. Code Ann. § 6-31-10, *et seq.*

Specifically, the Agreement fails to include the information required by Section 6-31-60, including but not limited to, “a description of public facilities that will service the development, including who provides the facilities, the date any new public facilities, if needed, will be constructed, and a schedule to assure public facilities are available concurrent with the impacts of the development.”

73. The Agreement fails to satisfy S.C. Code Ann. § 6-31-70, which requires that a development agreement and authorized development must be consistent with the local government’s comprehensive plan and land development regulations. The number of housing units and commercial facilities that are authorized by this Development Agreement is patently inconsistent with the Comprehensive Plan of the Town of Awendaw, which seeks to preserve the small town, pedestrian scale of the existing municipality and the rural, undeveloped areas surrounding it.

74. The rezoning of the Nebo Tract through the Development Agreement and purported annexation is simply a contrivance intended to circumvent the more protective, existing zoning of the County, which has zoned this area, “Agricultural Preservation.” Notwithstanding the purported amendments to the Comprehensive Plan, passed simultaneously with the annexation and adoption of the Development Agreement, the Town’s Comprehensive Plan as a whole does not contemplate this kind of annexation to allow for such massive residential development far from the Town’s historic business district. As such, this rezoning through the Development Agreement is invalid.

75. The Town of Awendaw’s purported rezoning of the Nebo Tract from the zoning of the

County to the zoning specified in the Development Agreement is arbitrary, capricious, and in violation of state law and the applicable ordinances. In so acting, the Town Council exceeded its authority as established under the laws of South Carolina.

76. The Agreement fails to satisfy S.C. Code Ann. § 6-31-40, which requires that development agreements involving property containing no more than two hundred fifty acres of highland shall be for a term not to exceed five years. The Town does not have authority over 250 acres of highland on the property purportedly subject to the Development Agreement, but the Development Agreement nevertheless purports to have a ten-year duration.

**SEVENTH CLAIM FOR RELIEF
(Illegal Amendment to Comprehensive Plan)**

77. Plaintiffs incorporate the allegations of the preceding paragraphs as if set forth in full.

78. S.C. Code Ann. § 6-29-510 requires that the planning process consider nine required elements and must also consider potential conflicts with adjacent jurisdictions and regional plans or issues. Upon information and belief, the Planning Commission did not consider the impact of the Nebo Tract Planned Development on any of the nine planning elements, nor did it consider conflicts with Charleston County, the Town of Mount Pleasant, or the Forest Plan for the Francis Marion in making its recommendation. Upon information and belief, rather than addressing the necessary elements and engaging in the required coordination, the Town declined to engage in any of the substantive planning required by the statute and simply declared the Nebo Tract Planned Development with densities and uses agreed to in an addendum to the Development Agreement to be part of the Comprehensive Plan. The Town thereby evaded any meaningful review of the development's consistency with the Plan it had developed through a more systematic process, as well as its impacts on the elements addressed in the Plan. In so doing, the Town rendered the lengthy and ongoing planning and revision process called for by Chapter Six,

Title 29 of the South Carolina Code a nullity. The statutory requirements become a meaningless formality if the Town can bypass the required planning process and arbitrarily declare its Plan amended to include a development that fundamentally changes the planned-for character of the Town without analyzing or even addressing the required planning elements.

79. The amendment was not the product of any actual planning on the part of the Town, and it has not altered or affected the Plan in any meaningful way. After October 1, 2009, the Town continues to rely on and to provide to the public the same 2004 Comprehensive Plan that it did before October 1, 2009.

80. In sum, the purported amendment of the Comprehensive Plan violates the applicable substantive requirements and amounts to nothing more than an arbitrary declaration that the Town's Comprehensive Plan will include the Nebo Tract Planned Development approved on October 1, 2009 so that the Development Agreement and Rezoning approved on that same date can be reciprocally declared consistent with the simultaneously-amended Plan.

**EIGHTH CLAIM FOR RELIEF
(Arbitrary and Unreasonable Rezoning)**

81. Plaintiffs incorporate the allegations of the preceding paragraphs as if set forth in full.

82. On October 1, 2009, the Town enacted an ordinance to rezone the Nebo Tract as a planned development. The rezoning is fundamentally inconsistent with the Town's Comprehensive Plan, which contemplates a rural community with commercial development located in a Town Center far from the dense mixed-use development approved for the Nebo Tract, and also requires that any rezoning of a planned development not have a detrimental impact on surrounding areas. The rezoning of the Nebo Tract Planned Development would fundamentally alter the Town and shift its center from that identified in the Plan, while also degrading unique and valuable habitat in the surrounding areas. As discussed in the Sixth Claim,

supra, the Town cannot lawfully resolve the inconsistency by simply declaring its Comprehensive Plan to include, and thus be consistent with, the planned development. Because the unlawful amendment to the Comprehensive Plan is of no effect and the rezoning of the Nebo Tract is inconsistent with the 2004 Comprehensive Plan for the Town of Awendaw, the rezoning is arbitrary and unreasonable.

83. The rezoning is further unlawful because the Town has no jurisdiction over the Nebo Tract, which as discussed in ¶¶ 8-11, *supra*, is not contiguous with the Town limits and could therefore not be annexed into the Town. The Town lacks authority to rezone the property, which is governed by the zoning laws of Charleston County, not the Town.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment as follows:

A. Declare, as the result of the aforesaid arbitrary and illegal acts, that the annexation ordinance relating to the Nebo Tract is absolutely void and of no force or effect whatsoever.

B. Issue a declaratory judgment in Plaintiffs' favor adjudicating the invalidity of the annexation and all accompanying ordinances regarding the Nebo Tract, including the ordinance approving the Development Agreement, the amendment of the Comprehensive Plan, and the purported rezoning, and a permanent injunction enjoining acts in furtherance of any of the illegally enacted ordinances and requiring that the Nebo Tract be returned to the *status quo* prior to the illegal annexation and rezoning; and

C. Award Plaintiffs such other and further relief as the Court may deem just and proper.

Respectfully submitted this the 23rd day of April, 2010.

 (by edw/fernando)

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
CASE NO.: 09-CP-10-7399

LYNNE VICARY, KENT PRAUSE,))
and SOUTH CAROLINA))
COASTAL CONSERVATION))
LEAGUE,))

Plaintiffs,))

vs.))

TOWN OF AWENDAW, and EBC,))
LLC,))

Defendants.))

**ANSWER OF TOWN OF AWENDAW
TO FIRST AMENDED COMPLAINT**

FILED
2010 JAN 21 AM 11:56
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Defendant Town of Awendaw ("Awendaw" or "Defendant") answers Plaintiffs' First Amended Complaint below. Any allegation not specifically admitted is denied.

Summary of Claims

1. Paragraph 1 of the Amended Complaint contains summaries arguments and characterizations to which no response is required. To the extent a response is required, Awendaw denies Paragraph 1.

Introduction

2. Paragraph 2 contains a summary of arguments and characterizations to which no response is required. Awendaw admits it is located approximately twenty miles north of Charleston near the Francis Marion National Forest and Cape Romain National Wildlife Refuge. Awendaw and the area around it contain various plants and animals. All other allegations and characterizations in Paragraph 2 are denied.

Jurisdictional Facts and Parties

3. Paragraph 3 contains legal conclusions to which no response is required. To the extent a response is required, Awendaw denies the allegations in Paragraph 3.
4. Upon current information and belief, Awendaw admits that Plaintiffs Lynne Vicary and Kent Prause reside and own property in Awendaw, South Carolina. Awendaw does not currently have information or belief sufficient to support or deny the other characterizations and allegations in Paragraph 4, and therefore denies those characterizations and allegations.
5. Awendaw admits, upon current information and belief, that the Coastal Conservation League is a not-for-profit corporation organized under the laws of South Carolina. Awendaw does not have information sufficient to admit or deny the remaining allegations in Paragraph 5, and accordingly denies those allegations.
6. Awendaw admits the allegations in Paragraph 6.
7. Upon current information and belief, Awendaw admits the allegations in Paragraph 7.

Background

8. Awendaw admits that certain petitions were filed by the Town, the dates and contents of which speak for themselves. Certain of those petitions involved portions of the Nebo Tract and a ten-foot strip of the Francis Marion National Forest. The other allegations in Paragraph 8 contain characterizations and argument to which no response is required, but to the extent a response is required by Awendaw, Awendaw denies the characterizations and allegations.

9. Awendaw admits that it has annexed a ten-foot strip of the Francis Marion National Forest and the Nebo Church Tract. The documents affecting that annexation speak for themselves. Awendaw further admits that it has written a letter to the United States Forestry Service regarding annexation of the strip. Awendaw denies the remaining allegations and characterizations in Paragraph 9.
10. Awendaw admits that it has annexed other areas in the past and has satisfied the requirements of Title 5, Chapter 3 of the South Carolina Code. The documents affecting those annexations speak for themselves. Awendaw denies the remaining allegations and characterizations in Paragraph 10 of the Amended Complaint.
11. Awendaw denies the allegations in Paragraph 11.
12. Paragraph 12 contains legal conclusions and characterizations to which no response is required. Awendaw admits that until recently the Nebo Tract was subject to certain zoning and other ordinances of the County of Charleston. To the extent a response is required to the remaining allegations, Awendaw denies the allegations and characterizations.
13. Awendaw admits that it has adopted a series of ordinances with regard to the Nebo Tract, the terms of which speak for themselves. Those ordinances include annexation of the Nebo Tract, entering into a development agreement with EBC, amending the Town's comprehensive plan, and rezoning certain property. The ordinances also permit certain development of the Nebo Tract. Any other characterizations or allegations in Paragraph 13 are denied.
14. Awendaw denies the allegations in Paragraph 14.

15. Awendaw admits, upon current information and belief, that Lynne Vicary and Kent Prause own property in Awendaw. Awendaw lacks sufficient information and belief and accordingly denies the remaining allegations in Paragraph 15.
16. Awendaw admits that the League is an environmental organization with certain articulated goals and a political agenda. The remainder of Paragraph 16 contains characterizations and arguments to which no response is required. To the extent a response is required, Awendaw denies the allegations in Paragraph 16.
17. Paragraph 17 contains characterizations and arguments to which no response is required. Awendaw admits that the Forest Service manages the Francis Marion National Forest according to certain laws, regulations, and policies. Awendaw denies the remaining characterizations and allegations in Paragraph 17.
18. Paragraph 18 contains characterizations and arguments to which no response is required. To the extent a response is required, Awendaw denies the characterizations and allegations in Paragraph 18.
19. Awendaw admits that it has certain requirements imposed upon it by the South Carolina Code, including review of its comprehensive plan. The remaining allegations, characterizations, and arguments in Paragraph 19 are denied.
20. Awendaw admits that the Nebo Tract is near the Fairlawn Plantation and the Francis Marion National Forest. The remaining characterizations, allegations, and arguments in Paragraph 20 are denied.
21. Awendaw denies the allegations in Paragraph 21.

Procedural Background

22. Awendaw admits that in or about August 2009 it provided certain notices to the public regarding planning commission meetings and other meetings. The terms and contents of those notices speak for themselves. Awendaw denies the remaining allegations in Paragraph 22.
23. Awendaw admits that a planning commission hearing was held on or about August 24, 2009, and certain motions were made. Awendaw denies the remaining allegations in Paragraph 23.
24. Awendaw admits that in or about August 2009 it provided notice for public hearings on rezoning the Nebo Tract and the development agreement, the terms of which speak for themselves. The remaining allegations in Paragraph 24 are denied.
25. Awendaw admits that on or about August 29, 2009, it published a notice for a public hearing on October 1, 2009. The terms of the notice and the hearing speak for themselves. Awendaw denies the remaining allegations in Paragraph 25.
26. Awendaw admits that on or about September 8, 2009, there was a first reading of an annexation ordinance, the terms of which speak for themselves. Awendaw denies the remaining allegations in Paragraph 26.
27. Awendaw admits that on or about September 13, 2009, it published a public notice of a planning commission meeting, the terms of which speak for itself. Awendaw denies any other allegations in Paragraph 27.
28. Awendaw admits that on or about September 15, 2009, it provided public notice regarding upcoming Town Council meeting on or about October 1, 2009, the

terms of which speak for itself. Awendaw denies the remaining allegations in Paragraph 28.

29. Awendaw admits that on or about September 28, 2009, the Town's Planning Commission passed certain resolutions regarding the Town's comprehensive plan and the Nebo Tract, the terms of which speak for themselves. Awendaw denies the remaining allegations of Paragraph 29.

30. Awendaw admits that on or about October 1, 2009, it held certain meetings regarding rezoning and the development agreement, the terms of which speak for themselves. Awendaw denies the remaining allegations in Paragraph 30.

31. Awendaw admits that in about November 2009, members of the League reviewed public records requested through the South Carolina Freedom of Information Act. The remaining characterizations, allegations, and arguments in Paragraph 31 are denied.

FIRST CLAIM FOR RELIEF
(Nebo Tract is Allegedly Void
Because it is not Contiguous with Awendaw's Boundaries)

32. Awendaw incorporates its responses above.

33. Awendaw admits that in or about July and September, 2009, EBC filed certain petitions with Awendaw to annex certain property, including the Nebo Tract, the terms of which speak for themselves. Any other characterizations in Paragraph 33 are denied.

34. Awendaw admits that, upon current information and belief, the underlying premises of certain petitions filed by EBC were that previous annexations were valid. Any other allegations in Paragraph 34 are denied.

35. Awendaw admits that in or about 2004 it annexed a ten-foot strip of the Francis Marion National Forest, and that the Nebo Church Tract is contiguous to other property in Awendaw. The remaining allegations and characterizations in Paragraph 35 are denied.
36. Awendaw denies the allegations in Paragraph 36.
37. Awendaw denies the allegations in Paragraph 37.
38. Awendaw denies the arguments, characterizations, and allegations in Paragraph 38.

SECOND CLAIM FOR RELIEF
(Annexation of Nebo Tract is Allegedly Void
Because it is not Adjacent and Contiguous with the Boundary of the Town)

39. Awendaw incorporates its responses above.
40. Awendaw admits that the South Carolina Code governs property annexation and procedures, including the quoted paragraph to the extent it is consistent with that Code. The terms of those statutes speak for themselves. Any other characterizations or allegations in Paragraph 40 are denied.
41. Awendaw admits that the South Carolina Code, including § 5-3-305, imposes certain rules and restrictions on annexation of land. The terms of those laws speak for themselves. Any other characterizations and allegations in Paragraph 41 are denied.
42. Awendaw denies the allegations in Paragraph 42.
43. Paragraph 43 consists of arguments and characterizations, to which no response is required. To the extent a response is required, Awendaw denies the arguments, characterizations, and allegations in Paragraph 43.

THIRD CLAIM FOR RELIEF
**(Alleged Failure to Comply with Procedural Requirements
of the South Carolina Local Development Act)**

44. Awendaw incorporates its responses above.
45. Awendaw admits that the South Carolina Code, including § 6-31-50(a), has certain requirements for public hearings when entering development agreements. The terms of those Codes speak for themselves. Any remaining allegations in Paragraph 45 are denied.
46. Awendaw admits that South Carolina Code § 6-31-50 has certain requirements for notice when entering into development agreements, the terms of which speak for themselves. Any further allegations in Paragraph 46 are denied.
47. Awendaw admits that South Carolina Code § 6-31-50 has certain requirements for notice when entering into development agreements, the terms of which speak for themselves. Any remaining allegations in Paragraph 47 are denied.
48. Awendaw denies the allegations in Paragraph 48.
49. Awendaw denies the allegations in Paragraph 49.
50. Awendaw denies the allegations in Paragraph 50 except, upon current information and belief, that the notice on or about September 15 listed certain parcel numbers. The terms of the notices and the applicable law speak for themselves.

FOURTH CLAIM FOR RELIEF
**(Alleged Failure to Comply with Procedural Requirements from any
Comprehensive Plan)**

51. Awendaw incorporates its responses above.

52. Awendaw admits that South Carolina Code § 6-29-530 includes certain requirements for adopting comprehensive plans, the terms of which speak for themselves. Any remaining allegations in Paragraph 52 are denied.
53. Awendaw denies the allegations in Paragraph 53.
54. Awendaw admits that South Carolina Code § 6-29-520 has certain requirements for amending a comprehensive plan, the terms of which speak for themselves. Any remaining allegations in Paragraph 54 are denied.
55. Awendaw denies the allegations in Paragraph 55.
56. Awendaw admits that South Carolina Code § 6-29-510 contains certain requirements for local planning commissions and the updating and amending of comprehensive plans, the terms of which speak for themselves. Awendaw further admits that the Town's Planning Commission has certain authorizations to adopt rules and procedure pursuant to certain town ordinances, the terms of which speak for themselves. The remaining characterizations, allegations and arguments in Paragraph 56 are denied.
57. Awendaw denies Paragraph 57.

FIFTH CLAIM FOR RELIEF
**(Alleged Failure to Comply with the South Carolina Local
Development Agreement Act)**

58. Awendaw incorporates its responses above.
59. Awendaw denies the allegations in Paragraph 59.
60. Awendaw denies the allegations in Paragraph 60.
61. Awendaw denies the allegations in Paragraph 61.
62. Awendaw denies the allegations in Paragraph 62.

SIXTH CLAIM FOR RELIEF
(Alleged Illegal Amendment to Comprehensive Plan)

63. Awendaw incorporates its responses above.

64. Awendaw admits that South Carolina Code § 6-29-510 has certain requirements for the planning process, the terms of which speak for themselves. Awendaw denies the remaining allegations, characterizations and arguments in Paragraph 64.

65. Awendaw admits that it has relied at certain times on the comprehensive plan. Any remaining allegations, arguments or characterizations in Paragraph 65 are denied.

66. Awendaw denies the allegations in Paragraph 66.

SEVENTH CLAIM FOR RELIEF
(Alleged Arbitrary and Unreasonable Zoning)

67. Awendaw incorporates its responses above.

68. Awendaw admits that on or about October 1, 2009, the Town enacted certain ordinances regarding rezoning and the Nebo Tract. The terms of those ordinances speak for themselves. Awendaw denies the remaining allegations in Paragraph 68.

69. Awendaw denies the allegations in Paragraph 69.

Awendaw further denies all allegations and requests in the section beginning "Prayer for Relief", and the paragraphs beginning "Wherefore" including all subparagraphs.

FIRST AFFIRMATIVE DEFENSE
(Standing)

Plaintiffs lack standing to bring the claims asserted.

SECOND AFFIRMATIVE DEFENSE
(Failure to Set a Claim)

The Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted and fails to state facts sufficient to constitute a cause of action.

THIRD AFFIRMATIVE DEFENSE
(Compliance with Applicable Laws)

Awendaw has complied with all applicable laws, including procedures for annexation and rezoning.

FOURTH AFFIRMATIVE DEFENSE
(Substantial Compliance / De Minimis)

Awendaw has substantially complied with all applicable laws and regulations, and any alleged non-compliance was *de minimis*.

FIFTH AFFIRMATIVE DEFENSE
(Lack of Conditions Precedent)

Plaintiffs have failed to comply with required conditions precedent to bringing their claim.

SIXTH AFFIRMATIVE DEFENSE(S)
(Statute of Limitations; Estoppel; Laches; Waiver)

Plaintiffs' claims are barred by the applicable statutes of limitations and by the doctrines of estoppel, laches and waiver.

SEVENTH AFFIRMATIVE DEFENSE
(Lack of Necessary Party)

Plaintiffs have failed to name all necessary, proper, and indispensable parties required in order to properly adjudicate the claims alleged.

EIGHTH AFFIRMATIVE DEFENSE
(Unclean hands)

Plaintiffs' claims are barred by the Plaintiffs' unclean hands.

NINTH AFFIRMATIVE DEFENSE
(Acts of Defendant Were at All Times within the Applicable Laws)

The actions of Awendaw at all times have been conducted in accordance with all applicable state and federal laws and regulations.

TENTH AFFIRMATIVE DEFENSE
(Challenge to Annexation is Outside of the Statutory Period for Contesting Annexations)

Plaintiffs have contested the annexation of the subject properties outside of the period permitted by the applicable laws, including without limitation South Carolina Code § 5-3-270.

ELEVENTH AFFIRMATIVE DEFENSE
(Incorporation of Defenses Raised by Other Defendants)

Awendaw incorporates the defenses of any other defendants as they may apply to Awendaw.

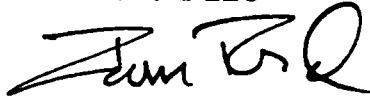
TWELFTH AFFIRMATIVE DEFENSE
(Ongoing Investigation – Reservation of Rights)

Awendaw has not had an opportunity to conduct a sufficient investigation or to engage in adequate discovery regarding circumstances of Plaintiffs' allegations. Awendaw intends to act as best it can to inform itself of the pertinent facts and prevailing circumstances surrounding any reported injury or damage to Plaintiffs as alleged in their Amended Complaint and gives notice of its intent to assert any further affirmative defenses that its information gathering process may indicate is supported by fact and/or law.

WHEREFORE, Defendant Awendaw asks the Court to dismiss Plaintiffs' Amended Complaint and award attorneys' fees and costs and for such other and relief as the Court and jury may deem appropriate.

Respectfully submitted,

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January 21, 2010
Charleston, South Carolina

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

LYNNE VICARY, KENT PRAUSE, and
SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,

Plaintiffs,

vs.

TOWN OF AWENDAW and EBC, LLC,
Defendants.

Case no. 09-CP-10-7399

**ANSWER OF
DEFENDANT TOWN OF AWENDAW
TO SECOND AMENDED COMPLAINT**

FILED
MAY 21 PM 2:14
JULIE J. ARMSTRONG
CLERK OF COURT

Defendant Town of Awendaw ("Awendaw" or "Defendant"), answering Plaintiffs' Second Amended Complaint as provided in the Court's Order filed April 23, 2010, which states that the Defendants are permitted to file separate general denials pertaining only to the revised and new allegations, while reserving the right to add new affirmative defenses at a later date, alleges:

1. Defendant repeats and restates everything contained in its previous Answer, filed on January 21, 2010, in response to Plaintiffs' First Amended Complaint as though set forth herein verbatim.
2. Defendant denies the revised allegations contained in paragraph 1 of the Second Amended Complaint.
3. Defendant admits the revised allegations contained in paragraph 8 of the Second Amended Complaint that a third petition was filed "On or about September 14, 2009." As to the remaining allegations, Defendant incorporates its response from

its previous Answer, pursuant to the Court's order, and alleges that all of the "annexation attempts" described were legal and proper, and were enacted according to law.

4. Upon information and belief, Defendant admits the allegations contained in new paragraph 21 of the Second Amended Complaint.
5. Upon current information and belief, Defendant denies the allegations contained in new paragraph 23 as characterized, and states that it is aware of a petition executed by EBC and filed on or about July 10, 2009, the terms of which speak for themselves. Any other allegations are denied subject to revision once the described document is produced and reviewed.
6. Upon information and belief, Defendant has not currently identified the document described in new paragraph 30 of the Second Amended Complaint, and accordingly denies the allegations as characterized therein, subject to revision once the described document is produced and reviewed.
7. Upon information and belief, Defendant admits the allegations contained in new paragraph 33 of the Second Amended Complaint to the extent they allege that on October 1, 2009, the Town Council held a hearing on the rezoning and Development Agreement, conducted second readings of the ordinances approving the annexation, rezoning, and Development Agreement, and that the Town Council did conduct a second reading of the ordinance to amend the Comprehensive Plan. Defendant lacks sufficient knowledge or information sufficient to form a belief as to the remaining allegations contained in new

paragraph 33 of the Second Amended Complaint and therefore denies such allegations. Defendant further incorporates its previous responses to the allegations in this paragraph.

8. Upon information and belief, Defendant admits the allegations contained in new paragraphs 34 and 35 of the Second Amended Complaint to the extent they allege that Awendaw passed Ordinances numbered 09-08 and 09-09 and allege that the actions taken in passing such Ordinances were at all times legal and proper and were passed according to law. Any other allegations are denied.
9. Upon information and belief, Defendant admits the allegations contained in new paragraph 36 of the Second Amended Complaint.
10. Upon information and belief, Defendant admits the revised allegations contained in new paragraph 37 of the Second Amended Complaint to the extent they allege that Awendaw passed Ordinance No. 09-11 and alleges that the actions taken in passing such Ordinance were at all times legal and proper and the Ordinance was passed according to law. Defendant denies the remaining allegations contained in new paragraph 37 of the Second Amended Complaint.
11. Responding to new paragraph 51 of the Second Amended Complaint, Defendant repeats and restates its responses to paragraphs 1 through 50 of the Second Amended Complaint as though set forth herein verbatim.
12. Upon information and belief, Defendants has not currently identified the document described in new paragraph 52 of the Second Amended Complaint, and

accordingly denies the allegations as characterized therein, subject to revision once the described document is produced and reviewed.

13. Defendant denies the allegations contained in new paragraphs 53 through 56 of the Second Amended Complaint.

14. Defendant denies the allegations contained in new paragraph 76 of the Second Amended Complaint.

Any additional allegations not specifically admitted herein are denied.

WHEREFORE, having fully answered Plaintiffs' Second Amended Complaint, Defendant prays that the Plaintiffs' Second Amended Complaint be dismissed with prejudice and this Defendant be awarded costs and reasonable attorneys' fees, and such other and further relief as is deemed necessary and appropriate and allowed by law.

Respectfully submitted,

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May 21, 2010
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	DOCKET NO. 2009-CP-10-7399
	)	
	)	
LYNNE VICARY, KENT PRAUSE,	)	
and SOUTH CAROLINA COASTAL	)	
CONSERVATION LEAGUE	)	
	)	
Plaintiffs	)	
	)	
vs.	)	
	)	
TOWN OF AWENDAW, et al	)	
	)	
Defendant	)	
	)	
	)	
	)	TRANSCRIPT OF RECORD
		April 16, 2014
		Charleston, South Carolina

B E F O R E:

THE HONORABLE J. C. NICHOLSON, JUDGE

A P P E A R A N C E S:

W. JEFFERSON LEATH, JR., ESQ.
CHRISTOPHER K. DESCHERER, ESQ.
Attorneys for the Plaintiff

DWAYNE GREEN, ESQ.
Attorney for the Defendant

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

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DEFENDANT

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1 PROCEEDINGS

2 THE COURT: Mr. Green?

3 MR. GREEN: Yes, Your Honor?

4 THE COURT: What is EBC, LLC?

5 MR. GREEN: They are an LLC set up for a

6 development company. They are no longer in the case but

7 they were a development ---

8 THE COURT: --- okay, they're out of the case now?

9 MR. GREEN: Yes, Your Honor.

10 THE COURT: Okay. Did you file a pretrial --

11 anything pretrial brief?

12 MR. GREEN: I do have a pretrial very brief

13 summation of the facts.

14 THE COURT: I understand the issue is standing and

15 the statute of limitations has already been resolved in a

16 summary judgment motion right?

17 MR. GREEN: They have not been resolved. And Your

18 Honor ---

19 THE COURT: --- I thought Judge Harrington had

20 ruled on those two issues -- on the standing issue and

21 the statute of limitations issue.

22 MR. GREEN: She ruled on them, Your Honor. But

23 based on the Supreme Court ruling -- I'm sorry, yes the

24 Supreme Court ruling on this case those are still for

25 Your Honor to decide. Just because she denied the

1 motions at the pretrial phase does not mean that Your
2 Honor could not...

3 THE COURT: All right. Hand me up your facts that
4 you were going to give to me.

5 [Whereupon, Mr. Green provides documents to the
6 court]

7 THE COURT: So you're telling me on those two
8 issues that is not the law in the case?

9 MR. GREEN: Correct. And that's based on this
10 order, Your Honor.

11 THE COURT: Oh, you've already been to the Supreme
12 Court one time?

13 MR. GREEN: The parties at the time, Your Honor,
14 appealed the finding, the denial of a summary judgment
15 ---

16 THE COURT: --- right ---

17 MR. GREEN: --- of a summary judgment motion. In
18 that order the court said those are not binding on the
19 trial court and are not the law of the case.

20 THE COURT: Okay. So basically it could be raised
21 again motion to reconsider at the directed verdict stage
22 right?

23 MR. GREEN: Yes, Your Honor, we will be raising
24 those.

25 THE COURT: Okay. All right, that's fine. Give

1 me a chance to look at your pretrial briefs. I
2 understand the issue is I believe 5-3-150 (3) is that
3 correct?

4 MR. LEATH: Yes, Your Honor. That's one ---

5 THE COURT: --- that was an appropriate petition
6 annexing some property; I'm not sure what the property is
7 or where it's located ---

8 MR. LEATH: --- absolutely. I've got a map we'll
9 go over when ---

10 THE COURT: --- is that basically the issue?

11 MR. GREEN: It is, Your Honor.

12 THE COURT: And the plaintiff takes the position
13 the petition is improper and I'm sure the town takes the
14 position the petition was proper is that correct?

15 MR. GREEN: Correct, Your Honor.

16 THE COURT: All right. Give me a chance to read
17 the pretrial briefs. Are there any facts that y'all can
18 stipulate to?

19 MR. LEATH: I would think that once we get going
20 with it let me make a little introduction and maybe
21 Dwayne do that that most of the facts surrounding what
22 happened are not in controversy. The effect of that is
23 different.

24 THE COURT: I understand the effect of what
25 occurred legally is different but the facts are pretty

1 well agreed upon is that correct?

2 MR. GREEN: That's correct, Your Honor. And we've
3 also agreed to submit some deposition excerpts for the
4 court's benefit that would greatly reduce the time of
5 testimony ---

6 THE COURT: --- the only thing I'm asking you to do
7 is if y'all can stipulate to some facts I would
8 appreciate it because otherwise apparently from what I --
9 what she has told me okay, the issue is not necessarily a
10 factual dispute. It's an issue of what were the results
11 -- or could result -- from those facts is that correct?

12 MR. LEATH: That's correct, Your Honor.

13 THE COURT: What actually happened during the
14 process is not in dispute.

15 MR. GREEN: Correct.

16 MR. LEATH: That's correct, Your Honor.

17 THE COURT: Let me read this and y'all talk about
18 what you can stipulate to and what you can't. Otherwise
19 from my perspective either I've got to listen to the
20 testimony and make findings of fact or y'all are going to
21 have to stipulate to something to avoid that okay.

22 MR. LEATH: I will give it a shot and I think
23 perhaps we can do that. It might make it easier.

24 THE COURT: That sure will shorten the trial okay.

25 MR. LEATH: Let's just talk about it ---

1 THE COURT: --- from the standpoint of getting to
2 the ultimate issue there has got to be a stipulation of
3 testimony or some exhibits.

4 MR. LEATH: Yes, sir. And we have ---

5 THE COURT: --- for this court to make a decision.

6 MR. LEATH: And we've agreed on some exhibits that
7 will track the stipulation.

8 THE COURT: Okay. See what y'all can stipulate to
9 and give me a chance to read these pretrial briefs and
10 we'll get started.

11 [Whereupon, the court reviews documents]

12 [Whereupon, counsel confer]

13 MR. GREEN: Your Honor?

14 THE COURT: Let me finish. I'm almost through,
15 okay. Hold on just a second.

16 [Whereupon, the court continues review of documents]

17 THE COURT: Okay. Yes, sir?

18 MR. GREEN: I gave this to the other side as well.
19 This has a more complete summary of our facts if Your
20 Honor reads either one of those.

21 [Whereupon, Mr. Green provides documents to the
22 court]

23 THE COURT: All right. Let me ask you a question.
24 It appears from reading the plaintiff's pretrial briefs
25 and looking at the pretrial brief that I just handed back

1 to Mr. Green that the two factual disputes is the effect
2 of the letter of May 3rd, 1994 as well as the petition.
3 And the second dispute is about a valid legal description
4 of the ten foot strip. That appears to be the only two
5 issues factually in dispute is that correct?

6 MR. GREEN: I would say that's correct, Your Honor.

7 MR. LEATH: Factually I think that's probably
8 right. We have a couple more legal arguments but that's
9 ---

10 THE COURT: --- I understand about the legal. I'm
11 talking about from a factual standpoint only factual the
12 court has got to decide is the effect of that letter.

13 MR. GREEN: Correct, Your Honor.

14 THE COURT: The intent of the letter and whether it
15 was about a legal description correct?

16 MR. GREEN: Correct, Your Honor.

17 THE COURT: Other than that y'all can sort of agree
18 to what happened without testimony is that correct ---

19 MR. GREEN: --- Correct.

20 MR. LEATH: Yes sir, we can.

21 THE COURT: All right. Tell me what y'all can
22 agree to?

23 MR. LEATH: I think this -- do you want to state
24 what we can agree to? I'll be glad to try it.

25 MR. GREEN: Let me show him -- can I give him --

1 this is one of our exhibits that goes along with that?
2 MR. LEATH: Sure.
3 MR. GREEN: Your Honor, this exhibit number 1
4 highlights in yellow what is described in the 1994 legal
5 letter.
6 [Whereupon, documents are provided to the court]
7 THE COURT: So what is highlighted...
8 MR. GREEN: Yellow.
9 THE COURT: Yellow, which is -- here it is right on
10 top, okay, which lies I guess to the northwest of U.S.
11 17, Highway 17 right?
12 MR. GREEN: Yes, Your Honor.
13 THE COURT: Running from Loftin Road to almost to
14 the Wando River right.
15 MR. GREEN: Correct, Your Honor.
16 THE COURT: Excuse me, Guerins Bridge Road.
17 MR. GREEN: Correct, Your Honor. And that yellow
18 line describes exactly what is referenced in the 1994
19 letter.
20 THE COURT: Where is the property that we are
21 trying to get contiguous to for development? Is that on
22 the northwest end or?
23 MR. GREEN: It's on this end [indicates], Your
24 Honor.
25 THE COURT: On the southwest end?

1 MR. GREEN: Correct, Your Honor.

2 THE COURT: So we're trying to come from basically
3 northeast to southwest?

4 MR. GREEN: Correct, Your Honor.

5 THE COURT: And that's where it arrives with
6 Guerins Bridge Road?

7 MR. GREEN: Correct.

8 THE COURT: Okay. That's where you're trying to
9 get contiguous to is that right?

10 MR. GREEN: Yes, Your Honor. And here is a second
11 map that goes together with it also.

12 THE COURT: Okay.

13 [Whereupon, Mr. Green provides documents to the
14 court]

15 THE COURT: So if y'all can agree that -- are you
16 going to mark these as defendant's exhibit 1 and 2?

17 MR. GREEN: Correct, Your Honor. And those have
18 been pre-marked. I'll give these to the court reporter
19 and that's for Your Honor's benefit.

20 THE COURT: Okay.

21 [Whereupon, defendant's exhibit numbers 1 and 2 are
22 entered into evidence by the court]

23 MR. GREEN: And this is for -- this is copies of
24 those that I've given to the court reporter.

25 [Whereupon, exhibits are provided to the court]

1 reporter]

2 THE COURT: Are those color copies?

3 MR. GREEN: Yes, Your Honor.

4 THE COURT: All right. What else, Mr. Green?

5 MR. GREEN: We've stipulated that -- we think Your
6 Honor has correctly stated the two disputes of fact.

7 THE COURT: Right.

8 MR. GREEN: What I've handed up to Your Honor and
9 we think is key is the dates are -- also there is no
10 dispute about the dates. Primarily what is being
11 challenged is an annexation which took place or two
12 ordinances of annexation that took place in 2004 that
13 first annexed this strip -- this strip had been used
14 previously and that letter had been used previously.
15 This challenge in this case was brought several years
16 afterwards and that just ---

17 THE COURT: --- when was the lawsuit brought?

18 MR. GREEN: It was originally filed November 25th,
19 2009.

20 THE COURT: And the annexation occurred when?

21 MR. GREEN: The annexation was back in 2004, Your
22 Honor.

23 THE COURT: Okay. So approximately five years
24 later?

25 MR. GREEN: Correct, Your Honor, December 2004.

1 And we have the statute that we're citing that we think
2 is key and again Your Honor ---
3 THE COURT: --- let's don't get in a legal argument
4 on the statute just factually what you ---
5 MR. GREEN: --- just the facts.
6 THE COURT: What else can you agree on factually?
7 MR. GREEN: I think the dates of ordinances, the
8 dates of ---
9 THE COURT: --- let's put them all in evidence if
10 you would.
11 MR. LEATH: Maybe I could get these marked. The
12 first group of documents we have is 1 through 8, which
13 tracks the history of what happened on the ten foot strip
14 back in 2003, 2004.
15 THE COURT: All right. That's the same as what he
16 has here with the dates on the sheet.
17 MR. LEATH: I'm not sure if it is the same or not
18 because I haven't looked at the dates but we agree that
19 that map depicts the area we're dealing with.
20 THE COURT: Okay.
21 MR. LEATH: So this is kind of a chronological.
22 THE COURT: Okay. So you're going to mark these 1
23 through 8. Mr. Green do you have objection to those?
24 MR. GREEN: No objection, Your Honor.
25 THE COURT: Okay. So ahead and get them marked.

1 MR. LEATH: They are marked. That's for the court.
2 THE COURT: I'll admit plaintiff's exhibit 1
3 through 8 without objection.
4 [Whereupon, plaintiff's exhibit numbers 1 through 8
5 are entered into evidence by the court]
6 MR. LEATH: 1 through 9 we want to put in is a
7 highlighted copy of the Town's deposition ---
8 THE COURT: --- any objection, Mr. Green?
9 MR. GREEN: No objection, Your Honor.
10 THE COURT: So 9 will be the deposition?
11 MR. LEATH: Yes, sir.
12 THE COURT: Whose deposition?
13 MR. LEATH: It's Mr. Wallace who represented the
14 Town. He's here today. But it's a 30 (b)(6) deposition
15 of the Town of Awendaw.
16 THE COURT: Okay.
17 MR. LEATH: It's the Town's deposition.
18 THE COURT: Okay. The city manager?
19 MR. LEATH: Yes, sir.
20 THE COURT: Okay.
21 MR. LEATH: He's not the City manager. He's
22 actually a consultant but I'm not sure exactly what his
23 title is. In that deposition it states what he was
24 testifying about.
25 THE COURT: Okay. That's number 9. What else?

1 [Whereupon, plaintiff's exhibit number 9 is entered
2 into evidence by the court]

3 MR. LEATH: The next ones are the ordinances, which
4 are actually the ones at issue here and that is the
5 annexation ordinances for the tract in question, which is
6 not just a ten foot strip but it's the ultimate Nebo
7 tract; the 360 acres. And that didn't take place until
8 2009.

9 THE COURT: 160 acres?

10 MR. LEATH: It's 360; 359.

11 THE COURT: 369 acres?

12 MR. LEATH: 359, 3-5-9.

13 THE COURT: Okay.

14 MR. LEATH: And that is -- that's the ultimate
15 tract over here [indicates] at the top. This
16 [indicates] is the one we're fighting about, this
17 annexation. This [indicates] is the ten foot strip and
18 this [indicates] is the ultimate tract which was annexed
19 in the EBC in 2009.

20 THE COURT: Okay. What number are you going to
21 mark that?

22 MR. LEATH: I thought we'd mark this as maybe 10.

23 THE COURT: That's the annexation of Nebo tract,
24 right?

25 MR. LEATH: Yes, sir.

1 [Whereupon, plaintiff's exhibit number 10 is marked
2 by the court reporter]
3 [Whereupon, plaintiff's exhibit number 10 is entered
4 into evidence by the court]
5 THE COURT: What else? What other --
6 MR. LEATH: I believe that's all we have.
7 MR. GREEN: I have a couple ---
8 THE COURT: I've got a couple on the ten foot
9 strip.
10 MR. LEATH: I think that's already in there
11 somewhere. It's in some of our documentation.
12 THE COURT: Let's get it marked.
13 MR. LEATH: I think its part of exhibit ---
14 THE COURT: --- it's part of 1 through 8?
15 MR. LEATH: It's part of 1 through 8.
16 THE COURT: All right. Anything else that you want
17 to have from the plaintiff's standpoint?
18 MR. LEATH: Can we put this map in?
19 THE COURT: They have to reduce it to where it can
20 be folded. You're welcome to put it in unless Mr. Green
21 objects. Mr. Green do you have any objection ---
22 MR. GREEN: --- no objection, Your Honor.
23 THE COURT: Okay. You want to make that number
24 11?
25 MR. LEATH: Yes sir, number 11.

1 THE COURT: All right. That's the ten foot strip
2 of the Nebo tract right -- without objection number 11.
3 MR. GREEN: Correct, Your Honor.
4 [Whereupon, plaintiff's exhibit number 11 is marked
5 by the court reporter]
6 [Whereupon, plaintiff's exhibit number 11 is entered
7 into evidence by the court]
8 MR. LEATH: And we have one more that is a recent
9 letter and I'm not sure Mr. Green and I have had a chance
10 to talk about this one. This would only come up if there
11 is an argument made about the mootness of this entire
12 case and it's a recent letter...
13 MR. GREEN: And we don't agree to this one and that
14 issue should not come up.
15 MR. LEATH: All right. Well maybe -- we'll park
16 that one for now.
17 THE COURT: All right. So moot is not going to
18 come up; just the statute of limitations and the
19 standing.
20 MR. GREEN: Correct.
21 THE COURT: Okay. Does the plaintiff have
22 anything else?
23 MR. LEATH: We do have one more thing; one more.
24 [Whereupon, Mr. Leath and Mr. DeScherer confer]
25 [Whereupon, plaintiff's exhibit number 12 is marked

1 by the court reporter]
2 MR. LEATH: All right. So 12 is the church's 110
3 percent petition form that they filed for the annexation.
4 THE COURT: The church?
5 MR. LEATH: The church -- so on the tract.
6 THE COURT: Number 12 is the what church?
7 MR. LEATH: It's the Nebo church right here
8 [indicates] in the corner. So to get to the Nebo tract
9 you've got to go from town, 10 foot strip, Nebo Church,
10 and tract to get to the contiguity there.
11 THE COURT: And Nebo Church agreed to it?
12 MR. LEATH: Right. They filed a 100 percent
13 petition, which is this [indicates].
14 THE COURT: Any objection?
15 MR. GREEN: No objection, Your Honor.
16 THE COURT: All right, 12 admitted without
17 objection.
18 [Whereupon, plaintiff's exhibit number 12 is entered
19 into evidence by the court]
20 MR. LEATH: Here are these other ones so the court
21 can have them.
22 [Whereupon, Mr. Leath provides documents to the
23 court]
24 THE COURT: Okay. Anything else for the
25 plaintiff?

1 MR. LEATH: We do have and it was already filed a
2 long time ago; like 3 years ago. It's in the court's
3 file, but I may as well mark it so the court can take a
4 look at it. It's a copy of an affidavit from the forest
5 service.

6 THE COURT: From a factual standpoint I can't
7 consider what's in the file, it's what's in evidence.

8 MR. GREEN: And we objection to that.

9 THE COURT: What is it?

10 MR. GREEN: That's an affidavit we believe from
11 someone from the forest service.

12 THE COURT: Paul Bradley?

13 MR. GREEN: That's what it appears ---

14 THE COURT: --- is he going to be available to
15 testify?

16 MR. LEATH: He's not. He's out of state. He's --
17 we got this affidavit back in 2011 and it's been filed
18 for three years.

19 THE COURT: I'm not -- if he's not subject to
20 cross-examination I'm not going to allow in the
21 affidavit, okay.

22 MR. LEATH: May I just be heard on that?

23 THE COURT: Yes. I'll be glad to hear you but I
24 mean we're in a trial; we're not at a summary judgment
25 motion where you can submit affidavits.

1 MR. LEATH: Right. This is an out of state
2 witness, a government agent forest service. This
3 affidavit has been submitted for years with no objection
4 whatsoever about it. And what ---

5 THE COURT: --- well that was a different
6 proceeding. You can do that on summary judgment motions
7 but tell me how it's allowed in a trial. If you had a
8 jury sitting here do you think the court would allow it?

9 MR. LEATH: A court wouldn't allow it with a jury.

10 THE COURT: I understand, but I'm sitting as a
11 jury.

12 MR. LEATH: But I think the court has the
13 discretion to admit this document because it's a
14 notarized document under oath from a government operative
15 on this subject and what it does is it explains the
16 effect of the other government document that is an issue
17 here, 1994. I think it meets the test of relevancy, I
18 think it's important.

19 THE COURT: I understand. But it doesn't meet the
20 test of cross-examination.

21 MR. LEATH: What I would like to do Your Honor if I
22 may is mark it for I.D. ---

23 THE COURT: --- that's my problem is that he
24 doesn't have an opportunity to cross-examine the witness
25 at trial, okay.

1 MR. LEATH: May I mark it for identification?

2 THE COURT: Yes, mark it for identification during

3 the trial. After I hear the testimony I may change my

4 mind and I'll let you revisit it okay.

5 MR. LEATH: Yes, sir.

6 THE COURT: But at this point in time if he objects

7 I'm not going to let it in because I don't think it's

8 appropriate at a trial. Let me say this okay. If y'all

9 -- if you want to go take his deposition and submit it to

10 the court I would probably allow that and leave the

11 record open to receive it if you think it's that

12 important, okay.

13 MR. LEATH: Yes, sir. We'll see how it goes and

14 then decide later.

15 THE COURT: That solves my problem giving him an

16 opportunity to cross-examine him.

17 MR. LEATH: I understand.

18 MR. GREEN: And Your Honor, we have no problem ---

19 THE COURT: And I'll do the same thing for the city

20 okay. If you have somebody you want to go depose and

21 submit it later I'll leave the record open for you.

22 MR. GREEN: Thank you, Your Honor.

23 THE COURT: Okay.

24 MR. LEATH: So we'll just mark this and leave it

25 with the court reporter for identification.

1 THE COURT: Okay.
2 [Whereupon, plaintiff's exhibit number 13 is marked
3 for identification only by the court reporter]
4 THE COURT: What does the city have?
5 MR. GREEN: We have deposition -- and I'm going to
6 mark these as we mention them. I've given copies to --
7 opposing counsel has copies -- but just excerpts from the
8 deposition of Megan Desrosiers on behalf of the Coastal
9 Conservation league.
10 THE COURT: Megan who?
11 MR. GREEN: Desrosiers -- did I pronounce that
12 right?
13 MR. LEATH: Desrosiers ---
14 THE COURT: How do you spell it?
15 MR. GREEN: D-E-S-R-O-S-I-E-R-S.
16 THE COURT: Okay.
17 MR. GREEN: And we'll mark that as our next
18 defendant's exhibit, which I think will be 4.
19 THE COURT: Okay, number 4. Any objection from the
20 plaintiff?
21 MR. LEATH: No, sir.
22 [Whereupon, defendant's exhibit number 4 is marked
23 by the court reporter]
24 [Whereupon, defendant's exhibit number 4 is entered
25 into evidence by the court]

1 MR. GREEN: And the excerpts from the deposition of
2 the plaintiff Ken Prause.
3 THE COURT: Okay.
4 MR. GREEN: Walter Ken Prause; and that will be our
5 number 5.
6 THE COURT: Any objection from the plaintiff?
7 MR. LEATH: No, sir.
8 THE COURT: All right. Number 5 admitted without
9 objection.
10 [Whereupon, defendant's exhibit number 5 is marked
11 by the court reporter]
12 [Whereupon, defendant's exhibit number 5 is entered
13 into evidence by the court]
14 MR. GREEN: And then we have excerpts from the
15 deposition of Lynn Vicary; she's the other plaintiff.
16 That will be our number 6.
17 THE COURT: Any objection?
18 MR. LEATH: No, sir.
19 THE COURT: All right. Number 6 admitted without
20 objection.
21 [Whereupon, defendant's exhibit number 6 is marked
22 by the court reporter]
23 [Whereupon, defendant's exhibit number 6 is entered
24 into evidence by the court]
25 MR. GREEN: And we also have some excerpts, some

1 matching excerpts from the deposition of Bill Wallace.

2 THE COURT: Bill Wallace?

3 MR. GREEN: From his 30 (b)(6).

4 THE COURT: Okay. Now who is he?

5 MR. GREEN: He is -- at the time he was the
6 director of planning for the town of Awendaw. He's now
7 the town administrator but back then he was the town
8 planner.

9 THE COURT: Okay.

10 [Whereupon, defendant's exhibit number 7 is marked
11 by the court reporter]

12 MR. GREEN: And all of those together, Your Honor,
13 we've put in a packet ---

14 THE COURT: --- that's number 7 right?

15 MR. GREEN: Correct.

16 THE COURT: Any objection to number 7?

17 MR. LEATH: No, sir. I believe Mr. Wallace's
18 deposition you already have as our number 10 or 11.

19 THE COURT: Okay. Go ahead.

20 [Whereupon, defendant's exhibit number 7 is entered
21 into evidence by the court]

22 MR. GREEN: And that's everything we have besides
23 the maps that Your Honor already has and the letter from
24 1994 and we also have the annexation I believe, which is
25 part -- already been made part of the plaintiff's exhibit

1 so we're not going to remark those. And that's
2 everything that we have, Your Honor.

3 THE COURT: Now is there any other facts the two of
4 y'all can stipulate to?

5 MR. LEATH: I may have one more document. This is
6 -- we'll have to -- we might have an argument about this
7 but it comes from the Mayor's files of the town of
8 Awendaw. And it's connected to the Bradley situation,
9 the forest service -- the letter that the forest service
10 wrote the town.

11 MR. GREEN: We have an objection to this, Your
12 Honor as well. This is from someone -- it's a letter
13 from someone who is not here, who has not been deposed
14 and we don't have any way of verifying it -- we say it's
15 hearsay but we haven't ---

16 THE COURT: --- well, what's your position? If you
17 can have any somebody identify it for having received it
18 or something I'll be happy to listen to ---

19 MR. LEATH: --- well, this comes from ---

20 THE COURT: --- otherwise we'll take the deposition
21 ---

22 MR. LEATH: --- the Mayor's files and again it's a
23 document produced by the town. It's in their files as
24 part of the public records; it's a public record
25 document.

1 THE COURT: I understand. But he objects because
2 it hasn't been identified. Let's identify it and I'll
3 consider it okay.

4 MR. LEATH: Okay.

5 THE COURT: You've got a witness out there I'm sure
6 that can identify it.

7 MR. LEATH: All right.

8 THE COURT: Your objection is authentication of the
9 document is what you're saying right?

10 MR. GREEN: Correct, Your Honor.

11 THE COURT: Just authenticate properly and I'll
12 consider it.

13 [Whereupon, plaintiff's exhibit number 13 is marked
14 for identification only by the court reporter]

15 THE COURT: All right. Anything else? Anything
16 else from the plaintiff?

17 MR. LEATH: Just that document, Your Honor.

18 THE COURT: Anything else from the defendant?

19 MR. GREEN: Nothing from the defendant, Your Honor.

20 THE COURT: All right. Is the plaintiff ready to
21 call your first witness?

22 MR. LEATH: Yes, Your Honor. Before we call
23 actually a witness I'd like to be able to sort of outline
24 for the court ---

25 THE COURT: --- that's fine. I'll be glad to hear

1 opening statements ---

2 MR. LEATH: --- our claims. And this will make it
3 understandable through the witnesses.

4 THE COURT: All right.

5 OPENING STATEMENT

6 MR. LEATH: Your Honor, I'm Jeff Leath as you know.
7 And this is pro bono matter for me and Chris DeScherer
8 who is with the Southern Environmental Law Center. And
9 so we're doing work both for the conservation league and
10 for Mr. Prause and Ms. Vicary who are residents of
11 Awendaw.

12 And what this case is about in addition to the
13 annexation issue is what our interest is and is
14 preserving to the extent we can the Francis Marion forest
15 from commercial development. And that's really what this
16 thing is all about. And drilling it down or boiling it
17 down that's what it comes down to.

18 So the facts, the court understands them, back in
19 roughly 2003 or 2004 the town was trying to ultimately
20 annex this property. And in order to annex it, the court
21 understands this, you have to have contiguity; you have
22 to have properties which border and have a continuous
23 boundary with the town to be able to do annexations.
24 And ultimately this Nebo tract was annexed in 2009 by
25 virtue of a connection through this forest service ten-

1 foot tract. And we have several significant legal
2 problems with that attempted annexation of the Nebo
3 tract. And that's what we're all about is the 359 acres
4 owned by the Boardman [phonetic] and the DeFraunt
5 [phonetic] families. We do not want to see that
6 commercially developed.

7 And the problem in a nutshell is this. In order to
8 get these annexations you have to have a petition by 100
9 percent of the owners; that's the method they use. And
10 there was never any petition by the forest service on the
11 shoestring of a ten-foot tract. There was no affirmative
12 petition. The documents will show you that the town
13 tried to get the forest service to agree in 2003 and
14 2004. They couldn't get that agreement. So what they
15 tried to do is go back -- and this testimony is
16 undisputed; it's in Mr. Wallace's deposition what they
17 tried to do was take a ten year old letter from the
18 forest service, which is our exhibit 1 back in 1994 and
19 bootstrap that up into a petition.

20 Well, it's not. It's not a petition. It was never
21 an affirmatively desired thing by the forest service. It
22 didn't constitute a petition. And so what we want to
23 show the court today is a couple of things in addition to
24 that which is clear. They have a petition by everybody
25 else. They have 100 percent petition by everybody else.

1 There is a form, which is our exhibit number 12, if
2 you're going to have 100 percent petition you got to fill
3 one out; the landowners do just like the Nebo church did
4 in exhibit 12. There's no such document in this case
5 from the forest service; it doesn't exist.

6 So in addition to that problem that there is not a
7 petition at all, there never was and isn't now, there are
8 two problems with trying to do contiguous annexation
9 using this ten-foot strip. One of them is the statute I
10 think it was amended in 2000 and its 5-3-305 not just the
11 150-305.

12 THE COURT: 505?

13 MR. LEATH: 5-3-305.

14 THE COURT: Okay.

15 MR. LEATH: And what that requires is you've got to
16 have a contiguous border with your annexing in it. And
17 the court can see the yellow is the tabbed one right down
18 here [indicates]. The only border on the ten-foot
19 section is about maybe a quarter of a mile. The rest of
20 this ten-foot strip does not constitute the contiguous
21 border with the town at all. So it doesn't meet the
22 definition of adjacent lands that 530 require. The other
23 part -- and this is our testimony today is this. In the
24 exhibit number 1, which the town used, the 1994 letter
25 what we did was this we went and tried to determine okay,

1 let's say that was legal. Would that language -- the
2 definition of the tract of land that is in that exhibit
3 number 1 would that identify this ten-foot strip or not.
4 So if you use that document as a petition would that give
5 you this ten-foot strip?

6 So we hired Mr. Frank who is going to testify who is
7 a surveyor, a land surveyor to go out and try to answer
8 that question for us. And I'll allow his testimony to
9 speak for itself. But we found that it doesn't. And so
10 therefore we have those problems with the annexation.
11 Number 1 there was never any petition. It's void ab
12 initio in our view; it doesn't exist. The Nebo tract,
13 which is the ultimate issue wasn't annexed until 2009 and
14 that is when we filed suit within probably 30 days after
15 that.

16 THE COURT: When was it annexed in '09?

17 MR. LEATH: The Nebo ---

18 THE COURT: --- when was it annexed?

19 MR. LEATH: We have it in the records in there. I
20 think its October 1.

21 THE COURT: Okay, October 1?

22 MR. LEATH: October 1, '09 I believe is the date.
23 The documents will show that.

24 THE COURT: Okay. All right. And y'all filed
25 on...

1 MR. LEATH: November 25th ---

2 THE COURT: --- November 25th okay.

3 MR. LEATH: So that's the issue. The issue is it
4 doesn't exist. As a matter of law there wasn't any
5 petition. And number 2 through factually it's not the
6 type of strip that meets the code definition. It doesn't
7 have contiguous border. And thirdly the so called
8 petition, the letter that was used in an attempt to
9 substitute for a petition when the forest service
10 wouldn't petition doesn't describe this strip. It was
11 defective factually.

12 So I'm prepared to put up the surveyor very briefly
13 regarding his work -- and that would be other than the
14 arguments and the documents we already have the extent of
15 what we would put in.

16 THE COURT: Okay. Mr. Green?

17 MR. GREEN: May I be heard briefly?

18 THE COURT: I'll be glad to hear an opening
19 statement.

20 MR. GREEN: Thank you, Your Honor.

21 THE COURT: Be glad to listen to you.

22 OPENING STATEMENT

23 MR. GREEN: Thank you very much, Your Honor. This
24 is a matter of dire importance to the town of Awendaw.
25 You're going to hear from our town manager who has been

1 town administrator who has been with the town throughout
2 this process. A little history on the town of Awendaw
3 shortly after hurricane Hugo a small rural community just
4 past Mt. Pleasant formed in order to get federal
5 assistance and to help the community there. Awendaw
6 borders the Francis Marion national forest. This letter
7 that was used in 1994 has been used seven times, no less
8 than seven times ---

9 THE COURT: --- are any of the city limits of
10 Awendaw on the north side of 17 where the Francis Marion
11 is?

12 MR. GREEN: On the north side? Yes, Your Honor,
13 and our map shows that.

14 THE COURT: Okay.

15 MR. GREEN: Your Honor, the important thing to know
16 is that with the federal government -- and you'll hear
17 this from our town administrator -- they are somewhat
18 different than a private individual in that they have a
19 policy they do not object to the annexation of property
20 through the forest. It's done all over this state and if
21 it were not the town of Awendaw could not grow; it would
22 simply not grow.

23 The main issue in this case for us, Your Honor is
24 that beginning of 1994 there was a course of dealing
25 conversations between the national forest service and the

1 town of Awendaw. They wrote this letter and described
2 with particularity; the yellow strip that Your Honor has
3 on defendant's exhibit number 2. That is what the town
4 relied on in order to annex through the Francis Marion
5 national forest. And this was not a one-time instance.
6 There is an ongoing course of dealing between the forest
7 service and the town of Awendaw. No objections were
8 raised.

9 As a matter of fact when this initial ten-foot strip
10 was annexed in October -- I'm sorry in December of 2004
11 there was no objection at that time. And this lawsuit
12 was brought five years afterwards. So one of the issues
13 that we're going to bring up and we've briefed and we
14 have all the exhibits is that the Coastal Conservation
15 league and two residents are suing to stop or to
16 invalidate an annexation that happened five years ago.
17 And the statute is clear, Your Honor ---

18 THE COURT: --- they're trying to invalidate the
19 annexation of the Nebo tract right?

20 MR. GREEN: They are but they're doing that ---

21 THE COURT: --- they're not just trying to set
22 aside the annexation of the yellow tract they're just
23 saying -- I don't know.

24 MR. GREEN: They're saying that is void also.

25 THE COURT: Okay.

1 MR. GREEN: And here's the other problem that we
2 have with this, Your Honor, is -- and we'll get into this
3 and we'll bring this up in context of our testimony but
4 in order to even bring the suit the plaintiff's have to
5 demonstrate an injury in fact or a concrete
6 particularized harm. There is no -- and Your Honor will
7 see from all their depositions and testimony they are
8 fearful that taxes might go up. They are fearful there
9 might be pollution.

10 THE COURT: Are you saying they've got to show
11 injury and what?

12 THE COURT: Injury in fact which is concrete and
13 particularized.

14 THE COURT: Okay.

15 MR. GREEN: And Your Honor will see from their
16 testimony in their deposition there is no injury in fact
17 that they can demonstrate. But between that and the fact
18 that they are going back and trying to invalidate this
19 2004 annexation the statute is clear and Your Honor will
20 hear this that there is a 90-day window if you're going
21 to challenge an annexation. And they are directly
22 challenging this initial annexation of the ten-foot
23 strip. It's been used throughout Awendaw's history.
24 It's been used -- and your Honor will hear that the City
25 of Charleston uses it, other cities use it. It's ---

1 THE COURT: --- use the federal letter you're
2 talking about?

3 MR. GREEN: No, use the ten-foot strip.

4 THE COURT: Have you figured out how the City of
5 Charleston annexed Daniel Island yet?

6 MR. GREEN: We know how that happened.

7 THE COURT: You know how that happened? Okay, go
8 ahead.

9 MR. GREEN: But Your Honor, the key is -- and the
10 question Your Honor correctly pointed out and the
11 testimony will get to this is the federal government has
12 a policy that allows annexation. Do they have to
13 affirmatively write a letter or do some form? The state
14 law is silent as to what constitutes a 100 percent
15 petition. There is no particular form that is set forth
16 by the State in order to say 100 percent petition is
17 necessary.

18 So there is no state form in the municipal code or
19 that a municipal association would give. So, Your Honor
20 has gone right to the issue is whether or not this letter
21 is sufficient given that federal government -- and you
22 will hear this they don't object to the annexation and
23 they have said they have no problem with it whatsoever.
24 And that was what the letter was designed to demonstrate
25 and the town communicated throughout this process with

1 the forestry service. So this isn't a one-time instance.
2 This is a seven time occurrence. This isn't the first
3 time that these plaintiffs for the Coastal Conservation
4 league have sued to stop annexations in Awendaw so it's
5 an ongoing battle.

6 But the key very much is can Awendaw ever grow? And
7 what the plaintiff has done is they are seeking to attack
8 five years after the fact the basis for Awendaw's growth.
9 There has been no harm, no actual harm demonstrated.
10 There has been no particularized harm. These plaintiffs
11 don't have standing to bring this suit. But in either
12 event Your Honor, what you're going to hear from us and
13 this is what our opening statement goes to is Mr. Wallace
14 will tell you ---

15 THE COURT: --- they could grow on the east side of
16 17 as much as they want can't they? There is no national
17 forest over there.

18 MR. GREEN: But they can -- correct, Your Honor,
19 and they've had no problem with that. But it's our
20 belief ---

21 THE COURT: --- you said they needed to grow. I'm
22 just saying they can grow all they want on the east side
23 of 17.

24 MR. GREEN: Correct, Your Honor. But there are --
25 I think there are other issues there, Your Honor, which

1 are ---
2 THE COURT: --- I understand.
3 MR. GREEN: But in any event Your Honor you will
4 hear from Mr. Wallace as to the whole process of
5 annexation from 1994 through the present day. And we do
6 want to preserve those two issues of standing and statute
7 of ---
8 THE COURT: --- statute of limitation, okay. Thank
9 you very much. Call your first witness.
10 MR. LEATH: Your Honor, we'll call Mr. Robert Lee
11 Franks.
12 [Whereupon, Mr. Franks comes forward]
13 [Whereupon, the witness is duly sworn by the Clerk
14 of Court]
15 CLERK OF COURT: State your name and spell your
16 last name.
17 THE WITNESS: Robert Lee Frank, II, F-R-A-N-K.
18 - - - - -
19 ROBERT FRANK,
20 Having been first duly sworn,
21 Was examined and testified as follows:
22 DIRECT EXAMINATION
23 BY MR. LEATH:
24 Q. Mr. Frank, good morning. And I'd like to ask you to
25 speak up loud enough so we can all hear you when you give

1 your testimony. Can you do that?
2 A. Yes, sir.
3 Q. Can you hear me all right?
4 A. Yes, sir.
5 Q. All right, sir. A little background for the court
6 and for me too what is your profession?
7 A. I am a registered land surveyor in the state of
8 South Carolina.
9 Q. When you say registered do you have a license?
10 A. Yes sir, I do.
11 Q. Okay. Is it current?
12 A. Yes, sir.
13 Q. How long have you had it?
14 A. Since 2000.
15 Q. All right, sir. Have you been in active practice as
16 a land surveyor every since?
17 A. Yes, sir.
18 Q. Have you ever given any testimony or done any work
19 for a court?
20 A. Yes sir, on several occasions.
21 Q. Okay. Give us just a little bit of background on
22 that please.
23 A. I've testified at the Administrative Law Court on
24 several dock survey cases and I've testified with the
25 Master in Equity on several boundary survey cases and

1 I've acted as a court appointed surveyor in two cases as
2 well.
3 Q. You've been a court appointed surveyor?
4 A. Yes, sir.
5 MR. LEATH: Your Honor, I'd like to qualify him as
6 an expert in surveying ---
7 THE COURT: --- Mr. Green, do you have any
8 objection to Mr. Frank being qualified as a surveyor?
9 MR. GREEN: Not as a surveyor Your Honor, no.
10 THE COURT: All right. The court so finds.
11 MR. LEATH: Thank you.
12 Q. [Mr. Leath] All right Mr. Frank, some years back
13 did we ask you to undertake some work on behalf of the
14 plaintiff's in this case in terms of taking a look at
15 some property around Awendaw and comparing it with that
16 1994 forest service letter that I handed you, which is
17 marked as plaintiff's exhibit 1. Did we ask you to
18 undertake some work in that regard?
19 [Whereupon, the witness reviews document]
20 A. Yes, sir.
21 Q. Okay. And do you recall what it was, what your
22 task was, what we asked you to do?
23 A. As I recall I was provided this letter and two other
24 documents and asked to review them and try to determine
25 if particularly this letter constituted an adequate legal

1 description to be used as the basis for an annexation.
2 Q. All right, sir. And did you go out and take a look
3 at the property and compare the property descriptions in
4 that document number 1 with this ten-foot strip here that
5 I think is in plaintiff's 11 that is one of the strips of
6 land in controversy. Did you do that?
7 A. Document number 1 being the annexation?
8 Q. Document number 1 being that letter in front of you.
9 A. This letter in front of me does not refer to that
10 strip right there [indicates]. This letter right here
11 refers to a different strip.
12 Q. Well, that's the question I've got for you. Did you
13 undertake to compare whether or not that letter describes
14 this strip?
15 A. Yes.
16 Q. Does it?
17 A. No.
18 Q. Okay. So if one were to utilize that letter to
19 describe a tract of land does it describe this ten-foot
20 strip at issue in this case?
21 A. No, it does not.
22 Q. All right. I'm going to let Mr. Green ask you some
23 questions, sir and then maybe I'll have another one or
24 two to follow up.
25 THE COURT: Mr. Green?

1 CROSS-EXAMINATION

2 BY MR. GREEN:

3 Q. Just a couple of questions Mr. Frank. You are --

4 just to be clear on the expertise you are professing you

5 are not a legal expert on land annexations?

6 A. No, sir.

7 Q. And you've never worked for the state or any

8 government municipality handling annexations?

9 A. No, sir.

10 Q. Okay. And you don't know what the legal

11 requirement is from the state of South Carolina for 100

12 percent petition?

13 A. No, sir.

14 Q. And you're not professing to have that expertise for

15 the court?

16 A. No, sir.

17 Q. And you've not handled any annexations on behalf of

18 any municipality during your time as a land surveyor?

19 A. Not to the best of my knowledge.

20 Q. And your testimony right now is your opinion on the

21 sufficiency of the legal description in the 1994 letter?

22 A. Yes, sir.

23 Q. That's all the questions I have.

24 THE COURT: Any redirect?

25 MR. LEATH: I don't think I have any redirect. If

1 the court has a question or two that's fine but I don't
2 think I have any follow up questions.

3 THE COURT: Mr. Frank you may step down. Any
4 reason he can't be excused?

5 MR. LEATH: No sir.

6 MR. GREEN: There is no reason.

7 THE COURT: All right. Mr. Frank, thank you so
8 very much for being here. You may be excused.

9 [Whereupon, the witness is excused and exits the
10 witness stand]

11 THE COURT: Call your next witness.

12 MR. LEATH: That's it for us in terms of live
13 witnesses, Your Honor. I think everything else we've got
14 is in the testimony in the depositions ---

15 THE COURT: --- as I told you earlier I believe
16 when you wanted to introduce that letter if you decide
17 you'd like to take his deposition -- is it Mr. Bradley?

18 MR. LEATH: Mr. Bradley is -- yes sir, if ---

19 THE COURT: --- if you decide you would like to do
20 that I will leave the record open for you but please let
21 me know if you want to do that okay.

22 MR. LEATH: I will let you know at the end of this.
23 And we may not have to depending upon whether or not...

24 THE COURT: All I'm saying to you is if you decide
25 you want to do it I'm going to leave the record open for

1 you so at this point in time you haven't rested your case
2 if you decide to do that.
3 MR. LEATH: Yes sir, thank you very much. I
4 appreciate that ---
5 THE COURT: --- that's all I was trying to put on
6 the record, okay.
7 MR. LEATH: Yes, sir. I appreciate that.
8 THE COURT: Mr. Green, you want to call your first
9 witness?
10 MR. GREEN: We would call Mr. Bill Wallace.
11 THE COURT: Okay.
12 [Whereupon, Mr. Wallace comes forward]
13 [Whereupon, the witness is duly sworn by the Clerk
14 of Court]
15 CLERK OF COURT: Just state your name and spell
16 your last name.
17 THE WITNESS: Wallace, Bill Wallace.
18 CLERK OF COURT: And spell your last name.
19 THE WITNESS: W-A-L-L-A-C-E.
20 MR. GREEN: May it please the court?
21 THE COURT: Yes, sir.
22 - - - - -
23 BILL WALLACE,
24 Having been first duly sworn,
25 Was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GREEN:

Q. Mr. Wallace, can you give us your name for the record and tell us where you work?

A. Yes. My name is D. William Wallace. I'm known as Bill. I work for the town of Awendaw. I'm the town administrator.

Q. Okay. And how long have you worked at the town of Awendaw?

A. I've worked for the town over 12 years. For 10 years -- almost 10 years I was the director of planning on a consulting basis for the town. The last two and half years I've been full time town administrator.

Q. And can you tell us what your duties were as the planning director for the town?

A. I was a consulting planning director for the town. I was responsible for all the planning, zoning subdivision type activities of the town.

I was a staff for the planning commission, staff for the board of zoning appeals; I attended council meetings and assisted in public hearings where there were public hearings related to planning and zoning type matters.

Q. And can you give the court the benefit of your work background in planning and your educational background.

A. I've been a professional planner for over 45 years.

1 I started doing planning in the 1960's. I have a Masters
2 Degree in City Planning from Georgia Tech. I've worked
3 for the city of Marietta, Georgia as planning director.

4 I worked for DeKalb County, Georgia as a planner in
5 the planning department. I worked for the state of
6 Georgia in the state planning agency. I've worked for
7 the city of Charleston.

8 I was director of planning for the city of
9 Charleston for six and a half years. I've worked for
10 several national and regional planning and engineering
11 type consulting firms.

12 And in those capacities I did consulting work for
13 governmental entities as an employee of Post, Buckley,
14 Schuh & Jernigan. I wrote the zoning ordinance for the
15 city of Columbia, South Carolina. I did planning studies
16 for other towns such as LaGrange, Georgia.

17 So I've been associated with planning activities and
18 governmental activities for over 45 years. And during
19 the time that I was involved with the city of Marietta
20 and the city of Charleston and other entities I was very
21 intimately involved with annexation issues.

22 And the role that I had with the city of Charleston
23 I was the primary person in charge of all annexation
24 activities for the city.

25 Q. And can you tell the court a little bit of some of

1 the issues you had with annexations when dealing with
2 Charleston as it relates to your background on
3 annexations?

4 A. I have backgrounds in annexations going back to the
5 1970's when I worked for the city of Marietta, Georgia.
6 During that time I was also in charge of annexations for
7 the city.

8 I was involved with annexing land that belonged to
9 the national park service known as Kennesaw Mountain
10 National Battlefield Park. We annexed strips of property
11 through the national battlefield park to reach lands that
12 were not contiguous unless we did go through the park in
13 a similar situation to what we have with the forest here
14 in Awendaw.

15 When I worked for the city of Charleston again we
16 had many issues. The state law has changed over time.
17 For example, when the state law when I was with the city
18 of Charleston was that you could for example annex a ten-
19 foot strip of land along the highway right of way without
20 getting a petition from the state or the county or anyone
21 else. You could just annex a ten-foot strip.

22 You could go down that ten-foot strip and go until
23 it touched a particular piece of property and then that
24 made that property contiguous and you could annex it into
25 the town or the city. State laws have changed several

1 times during the subsequent years. Also when I was a
2 consultant working for myself I had a firm called the
3 Wallace Company. I was a consultant to Charleston
4 National golf course. When Charleston National golf
5 course was developed in was in unincorporated Charleston
6 County.

7 Prior to its opening hurricane Hugo came through and
8 pretty much decimated the golf course operation. And it
9 was decided at that point in time that they needed to
10 change the master plan. I assisted them in changing the
11 master plan and part of that was to annex the property
12 into the town of Mt. Pleasant.

13 It was not contiguous to the town of Mt. Pleasant
14 and I was responsible for going to several different
15 property owners in the general area and developing an
16 annexation plan that included all of the different
17 property owners willing to annex into the town of Mt.
18 Pleasant so that the Charleston National plan could be
19 revised using a planned development designation in the
20 town of Mt. Pleasant. So I've been involved with
21 planning and annexation type issues for over 45 years.

22 Q. Okay. Were you involved as director of planning
23 for the town of Awendaw when the Nebo tract was annexed?

24 A. Yes.

25 Q. Okay. And you were also -- were you also involved

1 with annexation in the town of Awendaw prior to that
2 time?
3 A. Yes.
4 Q. Okay. Can you -- let me ask you this. I'm going
5 to hand you a map that Your Honor has a copy of.
6 [Whereupon, the witness reviews document]
7 THE COURT: Which one is it?
8 MR. GREEN: This is defendant's exhibit 1 and 2.
9 THE COURT: Which one is 1 and which one is 2?
10 MR. GREEN: One is the one with the yellow line.
11 THE COURT: Okay. This one [indicates]? Okay.
12 Q. [Mr. Green] As it pertains to this property can you
13 give the court a brief history of annexations in the town
14 of Awendaw particularly as it relates to dealings with
15 the National Forest service? And you can use this map.
16 A. Yes. The ---
17 Q. --- let me back up. Did you prepare this map?
18 A. Yes, I did prepare these maps.
19 Q. And you have knowledge of what's inside these?
20 A. Yes I do.
21 Q. Please explain to the court the significance of this
22 map and the yellow line and the history of annexations
23 with regard to...
24 A. The first map not the one with the yellow line on it
25 but the other one that has dates on it has dotted lines

1 and dates adjacent to the dotted lines. What this shows
2 is that the -- and you can see also in the legend over to
3 the right that tells what years pieces of property were
4 either incorporated in the original incorporation in 1992
5 or annexed into the town after that original
6 incorporation.

7 And you can see the town -- the original part of the
8 town is in the center of this map and its labeled 1992 to
9 1994. That was the original incorporation and a couple
10 of small areas that was added to it.

11 At that point in time that was roughly all the area
12 that was in the town and I believe that at the time of
13 incorporation there were roughly 300 people or so living
14 in that particular area.

15 It became very clear that it was not possible for
16 the town to grow either east of 17, west of 17, north of
17 17, south of 17; whichever way you want to describe it.
18 The forest service owns property all the way around and
19 it was virtually impossible for the town to grow without
20 going through the national forest.

21 In my ongoing discussions with the national forest
22 and my ongoing discussions with Mayor Austin [phonetic]
23 who was the mayor at the time of the incorporation and
24 some 18 years after that the national forest agreed that
25 it would be possible to annex ten-foot strips of land

1 through the forest in order to reach areas that wanted to
2 be part of the town to make then contiguous. You can see
3 on the dates on this map [indicates] there were at least
4 five times prior to the Nebo tract annexation where a ten
5 foot strip was used. 1994, 1995, 1996, twice in '96,
6 1997; all of those were annexed using a ten-foot strip
7 prior to the annexation of the Nebo tract or the ten-foot
8 strip leading to the Nebo tract.

9 All of those were based on the letter than we
10 received from the national forest service. There was
11 never an objection from the forest service. There was
12 never an appeal by any person relating to any of those
13 annexations using the ten-foot strip.

14 Q. That letter you are referring to, the 1994 letter is
15 defendant's exhibit number 3 correct?

16 A. Yes.

17 Q. Just so Your Honor has that also.

18 THE COURT: Thank you, sir.

19 A. So when we looked at this particular letter it's
20 very definitive. It is not a legal description in the
21 sense of preparing a deed or a legal transaction.

22 I agree that that is not what this is. But it very
23 definitively defines what areas the national forest
24 service said that we could annex into the town using a
25 ten-foot strip process. So if you look at the map that

1 has the yellow strip on it I just highlighted two areas
2 that were discussed. And it specifically mentions in
3 here Awendaw church. And Awendaw church is highlighted
4 on this map [indicates] its roughly in the center of the
5 map.

6 So starting at Awendaw church, which is a well known
7 landmark; it's been there for many, many years. There is
8 no doubt or discrepancy as to where Awendaw church is
9 located. So it says starting at Awendaw church going
10 southeasterly along the national forest boundary, which
11 if you look at that the Awendaw church property is a
12 triangle.

13 If you start at the apex of that triangle and go
14 southerly to Highway 17 and then you continue along
15 Highway 17 so it's along the national forest service
16 boundary to Highway 17 and continuing northeasterly along
17 the national forest boundary to the Wando River. The
18 national forest service boundary the extent of it in
19 Awendaw is where this ten-foot strip begins.

20 The Wando River is part of the boundary of this
21 particular piece of property as well as part of the
22 boundary of the Nebo tract that was subsequently annexed.
23 So my professional opinion is that there is no doubt
24 whatsoever based on this letter that this strip that we
25 annexed, the ten-foot strip is defined in this particular

1 letter. It also says going in the opposite direction to
2 Loftin Road. Loftin Road is up on the other end you can
3 see at the top right hand corner of this map [indicates].
4 You see its labeled Loftin Road. We could annex there.
5 We did annex.

6 If you go back to the first map you'll see there is
7 an annexation labeled 1-6-94 along Highway 17 and that's
8 exactly the strip along Highway 17 that is described in
9 this particular letter.

10 So I would say based on my professional experience
11 in dealing with annexations and dealing with contiguous
12 definitions and those type matters that this letter is
13 very clear in explaining what properties we could annex
14 into the town.

15 Q. [Mr. Green] Mr. Wallace, when were the ordinances
16 read at town council? When were the ordinances annexing
17 the ten-foot strip to the Nebo church what was the
18 approximate date of those?

19 A. That was in 2004. I think it was in December of
20 2004.

21 Q. Okay. And within 90 days or immediately after that
22 annexation of the ten-foot strip did you receive any
23 challenges or any legal challenges to that annexation at
24 that time?

25 A. No.

1 Q. Okay. And what steps did you or what steps does
2 the town take to publicize annexations of this type? Or
3 how is it broadcasted ---

4 A. --- State law does not require annexations using the
5 100 percent method to be advertised. If you have an
6 election and you use a 75 percent method or some other
7 method that is allowed you do have to have a public
8 hearing.

9 You do not have to have a public hearing for the 100
10 percent method. However, this is an annexation using the
11 100 percent method is put on town council agenda, which
12 is advertised as an official meeting of the town that is
13 posted at the town hall.

14 We post it on the board outside of town hall. And
15 during those meetings there is a citizen participation
16 period and it is possible for people to come and discuss
17 anything that is on the agenda.

18 So even though it was not advertised as a public
19 hearing per se anyone who wanted to could have come to
20 those meetings when council voted on the annexation of
21 the ten-foot strip and offered any comments pro or con if
22 they desired to do so.

23 Q. And the meeting was open to the public?

24 A. Yes.

25 Q. And following the meeting or at the meeting did you

1 hear any objections from any of the plaintiffs or
2 representatives for the plaintiffs in this lawsuit?

3 A. No.

4 Q. Okay. What is the date that the annexation of the
5 Mt. Nebo parcel was completed?

6 A. It was completed I believe October the 1st, 2009
7 approximately five years after the ten-foot strip
8 annexation.

9 Q. Okay. And are you familiar with the timeframe in
10 which an annexation can be challenged?

11 A. Yes. According to state law it says that you have
12 no more than 90 days to file legal proceedings objecting
13 to an annexation.

14 Q. Now the plaintiffs in this lawsuit do they live
15 adjacent to the Mt. Nebo parcel?

16 A. No.

17 Q. Okay. And how do you know that?

18 A. Well, I know where they both live. I know the
19 addresses that they live and I know the address of the
20 property that is the Mt. Nebo property.

21 And I believe Mr. Prause's residence is probably
22 somewhere in the range of three to four maybe even five
23 miles depending on whether you measure by the way the
24 crow flies or driving around the road. And then Ms.
25 Vicary lives on Doar Road and I believe as the crow flies

1 it's probably seven or eight miles to her residence.

2 Q. And neither of their properties are contiguous or
3 adjacent to the Nebo tract?

4 A. No.

5 Q. All right. And can you tell the court a little bit
6 about -- well, let me back up.

7 Have you explained everything that you need to on
8 the map about -- I think there was some clarification you
9 had about whether or not the town could expand or the
10 court had some question about whether or not the court
11 [sic] could expand on the east side of 17. Can you
12 explain why that's not possible ---

13 A. --- the town -- if you look at the map with the
14 dates on it and the numbers where the dotted lines -- the
15 white areas that you see in between virtually all of that
16 is national forest property. So the national forest owns
17 land on both sides of 17; not just on one side of 17.

18 Q. And was there a continuous course of dealings with
19 the national forest service throughout these seven
20 annexations where they were kept apprised of the
21 annexations and what was going on?

22 A. Yes. I had ongoing discussions with Orlando Sutton
23 [phonetic] as we went through this process. And I
24 believe in the depositions and the discovery there are
25 evidences of letters and discussions that I had with Mr.

1 Sutton. I met with him one time with the membership of
2 the Nebo church. I met with him two or three times
3 individually at his office or at the Visitors -- the
4 Sewee Visitors Center.

5 I had ongoing discussions with him throughout the
6 entire process. And I sent him a copy of the agenda for
7 the meeting. He was made aware of when the meeting was
8 going to be and we talked about the annexation.

9 And when the annexation was complete I sent him a
10 copy of the ordinance that was annexing that strip of
11 property. So he was fully aware of the actions that the
12 town was taking.

13 Q. And was there a reason or is there a reason that the
14 annexation with regard to the federal government why
15 those are any different than say private individuals.

16 A. Well, the private individuals generally have one
17 person who is responsible for signing a document whether
18 they are the person whose name appears on the deed or
19 whether they are a person who is legally set forth -- say
20 for example in the case of EBC they were an LLC and
21 somebody was designated as a person who could sign for
22 the LLC.

23 In the case of the national forest service the
24 national forest service has a manual that governs how
25 they deal with annexations. And basically that manual

1 you can see online and I have gone online and I've read
2 the manual. I have talked with people in Washington,
3 D.C. in the national forest service office and their
4 position ---

5 MR. LEATH: --- Your Honor, we're now getting into
6 hearsay. I've let ---

7 THE COURT: --- I'll sustain the objection.

8 Q. You can't say -- what you know of your knowledge as
9 to how you deal with the forest service. Not what
10 anybody told you or what you heard.

11 A. My knowledge in my ongoing conversations is that the
12 forest service does ---

13 MR. LEATH: --- Your Honor ---

14 THE COURT: --- I'll sustain the objection.

15 Q. Not the conversations; just what you know. Is there
16 a way that you deal differently with the forest service
17 than individuals?

18 A. Yes.

19 Q. And let me ask you specifically the plaintiffs have
20 alleged harm as a result of this annexation. Has there
21 been any changes whatsoever physically to this parcel
22 that you're aware of any development or anything on this
23 parcel since the annexations happened?

24 A. No.

25 Q. Is it still raw natural land?

1 A. Yes.

2 Q. And has there been any -- to your knowledge has
3 there been any increased taxes on the residents of
4 Awendaw as a result of this annexation?

5 A. Citizens of Awendaw and not on this particular piece
6 of property?

7 Q. Yes.

8 A. Yes - no there have not been.

9 Q. There have not been any increased taxes as a result
10 of this annexation ---

11 A. --- no ---

12 Q. --- to the citizens of Awendaw?

13 A. Right.

14 Q. Did any plaintiffs voice any -- actually I'll stop
15 at that question. Answer any questions that Mr. Leath
16 has for you and I will follow up some questions...

17 THE COURT: Mr. Green, come mark on defendant's 2
18 where the Nebo tract is for me please.

19 MR. GREEN: Yes.

20 THE COURT: That Nebo tract -- question mark where
21 is it?

22 Q. [Mr. Green] Can you mark on this where the Nebo
23 tract is for the court's benefit?

24 [Whereupon, the witness complies]

25 THE COURT: Can you get him also to mark on the one

1 that is admitted into evidence so mine and his -- the one
2 in evidence is the same.

3 [Whereupon, the witness complies]

4 MR. GREEN: Your Honor, I think with the yellow
5 strip I think there is also ---

6 THE COURT: --- I'm sorry, what?

7 MR. GREEN: The map with the yellow strip...

8 THE COURT: Oh, I can see it now. Okay, thank you.

9 Q. [Mr. Green] Mr. Wallace, has the process that
10 you've used -- has the process that the town used for the
11 annexation of the Nebo strip, of the Nebo strip and the
12 Nebo parcel was that consistent with how the town has
13 worked continuously with the national forest service
14 since the inception of the town?

15 A. Yes.

16 Q. Has there been any deviation from the practice and
17 the policy of annexing through the national forest
18 service throughout this entire time period?

19 A. No.

20 Q. And were there any challenges that any of the
21 previous seven annexations using this method and using
22 this letter?

23 A. No.

24 Q. And similarly were there any objections or any
25 problems voiced to you by the national forest service

1 about your reliance on -- or the town's reliance on the
2 letter for permission in going forward with these
3 annexations?

4 A. No.

5 Q. That's all the questions I have at this time.

6 Please answer any questions ---

7 THE COURT: --- cross-examination?

8 CROSS-EXAMINATION

9 BY MR. LEATH:

10 Q. Mr. Wallace, you operate as a consultant to the town
11 of Awendaw right?

12 A. Yes.

13 Q. And you get paid by them right?

14 A. Excuse me?

15 Q. You get paid by them; they are one of your client's
16 right?

17 A. Yes.

18 Q. Okay. Now you were involved in the decision to get
19 this ten-foot tract annexed back in 2004 right?

20 A. Yes.

21 Q. And your deposition reflects the fact that you
22 utilized the exhibit 1, the 1994 letter from the forest
23 service and you and the Mayor and the town manager got
24 together and put together that annexation, that's correct
25 isn't it?

1 A. Yes.

2 Q. Now, let's just talk about what is required for an
3 annexation. You've developed a good bit of expertise in
4 annexation and worked in it over the years right?

5 A. Yes.

6 Q. And profess to have knowledge and expertise
7 regarding the laws and the fact that the laws have
8 changed right?

9 A. Yes.

10 Q. All right. Let's talk about what is required by
11 the law. This is code section 5-3-140 and this is an
12 alternate method for annexation when the entire area
13 proposed to be annexed is owned by the federal or state
14 government. In that connection what is the first
15 sentence of that statute requirement? Just read it into
16 the record.

17 A. [Reading] If the territory proposed to be annexed
18 belongs entirely to the federal government or the state
19 of the South Carolina and is adjacent to a municipality
20 it may be annexed upon the petition of the federal
21 government or the state to the city or town or council
22 therein.

23 Q. Thank you. So it may be annexed by a petition to
24 the federal -- to the municipality, right, that's what
25 that says?

1 A. Yes.

2 Q. That's code 5-3-140. Now one that is at issue here
3 in this case in addition to that one is 5-3-150. And
4 again read the first sentence of 5-3-153, which is down
5 at the bottom and then we'll talk about this. What does
6 it require? Read it out into the record.

7 A. [Reading] Notwithstanding the provisions of
8 subsections 1 and 2 of this section an area or property
9 which is contiguous to a municipality may be annexed to
10 the municipality by filing with the municipal governing
11 body a petition signed by all persons owning real estate
12 in the area requesting annexation.

13 Q. Okay. So both of these statutes that we've just
14 read regarding governmental ownership of property as well
15 as private ownership of property require an affirmative
16 petition to the city?

17 And I want to ask you about this document. I'm not
18 sure which one we have, but it's one of our exhibits
19 marked in the record.

20 [Whereupon, Mr. Leath reviews documents]

21 Q. For the record this is going to be plaintiff's
22 exhibit 12 so the court can follow me with this. I'm
23 writing on the top of it.

24 So we've just been over the idea of petitions being
25 required by those two statutes. And I'm going to show

1 you exhibit number 12.

2 [Whereupon, the witness reviews document]

3 Q. Now exhibit number 12 is actually the petition form
4 that the town of Awendaw uses to affect these petitions
5 and this particular one is signed by the folks at the
6 Nebo church correct?

7 A. Yes.

8 Q. So they actually filled in a form, signed it as a
9 landowner and submitted this 100 percent petition to the
10 forum?

11 A. Correct.

12 Q. And that's exactly consistent with the way the
13 statute works and requires right?

14 A. Correct.

15 Q. Now there is no such document at all from the
16 federal government in this case on this ten foot strip is
17 there?

18 A. No.

19 Q. There is not.

20 A. Well I, I...

21 Q. There is no such petition form as exhibit 12.

22 A. Not as a form like that no. But state law does not
23 require that form.

24 Q. Okay. But the state law does require a petition.

25 A. It does require a petition ---

1 Q. --- an affirmative act.
2 A. And we considered the letter from 1994 to be that
3 petition.
4 Q. I understand what you considered. But you don't
5 have a petition from the federal government petitioning
6 it other than what you consider ---
7 A. --- that's what we consider ---
8 Q. --- in this particular ---
9 A. --- a petition, yes ---
10 THE COURT: --- hold on a second. Wait a minute
11 now. Listen to his question and don't interrupt him.
12 And you may answer and you may give an explanation but
13 let him finish the question. Mr. Leath, don't interrupt
14 him while he's answering your question okay. This is not
15 an argumentative session. It's a question and answer
16 session.
17 A. Okay.
18 THE COURT: Please proceed Mr. Leath. If you want
19 to back up a while to go back into it that's fine.
20 MR. LEATH: No, I don't need to, Your Honor. I
21 think I've got it; I appreciate it.
22 THE COURT: Okay.
23 Q. [Mr. Leath] So Mr. Wallace while there is no
24 petition form signed it is correct is it not that in that
25 timeframe in 2004 the town tried to get the federal

1 government to affirmatively agree by petition or
2 otherwise to the annexation of the strip that's true is
3 it not?

4 A. Yes.

5 Q. And your letter right here -- this is exhibit 4 --
6 was an attempt on your part to do just that. You write
7 to Mr. Orlando Sutton the district ranger of the
8 department of agriculture and you say as you know we have
9 annexed -- second paragraph -- national forest property
10 in this manner in the past.

11 We request that you allow the town to annex a ten-
12 foot strip along the southern edge of the highway from
13 the town. This is the only possible way the church can
14 annex at this time.

15 You never received subsequent to 2004 any agreement
16 letter or document from the federal government
17 authorizing or agreeing to this annexation did you; never
18 since subsequent to 2004 when you wrote that letter.

19 A. Subsequent to 2004 they did not write a document,
20 no.

21 Q. Okay ---

22 A. --- but subsequent to 2004 I did have conversations
23 ---

24 Q. --- now we've already had a hearsay objection about
25 what conversations you had with any individuals and I'm

1 just not going to allow you to testify to that at this
2 point. Answer my question. My question is did you ever
3 receive any document, petition, anything from anyone at
4 the forest service saying annex our property?
5 A. No.
6 Q. So it was the 1994 ten years earlier document that
7 you and the Mayor and the town manager decided to use a
8 petition correct?
9 A. Yes.
10 Q. All right. Now was the Mayor in 2011 Samuel
11 Robinson [phonetic]?
12 A. Yes.
13 Q. Okay. And you're familiar with the files in terms
14 of annexation and documents back and forth from the
15 forest service to the town regarding these annexations
16 aren't you? You make that part of your job do you not?
17 A. Yes. But I think that -- my understanding is Mayor
18 Robinson went to the forest service and he did not make
19 me privy to any of his discussions with the forest
20 service.
21 Q. Okay. So have you seen this particular letter the
22 forest service wrote in February 16th, 2011 before today?
23 [Whereupon, the witness reviews document]
24 A. No.
25 Q. You've never seen that document?

1 A. No.

2 Q. Okay. Do you know who Mr. Bradley is?

3 A. Yes.

4 Q. Who is he?

5 A. He's the forest supervisor for the state.

6 Q. Okay. Is he over Mr. Orlando Sutton who you wrote

7 to or not?

8 A. I assume he is.

9 Q. But you've never seen this correspondence?

10 A. No.

11 Q. Okay. Thank you.

12 THE COURT: You may ask him about it because he

13 said he knows about the regulations if you so choose

14 rather than deposing him. He said he is familiar with

15 the forest service regulations.

16 MR. LEATH: All right, sir.

17 THE COURT: If you want to. I'm not trying to tell

18 you what to do. I'm giving you the opportunity.

19 MR. LEATH: No, sir. I am going to ask him this

20 letter.

21 THE COURT: I haven't seen the letter so I don't

22 know what's in it. Maybe he'll know, maybe he won't; I

23 don't know. But I'll allow you to do that in lieu of

24 taking his deposition.

25 Q. [Mr. Leath] The first sentence in there says Dear

1 Mayor Robinson. The purpose of this letter is to clarify
2 the position of the USDA forest service as stated on the
3 May 3rd 1994 letter by David Wilson ---

4 MR. GREEN: --- Your Honor, we object. Asking
5 questions ---

6 THE COURT: --- he can ask him questions about the
7 letter. If he doesn't know that's fine.

8 MR. GREEN: Okay. This line of questioning ---

9 THE COURT: --- that's all I'm saying. If he
10 doesn't know he doesn't know. If he knows he can answer
11 it. If he doesn't that's fine. I think he can do that.

12 Q. [Mr. Leath] The first question is during this
13 timeframe, which is February ---

14 THE COURT: --- first of all Mr. Wallace do you
15 have a copy of the letter?

16 A. No.

17 Q. [Mr. Leath] I'll give it to you.

18 MR. LEATH: I will.

19 THE COURT: Give him a copy so he'll know what
20 you're reading from. Do you have another copy?

21 MR. LEATH: I will.

22 THE COURT: Give him a chance to read the letter
23 and then ask him questions about it okay.

24 [Whereupon, the witness reviews document]

25 THE COURT: Mr. Green, if you have any objections

1 please make them. I'm not trying to give him an open
2 door on the issue okay.

3 MR. GREEN: Thank you, Your Honor.

4 THE COURT: I'm just trying to advert from y'all
5 going and doing a deposition if possible if we can deal
6 with it through the letters.

7 MR. GREEN: If this will prevent us from having to
8 go take it then ---

9 THE COURT: --- it depends on what he knows and he
10 doesn't know.

11 MR. GREEN: Thank you.

12 Q. [Mr. Leath] I guess the first question I've got Mr.
13 Wallace is around February of 2011 was there discussion
14 in your office and with the Mayor regarding what the
15 forest service position was on that 1994 letter?

16 A. No.

17 Q. There was no discussion at all?

18 A. No.

19 Q. So as to whether -- why the forest service would
20 write Mayor Robinson about that you don't have any
21 knowledge?

22 A. My understanding is that Mayor Robinson went to
23 Columbia along with Nell Daniels [phonetic], one of our
24 council members and had a meeting with Mr. Bradley. I've
25 never seen this letter. I don't know what the meeting --

1 the results of the meeting were no.
2 Q. And this was never shared with you?
3 A. No.
4 Q. And you've never seen this document before?
5 A. No.
6 Q. You'll see in the 1-2-3-4 -- the fourth paragraph of
7 this letter there is a statement regarding what the
8 forest service position was involving the previous
9 letter; you see that statement?
10 A. Yes.
11 Q. Have you ever received a similar statement or
12 otherwise from the forest service ever about their
13 position on their 1994 letter?
14 A. No.
15 Q. Okay. So you don't know anything about the
16 position of the forest service today as we sit here
17 regarding that letter, the 1994 letter?
18 A. Not regarding the 1994 letter no.
19 Q. Okay. Now with regard to the town of Awendaw what
20 is the reason that it wants this Nebo tract annexed? Why
21 would it want to have a zoning change in here? If it's
22 annexed you're going to change the zoning from
23 agricultural to what commercial?
24 A. No, to a planned development.
25 Q. Planned development. And do you have any ideas we

1 are here today that the ECB folks have any intention of
2 carrying through with any planned development on this
3 tract?

4 A. I can't speak for them, no.

5 Q. Okay. So if there is no plan for any commercial
6 development would there be any reason at all that the
7 town would want to annex this property other than just
8 leave it in its agricultural format that it is in now?

9 A. No, I didn't say there was no plan. You asked me if
10 I knew if ECB, EBC or whatever the initials are was
11 planning to do it themselves. I don't know what their
12 intentions are. There is a plan and that plan was
13 approved by the town of Awendaw.

14 So yes, there is a plan and we know and we have a
15 developer's agreement with them that's based on this
16 plan. And the developer's agreement is a document that
17 goes with the land. If they sell the land to someone
18 else whoever buys it is subject to the same plan that
19 they are.

20 They generally are not real estate developers. My
21 assumption is they would not develop the property
22 themselves but they would sell it to someone else who
23 would develop it.

24 Q. Do you have any knowledge that it's for sale or that
25 there is any intention of ---

1 A. --- yes, they've agreed to sell it a couple of
2 times.

3 Q. Okay. Has it been proposed to put a park on that
4 property at some point?

5 A. Yes.

6 Q. And has the town agreed to that?

7 A. No.

8 Q. Why not?

9 A. Because we weren't asked to.

10 Q. Okay. Would the town have any objection if a park
11 were to be put on there?

12 A. Yes.

13 Q. Why?

14 A. Because we have 150,000 acres of park all around us.
15 We don't need any more park land. What we need is some
16 land that would be for the most part according to this
17 plan residential development for residents to be in the
18 town of Awendaw.

19 Q. So basically the town just wants more commercial
20 development here rather than agricultural or natural uses
21 of this land?

22 A. Well, I think commercial is not an appropriate term.
23 The vast majority of this property would be residential
24 not commercial.

25 Q. Okay. And the town wants that regardless of what

1 the owner of this tract wants.

2 A. I'm sorry, say that again.

3 Q. I said the town would like to have that happen
4 regardless of what the owner of this tract would want.

5 A. That's correct.

6 Q. Okay. Does the town intend in the future to use
7 this 1994 letter if it deems it necessary regardless of
8 any petitions from the federal government to annex land?

9 A. Yes.

10 Q. Thank you.

11 THE COURT: Mr. Wallace, I just have one question.
12 You said the vast majority would be residential. Under
13 your plan what is the other use other than ---

14 THE WITNESS: --- there would be some commercial.
15 The reason for a planned development zoning is that you
16 would have mixed uses. Most zoning ordinances are of the
17 nature that they segregate uses where you have certain
18 areas set aside for a shopping center or an office
19 building and other areas set aside for residential ---

20 THE COURT: --- what kind of commercial would it
21 be? How would it be -- what type of commercial?

22 THE WITNESS: This would be commercial that would
23 primarily support the people who lived on the property.
24 It would be a small shopping center type development.
25 They would also have land that they would donate to the

1 town of Awendaw that we would use for governmental
2 purposes. And they also have land that would be donated
3 to Nebo church to expand their parking facilities.

4 THE COURT: Okay. I didn't mean to -- any
5 questions you have on cross in response to my question?

6 MR. LEATH: No, thank you.

7 THE COURT: Okay. Mr. Green, anything on
8 redirect?

9 REDIRECT EXAMINATION

10 BY MR. GREEN:

11 Q. Last question Mr. Wallace. Subsequent to the 1994
12 authorization by the federal government did any member of
13 the national forest service ever object to the seven
14 annexations that followed relying on that letter?

15 A. No.

16 Q. And was there an ongoing course of dealing and
17 ongoing communications between the town of Awendaw and
18 the national forestry service as to the annexations that
19 were taking place?

20 A. Yes.

21 Q. No other questions.

22 [Whereupon, the witness is excused and exits the
23 witness stand]

24 THE COURT: Call your next witness.

25 MR. GREEN: Our next witness is Mr. Prause.

1 [Whereupon, Mr. Prause comes forward]
2 [Whereupon, the witness is duly sworn by the Clerk
3 of Court]
4 CLERK OF COURT: Just state your name into the
5 microphone and spell your last name.
6 THE WITNESS: My full name is Walter Kent Prause,
7 III; last name is spelled P-R-A-U-S-E.
8 - - - - -
9 KENT PRAUSE,
10 Having been first duly sworn,
11 Was examined and testified as follows:
12 DIRECT EXAMINATION
13 BY MR. GREEN:
14 Q. Mr. Prause, thank you for being here today. Can you
15 give the court your address?
16 A. 804 Stone Point Road, Awendaw, South Carolina.
17 Q. And where is your home -- where is your address in
18 relation to the Mt. Nebo tract.
19 A. As stated earlier by Mr. Wallace depending on how
20 you measure it driving down a road or as the crow flies
21 it is generally three to five miles away from the Nebo
22 tract.
23 Q. And obviously you're one of the named plaintiff's in
24 this suit and you're suing to invalidate this annexation.
25 A. Correct.

1 Q. And you understand the concept of injury in fact or
2 specific harm?
3 A. Yes.
4 Q. Can you tell ---
5 THE COURT: --- I'm sorry, specific what?
6 MR. GREEN: Specific harm.
7 THE COURT: Okay. All right.
8 Q. [Mr. Green] Can you tell the court how this
9 annexation has harmed you?
10 A. The annexation has -- well it will harm me ---
11 Q. --- you can tell me how you think it will in the
12 future but up until this date -- rather up to the point
13 of the lawsuit can you tell the court how the annexation
14 harmed you.
15 And if you want to tell how it will we can describe
16 that later. How has it harmed you up to now?
17 A. Well, as has been already set forth in the record
18 the property has not been developed. It is in its
19 natural state. The harm has not occurred yet.
20 Q. Okay. So is it accurate that there is no harm as
21 of today's date or as of the date of filing this there
22 has been no harm to you as a result of this annexation
23 because there has been no change.
24 A. Correct.
25 Q. Okay. And all of your complaints -- or all of your

1 allegations in this complaint is what you believe will
2 happen in the future.

3 A. Correct.

4 THE COURT: Let me ask you a question. And I don't
5 know the answer but I assume there has been no
6 development because of this particular lawsuit to
7 challenge annexation. Is that correct or incorrect?

8 MR. GREEN: Well, without going into the settlement
9 the ---

10 THE COURT: --- I don't know I'm just asking. Or
11 is it ---

12 MR. GREEN: --- we don't know whether or not ---

13 THE COURT: --- or is there a financial thing on
14 the owner or can they development with this lawsuit going
15 on I guess is my question?

16 MR. GREEN: They've settled out. So they -- our
17 understanding and we've not seen the settlement document
18 and won't speak to it, we don't know about it is that
19 they are not -- they are no longer even part of the
20 lawsuit. So my understanding is they proposed to sell it
21 but we don't know. But there is no plans -- they do not
22 have any ---

23 THE COURT: --- the only reason I asked it you were
24 asking him if there was any harm now. So my question is
25 the harm I'm sure is going to be from development he is

1 going to testify in the future but are these people
2 prohibited from any sort of fashion from development
3 under that use plan because of this lawsuit?

4 MR. GREEN: Well, they're not prohibited but they
5 do seek an injunction. But what we'll argue in our
6 standing argument is the law requires not harm that is
7 projected in the future ---

8 THE COURT: --- I understand that's why I'm asking
9 the question.

10 MR. GREEN: Correct.

11 THE COURT: There can't be any harm now if they
12 can't develop it. So it's going to have to be in the
13 future from the way this lawsuit is developed or seems to
14 be is my question.

15 MR. GREEN: Like a proactive lawsuit?

16 THE COURT: Right.

17 MR. GREEN: Right.

18 THE COURT: I mean he can't testify to harm now
19 because of the lawsuit I assume; I don't know is why I'm
20 asking.

21 MR. GREEN: And I don't know that either, Your
22 Honor. My question was just establishing the record as
23 to any harm up to the time of the lawsuit based on what
24 we understand the standing ---

25 THE COURT: --- up to the time of the lawsuit?

1 Okay, that's fine ---

2 MR. GREEN: --- or up to the present day obviously.
3 But certainly, Your Honor, from the time of the lawsuit
4 up to the present day our thought is that the suit would
5 have a prohibitive effect up to the lawsuit. Again, we
6 were just asking if there was any harm from either
7 annexation because remember the first annexation took
8 place in 2004. There were five years ---

9 THE COURT: --- that was the ten-foot strip?

10 MR. GREEN: Correct.

11 THE COURT: Okay.

12 Q. [Mr. Green] And Mr. Prause let me clarify that
13 question. Was there any harm to you from 2004 to 2009 as
14 a result of the Mt. Nebo annexation and the ten foot
15 strip and I mean the Mt. Nebo church?

16 A. No.

17 Q. Okay. So taking apart separating the Nebo tract
18 from the Nebo church and ten foot strip there was no harm
19 to you whatsoever I believe is your testimony due to the
20 annexation of the ten foot strip, which is being
21 challenged and the Nebo church itself?

22 A. I just stated ---

23 Q. --- yes, I just want to make it clear that I'm
24 separating those two. Your answer is no?

25 A. Correct.

1 Q. And to echo the court's inquiry your concern is
2 about projected development that may happen?

3 A. Correct.

4 Q. Okay. And is it your contention that the town does
5 not have the authority in general to develop property as
6 residential and commercial?

7 A. No.

8 Q. That's not your contention?

9 A. Well, the town doesn't develop property. It grants
10 the authority for others to develop it or at least to my
11 knowledge. I don't believe the town of Awendaw is in the
12 development business if that's the question.

13 Q. Okay. Well, let me ask you this. You've sued the
14 town of Awendaw before to prohibit annexation and
15 development haven't you?

16 A. Yes.

17 Q. On different bases -- for different reasons?

18 A. Generally for the same reason.

19 Q. Is it not true -- is it not your general belief
20 you're trying to prevent a certain type of development in
21 the town?

22 A. Yes.

23 Q. Okay. And that's the general purpose of this
24 lawsuit?

25 A. Yes.

1 Q. Okay. So regardless of how this property was
2 annexed if this type of proposal for development was
3 proposed to the town you would be opposed to that anyway.

4 A. Correct.

5 Q. And this annexation challenge is the method that you
6 are challenging this proposed development?

7 A. Yes.

8 Q. And Mr. Prause it's your belief that the town should
9 not develop in this fashion?

10 A. Correct.

11 Q. Because you believe it will -- let's talk now about
12 how you believe development of this type will harm you.

13 How do you believe that residential development and
14 development of the type mentioned by Mr. Wallace were to
15 occur on this property how do you believe that that would
16 harm you in the future?

17 A. Degradation of the environment. As may have been
18 mentioned earlier or perhaps not the property prior to
19 its annexation was in unincorporated Charleston County
20 which has a comprehensive land use master plan the same
21 as the town of Awendaw, which is required of all local
22 jurisdictions that wish to have zoning pursuant to state
23 law. The county's plan for this area is much less
24 intense residential development and no commercial
25 development whatsoever. The thought of myself and I

1 assume the other plaintiffs through their depositions and
2 other matters of record are that this property was
3 annexed into the town of Awendaw to circumvent the county
4 requirements and enter into this development agreement
5 that Mr. Wallace has alluded to to provide an intensity
6 and density of development that is much greater than what
7 would have been allowed had the property remained in
8 Charleston County.

9 With respect to specific effects more houses means
10 more rooftops, more impervious surface areas that affect
11 storm water runoff would have an effect upon pollution.
12 This is an inholding in the national forest, which will
13 have a direct effect upon the eco system of the forest,
14 which has certain unique flora and fauna.

15 And the commercial development will contrary to what
16 has been stated is actually located -- the commercial
17 area is located on Highway 17 according to the plan map.
18 It will also generate trips from cars going up and down
19 the highway. It won't just be for the use of the
20 residents that would live on the tract.

21 That also has adverse effects of congestion and car
22 crashes, oil, gasoline fumes and otherwise would be more
23 detrimental to the area had it not been annexed and zoned
24 and subject to the development greater than the town of
25 Awendaw and rather have remained in Charleston -- had

1 remained in Charleston County.

2 Q. And you work -- don't you work with planning for the
3 town of Mt. Pleasant?

4 A. Yes.

5 Q. Is Mt. Pleasant degraded in the way that you do not
6 want Awendaw to be degraded with the development in Mt.
7 Pleasant?

8 A. In some respects, yes.

9 Q. And do you believe that a certain density degrades
10 Awendaw; a certain level of density will degrade Awendaw?

11 A. Yes, it definitely has that opportunity.

12 Q. Okay. And you live on Intracoastal Waterway. Is
13 your house degrading the national resources of Awendaw?

14 A. No.

15 Q. It's your opinion that a certain level of density
16 would?

17 A. Correct.

18 Q. And you're aware that more people are moving to the
19 Charleston area. You just don't want them to move in a
20 certain density to Awendaw.

21 A. Yes.

22 Q. You will agree with me though that once the town --
23 once a property is within the town the town has the
24 authority to set the zoning rather than the county at
25 that point?

1 A. They do.

2 Q. Okay. So your challenge is not to the power of the
3 town to do this type of development; merely to the
4 annexation methods because of the harm you think will
5 follow?

6 A. That's correct. There are some other aspects of the
7 suit that go to the zoning and comprehensive plan issues
8 as well but we're here talking about the annexation
9 today.

10 Q. And that's mainly what I want to clarify Mr. Prause.
11 So you -- how many times have you sued Awendaw over
12 development?

13 A. The third -- this is the third time in which I've
14 been a plaintiff in a lawsuit.

15 Q. And those last two lawsuits were also for annexation
16 over development ---

17 A. --- oh excuse me, four times. No, only one other
18 was annexation. One was for improper preliminary plat
19 approval and the other was for cell tower construction --
20 approval to allow a cell tower to be constructed.

21 Q. You wanted to prevent cell towers?

22 A. No.

23 Q. I won't go into those lawsuits but those have been
24 all resolved. They didn't go -- did they go to verdict?

25 A. I don't recall.

1 Q. Okay. But this is the latest challenge to
2 development in Awendaw that you do not agree with?
3 A. Correct.
4 Q. And your co-plaintiff in the past has also been the
5 coastal conservation league?
6 A. Excuse me?
7 Q. Has the coastal conservation league been a prior
8 plaintiff with you in the previous lawsuits?
9 A. Yes, yes.
10 Q. And this -- the reason I'm asking your main interest
11 in this lawsuit is not because you are contiguous or
12 adjacent to the property but because you live in the town
13 of Awendaw and you don't agree with this type of
14 development for Awendaw?
15 A. I would have the same sentiments if I lived in the
16 unincorporated area of Charleston County or if it were an
17 adjoining additional municipality.
18 Q. Do you believe that living in Awendaw confers
19 greater status to you to make this lawsuit?
20 A. Probably so.
21 Q. And so the basis for your being a plaintiff is
22 because you live in Awendaw?
23 A. The basis is because I don't agree with what has
24 transpired.
25 Q. Okay. Did you voice that opposition at any of the

1 public hearings for the 2004 annexation?
2 A. No.
3 Q. How about for the 2009?
4 A. Yes.
5 Q. And you had a chance to be heard in the normal
6 political process?
7 A. Correct.
8 Q. Okay. And the town voted against your position?
9 A. Yes.
10 Q. And you have the opportunity obviously to vote in
11 Awendaw elections.
12 A. Yes.
13 Q. Which you do.
14 A. Yes.
15 Q. But because the town did not vote the way that you
16 wanted you're suing the way that they -- you're suing to
17 challenge the way they annexed and developed -- plan to
18 develop this property?
19 A. Yes, it's because that I don't agree with what
20 transpired.
21 Q. Okay. Those are my questions Mr. Prause. I
22 appreciate your honesty in being here and that's all the
23 questions I have for you. Thank you.
24 THE COURT: Mr. Leath?
25 MR. LEATH: We don't have any, Your Honor.

1 THE COURT: You may step down. Thank you very
2 much. Let me say -- are you represented or are you
3 pro se?

4 THE WITNESS: Excuse me, Your Honor?

5 THE COURT: Anybody representing you in this
6 lawsuit?

7 THE WITNESS: Yes.

8 THE COURT: Who?

9 THE WITNESS: Mr. Leath and Mr...

10 THE COURT: Okay. Have a seat. You may step down.
11 [Whereupon, the witness is excused and exits the
12 witness stand]

13 THE COURT: If he was pro se I was going to let him
14 make a statement, okay. Call your next witness.

15 MR. GREEN: I'll be very, very brief. Ms. Vicary?

16 THE COURT: Who are you calling?

17 MR. GREEN: Ms. Vicary; she's the other plaintiff.

18 MS. SINKLER: I'm actually Ms. Sinkler on behalf of
19 the coastal conservation league.

20 MR. GREEN: Oh, I'm sorry. I'm fine then. Thank
21 you, Your Honor; that's all. If he is there for the
22 plaintiff that's the only -- we have coastal conservation
23 league position on the...

24 THE COURT: You going to call Ms. Vicary?

25 MR. GREEN: I don't believe she's here.

1 MS. SINKLER: I'm Ms. Sinkler.
2 MR. GREEN: She's not here. I'm sorry.
3 MR. LEATH: Ms. Vicary is not here, Your Honor.
4 Michelle Sinkler is here on behalf of the conservation
5 league.
6 THE COURT: Okay. You going to call her?
7 MR. GREEN: No, we have a representative -- we
8 already put that in the record ---
9 THE COURT: --- are you calling anybody else?
10 MR. GREEN: No sir, Your Honor.
11 THE COURT: Okay. Any reply testimony?
12 MR. LEATH: No, Your Honor. The only thing we'd
13 like to ask is we want to substitute this for 11 and to
14 have the record held open ---
15 THE COURT: --- number 11? What is number 11?
16 MR. LEATH: It's a big map I think it is.
17 THE COURT: All right.
18 MR. LEATH: We're just going to substitute ---
19 THE COURT: --- substitute for the big map?
20 MR. LEATH: A small version for the big map. And
21 just ask that the record be held open so we can get Mr.
22 Bradley's testimony for the court if we need to.
23 THE COURT: Okay. I told you I would allow that.
24 MR. LEATH: Yes, sir.
25 MR. GREEN: If we withdraw that objection to the

1 admission would that close the case so there could be a
2 decision?

3 THE COURT: I'm going to leave it up to the two of
4 y'all. If y'all want to go talk about it -- that maybe
5 plus a couple of stipulations.

6 MR. GREEN: And would we ---

7 THE COURT: --- if y'all want to go talk about it
8 for a minute we'll take a short break and you can talk
9 about it.

10 MR. LEATH: Yes, sir.

11 THE COURT: And it's up to y'all. I'm not trying
12 to tell you how to try your case. If y'all want to do
13 that, with maybe with some stipulations that's fine.

14 MR. GREEN: I think that ---

15 THE COURT: --- I'm just wasn't trying to shut the
16 door on you.

17 MR. GREEN: And if we can come to some agreement
18 about either the admission or stipulations that prevents
19 us from going on ---

20 THE COURT: --- yes, I'm not going to force you to
21 go take a deposition, okay. I don't care. I was just
22 not going to shut the door on you to give you that
23 opportunity if you so chose. And he's taken advantage of
24 it. And if y'all can do that differently I'm fine with
25 whatever you want to do. It doesn't matter to me. I'll

1 give you about a five or ten minute break.

2 [Whereupon, court takes a brief recess]

3 [Whereupon, plaintiff's exhibit number 14 is marked
4 by the court reporter]

5 THE COURT: Yes, sir?

6 MR. LEATH: All right, Your Honor I believe we
7 worked this out. I think we are going to admit this
8 letter as exhibit 14 although Mr. Green has ---

9 THE COURT: --- that's from who now?

10 MR. LEATH: That's from Paul Bradley of the
11 national forest service to the Mayor of Awendaw.

12 THE COURT: Okay. Dated what?

13 MR. LEATH: The date is February 16, 2011.

14 Plaintiff's 14.

15 THE COURT: Okay.

16 MR. LEATH: But Mr. Green wants to make an argument
17 about Mr. Bradley's capacity. I said that's fine.

18 MR. GREEN: It's just with the stipulation I think
19 that we ---

20 THE COURT: --- I'm sorry, what now?

21 MR. GREEN: The only stipulation is he could not
22 speak as to the letter of 1994 because he didn't write
23 it. That's all.

24 THE COURT: All right. I haven't read the letter
25 so let me read the letter and I'll listen to your

1 argument. Why are -- you're just giving that to me by
2 way of explanation or?

3 MR. GREEN: Just as -- correct.

4 THE COURT: All right. So 14 is admitted without
5 objection, legal objection?

6 MR. GREEN: Correct.

7 THE COURT: Okay.

8 [Whereupon, plaintiff's exhibit number 14 is entered
9 into evidence by the court]

10 THE COURT: But your position as to the letter is
11 Mr. Bradley doesn't know anything about the '04 letter?

12 MR. GREEN: The '94 letter.

13 THE COURT: That's the one that gave the
14 descriptions?

15 MR. GREEN: Correct.

16 THE COURT: Okay. Here it is; okay defendant's
17 exhibit number 3?

18 MR. GREEN: Yes, Your Honor.

19 THE COURT: Okay. Does he say in the letter he
20 didn't know about it or what?

21 MR. GREEN: I think he came after the fact and he
22 spoke as to the letter. Our opinion is since he didn't
23 write the letter he doesn't know what the intent of the
24 letter was.

25 THE COURT: Okay. All right, anything else?

1 MR. LEATH: No thank you, Your Honor. We
2 appreciate it very much. We are done and I guess my only
3 question would be for the court would the court entertain
4 some proposed orders from both sides or how does the
5 court feel?

6 THE COURT: I don't know. I want to ask you a
7 couple of questions. The first question is as to Mr.
8 Prause and as far as the -- I'll just call it the coastal
9 conservation league. My question I wrote down during
10 the testimony was the only change was and I think Mr.
11 Wallace referred to it as a plan. But it's still a
12 zoning change changing the density of the use of a
13 property of agricultural to residential. Does that in
14 itself is that an element of damages as far as this case
15 is concerned to Mr. Prause and the coastal league?

16 MR. GREEN: They allege that it's a damage. We
17 don't concede to that ---

18 THE COURT: --- I understand that but what's the
19 law on that issue? What I was going to do was ask y'all
20 to send me a very, very short memorandum on that issue.
21 Is it a proper issue for the court to consider is what
22 I'm asking? And I'd like to get some law on that effect
23 from both of you.

24 MR. GREEN: We can get that, Your Honor. One other
25 thing is just because we know there some time we can do

1 it is to raise the directed verdict as to statute of
2 limitations and as to standing?

3 THE COURT: All right. You've asked to dismiss it
4 on standing and statute of limitations?

5 MR. GREEN: And we put it in a brief form if Your
6 Honor wants to take it under advisement. But we have
7 both of those fully briefed.

8 THE COURT: Is there anything -- I haven't read
9 your briefs but I'll make them part of the court's
10 exhibits. Defendant town of Awendaw filed a motion for
11 directed verdict on the issue of standing and on the
12 issue of statute of limitations. I'll make them court's
13 exhibit 1 and 2.

14 MR. GREEN: Correct.

15 THE COURT: And consider them in making my decision
16 on those issues.

17 [Whereupon, court's exhibit numbers 1 and 2 are
18 marked by the court reporter]

19 THE COURT: Is there anything you want to add to
20 these verbally?

21 MR. GREEN: Not verbally, Your Honor. The only
22 thing we'll say is all the exhibits that are referenced
23 in those memos have been put into evidence.

24 THE COURT: Okay.

25 MR. GREEN: So -- and that's it.

1 THE COURT: All right. Anything you would like to
2 present to the court on the issue of standing and
3 statute.

4 MR. LEATH: Your Honor, simply that the prior order
5 that's in the record of Judge Harrington we think
6 encompasses these arguments that were made exhaustively;
7 briefed and argued to her over a huge amount of time and
8 think that they pretty well summarize it.

9 THE COURT: Well how about just briefly telling me
10 why you think you can get around the statute of
11 limitations on trying to set aside a ten-foot easement
12 ten years later?

13 MR. LEATH: Well, it's not the ten-foot easement
14 that we are trying to set aside. What it is is a Nebo
15 tract annexation that shouldn't have happened in 2009 ---

16 THE COURT: --- I understand that. That's what
17 you're trying to set aside but you're attacking it on an
18 annexation that is ten years old.

19 MR. LEATH: No, the annexation took place of the
20 Nebo tract in 2009. It was simply done by virtue of
21 instead of having a proper petition to use the 1994
22 letter for the tract, the shoestring annexation. But
23 the Nebo tract ultimate annexation together with the
24 ordinance which adopted both of them didn't take place,
25 and it's in the record, until 2009, October 1st.

1 THE COURT: Oh, the ordinance adopted it. It
2 didn't take place...

3 MR. LEATH: I think that's correct is it not?

4 MR. GREEN: That's not true, Your Honor.

5 MR. DESCHERER: Your Honor, there were three
6 ordinances related to the three annexations. The ten-
7 foot ordinance was enacted purportedly in 2004 and then
8 the Nebo church also in 2004. And then in 2009 came the
9 Nebo tract ordinance which we are challenging. And in
10 2004 the town enacted the ordinance, which is in evidence
11 saying that they had received a duly authorized petition
12 for annexation from the federal government.

13 And our contention is they never received that
14 annexation. And under the law in South Carolina statutes
15 and the Constitution the municipalities only have the
16 powers that are given to them under those statutes ---

17 THE COURT: --- I understand that. But my
18 question, and let me try to be more specific. My
19 question is this; you're trying to settle the side to
20 keep out annexation. Now you'll be able to do that if
21 you set aside the ten-foot easement that was done some
22 ten years earlier from the date.

23 MR. DESCHERER: Correct.

24 THE COURT: I guess it was done -- what -- from the
25 time they annexed it was '04 '05 five years;

1 approximately five years. So in order to set aside the
2 annexation for Nebo you have to attack earlier
3 annexation. You're outside the statute on that.

4 MR. DESCHERER: And as Judge Harrington found, Your
5 Honor, because there was no petition for annexation from
6 the forest service as a matter of law that annexation
7 never took place. The town didn't have the authority.
8 The town's authority to annex is only triggered by a duly
9 authorized petition ---

10 THE COURT: --- you're raising a jurisdictional
11 issue on behalf of the town that they didn't have the
12 authority or the jurisdiction to annex ---

13 MR. DESCHERER: --- they didn't have the authority
14 right.

15 THE COURT: Do you think that issue can be raised
16 outside the time?

17 MR. DESCHERER: Absolutely, yes. And I would point
18 Your Honor to pages -- the last two -- the statute of
19 limitations section of Judge Harrington's order and she
20 makes -- there are about four reasons, primary reasons
21 why she finds that the challenge to the 2004 ordinance is
22 still timely. Number 1 ---

23 THE COURT: --- I'll read her order.

24 MR. DESCHERER: Okay, fair enough.

25 THE COURT: Talk to me a little bit your standing

1 issues.

2 MR. DESCHERER: Standing issues we ---

3 THE COURT: --- and I haven't read the case. I
4 just read in the newspaper where there is a challenge to
5 the cruise ships here in Charleston was dismissed because
6 of lack of standing. Is that correct or incorrect? I
7 believe they said the individuals could sue but not that
8 group. Now I haven't read the opinion so talk to me a
9 little bit about standing. Mr. Green, I'll hear from
10 you. I'm not going to cut you off. You don't have to
11 stand up. I'll give you an opportunity to talk okay.

12 MR. GREEN: I thought he was finished. Sorry, Your
13 Honor.

14 THE COURT: Just take it easy, calm down; I'll
15 listen to you. Go ahead.

16 MR. DESCHERER: So Your Honor, we had a hearing in
17 front of Judge Harrington where we supplied affidavits
18 from several members of the coastal conservation league,
19 also from individual plaintiffs, also from a professor at
20 the College of Charleston a biologist, a former Citadel
21 professor, a wetlands scientist who is very familiar with
22 the Francis Marion national forest. And in general the
23 concern of our folks is that the actions taken -- the
24 ordinances that we are challenging result in -- will
25 result in harm that affects not only the individuals

1 because they either walk in these areas in the national
2 forest, they bird watch, they deeply care about -- they
3 recreate in these areas as well as members of the coastal
4 conservation league. And that this harm caused by
5 increasing -- rezoning this property and allowing intense
6 residential and commercial development basically within
7 the national forest -- and as our affidavit points ---

8 THE COURT: --- surrounded by the national forest.
9 It's not in the national forest; it's surrounded by the
10 national forest ---

11 MR. DESCHERER: --- it's encircled by the national
12 forest and Highway 17. And basically what Paul Bradley
13 says is if you allow this type of residential and
14 commercial development within the forest then you cannot
15 -- the forest service cannot do the prescribed burning to
16 maintain the forest anymore.

17 So it undermines their management abilities which
18 has an effect on this resource that is enjoyed by the
19 plaintiff's in this matter. And so they believe they are
20 aggrieved and harmed by the ordinances that been enacted
21 by...

22 THE COURT: So those all were submitted pursuant to
23 the summary judgment motion. Do you want me to consider
24 all that in this case?

25 MR. DESCHERER: It was not to -- yes, Your Honor,

1 yes. Thank you.

2 THE COURT: I understand why you're saying how
3 you've been damaged. But why isn't the forest service
4 the appropriate party to be bringing this suit if they
5 have the same concerns as the coastal league?

6 MR. DESCHERER: I believe ---

7 THE COURT: --- my question is why do you have --
8 what gives you standing to bring this lawsuit?

9 MR. DESCHERER: Well, Your Honor ---

10 THE COURT: --- and I'm not talking about Mr.
11 Prause; that's a different situation.

12 MR. DESCHERER: Sure. I would point Your Honor to
13 the actual 100 percent petition ordinance that was
14 enacted by Awendaw with respect to the ten-foot strip.
15 And the first paragraph says whereas comma a proper
16 petition -- a proper petition has been filed with the
17 town council ---

18 THE COURT: --- I understand that. My question is
19 what gives you the right to come into court? I'm not
20 trying to get you to argue about whether they did right
21 or wrong. What gives you the right to be here?

22 MR. DESCHERER: Under the declaratory judgment act
23 we feel like they are the case in controversy and we
24 believe we have standing under that statute and because
25 there is a case in controversy that we are entitled to

1 come into court for a declaration about the legality of
2 these ordinances.

3 THE COURT: What gives the Coastal Conservation
4 league the authority to come into court?

5 MR. DESCHERER: Their members, their organization,
6 their mission is to conserve the public resources, the
7 natural resources in the Lowcountry of South Carolina.
8 The Francis Marion national forest is one of the most
9 important natural resources not only in this part of the
10 state but also regionally.

11 And their members regularly bird watch, use areas in
12 immediate proximity to this tract of land. And we've
13 submitted affidavits to that effect. They have a right
14 to come into court to petition the court for a
15 declaratory judgment because they believe that these
16 actions taken by the town will degrade their member's
17 opportunities to protect or to enjoy and recreate in this
18 area.

19 THE COURT: Okay. Anything else?

20 MR. LEATH: Your Honor, if I could just ---

21 THE COURT: --- is there anything you want to add?

22 MR. LEATH: Yes. I'd like to add something on the
23 cruise lines because we were involved in that -- I was
24 involved in that ---

25 THE COURT: --- like I said all I know is what I

1 read in the paper. I haven't rendered an opinion and I
2 hesitate to rely on what was in the paper because I don't
3 know if it's right or wrong.

4 MR. LEATH: And what that involves just so you know
5 is the issue of standing with regard to a nuisance. You
6 know you've got to have a direct impact on a nuisance
7 claim, which is a damage claim for value. This is a
8 declaratory judgment action, which is really very, very
9 different. That's all I wanted to...

10 THE COURT: Okay.

11 MR. DESCHERER: Your Honor, could I add one more
12 point?

13 THE COURT: Yes, sir.

14 MR. DESCHERER: In some of the annexation cases
15 involving standing they have -- some of the courts have
16 said these folks don't have standing because this is a
17 good faith legitimate petition for annexation that has a
18 defect and only certain people can challenge it. Here is
19 a much, much different case. So I think -- the crux of
20 what Judge Harrington found is that this is a much ---

21 THE COURT: --- I'll read her opinion. Very
22 briefly Mr. Green ---

23 MR. GREEN: --- we're ---

24 THE COURT: --- you're opposed to all that ---

25 MR. GREEN: --- we'll be much briefer --

1 THE COURT: --- tell me why they don't have
2 standing right quick.

3 MR. GREEN: They don't have standing ---

4 THE COURT: --- you want to submit -- you want me
5 to rely on your briefs?

6 MR. GREEN: The brief is good but I just want to
7 say two things to Your Honor.

8 THE COURT: Okay.

9 MR. GREEN: A denial for a motion for summary
10 judgment does not set the law of the case.

11 THE COURT: Does not what?

12 MR. GREEN: Set the law ---

13 THE COURT: --- I understand. I agree with that.
14 I was wrong when I asked you that earlier. You're
15 correct. I'll stand corrected.

16 MR. GREEN: Or else there would be no reason for us
17 to try that. But the law is very clear. From a public
18 policy standpoint, Your Honor, public policy if a
19 plaintiff had come five years after the fact -- you'll
20 notice in everything they've submitted they do not
21 challenged the annexation process for the Nebo tract.
22 Everything links back to the ---

23 THE COURT: --- well, that's why I asked you the
24 question I asked you about changes to the density. The
25 ten foot strip didn't change any density.

1 MR. GREEN: It did not.

2 THE COURT: But the -- the plan for the Nebo tract
3 did change the density which can have an impact.

4 MR. GREEN: Within the town authority ---

5 THE COURT: --- you didn't create the controversy
6 until you brought -- changed the plan for Nebo i.e. the
7 concentration of -- I don't know what the plan says but
8 it's residential. It's gone from agricultural to
9 residential so you changed the use of that plan.

10 MR. GREEN: And what we direct Your Honor to is
11 5-3-270. It's a very ---

12 THE COURT: --- 5-3-270, okay.

13 MR. GREEN: It's very specific on the time that you
14 have to challenge an annexation period. And so if
15 they're going to challenge that they do a very good job
16 of saying well we're challenging this ---

17 THE COURT: --- I understand. In order to defeat
18 the Nebo tract annexation they've got to defeat the ten
19 foot.

20 MR. GREEN: Correct.

21 THE COURT: So you're saying they can't do that. I
22 understand what you're saying.

23 MR. GREEN: And on the standing I think it's even
24 clearer, Your Honor, because -- and we'll do the brief
25 about whether or not increased zoning or more residential

1 is an actual harm.

2 THE COURT: Right. That's what I would really like
3 to know.

4 MR. GREEN: But that type of annexation or that
5 type of zoning has already been planned for Awendaw.

6 THE COURT: Has what?

7 MR. GREEN: Has already been planned for Awendaw.
8 That's not something new so that's ---

9 THE COURT: --- well, they can't plan on what they
10 don't -- not in the city.

11 MR. GREEN: I believe it has -- hasn't there been
12 ---

13 THE COURT: --- I mean I assume maybe they have
14 gotten some plans outside the city but they can't plan
15 what's within the city. The plan didn't change until
16 they took it in.

17 MR. GREEN: No, but there were plans of this type
18 before in the city.

19 THE COURT: Oh, okay.

20 MR. GREEN: So it's nothing new -- it's not a new
21 harm. So the thing is if you're moving to Charleston or
22 Mt. Pleasant saying I don't like the development here and
23 so you sue because you don't like the general concept you
24 attack something that happened five years ago. And
25 you're not harmed -- you have the choice to move into a

1 municipality. But the effect of this Your Honor is
2 trying to limit what Awendaw has been -- their growth for
3 the past seven years. And it's an ongoing attempt as you
4 will see as was established by Mr. Prause to try to stop
5 Awendaw's growth when all ---

6 THE COURT: --- what's that have to do with
7 anything as far as this case is concerned?

8 MR. GREEN: Well it just goes to ---

9 THE COURT: --- whether he sued you a dozen times
10 or twenty five times what difference does that make in
11 this lawsuit?

12 MR. GREEN: We just felt like there was a prior
13 motive to show that this -- there is not an actual harm
14 that has spurred this on. It's a philosophy. And that
15 does not meet -- if you have a philosophy against a
16 certain level of development that's not actual harm or
17 specific harm as stated by the statute. And we're
18 showing that was just to show that you can
19 philosophically disagree that a town should grow ---

20 THE COURT: --- I don't care philosophically why
21 he brought the lawsuit okay. That doesn't enter into my
22 decision whatsoever.

23 MR. GREEN: We understand, Your Honor. I guess the
24 only point we're making is there has to be a specific
25 harm and we'll brief that.

1 THE COURT: I understand that. That's why I asked
2 you the question okay. But as far as why he did it and
3 what his philosophy is I don't think that has anything to
4 do with my decision.

5 MR. GREEN: We understand, Your Honor. And so --
6 but the briefs do go into all that and again the court I
7 think the Supreme Court specifically says that Your Honor
8 has the right to look at it de novo. All these
9 affidavits these people weren't listed as witnesses; they
10 weren't here today.

11 THE COURT: I'm going to look at the summary
12 judgment de novo. I'm going to do that, okay.

13 MR. GREEN: Thank you, Your Honor. And again all
14 of our exhibits that are were in evidence today.

15 THE COURT: Okay. Thank you so very much. I
16 appreciate it.

17 *****END OF TRANSCRIPT OF RECORD*****
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C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of Common Pleas for Charleston County, South
Carolina on the 16th day of April, 2014.

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

June 15, 2014

Joyce C. Rueger, CVR-M
Court Reporter



United States
Department of
Agriculture

Forest
Service

Francis Marion
and Sumter
National Forests

1835 Assembly Street, Room 333
Columbia, South Carolina 29201
(803) 765-5222

Reply To: 5400

Date: May 3, 1994

Honorable William E. Alston
Mayor of Awendaw
6470 Eay 17 North
Awendaw, SC 29429

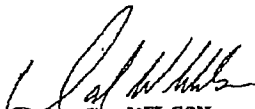
Dear Mayor Alston:

The Forest Service has no objection to the Town of Awendaw's annexation of a ten-foot wide parcel of the Francis Marion National Forest along Doar and Sewee Roads; and U.S. Highway 17 northerly to Lofton Road and southerly to the National Forest boundary in Charleston County; also a ten-foot wide strip starting at Awendaw Church extending southeasterly along the National Forest boundary to Highway 17 and continuing northeasterly along the National Forest boundary to the Wando River; additionally, a ten-foot wide strip of land along the National Forest boundary, which is adjacent to private parcels on the north side of Highway 17, from Awendaw Church northeasterly to Lofton Road.

It is our understanding that this action will not encumber National Forest management now or in the future. Our stance of "no objection" is based on this understanding.

We appreciate the good working relationship with the Town of Awendaw, and look forward to working closely with you and the council members.

Sincerely,


DAVID W. WILSON
Forest Supervisor

cc:
FR, Wambaw



Caring for the Land and Serving People

PLAINTIFF'S
EXHIBIT

PL. EX. 2

TOWN OF AWENDAW

WILLIAM H. ALSTON-MAYOR
6971 Dear Road
Awendaw, SC 29429
Telephone (843) 928 3100
Fellsha C. Woodberry-Clerk



COUNCIL MEMBERS
Jeffrey Coan, Sr.
Delores Cooper
Miriam C. Green
Bryan McNeal, Jr.

E-Mail: awendaw@ids.net

November 25, 2003

USDA Forest Service
Wambaw Ranger District
1015 Pinckney Street
Post Office Box 788
McClellanville, SC 29458-0788
Attention: Orlando Sutton

Dear Mr. Sutton:

Please let this letter serve as a formal request from the Town of Awendaw to the Francis Marion National Forest to annex a minimum portion of your property into the town of Awendaw so that we can annex Mt. Nebo African Methodist Episcopal Church, located at 5600 Highway 17N, Awendaw, SC 29429 into the Town.

In 1994, when the Forest service provided Awendaw with the right of way to annex other property, Mt. Nebo AME Church was missed. Since this small church is surrounded by your property and your property only, it would be necessary to annex a small portion of your property to allow Mt. Nebo to be annexed.

Although we did previously receive a letter from the forest department giving Awendaw the right of way, that documentation is unclear (see attached letter). We would like to clarify that you will allow the Town to annex the portion of your property that is necessary in order to annex Mt. Nebo AME church.

It is my understanding that the members of that church have previously written you a letter requesting that you annex portions of your property. Please help us get this process completed as quickly as possible to allow Mt. Nebo Church to receive the benefits that go along with being part of the Town of Awendaw.

Please contact me as soon as possible to clarify this matter. I can be reached at the Town of Awendaw at 928-3100.

Sincerely,

Dan H. Martin
Town Administrator

PLF. EXH. 9

**PLAINTIFF'S
EXHIBIT**

2

WILLIAM H. ALSTON-N
6971 Dear Road
Awendaw, SC 29429
Telephone (843) 928 3100
Felisha C. Woodberry-Clerk

January 23, 2004

Mr. Orlando Sutton, Ranger
U.S. Forestry Service Headquarters
1015 Pinckney St.
McClellanville, SC 29458.

Dear Mr. Sutton:

The Pastor and congregation of the Mt. Nebo A.M.E. Church, collectively desire to be annexed into the Town of Awendaw. However, we need your assistance. In order for property to be annexed into the Town's boundary, it must be contiguous to property already within the Town's boundary.

The Town of Awendaw is requesting that the Forestry Service grant at least a 10 foot strip of land in order that annexation is possible, so that property can be annexed into the Town of Awendaw.

It was in the early years of incorporation of the Town of Awendaw that the Forest Service granted to the Town of Awendaw the use of a 10 foot strip of land in order for property to be contiguous for annexing into the Town.

In view of the above, request is hereby being made of the Forest Service to grant to the Town of Awendaw the use of at least a 10 foot strip of land in order that annexation of Mt. Nebo A.M.E. Church and other future annexation of property can be accomplished.

Sincerely,

W.H. Alston, Mayor
W.H. Alston, Mayor
Town of Awendaw

**PLAINTIFF'S
EXHIBIT**

3

PLF. EXH. 10

Phone 1/24/04
I had a really good mtg. with town planner Bill Walker the Congregation (pastor + 5 or more members) this past Friday. I have a few different thoughts after our discussion. I will give you a call to discuss further as well as an e-mail.
Orlando

2/3/04
Jeff Skiff
Joanna
I would like to discuss with Steve
John

TOWN OF AWENDAW

Planning Department
D. William Wallace- Director
Jody Muldrow-Planner



Phone 843.928.4204
Fax 843.928.3713

6971 Deer Rd. Awendaw, SC 29429

February 12, 2004

Orlando Sutton
District Ranger
United States Department of Agriculture
Francis Marion National Forest
P.O. Box 788
McClellanville, SC 29458

Dear Mr. Sutton:

As you know we have been trying to annex the Mt. Nebo AME Church for some time. The church is not contiguous to the existing Town limits and cannot be annexed without first annexing other parcels between it and the Town boundary. I have contacted all the property owners that are between the existing Town limits and Mt. Nebo and requested that they consider annexing their property. Owners of the four parcels that must be included to make the church property contiguous have expressed their desire not to annex. Therefore, the only possible route left is to annex through the National Forest lands.

As you know, we have annexed National Forest property in this manner in the past. We request that you allow the Town to annex a 10-foot strip along the southern edge of the US Highway 17 ROW from the Town limits just below the U.S. Post Office to the Mt. Nebo property. This is the only possible way the church can annex at this time.

The Town respectfully requests your cooperation in this effort to allow the church to become a part of the Town of Awendaw.

Sincerely,


D. William Wallace
Director of Planning

843-928-3713

PLF. EXH. 11

**PLAINTIFF'S
EXHIBIT**

4

TOWN OF AWENDAW

WILLIAM H. ALSTON-MAYOR

6971 Dear Road
Awendaw, SC 29429
Telephone (843) 928 3100
Fellsha C. Woodberry-Clerk

E-Mail: awendaw@chls.net

COUNCIL MEMBERS

Jeffrey Coan, Sr.
Delores Cooper
Miriam C. Green
Bryan McNeal, Jr.

February 12, 2004

Orlando Sutton
District Ranger
United States Department of Agriculture
Francis Marion National Forest
P.O. Box 788
McClellanville, SC 29458

Dear Mr. Sutton:

The Town has been making an effort to annex property so that, among other reasons, the property would be able to participate in the water system to be constructed in the next few months. The Town received a loan and grant from the U.S. Department of Agriculture and another from the SC Department of Commerce to construct the water system. In order for properties to be eligible to participate, the property must be within the Town limits. The Town service area is wholly contained within the Town boundaries. The area outside the Town limits falls under the service area of the Mt. Pleasant Water System. They have no plans to provide water in the Awendaw area. Therefore, the only way to participate in a public water system is to annex into the Town of Awendaw.

We have annexed property of the NFS in the past. However, we understand that the Service is generally opposed to annexation due to the possible restrictions that may be placed on the Forest Service operations by local governments. This could hamper your ability to do things such as controlled burning to manage the NFS assets. The Town of Awendaw would like to state its position regarding the National Forest Service property in the Francis Marion National Forest adjacent to the Town boundaries. At the February meeting of Town Council, a motion was passed that the Town fully supports the NFS in its management of the Francis Marion National Forest. The Town believes the NFS is operating under the best management practices policy for the forest. We have no plans to restrict the NFS operations in any way related to the management of the forest. The Town is willing to pass an ordinance if you so desire that would limit the ability of the Town to pass restrictive regulations related to the management of the forest. This has been the policy of the Town for several years related to the NFS property already in the Town.

The Town considers the National Forest to be an excellent neighbor. We want to cooperate with the Service to continue to allow its management in a manner that makes the National Forest an outstanding asset to the area. We would appreciate your cooperation in our annexation efforts and we pledge to continue to fully support the operation and management practices of the Service. Thank you for your assistance in this matter.

Sincerely,

Dan H. Martin
Town Administrator

PLF. EXH. 12

**PLAINTIFF'S
EXHIBIT**

5

Annexation Ordinance

100 Percent Petition Method

WHEREAS, a proper petition has been filed with the Town Council by 100 percent of the freeholders owning 100 percent of the assessed value of the contiguous property hereinafter described petitioning for annexation of the property to the Town of Awendaw under the provisions of S.C. Code Section 5-3-150(3); and

WHEREAS, it appears to Council that annexation would be in the best interest of the property owners and the Town of Awendaw;

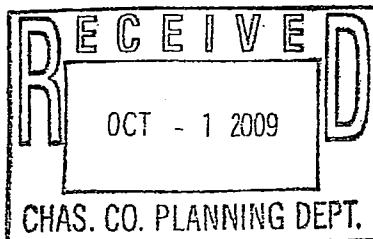
NOW, THEREFORE, BE IT ORDAINED by the Mayor and Council of the Town of Awendaw, South Carolina, this 10th day of May, 2004 that the property herein described is hereby annexed to and becomes a party of the Town of Awendaw effective May 10th, 2004.

This property is owned by Mt. Nebo AME Church and is located at 5600 N. Highway 17. This property is in Charleston County and is identified by the Charleston County Assessor's Office as Tax Map Nos. 625-00-00-005. This is a total of **3.13 acres**. This property is contiguous with property owned by the National Forest Service located on Highway 17 North that is a ten-foot wide strip along the north side of the right-of-way of Highway 17. The strip begins at the southwest corner of the NFS property at its common boundary with TMS 625-00-00-003 and extends along the entire frontage of Hwy 17N to the property owned by Mt. Nebo Church, which is TMS parcel 625-00-00-005, a distance of approximately 1.25 miles.

This property shall be zoned *Agricultural General (AG)* pending confirmation or rezoning pursuant to the Zoning Ordinance.

First reading April 15th 2004

Final reading May 10th 2004



[Signature]
MAYOR

Attest:

[Signature]
CLERK

**PLAINTIFF'S
EXHIBIT**

6

PL EX. 13

100 Percent Petition Method

ROA 0185

TOWN OF AWENDAW

WILLIAM H. ALSTON-MAYOR

6971 Doar Road
Awendaw, SC 29429
Telephone (843) 928 3100
Sam Brown -Clerk



COUNCIL MEMBERS

Nell C. Daniels
Miriam C. Green
Bryan McNeal, Jr.
Samuel N. Robinson

E-Mail: awendaw@tds.net

September 30, 2009

Mrs. Cathy Franks
Charleston Cty. Planning Dept.
4045 Bridgeview Drive
North Charleston, SC 29405-7464

Re: Annexation – Ordinance # 04-03

Dear Mrs. Franks,

I am enclosing for your official records one copy of the following annexation, which was ratified by the Town Council pursuant to Section 5-3150 at the Code of Laws of South Carolina. This Ordinance became effective upon ratification on May 10, 2004. Although this parcel was annexed in 2004, we have found that this information may not have been sent to your department; as a result, I am sending the documents to your department to update your records.

Also enclosed is a copy of the following:

Property description map
Annexation Ordinance
Town Council minutes from 4/15/2004 and 5/10/2004

Sincerely,

Samuel Brown, Jr., Town Clerk/Treasurer

Enclosures:

cc: Peggy Moseley, County Auditor
D. Michael Huggins, County Assessor
Mickey Miller, County Board of Registration
William B. Beck, Chief of Data Services Traffic Engineering SCDOT
Jennifer Miller, County Planning Board
Ron Mitchum, Executive Director Council of Governments
Elbert Matthews, County Business License
Hamish Richardson, Berkley Electric Cooperative, Inc.
Brenda Wheatley, Chas. Cty. GIS/Mapping Dept.
Mark Hammond, Secretary of State
Joseph D. Rich, Civil Rights Division Chief Voting Section-G. St.
Bobby Bowers, Director, State Budget & Control Board
Lisa S. Jones, State Coordinator Flood Mitigation Program

OCT - 1 2009

**PLAINTIFF'S
EXHIBIT**

8

PL. Ex. 17

189

Annexation Ordinance

100 Percent Petition Method

WHEREAS, a proper petition has been filed with the Town Council by 100 percent of the freeholders owning 100 percent of the assessed value of the contiguous property hereinafter described petitioning for annexation of the property to the Town of Awendaw under the provisions of S.C. Code Section 5-3-150(3); and

WHEREAS, it appears to Council that annexation would be in the best interest of the property owners and the Town of Awendaw;

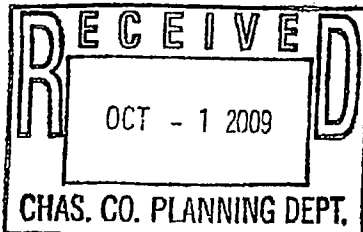
NOW, THEREFORE, BE IT ORDAINED by the Mayor and Council of the Town of Awendaw, South Carolina, this 10th day of May, 2004 that the property herein described is hereby annexed to and becomes a party of the Town of Awendaw effective May 10th, 2004.

This property is owned by Mt. Nebo AME Church and is located at 5600 N. Highway 17. This property is in Charleston County and is identified by the Charleston County Assessor's Office as Tax Map Nos. 625-00-00-005. This is a total of 3.13 acres. This property is contiguous with property owned by the National Forest Service located on Highway 17 North that is a ten-foot wide strip along the north side of the right-of-way of Highway 17. The strip begins at the southwest corner of the NFS property at its common boundary with TMS 625-00-00-003 and extends along the entire frontage of Hwy 17N to the property owned by Mt. Nebo Church, which is TMS parcel 625-00-00-005, a distance of approximately 1.25 miles.

This property shall be zoned *Agricultural General (AG)* pending confirmation or rezoning pursuant to the Zoning Ordinance.

First reading April 15th 2004

Final reading May 10th 2004



[Signature]
MAYOR

Attest:

[Signature]
CLERK

ANNEXATION ORDINANCE
100 PERCENT PETITION METHOD

WHEREAS, a proper petition has been filed with the Town Council by 100 percent of the freeholders owning 100 percent of the assessed value of the contiguous property hereinafter described petitioning for annexation of the property to the Town of Awendaw under the provisions of S.C. Code Section 5-3-150 (3); and

WHEREAS, it appears to Council that this annexation would be in the best interest of the property owners and the Town of Awendaw,

NOW THEREFORE, BE IT ORDAINED by the Mayor and Council of the Town of Awendaw, South Carolina, this 10th day of May, 2004 that the property herein described is hereby annexed to and becomes a part of the Town of Awendaw effective May 10th, 2004.

This property, owned by the National Forest Service, is located on Highway 17 North and is a ten-foot wide strip along the north side of the right-of-way of Highway 17. The strip begins at the southwest corner of the NFS property and extends along the entire frontage of TMS PARCELS 629-00-00-224, 303, AND 305 and continues to the property owned by Mt. Nebo Church, which is TMS parcel 625-00-00-005, a distance of approximately 1.25 miles. This annexation includes the Right-of-Way of Highway 17 between this 10-foot strip and TMS 629-00-00-287, a distance of approximately 0.3 miles.

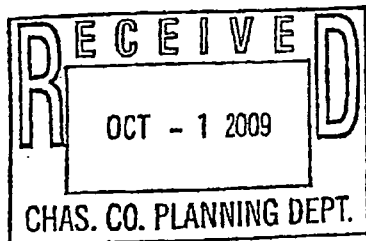
The property shall be zoned Agriculture General (AG) upon the effective date of this ordinance.

First Reading April 15th 2004 [Signature]
MAYOR

Final Reading May 10th 2004

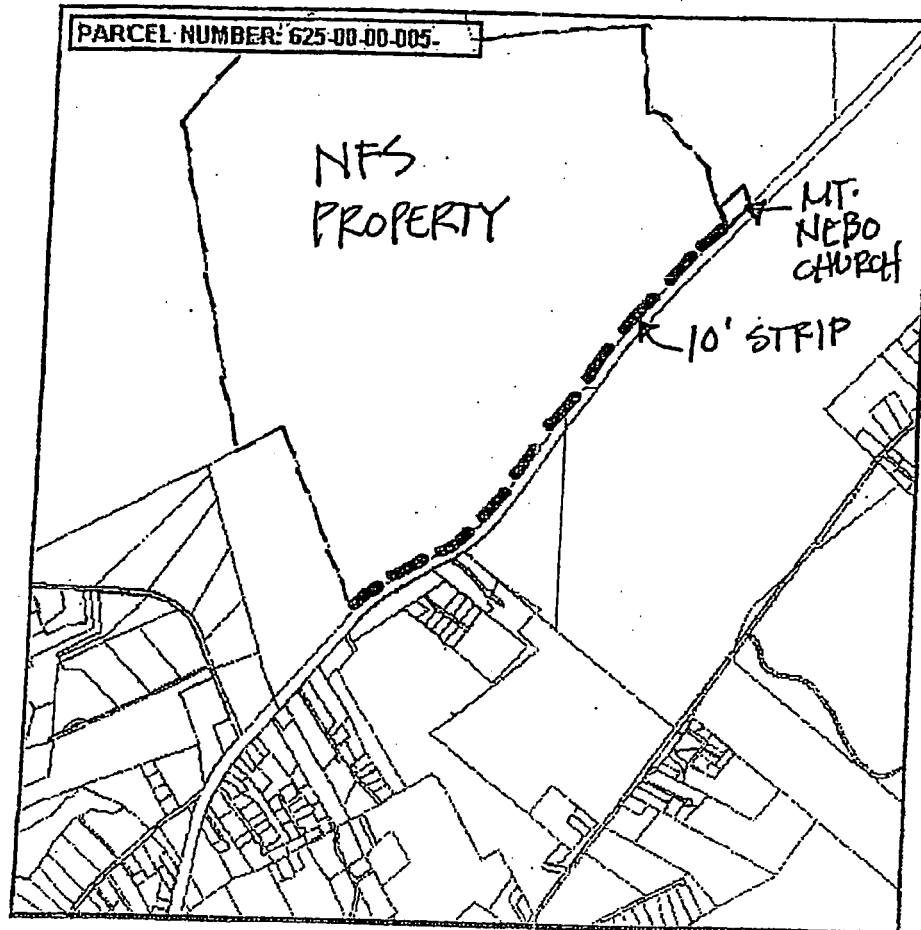
Attest:

[Signature]
CLERK





County of Charleston
Property Information System



PARCEL NUMBER: 625-00-00-005-

PARCEL NUMBER:	625-00-00-005-
ADDRESS:	HWY 17 N
PROP SITE NM:	03-CHURCH PARSONAGE CEMETARIES
GENERAL USE:	SPCL-PURPOSE
SUBDIVISION:	FRIDAY REED
LEGAL DESC:	
LGL HI ACRS:	3.12
LGL MAR ACRS:	

<http://gisweb.charlestoncounty.org/scripts/esrimap.dll?Name=CCPA&Cmd=PRINTB&MW=>, 4/1/2004

JULY 22, 2010

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON CASE NO. 09-CP-10-7399

4 LYNNE VICARY, KENT
5 PRAUSE, and SOUTH
6 CAROLINA COASTAL
7 CONSERVATION LEAGUE,
8 Plaintiffs,

9 vs.

10 TOWN OF AWENDAW
11 AND EBC, LLC,
12 Defendants.

30(b)(6)
DEPOSITION OF:
WILLIAM WALLACE

14 DATE: Thursday, July 22, 2010
15 TIME: 10:33 a.m.
16 LOCATION: Nexsen Pruet, LLC
17 205 King Street, Suite 400
18 Charleston, SC
19 REPORTER: Margaret F. Barnett
20 Professional Court Reporter
21 and Notary Public
22 (843) 769-0823
23
24
25

1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR THE PLAINTIFFS
3 LYNNE VICARY, KENT PRAUSE, and
4 SOUTH CAROLINA COASTAL
5 CONSERVATION LEAGUE:

6 LEATH, BOUCH & SEEKINGS, LLP
7 BY: W. JEFFERSON LEATH, JR., ESQUIRE
8 92 Broad Street
9 Charleston, SC 29401
10 (843) 513-1071

11 SOUTHERN ENVIRONMENTAL LAW CENTER
12 BY: CHRISTOPHER K. DeSCHERER, ESQUIRE
13 43 Broad Street, Suite 300
14 Charleston, SC 29401
15 (843) 720-5270

16 ATTORNEYS FOR TOWN OF AWENDAW:

17 GREEN, FORD & WALLACE, LLC
18 BY: IAN S. FORD, ESQUIRE
19 LISA MARIE SALTZBURG, ESQUIRE
20 602 Rutledge Avenue
21 Charleston, SC 29403
22 (843) 266-2626

23 ATTORNEYS FOR EBC, LLC:

24 NEXSEN PRUET, LLC
25 AMY D. JOWERS, ESQUIRE
405 King Street, Suite 400
Charleston, SC 29401
(843) 577-9440

**PLAINTIFF'S
EXHIBIT**

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STIPULATION

It is stipulated by and among Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent waives reading and signing of this deposition.

* * * * *

WILLIAM WALLACE

being first duly sworn, testified as follows:

EXAMINATION

BY MR. LEATH:

Q. For the record, we're going to need your full name and home and office address.

A. It's Donald William Wallace. My home address is 17 Formosa Drive, Charleston, South Carolina, and I work out of my home. I have a home office.

Q. Let me go through some background on you, if I can. Your present job is what, did you say?

A. I have a consulting firm, and I have both public and private clients, and the Town of Awendaw is one of my clients.

7

ordinance. So it's kind of a broad range of things.

Q. With regard to your private clients, I'm guessing you work with various boards and commissions?

A. Yes.

Q. Typically zoning?

A. Yes.

Q. Anything other than that, normally?

A. Not normally, no.

Q. Let's get some background information, if we can. I know we were talking off the record. When you and I first met years ago, you were working with the City of Charleston. What was your position there?

A. I was the Director of Planning for the City of Charleston for about six and a half years, from 1976 to 1983.

Q. What kind of educational background or experience background do you have to get you into that field, city planning, or urban planning, I guess it is?

A. My undergraduate degree is from Georgia Tech, the School of Architecture. I have a Bachelor of Science degree in building construction and took both architecture and civil engineering courses. Then I have a master's degree in city planning. As part of that master's degree, I did a specialty in real

6

Q. Do you have a name for that consulting firm?

A. The Wallace Company.

Q. Bill, what's the nature of your consulting business? What do you consult on?

A. Well, it's different, somewhat, depending on whether it's public clients or private clients, but public clients like the Town of Awendaw, I assist them with all their planning and zoning activities.

Private clients, I might assist them in developing plans for their property, attempting to get any permits or rezonings or any entitlements to the property, things of that nature. I've also had clients like the Housing Authority of the City of Charleston. I looked at some issues related to the possibility of the Charleston school that's -- you know, this was before they were all settled in, but the artisan school that does, you know, things like iron work and old timber work and things like that. And they're in the Old Jail.

Q. School of the Building Arts?

A. Right, yes, uh-huh. I did some analysis of their desire to expand in the Old Jail building downtown. In the past I've had clients like the City of Columbia. I helped them revise their zoning

8

estate, and I went to Georgia State graduate school and took additional courses in real estate, so my specialty and my master's degree was in real estate. I have other professional credentials. I'm a fellow of the American Institute of Certified Planners, which is a certification entity for people in the planning profession.

Q. Did you actually work in this field before coming to the City of Charleston?

A. Yes.

Q. Where?

A. I worked in Atlanta for a consulting firm. It was the first planning-type job that I had, a firm called Bartholomew & Associates, which is one of the oldest city planning and landscape architecture firms in the country. You're going back to the 1920s and '30s. Then I worked for a consulting firm, Mayes, Sudderth & Etheridge, also in Atlanta. I did planning work. I worked for the City of Marietta. I was Director of Planning for the City of Marietta for about three years. Then I came to Charleston and worked for the City of Charleston. Then I worked for a planning consulting firm, Post, Buckley, Shue and Jernigan, for about five or six years.

Q. Where are they from?

9

1 A. Their headquarters is in Florida. Miami,
2 Florida, is their headquarters. They are a large
3 firm. They have, I don't know, a couple of thousand
4 employees, I guess, something like that.

5 Q. What sort of work did you do for that
6 private company? Were you working with
7 municipalities?

8 A. In some degree I was. One of the things I
9 did when I was with the City of Charleston is I was
10 involved with the Visitor Reception and Transportation
11 Center. And then after I went to work with Post
12 Buckley, they had a consultant selection process to do
13 the master plan or revise the existing master plan for
14 the Visitor Center, and our firm won that contract.
15 So I worked for the City of Charleston as a consultant
16 on the Visitor Reception Center, but I also during
17 that time, as I mentioned before, I revised the City
18 of Columbia's zoning ordinance, working with them. I
19 also did a lot of private development work, working
20 for developers, helping them do master plans for their
21 property.

22 Q. Now, after Post Jernigan, you went where?

23 A. After Post Buckley, then I --

24 Q. Buckley, excuse me.

25 A. Yes, right. Well, it's Post, Buckley,

11

1 three years.

2 Q. Just for the record, for those that don't
3 know it, that is primarily an A&E firm?

4 A. That's correct.

5 Q. Architecture and engineering, principal
6 being Bill Wright. Ted Padgett was there, and he
7 left.

8 A. Right. Mainly what I did with them was
9 marketing and strategic planning-type work. They
10 wanted to expand, add offices, change the image of
11 their firm, and I was involved in all of those kinds
12 of things. I was a part owner of the firm. I was on
13 the board of directors and a stockholder in the firm.
14 Then I left them and went to work for a company called
15 HNTB. It's one of the biggest A&E firms in the
16 country. They, for example, were partners with LS3P
17 to design the airport here in Charleston. They also
18 designed the I-526 bridge up by, you know, Westvaco
19 facilities. So I worked for them, and then they
20 closed their office here in Charleston, and I went
21 back to work for myself again and have been doing that
22 for last five years or so.

23 Q. With the Town of Awendaw, I've seen your
24 name listed somewhere, and I'll find it somewhere with
25 an actual position on it, Director of Planning?

10

1 Shue and Jernigan. I think they just call themselves
2 PBS&J now, because all the principals are retired.
3 After that, I went to work for myself, just did
4 consulting work along the same kind of lines. I
5 continued to do some work for municipalities, some
6 work for private clients. Then I went to work for a
7 Saudi Arabian company, MJ Properties North America.
8 They owned a thousand acres or so down in Klawah and
9 Seabrook where now is the Fazio golf course and Farm
10 Freshfields shopping area. I was the project manager
11 for that, and I had 1600 acres in Atlanta, and I did
12 the same thing there: I helped them do a master plan
13 for the property and obtain rezoning and entitlements.
14 So I worked on those two projects for quite a few
15 years, about six years, I guess, altogether.

16 Then I worked for myself again for a
17 while. And I had some private clients, like I was the
18 project manager for Porter-Gaud school when they did
19 their revision of their master plan, and I was charged
20 with implementing that and looking over the
21 construction of the Science and Technology building
22 and the new campus work related to a baseball field
23 and their sports complex and things like that. Then
24 after that was when I went to work for Wright Padgett
25 Christopher. I worked for them for a little over

12

1 A. That's correct.

2 Q. Is that your title now?

3 A. Yes.

4 Q. But you're basically a consultant to them?

5 A. That's correct.

6 Q. You're not a full-time Town employee?

7 A. That's correct.

8 Q. Does that Director of Planning have any
9 kind of written job description anywhere?

10 A. No.

11 Q. I would be surprised if they did, but I
12 was just asking. Does anyone else work in the
13 Planning Department but you?

14 A. Yes.

15 Q. That would be Judy Muldrow?

16 A. Jody.

17 Q. Anyone else?

18 A. Well, there is a clerical assistant;
19 Michelle Nesbitt is the person. I'm not actually sure
20 of her position right now. They offered her a job to
21 move from the Planning area over to the Water
22 department, and I don't know if that's been resolved
23 yet or not.

24 Q. Do you have to spend much time in that job
25 on-site in the Town of Awendaw, or are you able to do

13

1 a lot of the work from your house in your consulting
2 business?

3 **A. No. I spend a lot of time there. I**
4 **attend all the Planning Commission meetings, Board of**
5 **Zoning Appeals meetings, all the Town Council**
6 **meetings. I periodically go there to meet with people**
7 **about zoning matters or subdivision matters.**
8 **Sometimes I'll meet with people at Mickey Seabrook's**
9 **office. He's an engineer for the Town of Awendaw.**
10 **Rather than driving all the way to Awendaw, I use his**
11 **office in Mount Pleasant, sometimes, to meet with**
12 **people. Then at times I do work at my house as well.**

13 **Q. Are you on a fixed annual salary?**

14 **A. No.**

15 **Q. Do you bill them for time as a consultant?**

16 **A. I bill them on an hourly basis.**

17 **Q. Going back, back when you were with the**
18 **City of Charleston, back in the '70s and '80s, I know**
19 **the City was expanding some them in annexations. Did**
20 **you get involved in City annexations back then?**

21 **A. Yes.**

22 **Q. What do you recall about your level of**
23 **involvement with the City?**

24 **A. Well, I was very much involved with**
25 **annexations. Our department, the Planning Department,**

15

1 **was pretty bad, and they decided that they needed to**
2 **drastically change their comprehensive plan for the**
3 **property. At that point, we annexed the property into**
4 **the Town of Mount Pleasant, and I was the person who**
5 **was responsible for putting the annexation package**
6 **together. We had to -- Charleston National Property**
7 **itself was not contiguous to the Town of Mount**
8 **Pleasant, and I had to work with several other people**
9 **to get individual pieces of property in between the**
10 **existing Town of Mount Pleasant and the Charleston**
11 **National tract to also agree to come into the town.**

12 **Q. Because the concept here of, if I**
13 **pronounce this right, contiguity means that the**
14 **annexing entity has got to be contiguous with that**
15 **real estate parcel sought to be annexed?**

16 **A. Correct.**

17 **Q. If it's not, you have to get other parcels**
18 **of real estate in between the two to link them up?**

19 **A. Correct.**

20 **Q. That's sort of the basis for what we're**
21 **going to talk about a little bit today.**

22 **A. Right.**

23 (PLF. EXH. 1, Notice of Deposition of Town
24 of Awendaw, was marked for identification.)

25 BY MR. LEATH:

14

1 **was primarily the entity that dealt with people on**
2 **annexations, and we would periodically go out and make**
3 **presentations to people, both individual property**
4 **owners or large groups of people, to explain the**
5 **advantages or disadvantages of annexation, and dealt**
6 **with people who, you know, property was annexed to**
7 **grant it a zoning category after it came into the**
8 **town, the City of Charleston.**

9 **Q. During that time, I would imagine you got**
10 **pretty familiar with the various state and local codes**
11 **and laws regarding requirements for annexation?**

12 **A. Yes.**

13 **Q. Did you work with the famous city lawyer**
14 **William Regan --**

15 **A. Yes.**

16 **Q. -- during that time and his annexation**
17 **fight up in the Supreme Court?**

18 **A. Yes.**

19 **Q. Since that time with the City, have you**
20 **also been involved in annexation issues?**

21 **A. Well, as a consultant I've been involved,**
22 **yes. I was a consultant to Charleston National Golf**
23 **Course Community. That community was in**
24 **unincorporated Charleston County. After Hugo, the**
25 **property was pretty much decimated, the golf course**

16

1 **Q. Exhibit No. 1 I have is just a copy of the**
2 **Notice of Deposition, and you have one of those in**
3 **your file, I know; I saw it. And you brought some**
4 **file material here with you today. Did you review the**
5 **various categories of information in this notice that**
6 **we're going to talk about today?**

7 **A. Yes.**

8 **Q. And try to find what you could find on it**
9 **to bring today?**

10 **A. Yes.**

11 **Q. May I just take a look at your file for a**
12 **minute, because what we might want to do is mark this**
13 **for identification.**

14 **MR. LEATH: Let's just go off the record**
15 **for just a second.**

16 (Off-the-record conference.)

17 BY MR. LEATH:

18 **Q. In looking at your file material that**
19 **you've brought today, you have a set of notes.**
20 **There's a newspaper article about a lawsuit, maybe**
21 **this lawsuit, over annexation. There's a 1994 letter**
22 **from David Wilson, Forest Supervisor; and then there's**
23 **sort of a package of documents from the Secretary of**
24 **State and some petitions; and a package of documents.**
25 **And other than that, everything else in the file has**

17

1 to do with, really, pleadings that have been filed in
2 this case. Am I right about that?

3 A. Yes.

4 Q. Where did you go to get these documents
5 that aren't pleadings in the case?

6 A. Where did I go?

7 Q. Yes. Where did you find them?

8 A. Well, this document right here came from
9 the law firm, Dwayne Green's firm. It was information
10 that was put together. Some of it was things that I
11 had supplied to them. Some were things that other
12 people in the town, the mayor or the administrator,
13 had supplied to them, things such as records of
14 advertisements for Planning Commission hearings or
15 other public hearings.

16 Q. The documents I'm going to go over with
17 you are sort of marked through 21, so if you don't
18 mind, I'm going to mark this package as 22,
19 Plaintiff's 22, and we'll substitute a copy of it.

20 (PLF. EXH. 22, Packet of documents from
21 Town of Awendaw, was marked for identification.)

22 BY MR. LEATH:

23 Q. Did you as part of this effort to respond
24 to the Notice of Deposition, other than getting this
25 package, 22, from Mr. Green's office, where did you

19

1 that would have the most information about it.

2 (PLF. EXH. 2, 5/3/1994 letter to Mayor
3 Alston from David Wilson, was marked for
4 identification.)

5 (PLF. EXH. 3, 7/10/2002 fax from Bill
6 Wallace, was marked for identification.)

7 BY MR. LEATH:

8 Q. Well, what I've done is I've tried to put
9 some of these in some sort of chronological order, but
10 I may not ask you the numbers exactly. I think I
11 might have it slightly out of order, which is fine.
12 The first one I've got, Bill, is Exhibit No. 3, and
13 this is kind of the earliest date I could get your
14 signature on something that involves the issues that
15 we're dealing with. Just so you know what they are
16 and we're on the same page on the record, what we're
17 talking about here is the annexation of what we call
18 the Nebo Church or Mt. Nebo Church or Nebo property
19 here. Do you understand that?

20 A. Yes.

21 Q. This first document, No. 3, looks like a
22 July '02 fax from you to a person named Carol. It
23 says: "I am a consultant to the Town of Awendaw,
24 helping them with planning functions. Please have
25 Mr. Thomas or Mr. Sutton call me about this. Thank

18

1 get the '94 letter? Where did that come from?

2 A. It came from the files of the Town of
3 Awendaw.

4 Q. The newspaper article, I guess you just
5 pulled it out of the newspaper?

6 A. I just cut it out of the newspaper, yes.

7 Q. Did you bring anything else out of the
8 Town of Awendaw's file other than this 1994 letter, or
9 do you think most of the information that we're going
10 to talk about is involved in this Exhibit 22?

11 A. I think most of it is in the exhibit.

12 Q. Have you seen any e-mails or any documents
13 from the Forest Service at all in this 2003-2004 time
14 frame about annexation? Have you seen any of their
15 internal e-mails and correspondence?

16 A. Yes.

17 Q. Do you feel comfortable or confident to be
18 able to discuss the matters that are asked for in the
19 Exhibit 1, the deposition notice, or are there any
20 items, those ten items, that you feel you don't have
21 any knowledge about or somebody else is more confident
22 to testify about?

23 A. I feel like I'm probably the most
24 competent person at the Town. Not that I know every
25 bit of information, but I think I would be the person

20

1 you for your help." This is on Wright Padgett

2 Christopher stationery. You weren't hired as the
3 Planning Director at that time?

4 A. Yes, I was.

5 Q. Oh, you were?

6 A. Yes. I was an employee of Wright Padgett
7 when I started working for the Town of Awendaw, and
8 the contract technically was with the Town of Awendaw
9 and Wright Padgett Christopher, but I was serving in
10 the same capacity.

11 Q. So they had a contract with Wright Padgett
12 Christopher?

13 A. Yes.

14 Q. When did you start, actually, with the
15 Town of Awendaw? How far do we go back then?

16 A. I believe it was 2001, somewhere in that
17 time frame.

18 Q. I know this one doesn't really have any
19 subject. I was just really trying to get a time frame
20 for this. Do you have any idea who this Carol was?

21 A. She was a secretary. I called to try to
22 find out who was the person to talk to, and she told
23 me that either Mr. Sutton or Mr. Thomas was, and asked
24 me if I would send something to her in writing so that
25 she could forward it on and try to have one of them

21

1 give me a call.

2 Q. Do you know what the subject was of this
3 that you were wanting to talk to them about back then?

4 A. Primarily annexation.

5 Q. And annexation, do you recall of what
6 areas were considered, under consideration?

7 A. Well, at that point in time, we desired to
8 annex fairly large pieces of the National Forest, just
9 ten-foot strips. We had had several conversations
10 with people in the area known as Woodville, which is
11 an area off of Guerins Bridge Road, and several of
12 those people expressed an interest in annexation. We
13 were not contiguous to those parcels, so I began to
14 look at ways we could annex property in between us and
15 Woodville to make those parcels contiguous.

16 Q. If the Forest Service owned some of that
17 property, to make it contiguous you would need the
18 Forest Service under the law to petition to be able to
19 have its property annexed in order to annex the
20 Woodville property?

21 MR. FORD: Object to the form. You can
22 answer.

23 MR. LEATH: First of all, let me make one
24 thing clear on the record. This is a 30(b)(6)
25 deponent of a party, so I'm entitled to cross-examine

22

1 him.

2 MR. FORD: That's fine. I'm just
3 preserving my objections.

4 MR. LEATH: Do you need the question read
5 back?

6 THE WITNESS: Yes.
7 (The Court Reporter read the question
8 commencing on page 21 line 16.)

9 MR. FORD: Same objection. You can
10 answer.

11 THE WITNESS: If the Forest Service owned
12 property in between the town, existing town limits in
13 Woodville, then we would have to annex Forest Service
14 property, yes.

15 BY MR. LEATH:

16 Q. And at that point in time, and indeed
17 today, in order to do that, is a petition not required
18 by the property owner?

19 A. Yes.

20 (PLF. EXH. 4, 7/17/2002 fax to Orlando
21 Sutton, was marked for identification.)

22 BY MR. LEATH:

23 Q. No. 4 is again in July of '02, and it's
24 from the Forest Service, Orlando Sutton, to a Steve
25 Wells. It says: "Orlando, Bill Wallace of WPC wants

23

1 to meet with someone knowledgeable of the land pattern
2 to discuss additional annexation and clarify NF" -- I
3 guess that's National Forest?

4 A. National Forest.

5 Q. "Boundary location. I will call so we can
6 discuss." Do you know Mr. Sutton and Mr. Wells? Have
7 you ever meet them?

8 A. Yes.

9 Q. Are those National Forest Service
10 employees?

11 A. Yes.

12 MS. JOWERS: Jeff, may I ask that you
13 identify the document you're looking at by a Bates
14 number so I can follow along?

15 MR. LEATH: I'm sorry. This is CCL
16 001054.

17 MS. JOWERS: Thank you.

18 (PLF. EXH. 5, 2/25/2003 and 3/31/2003
19 e-mails, was marked for identification.)

20 BY MR. LEATH:

21 Q. Let me ask you about this one. This is
22 Exhibit 5. This is 001039. I don't know if you've
23 ever seen this. This is an internal e-mail, Orlando
24 Sutton and Anne Kiser. I'll represent to you that we
25 have a number of these that we obtained through a FOYA

24

1 request to the National Forest Service. I don't know
2 whether you have seen any of this material before?

3 A. Yes, I have.

4 Q. This particular one on the top, of March
5 31, '03, mentions that Mr. Wallace would be calling,
6 it looks like, Orlando Sutton, and he says: Is there
7 anything we can do to stop them, question mark. Did
8 you ever have any conversations with Mr. Sutton around
9 that time frame that you can recall where he mentioned
10 that the Forest Service wanted to stop annexation?

11 A. No.

12 Q. Have you seen this document before, the
13 one I'm showing you?

14 A. Yes.

15 Q. On the bottom of it, there's a second one.
16 It looks like Anne Kiser is sending Joel Gardner one.
17 Do you know who Anne Kiser is or was?

18 A. Yes.

19 Q. Who's she?

20 A. She's a biologist with the National Forest
21 Service.

22 Q. On the bottom it says: "To give you some
23 background. There is no mention so far from the Town
24 of Awendaw trying to impose town zoning on National
25 Forest lands. The reason this is even an emerging

25

1 issue is the hope on the part of some, quote, wise
2 development groups that the Francis Marlon could stop
3 additional annexation." Do you recall having any
4 discussions with Anne Kiser or Joe Gardner around this
5 time about their position on annexation?

6 **A. No.**

7 **Q.** Do you know where Anne Kiser was located?

8 **A. I believe that she was in the office up in**
9 **McClellanville, if I'm not mistaken. They have two**
10 **offices. They have one, Witherbee, and I forget**
11 **what's the other one that's called in McClellanville.**
12 **I know Orlando works in both offices. I'm not sure**
13 **whether she works in one more than the other.**

14 **Q.** But the person on-site was Orlando Sutton,
15 generally?

16 **A. The person what?**

17 **Q.** On-site, that is in the local office?

18 **A. Well, Orlando is the person who's in**
19 **charge of that district. He's called the district**
20 **ranger.**

21 **Q.** Where was his office located?

22 **A. Those two locations I mentioned:**
23 **Witherbee and McClellanville.**

24 (PLF. EXH. 6, 10/7/2003 e-mails, was
25 marked for identification.)

26

1 BY MR. LEATH:

2 **Q.** Let's look at this next one, which is No.

3 6. It's 00137. This is another memo from a
4 Mr. Johnson and to Orlando Sutton at the top. It
5 looks like it's around the October time frame. It's
6 not real clear to me. It says at the top: "The
7 answer to annexation is likely no. We are not going
8 to write them a letter in support of annexation of
9 National Forest lands." Do you recall ever asking for
10 letters from the Forest Service at that time
11 supporting annexation of National Forest lands by the
12 town?

13 **A. Well, I had asked them to consider the**
14 **possibility of annexing large tracts of land, yes.**

15 **Q.** Did you get a response that was positive
16 from them at that time?

17 **A. Mr. Sutton, generally speaking, during**
18 **this whole time frame was very noncommittal and**
19 **indicated that it was something that would probably**
20 **have to go all the way to Washington, DC, to get a**
21 **written response.**

22 **Q.** That would be not unusual for the
23 government?

24 **A. Right.**

25 (PLF. EXH. 7, 10/9/2003 e-mails, was

27

1 marked for identification.)

2 BY MR. LEATH:

3 **Q.** I just got a couple more in this string.
4 This is Exhibit 7. This is 001036. This is an
5 October 9 of 2003 from Stephen Wells, and it says at
6 the top: "Nothing has changed. We should not agree
7 to annexation but probably just remain silent on the
8 issue if we can." It's to Jerome Thomas. Do you know
9 who he was or is?

10 **A. No.**

11 **Q.** It's copied to Orlando Sutton and Kiser
12 and Johnson. Stephen Wells, it looks like it says
13 he's a Fire, Lands & Minerals Staff Officer?

14 **A. Yes. I believe he may be Orlando Sutton's**
15 **supervisor, and I believe he's in the Columbia, South**
16 **Carolina, office, if I'm not mistaken.**

17 **Q.** Was this statement consistent with the
18 information you were getting from Orlando and others
19 regarding annexation at that time?

20 MR. FORD: Object to the form. You can
21 answer.

22 THE WITNESS: No.

23 BY MR. LEATH:

24 **Q.** It was not?

25 **A. No.**

28

1 **Q.** What was the difference?

2 **A. Well, as I said, during almost this entire**
3 **time, Mr. Sutton was very noncommittal and basically**
4 **never said anything one way or the other.**

5 **Q.** This indicates that the National Forest
6 Service, or at least Stephen Wells, was not going to
7 agree to annexation; correct?

8 **A. Well, it says in this letter, "We should**
9 **not agree to annexation but probably just remain**
10 **silent on the issue if we can." Not agree, but maybe**
11 **not go on record as objecting.**

12 **Q.** Well, that's sort of consistent with
13 Orlando who was remaining silent and not saying
14 anything too?

15 **A. Right. But this says not agree but maybe**
16 **not go on record as objecting.**

17 **Q.** Did the Forest Service during this period
18 of time, October 2003, end of the year 2003, ever go
19 on the record objecting to annexation?

20 **A. No.**

21 (PLF. EXH. 8, 11/24/2003 letter from
22 Orlando Sutton to Miriam Green, was marked for
23 identification.)

24 BY MR. LEATH:

25 **Q.** No. 8 is 001055. Again, we're at the end

29

1 of the year 2003, November 2003. The Department of
2 Agriculture writes Miriam Green at the Mt. Nebo
3 African Methodist Episcopal Church. It's discussing
4 annexation. And Orlando Sutton again says: "We have
5 not received a formal request from the Town of Awendaw
6 regarding annexation." Do you recall if an annexation
7 on this water line issue, a request for annexation for
8 this water line issue, was ever sent to the Forest
9 Service?

10 **A. That's not the way the process works. The**
11 **town does not send people a request and say, We want**
12 **you to annex. The person who owns the property asks a**
13 **petition to the town to annex their property.**

14 **Q.** I just want to identify this for the
15 record, because you're knowledgeable about it. I'll
16 take this one out of order just so we have a record on
17 it. This is Exhibit 21.

18 (PLF. EXH. 21, Copy of SC Code 5-3-150,
19 was marked for identification.)

20 BY MR. LEATH:

21 **Q.** I don't believe we have a Bates stamp on
22 this, but what this is is this is a copy of South
23 Carolina Code 5-3-150, and referring down to 3 on the
24 bottom. That is the petition process for annexation.
25 Is this the requirement that you're referring to?

31

1 people to have property annexed, why would this letter
2 have been sent? This is a request for property to be
3 annexed from the Town to the Forest Service.

4 **MR. FORD:** Object to form. You can answer
5 the question.

6 **THE WITNESS:** Two different issues. One,
7 Mr. Martin, as the Town Administrator at that point,
8 was fairly new to his job, and he didn't have any
9 experience. He had never been involved with
10 annexation. He didn't understand the process of
11 annexation. That's not to say that Mr. Martin is not
12 a smart person, but he had never been involved in
13 annexation issues before. He had never been involved
14 with local government before other than as a member of
15 a Planning Commission for the Town of Mount Pleasant.
16 I can say that Mr. Martin was not fully aware of the
17 issue of how you annex and what is necessary to annex,
18 and I believe that there's not a problem in writing a
19 letter to someone saying we desire you to annex. I
20 did the same thing to other property owners. I sent
21 letters to Fairlawn Plantation and asked them if they
22 would consider annexing, so that's not the same as
23 sending them a petition and asking them to approve our
24 petition. All we're doing is indicating that we have
25 an interest in them annexing into the property, of a

30

1 **A. Yes.**

2 **Q.** So just to have the record clear, in order
3 to annex property pursuant to this code section, a
4 municipality is required to obtain a petition from the
5 real estate owner?

6 **A. Yes.**

7 **Q.** To annex the property?

8 **A. Yes.**

9 (PLF. EXH. 9, 11/25/2003 letter from Mr.
10 Martin to Mr. Sutton, was marked for identification.)

11 BY MR. LEATH:

12 **Q.** No. 9 is actually a US Forest Service
13 Bates stamp document. It looks like 857 451044. It's
14 a Town of Awendaw letter, signed by Dan Martin,
15 November 25, 2003, and he's writing the Forest
16 Service. He says: "Please let this letter serve as a
17 formal request from the Town of Awendaw to Francis
18 Marion National Forest to annex a minimum portion of
19 your property into the Town of Awendaw so that we can
20 annex Mt. Nebo African Methodist Episcopal Church,
21 located at the 5600 Highway into the town." Have you
22 seen this letter before?

23 **A. Yes.**

24 **Q.** I'm a little bit puzzled. If what you
25 just said is correct, that the Town doesn't request

32

1 property into the town, and seeing what their reaction
2 is.

3 BY MR. LEATH:

4 **Q.** The second paragraph I want to ask you
5 about, it says: "In 1994, when the Forest Service
6 provided Awendaw with the right of way to annex other
7 property, Mt. Nebo AME Church was missed. Since this
8 small church is surrounded by your property and your
9 property only, it would be necessary to annex a small
10 portion of your property to allow Mt. Nebo to be
11 annexed." You read that?

12 **A. I read that, yes. It's not correct.**

13 **Q.** I want to ask you about this. First of
14 all, let's take the second sentence of that: "Since
15 this small church is surrounded by your property and
16 your property only, it would be necessary to annex a
17 small portion of your property to allow Mt. Nebo to be
18 annexed." Is that not correct?

19 **A. No.**

20 **Q.** That's not correct?

21 **A. No.**

22 **Q.** What is the story, as you understand it?

23 **A. Well, the Forest Service property was**
24 **contiguous to Mt. Nebo, but there was also private**
25 **property, part of Fairlawn Plantation, that was also**

33

1 contiguous to Mt. Nebo. And you'll find later there
2 is a letter from Mr. Sutton where he indicates that
3 the Forest Service is aware that there is private
4 property adjacent to Mt. Nebo Church, and directs the
5 town to see if they can approach those people for
6 annexation before the Forest Service is asked to annex
7 their property.

8 Q. We'll get out a map maybe in a little bit,
9 and you can show me that. When it says, "In 1994,
10 when the Forest Service provided Awendaw with the
11 right of way to annex other property, Mt. Nebo AME
12 Church was missed," is that part of the statement
13 correct?

14 A. No.

15 Q. Why is that?

16 A. First of all, the Forest Service never
17 provided any rights of way. Rights of way is a term
18 that relates to roads and actual ownership of
19 property. If the Forest Service provided Awendaw with
20 the right of way, that means they would have given
21 property title to the Town of Awendaw, which never
22 happened. Again, Mr. Martin was just simply not, you
23 know, conversant at that point in time with the ins
24 and outs of the annexation process or terminology such
25 as rights of ways or easements or things of that

35

1 A. Yes.

2 Q. The properties, the strips that are being
3 described in this document, in this No. 2, do those
4 strips that are being described or any of them run in
5 a contiguous fashion from the Town of Awendaw, at that
6 point '94, to the Mt. Nebo Church? Any of these
7 properties described in this letter?

8 A. Yes, they do.

9 Q. Which one would that be?

10 A. Well, it would be two different ones. The
11 first one says that the Forest Service has no
12 objection to the Town's annexation of a ten-foot
13 parcel of the Francis Marion National Forest along
14 Doar Road, Sewee Road and US Highway 17 northerly to
15 Lofton Road and southerly to the National Forest
16 boundary in Charleston County. Highway 17, southerly
17 to the boundary of Charleston County, is exactly the
18 piece of property that we annexed.

19 Q. Then it says: "Also a ten-foot-wide strip
20 starting at Awendaw Church, extending southeasterly
21 along the National Forest boundary to Highway 17 and
22 continuing northeasterly along the National Forest
23 boundary."

24 A. Yes.

25 Q. Do you know where Awendaw Church is?

34

1 nature. The Forest Service never gave the Town of
2 Awendaw any right of way on any of their property.

3 Q. I think that he's maybe referring to

4 Plaintiff's Exhibit 2; that is, Mr. Martin, in his
5 letter, which I don't have a Bates stamp on, and it's
6 one you brought with you. It's a letter, dated May 3,
7 1994, from David Wilson at the Forest Service to
8 Mr. Alston, the former mayor of Awendaw, about the
9 Forest Service having no objection to some
10 annexations. Is that right?

11 A. Yes.

12 Q. Is that the one you're referring to?

13 A. Yes.

14 Q. So it didn't grant any right of ways here?

15 A. No.

16 Q. And this letter does not constitute a
17 petition for annexation?

18 MR. FORD: Object to the form. You can
19 answer.

20 THE WITNESS: Yes, it does.

21 BY MR. LEATH:

22 Q. This constitutes a petition for
23 annexation?

24 A. Yes.

25 Q. In your view?

36

1 A. Yes.

2 Q. Where is that?

3 A. It's on the north side of Highway 17.

4 It's approximately halfway between Town Hall and Nebo
5 Church property.

6 Q. Does that have anything to do with the
7 Nebo Church?

8 A. This also would be, I think, describing
9 the piece of property, the ten-foot strip that we
10 annexed, yes.

11 Q. Do any of these have tax map references on
12 them for these ten-foot strips?

13 A. No. Because in many cases the tax maps
14 for Charleston County don't even show a tax map number
15 if the property is owned by the federal government.
16 In many cases, the Charleston County tax maps do not
17 even assign a number to property owned by the National
18 Forest Service or the federal government.

19 Q. Let's go back to 9 a minute again, this
20 Dan Martin letter. Where he says Mt. Nebo Church was
21 missed, are you saying that's incorrect?

22 A. Yes.

23 Q. Did Mr. Martin consult with you before he
24 sent this letter out?

25 A. No.

37

1 Q. Did you ever do anything to correct this
2 letter or write anything about it?

3 A. No.

4 (PLF. EXH. 10, 1/23/2004 letter from Mayor
5 Alston to Mr. Sutton, was marked for identification.)
6 BY MR. LEATH:

7 Q. Let me show you No. 10. 10, I don't have
8 a stamp on it, but it's a January 23 letter from the
9 mayor, 2004, to Orlando Sutton. The mayor is stating
10 in this letter: "The Pastor and congregation of the
11 Mt. Nebo AME Church, collectively, desire to be
12 annexed into the Town. However, we need your
13 assistance. In order for the property to be annexed
14 into the Town's boundary, it must be contiguous to
15 property already within the Town's boundary. The Town
16 of Awendaw is requesting that the Forestry Service
17 grant at least a ten-foot strip of land in order that
18 annexation is possible so that property can be annexed
19 into the Town of Awendaw." And then they request it
20 at the last paragraph. Did you have any knowledge of
21 this letter at the time that it went out?

22 A. No.

23 Q. Did anyone consult with you about it?

24 A. No.

25 Q. Do you have any idea why the mayor would

39

1 property contiguous have expressed their design not to
2 annex. Therefore, the only possible route left is to
3 annex through the National Forest lands. As you know,
4 we have annexed National Forest property in this
5 manner in the past. We request that you allow the
6 town to annex a ten-foot strip along the southern edge
7 of the US Highway 17 right of way from the town limits
8 just below US Post Office to the Mt. Nebo property.
9 This is the only possible way the church can annex at
10 this time."

11 Now, at the time you wrote this letter,
12 were the statements that you made in there correct?

13 A. Yes.

14 Q. Did you ever receive an affirmative
15 response from the Forest Service to that letter?

16 A. Verbally, not in writing.

17 Q. Did you ever receive a petition from the
18 Forest Service to annex that ten-foot strip?

19 A. We have a 1994 letter which we consider to
20 be a valid petition.

21 Q. But at that time that you wrote this
22 letter, on February 12, 2004, did you consider that to
23 be a valid petition at that time; and if so, my second
24 part of that question is: Why would you have written
25 this letter at all?

38

1 have written this letter requesting a ten-foot
2 annexation from the Forest Service?

3 A. Probably because the Mt. Nebo Church
4 requested him to do so.

5 Q. Do you know if the Mt. Nebo Church had
6 anyone looking into this ten-foot strip annexation
7 issue? If they had hired anybody? A consultant,
8 lawyer, anybody?

9 A. No.

10 (PLF. EXH. 11, 2/12/2004 letter from Mr.
11 Wallace to Mr. Sutton, was marked for identification.)
12 BY MR. LEATH:

13 Q. Let's take a look at No. 11. 11 is US
14 Forest Service, looks like, 857 454022. This is a
15 February 12, 2004, following that last one. This is a
16 letter from you. This letter to Mr. Sutton you wrote.
17 It says: "As you know, we have been trying to annex
18 the Mt. Nebo AME Church for some time. The church is
19 not contiguous to the existing town limits and cannot
20 be annexed without first annexing other parcels
21 between it and the town boundary. I have contacted
22 all the property owners that are between the existing
23 town limits and Mt. Nebo and requested that they
24 consider annexing their property. Owners of the four
25 parcels that must be included to make the church

40

1 A. Well, to be perfectly honest, because the
2 Coastal Conservation League and Kent Prause, who were
3 parties to this suit, had filed annexation lawsuits
4 against the town in the past over a very frivolous
5 nature, and I figured that the same thing would
6 probably happen in this case. And if we could do
7 everything we could to ensure that that was not going
8 to happen in the future, then it would be best if we
9 could get their approval in writing. But it turned
10 out that they would not give us anything in writing
11 saying that they desired to be annexed.

12 Q. So they never did give you a petition in
13 writing on that ten-foot strip the Forest Service
14 desired?

15 A. The 1994 letter is the petition for
16 annexation.

17 Q. I want to make the record clear, because
18 this is important in this case. Can you just answer
19 the questions as I pose them to you. First question
20 is: As a result of this February 24 letter, from
21 February 24 and any time going forward, did you ever
22 receive an affirmative petition from the US Forest
23 Service to annex the ten-foot strip at issue?

24 MR. FORD: Object to the form. You can
25 answer.

41

1 THE WITNESS: We already had a petition.

2 BY MR. LEATH:

3 Q. I'm going to ask it again. From February
4 24, 2004, going forward, I want you to answer this
5 question first, and I'll let you explain the second
6 one, did you ever receive an affirmative petition from
7 the US Forest Service after that date?

8 A. Not after that date, no.

9 Q. Going forward to annex the ten-foot after
10 the date?

11 MR. FORD: Object to form. You can
12 answer.

13 THE WITNESS: Not after that date.

14 BY MR. LEATH:

15 Q. So the answer is no?

16 MR. FORD: Same objection.

17 THE WITNESS: And there was no petition in
18 writing, no.

19 BY MR. LEATH:

20 Q. So it is your testimony that Exhibit No. 2
21 constitutes the only petition from the US Forest
22 Service, if any, to annex the ten-foot strip at issue?

23 MR. FORD: Object to form. You can answer
24 the question.

25 THE WITNESS: Yes.

42

1 BY MR. LEATH:

2 Q. Is that correct?

3 A. Yes.

4 Q. Now, in addition, from February 12, 2004,
5 going forward, to the present date, did you ever have
6 any verbal conversations with any members of the US
7 Forest Service which you interpret in any way to
8 constitute a petition for annexation under the law and
9 the code as we have previously discussed it?

10 A. Yes.

11 Q. Tell me about that.

12 A. I talked with Mr. Sutton on several
13 occasions, and the last conversation that I had with
14 Mr. Sutton was that the Forest Service would not
15 provide us anything in writing, because it would have
16 to go all the way to Washington. It would take two or
17 three years, possibly, to get an answer. The Mt. Nebo
18 Church was trying to build a new building or remodel
19 the building they had and add an addition to it. They
20 were very anxious to proceed ahead with annexation.
21 Mr. Sutton's comments to me was that the Forest
22 Service still had no objection to the town annexing
23 ten-foot strips of land to make other properties
24 contiguous.

25 Q. So he said they had no objection to

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1 annexing ten-foot strips of land?

2 A. Right.

3 Q. Well, I'm sure we'll get his deposition
4 version of that. For purposes of this, what was
5 attached to this Exhibit 11 is a rough drawing, and
6 it's supposed to be Parcel No. 625-00-00-005, which
7 has been referenced as the ten-foot strip. Does that
8 look correct to you?

9 A. No. This map does not look correct.

10 Q. Would the actual ten-foot strip be running
11 from more the bottom of that page up?

12 A. Yes.

13 Q. From the Town, so maybe from the south
14 more towards the north?

15 A. Correct.

16 Q. That's what I thought. Let me ask you
17 this question. Again, in Exhibit 11, you request to
18 allow the town to annex it, and you say this is the
19 only possible way that the church can annex at this
20 time. When was it, do you think, Bill, that you went
21 back and found or located this 1994 document to take
22 the position that they had already given permission,
23 Forest Service? Was it after this letter was written?

24 A. No.

25 Q. You already knew about it?

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1 A. Yes.

2 Q. At some point was there an election made
3 or decision made by the town to go with this Exhibit
4 No. 2, to go with this '94 letter, as the basis for
5 the annexation?

6 A. Yes.

7 Q. Who was involved in that decision?

8 A. Town Administrator, Dan Martin, the mayor
9 and myself.

10 Q. Did y'all actually have a meeting about
11 it?

12 A. I can't remember whether we had a meeting
13 or we just discussed it on the telephone, but, you
14 know, I discussed it both with the mayor and with Dan
15 Martin.

16 Q. Did you discuss it with the Forest Service
17 at all to say, Is this letter good enough for a
18 petition for annexation?

19 A. I did not use that language that I
20 remember with Mr. Sutton, no.

21 Q. But did you discuss that letter with him
22 specifically?

23 A. Yes. There is documentation that I sent a
24 copy of that petition to him for his review.

25 Q. When you say "that petition," you mean

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1 that letter?

2 **A. Yes.**

3 **Q.** In the conversations, when the decision
4 was made to go with Exhibit 2, the '94 letter, were
5 there any records kept of that meeting, or was this
6 all done verbally on the phone?

7 **A. Mostly done verbally.**

8 **Q.** Anybody keep any records or send any
9 e-mails about that, that you can recall?

10 **A. Not that I know of.**

11 (PLF. EXH. 12, 2/12/2004 letter from Mr.
12 Martin to Mr. Sutton, was marked for identification.)

13 BY MR. LEATH:

14 **Q.** Let's take a look at Exhibit 12. Again,
15 this is the same date of the letter you just wrote
16 Mr. Sutton, and here Dan Martin is writing Mr. Sutton,
17 same date. He's the Town Administrator, and in the
18 second paragraph he says: "We've annexed property for
19 the National Forest Service in the past. However, we
20 understand that the Service is generally opposed to
21 annexation due to the possible restrictions that may
22 be placed on the Forest Service operations by local
23 government." Was it your understanding that the
24 Forest Service was generally opposed to annexation, or
25 did you have a different understanding?

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1 Is that the parcel that we're talking about, and does
2 the little map section on the back look like it
3 properly describes 625-00-00-005?

4 **A. Well, 005 parcel is Mt. Nebo Church. It
5 is not the ten-foot strip.**

6 **Q.** Does the little drawing properly reflect
7 the ten-foot strip?

8 **A. Yes.**

9 **Q.** That's attached to this?

10 **A. Yes.**

11 **Q.** We corrected the other one now?

12 **A. Yes.**

13 **Q.** It runs from the south more towards the
14 north?

15 **A. Correct.**

16 **Q.** That property, for the record, is owned by
17 the National Forest Service?

18 **A. Correct.**

19 **Q.** Just to make sure again I get the record
20 straight, this first reading of this annexation
21 ordinance was done on April 15, 2004, final reading on
22 May 10, 2004, and it states: "Whereas, a proper
23 petition has been filed with the Town Council by 100
24 percent of the freeholders owning 100 percent of the
25 assessed value of the contiguous property," and so

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1 **A. Well, I believe that this is a generic**

2 statement that the Forest Service, and generally not
3 just the Forest Service but almost all federal

4 agencies as a whole, going back to my time with the
5 City of Charleston and even back to my time with the

6 City of Marietta 40 years ago when we annexed a

7 ten-foot strip across Kennesaw Mountain National

8 Battlefield Park to make areas contiguous to the City
9 of Marietta, their concern was that people would try,

10 whatever locality, town, city, whatever, would try to

11 draft ordinances that would restrict them in their

12 management practices. It was not that they had any
13 objection to the concept of being in a town, it's just

14 that they did not want to have to have any

15 entanglements or encumbrances upon their decision to

16 manage the forest in the best way that they thought.

17 (PLF. EXH. 13, Annexation Ordinance 100

18 Percent Petition Method, was marked for

19 identification.)

20 BY MR. LEATH:

21 **Q.** Get you to look at No. 13 here. I don't

22 think I have a Bates stamp on that. This is the

23 actual annexation ordinance for the property that

24 we're discussing here, which relates in it that it is

25 TMS Parcel 625-00-00-005. And my first question is:

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1 forth. To make sure the record is correct, is that
2 proper petition in your view Exhibit No. 2 that we've
3 been over, which is the 1994 letter?

4 **A. Yes.**

5 **Q.** Is there anything else other than that
6 letter that would constitute that petition?

7 **A. No.**

8 **Q.** Was this annexation ordinance ever sent
9 prior to its being enacted or draft of it to the
10 National Forest Service?

11 **A. I can't answer that question. That was
12 not my responsibility.**

13 **Q.** Have you ever seen any documentation
14 anywhere or anything or talked to anybody to find out
15 that it was in fact sent before being signed by the
16 mayor on April 15, 2004?

17 **A. I do not know.**

18 **Q.** Don't know one way or another?

19 **A. No.**

20 **Q.** Was it ever sent afterwards to the Forest
21 Service?

22 **A. Yes.**

23 **Q.** Approximately when, would you say?

24 **A. I can't answer that. I wasn't the one
25 responsible for doing that.**

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1 Q. The reason I'm going to ask you that is
2 because there's information, that we'll go through
3 later, that this information and the annexation was
4 not sent to the Secretary of State and otherwise
5 until, really, about five years later, 2009?

6 A. In some cases that's correct, yes.

7 Q. Do you believe, do you have any knowledge
8 that any time contemporaneously with this document it
9 was sent to the Forest Service so that they would know
10 what the Town of Awendaw had done?

11 A. I believe that it was.

12 Q. You believe it, but you haven't seen any
13 information one way or another?

14 A. Right.

15 Q. Have you ever talked to Mr. Sutton or
16 others to find out if they knew about this?

17 A. They knew about it, yes.

18 Q. How do you know that? You talked to him?

19 A. Yes.

20 (PLF. EXH. 14, Annexation Ordinance 100
21 Percent Petition Method, was marked for
22 identification.)

23 BY MR. LEATH:

24 Q. Just for the record, No. 14 is the
25 annexation ordinance for the 3.13 acres of the Nebo

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1 Church property. It was done on the same day, April
2 15, 2004.

3 A. Well, that was first reading. Final
4 reading was May 10.

5 Q. Just like the previous one: first reading
6 was April 15, and the second reading was May 10?

7 A. Yes.

8 Q. Anything unusual about putting those two
9 annexation ordinances together?

10 A. No.

11 (PLF. EXH. 15, 4/30/2004 and 5/3/2004
12 e-mails, was marked for identification.)

13 BY MR. LEATH:

14 Q. No. 15, sequentially, is again another one
15 of these e-mails, and you will see this one, on the
16 bottom, Stephen Wells, dated April 30, 2004, so that's
17 15 days after the first reading of the annexation of
18 the Forest Service property. And Mr. Wells writing
19 Anne Kiser, and he says: "It's my opinion that if
20 they annex without our consent, then we should go on
21 record that when town regulations conflict with
22 National Forest management, then National Forest
23 regulations, the Forest Plan and National Forest
24 policy will prevail. We haven't concurred or objected
25 to annexation."

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1 You see that statement? Do you disagree
2 with that, that in fact they did not, the National
3 Forest Service, didn't confer or object to this
4 annexation one way or another?

5 A. I do not agree, no.

6 Q. Because you consider the 1994 document to
7 be a petition for annexation?

8 A. And my conversations with Orlando Sutton.

9 Q. Do you believe that Orlando Sutton has the
10 authority or had the authority to petition for
11 annexation of National Forest Service property?

12 A. He didn't petition.

13 Q. He didn't?

14 A. No.

15 Q. What did he do?

16 A. Well, he was -- this is the petition by
17 David Wilson. It was not by Orlando Sutton.

18 Q. Exhibit 2. Well, the conversations with
19 Orlando Sutton, though, I'm asking you, because you
20 seem to indicate that Orlando Sutton had something to
21 do with the annexation. Did he have the authority to
22 petition for annexation of National Forest Service
23 property, as far as you knew?

24 MR. FORD: Object to the form. You can
25 answer.

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1 THE WITNESS: I have no idea.

2 BY MR. LEATH:

3 Q. Did he ever hold himself out as saying, I
4 can agree to this?

5 A. No.

6 (PLF. EXH. 16, Annexation Ordinance 100
7 Percent Petition Method, was marked for
8 identification.)

9 BY MR. LEATH:

10 Q. Let's take a look at No. 16. Again, I'm
11 sorry I don't have the stamp. This is September of
12 2009 now. This is an annexation ordinance for 359
13 acres, and it has to do with a -- it says on the
14 bottom: "This property shall be un-zoned to Plan
15 Development." Un-zoned from what to Plan Development?
16 Un-zoned from agriculture?

17 A. No. When a property is annexed into the
18 town, it loses the zoning that it had in the county,
19 and therefore has no zoning until the town gives it a
20 zoning.

21 Q. So when it was with the county, what type
22 of zoning did it have?

23 A. I believe it was AG-10.

24 Q. That would be an agricultural?

25 A. Yes.

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1 Q. That did permit some development of
2 residences?

3 A. Yes.

4 Q. One per every?

5 A. Ten acres.

6 Q. It says property owned by EBCSC and is
7 located at Highway 17 North adjacent to Mt. Nebo
8 Church?

9 A. Yes.

10 Q. In order to annex this property to be
11 contiguous, the Mt. Nebo Church would have to be
12 annexed?

13 A. Mt. Nebo Church had already been annexed
14 five years previously.

15 Q. I understand that. But in order to get to
16 annexing the EBCSC property, you had to have a
17 contiguous property to it?

18 A. Yes.

19 Q. And in this case, that was the Mt. Nebo
20 Church?

21 A. Yes.

22 Q. In order to get the Mt. Nebo Church
23 annexed, the petition that we've already been through
24 from the Forest Service was the strip, the ten-foot
25 strip that was contiguous, that annexed the Mt. Nebo

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1 Church?

2 A. Yes.

3 Q. So it goes, in order: Town of Awendaw,
4 one; ten-foot strip owned by the Forest Service, two;
5 Mt. Nebo Church, three; EBCSC, four?

6 A. Yes.

7 (PLF. EXH. 17, 9/30/2009 letter from Mr.
8 Brown to Mrs. Franks, was marked for identification.)
9 BY MR. LEATH:

10 Q. Let's look at No. 17. This is Town of
11 Awendaw letter of September 30, 2009, to Cathy Franks.
12 This is what I was referring to. She's at the
13 Charleston City Planning Department. Reference:
14 annexation ordinance.

15 A. Charleston County.

16 Q. Charleston County, I'm sorry. I said City
17 but County is right. It wouldn't be the City. Samuel
18 Brown is sending her information about the annexation
19 that we just discussed. It says: "I am enclosing for
20 your official records one copy of the following
21 annexation, which was ratified by the Town Council
22 pursuant to Section 5-3150." That's the code section
23 we discussed already. "This Ordinance became
24 effective upon ratification on May 10, 2004." It
25 says: "Although this parcel was annexed in 2004, we

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1 have found that this information may not have been
2 sent to your department; as a result, I am sending the
3 documents to your department to update your records."

4 Now, what is the requirement generally
5 from a municipality like Awendaw to notify the County
6 Planning Department of annexations?

7 A. Well, there's a list of agencies that have
8 to be notified, federal agencies, state agencies and
9 county and city agencies, in some cases. For the
10 county it was primarily for updating their records so
11 that it would show that this piece of property was in
12 the Town of Awendaw and it was no longer in the
13 county. And we discovered, in looking at our maps,
14 that the county had never undated their maps showing
15 this property, Mt. Nebo Church, specifically, and the
16 ten-foot strip in the Town of Awendaw, and when we
17 went back to research it, we found that apparently it
18 had never been sent to the county for them to have the
19 information to update their records.

20 Q. Is the county and indeed the state, are
21 they supposed to be notified of annexations in some
22 time-governed fashion?

23 A. Not that I know of.

24 Q. What is it or what rules or regulations
25 governed this notion of a town's informing the county

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1 and state of annexation? Is there a code section, or
2 is there some type of internal regulation?

3 MR. FORD: Object to form. You can
4 answer.

5 THE WITNESS: As far as the county goes, I
6 don't know -- I think primarily, as far as the county
7 goes, it's just a matter of intergovernmental
8 cooperation, of us just telling them so that they will
9 remove the properties from their tax records and
10 indicate that it is now in the taxing entity of the
11 town. In this case it was really -- that was not an
12 issue, because Mt. Nebo Church is a nonprofit
13 organization that doesn't pay property taxes, and
14 neither does the Forest Service. It primarily was an
15 issue of whether the county showed it on their maps or
16 not.

17 BY MR. LEATH:

18 Q. If you look at this again on 17, there's a
19 whole list of people being copied and entities being
20 copied on the bottom. Again, are you aware of any
21 requirements or regulations that would govern
22 notification of any of those entities?

23 A. Yes.

24 Q. Tell me about that.

25 A. Well, I don't know all the specifics.

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1 This is not my responsibility. It's the town clerk's
2 responsibility. But for example, you'll notice Civil
3 Rights Division of the Voting Section, any time any
4 town annexes property, it has to go to the Voting
5 Section, Voting Rights Section, so that they can see
6 if there's any change in things such as racial
7 composition of the town. Again, in this case it was
8 irrelevant because there's no residence on either one
9 of these two parcels. But, yes, there is a
10 requirement, primarily that I know of, is from the
11 Civil Rights Division. The others are primarily more
12 just for Intergovernmental cooperation so that maps
13 are correct and things of that nature.

14 (PLF. EXH. 18, 10/2/2009 letter from Ms.
15 Hatcher to Mr. Brown, was marked for identification.)

16 BY MR. LEATH:

17 Q. Just to follow-up on that, No. 18 is an
18 October 2, 2009, acknowledgment from the Office of the
19 Secretary of State back to Mr. Brown, the Treasurer of
20 the 2004 annexation, which is I guess more than five
21 years later. Have you ever had any experience while
22 working with the Town in terms of notification of
23 annexations going as long as this?

24 A. I can't answer that because it's not my
25 responsibility.

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1 (PLF. EXH. 20, Responses, was marked for
2 identification.)

3 BY MR. LEATH:

4 Q. Just to clarify it, and this is for my
5 information than anything else, let's take a look at
6 No. 19 here. 19 is just some information from the
7 town's development regs. In order to develop the
8 property, I'm looking up here, it says Permit, Section
9 A, is that generally what the property owner has to
10 get in order to be able to get this property
11 developed?

12 MR. FORD: Object to form. You can
13 answer.

14 THE WITNESS: State the question again,
15 please.

16 BY MR. LEATH:

17 Q. This tract we're talking about, Nebo
18 tract, in order to get it developed, say developed for
19 a more intensive commercial and real estate
20 development, are these the types of permits that the
21 property owner has to get?

22 A. These are the permits they would have to
23 get for any development there.

24 Q. Do you know if the property owner -- do
25 you know who it is, incidentally?

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1 Q. Whose is it?

2 A. Whose is it?

3 Q. Right.

4 A. Sam Brown. Or whoever is the town clerk.

5 I believe one of the problems that existed in the
6 beginning was there was a transition from the person
7 who was clerk before Sam Brown and his time, that
8 this, you know, action was not taken. And I can't
9 answer the question as to whether others have any time
10 delays or not, because I'm not the person responsible
11 for doing that.

12 MR. LEATH: Can we take about five
13 minutes, and then I can wrap up with some of this.

14 (A recess transpired.)

15 BY MR. LEATH:

16 Q. This 359-acre tract that we just discussed
17 a little while ago, 359 acres, the EBCSC tract, what
18 can we call that? Do I have to call it the EBCSC
19 tract? What do you call it?

20 A. Well, it's generally referred to in the
21 town as the Nebo tract.

22 Q. The whole thing, the Nebo tract?

23 A. Yes.

24 (PLF. EXH. 19, Town development regulation
25 information, was marked for identification.)

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1 A. Who the property owner is?

2 Q. Like what the entity is?

3 A. Well, I'm not sure what EBC --

4 Q. I'm not either.

5 A. -- stands for.

6 Q. But whoever that is?

7 A. Right.

8 Q. Do you know if that entity has any of
9 these permits yet?

10 A. No.

11 Q. No, they don't?

12 A. No.

13 Q. Let's just assume, hypothetically, and of
14 course we don't agree with this, but this property
15 were to have been legally annexed. What is the status
16 of it in terms of a developable piece of property?
17 What would be its zoning or what would it be, as of
18 right now, without these permits?

19 A. The zoning is Planned Development
20 according to a plan that was submitted and approved by
21 the Town of Awendaw.

22 Q. So that's the zoning?

23 A. Yes.

24 Q. But to take it to the next step where
25 those items on that plan come into being, these

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1 permits would have to be obtained?

2 **A. Yes.**

3 **Q.** And they have not been yet?

4 **A. No.**

5 **(PLF. EXH. 23, 100 Percent Petition Form**
6 **to the Mayor and Council of the Town of Awendaw, was**
7 **marked for identification.)**

8 BY MR. LEATH:

9 **Q.** What 23 is is a petition form for EBC, LLC
10 for 16 acres. And it's our understanding, and I think
11 we can find the document, that what actually got
12 annexed was 21 acres. Do you have any knowledge one
13 way or another about that, why that happened?

14 **A.** Well, there was discussion about how much
15 of the property of Parcel 41 to be annexed, and part
16 of the Parcel 41 was wetlands, and there was a
17 discussion among the developers as to -- the owners of
18 the property as to how much of that parcel to bring
19 in. And I can't say exactly why they made the
20 decision to change from one size to another, but I do
21 know they altered the size of the property two or
22 three times before it was finally petitioned for
23 annexation.

24 **Q.** Let me just ask you another series of
25 questions, and then I think we can wrap up. In terms

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1 of, for lack of a better word, the notification

2 process, publication process about these annexations,

3 to notify the public of these various hearings and

4 readings, did you have anything to do with that? Is

5 that any part of your responsibility?

6 **A. Yes.**

7 **Q.** How did you get involved in that?

8 **A.** Well, any time we had a public hearing, it
9 had to be advertised. Any time we had a Planning
10 Commission meeting, even though the state does not
11 require it, we advertise those meetings. We have
12 workshops that were advertised and open to the public.
13 This was probably, I would say, the most widely
14 advertised process that anything in the town has gone
15 through in my time with the town.

16 **Q.** Did you attend all of the Town Council
17 meetings and Planning Commission meetings where these
18 annexations and amendments to the Town's comprehensive
19 plans were discussed?

20 **A.** To the best of my knowledge, I did, yes.

21 **Q.** Would there be, if required, if public
22 notice was required, do you believe that adequate
23 public notice in fact went out for the various
24 meetings, if they were required?

25 **A. Yes.**

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1 **Q.** Who is in charge of doing that?

2 **A. Jody Muldrow.**

3 **Q.** Would Jody likely be the one that would
4 have the most accurate records of what public notice
5 went out about what particular meetings and what was
6 required?

7 **A.** Well, they're in file in the Town, and
8 basically that's what this document that you have in
9 front of you with the clip on it there, all of the
10 advertisements, there's copies of them in that
11 document.

12 **Q.** This is No. 22. Just to make sure I got
13 the record straight, because we can look at this later
14 without having to bother you with it, do you think
15 this reflects the notices of the various meetings, if
16 those public notices were actually required by law?

17 **A.** To the best of my knowledge. As I said,
18 I'm not the person who actually put the ads in the
19 paper. Jody and the town clerk are the two people who
20 do that.

21 **Q.** After reviewing this, if we've got some
22 questions about the notice-type issues, would Jody and
23 the town clerk be the folks we would want to talk to?

24 **A.** Primarily, yes.

25 **Q.** I just wanted to get that for the record.

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1 I think that's it for us.

2 **EXAMINATION**

3 **BY MS. JOWERS:**

4 **Q.** Bill, I'm Amy Jowers. We've met before.
5 As you know, I represent EBC, LLC. I just have a
6 couple of questions for you. Referring back to the
7 annexation, 2004 annexation of the ten-foot strip and
8 the Nebo Church tract, was notice of that annexation
9 advertised in the normal way?

10 **A.** We don't normally advertise annexation
11 requests. The annexation, the notice that is given,
12 primarily, is put on the agenda for the Town Council.
13 The Town Council agenda is available for scrutiny 24
14 hours before each meeting is posted at the Town
15 Council, and certain entities like the Coastal
16 Conservation League receive copies of the agenda
17 either by e-mail or regular mail.

18 **Q.** To the best of your knowledge, did the
19 Forest Service appear at the town meetings and
20 hearings when the Town Council considered those
21 annexations?

22 **A.** No, they did not.

23 **Q.** Did the Forest Service take a position at
24 that time against those annexations?

25 **A.** They did not take a position against

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1 annexation, no.

2 Q. Did they contest them after the
3 annexations were done?

4 A. No.

5 Q. Did they appeal the annexation of the
6 ten-foot strip of land at that time?

7 A. No.

8 Q. Did the Forest Service appeal the
9 annexation of the Nebo Church tract?

10 A. No.

11 Q. To your knowledge, did anyone appeal
12 either of those annexations?

13 A. No.

14 Q. Switching topics just a little bit. How
15 has the development agreement between the Town and EBC
16 been breached at this point?

17 MR. FORD: Object to form. You can
18 answer.

19 THE WITNESS: The Town had certain things
20 that they were required to do as part of the
21 development agreement and the owners had certain
22 things. The owners have not been able to fulfil their
23 requirements. Primarily, for example, they were
24 required to donate land to the Town, and because of
25 the lawsuit, they have not transferred their

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1 properties to the Town. Therefore, the Town would not
2 issue any permits to them until they met that
3 requirement.

4 BY MS. JOWERS:

5 Q. Is it possible for the development
6 agreement to go forward with this lawsuit pending?

7 A. No.

8 Q. Why?

9 A. Well, as I said, they are not able to
10 carry out their requirements according to the
11 development agreement, and therefore the Town would
12 not carry out any permitting requirements until they
13 do so.

14 Q. Would you agree that, because of this
15 lawsuit, a situation has been created such that the
16 contract between the Town and EBC cannot be performed
17 by either side?

18 A. That's correct.

19 Q. Has there to your knowledge been any prior
20 litigation between the Coastal Conservation League,
21 the Town and landowners over development other than
22 this suit?

23 A. Yes. The Coastal Conservation League, I
24 believe, there has been two or three lawsuits. In
25 fact, I think the most recent one related to what was

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1 called the Fenwick Tract, where they objected to the
2 rezoning of the Fenwick Tract. They also objected to
3 the Village at Bulls Bay subdivision and appealed a
4 permit from the state Department of Archives and
5 History related to that development. I believe, if
6 I'm not mistaken, that they were part of a lawsuit
7 about the Berkeley Electric communications tower that
8 was constructed. Also, Kent Prause, who's party to
9 this lawsuit, along with several other members,
10 contested an annexation in 2002 that was related to
11 property on Seewee Road. And I believe there was one
12 other one, I think, that had to do with property up
13 along Awendaw Creek and a subdivision approval for
14 that parcel.

15 Q. Do you know the outcomes of these various
16 lawsuits?

17 A. They were all either dropped or satisfied
18 in the Town's favor.

19 Q. I don't have any further questions, thank
20 you.

21 EXAMINATION

22 BY MR. LEATH:

23 Q. Before this deposition, have you ever had
24 any meetings with any EBC, LLC people or their
25 attorneys about this lawsuit?

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1 A. About the lawsuit?

2 Q. Yes.

3 A. Yes.

4 Q. Why did you do that?

5 A. Why?

6 Q. Yeah.

7 A. Because I had to respond to this
8 deposition.

9 Q. When did you have those meetings?

10 A. Over the last couple of months or so.

11 Q. Who have you talked to and tell me who you
12 met with?

13 MR. FORD: Let me just register an
14 objection. You can ask when and who, but the content
15 of those discussions we're going to take the position
16 as covered by privilege, including a joint defense
17 privilege.

18 MR. LEATH: Well, it can't be a privilege
19 if it has to do with an entity which is not the Town.

20 MR. FORD: Since it would be under a joint
21 defense agreement, the privilege extends.

22 MR. LEATH: What I'll do is I'll ask him
23 the questions, and we'll make a record. We have not
24 been provided with a joint defense agreement, and we
25 have not been able to take a look at whether or not it

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1 has any degree of legality in terms of a privilege
2 here. But we'll do all that.

3 MR. FORD: Sure, let's do it.

4 BY MR. LEATH:

5 Q. So I'll ask you the questions for the
6 record, and if your attorney directs you not to answer
7 a question, I'll give you sufficient time for him to
8 be able to do that. Because we'll be taking this up
9 with the court. What I want to know is: Have you had
10 any meetings with any of the not Town of Awendaw but
11 EBC, LLC lawyers?

12 MR. FORD: You may answer whether or not
13 you had these meetings.

14 THE WITNESS: Yes.

15 BY MR. LEATH:

16 Q. Let's try this one: On more than one
17 occasion?

18 A. Yes.

19 Q. On how many occasions?

20 A. I can't remember exactly. I would say,
21 probably three.

22 Q. Where?

23 A. In Mr. Green's law firm's office.

24 Q. I'll just ask you this for the record, and
25 it'll get an objection. Can you tell me what was

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1 discussed between you and their lawyers at these
2 meetings?

3 MR. FORD: I'm interposing an objection
4 based on the joint defense privilege and
5 attorney-client privilege and instructing the witness
6 not to answer on that basis.

7 MR. LEATH: Very good, okay.

8 BY MR. LEATH:

9 Q. You were asked some questions regarding
10 the Town's obligations and the property owner's
11 obligations under the development agreement. I'm
12 going to show you, it looks like Article 9, Land
13 Donations. Do you see that?

14 A. Yes.

15 Q. Is that what you were referring to that
16 the property owner is required to do to donate that
17 property?

18 A. Yes.

19 Q. Can you possibly explain to me how this
20 lawsuit, or indeed any lawsuit, could prevent a
21 landowner from donating that property?

22 MR. FORD: Object to the form. You can
23 answer.

24 THE WITNESS: Well, I can't answer why the
25 EBC came to that decision, but they notified the Town

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1 that they would not transfer any property as long as
2 this lawsuit was in force, because if something
3 happened primarily that was to do away with the zoning
4 or the annexation, then they would have given land to
5 the Town and not gotten anything in return for it.

6 BY MR. LEATH:

7 Q. Sure. If a court decides under this
8 declaratory judgment action that the original
9 annexation was illegal, then they wouldn't be annexed
10 into the town properly; correct?

11 A. I would assume that's correct.

12 Q. But there's nothing in this document at
13 all or this lawsuit that prevents them from donating
14 this property, is there?

15 MR. FORD: Object to the form. You can
16 answer.

17 THE WITNESS: I would say yes.

18 BY MR. LEATH:

19 Q. You would? Well, why would you say yes?

20 MR. FORD: Same objection.

21 THE WITNESS: Because this is a contract.
22 It's a two-sided contract. The Town has certain
23 requirements; they have certain requirements. If they
24 don't meet their requirements, then the Town considers
25 it not to be a valid contract.

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1 BY MR. LEATH:

2 Q. Does it say anywhere in this contract that
3 this land donation is contingent upon a legal
4 annexation having been made? Because I've read it; I
5 don't see it anywhere.

6 A. No.

7 Q. You talked about some litigation or some
8 contest to annexation Mr. Prause and the League did in
9 the past; right?

10 A. Uh-huh.

11 Q. Is that a yes?

12 A. Yes.

13 Q. Do you have a view that citizens are not
14 able to contest governmental activities?

15 A. No.

16 Q. Do you have a view that citizens and
17 citizens groups are not legally able to contest
18 annexations?

19 A. No.

20 Q. So you're not against groups like the
21 Coastal Conservation League or Mr. Prause contesting
22 an annexation if there is a basis for believing that
23 it was not legally done, are you?

24 A. Well, I believe that the lawsuit they did
25 in 2002 was a frivolous lawsuit. I think anybody who

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1 read the state law could have seen very clearly that
2 there was no basis for the lawsuit. I think it was
3 done just as an attempt to delay the process.

4 Q. Well, with this lawsuit, it seems to boil
5 down, in some part, to whether or not this 1994 letter
6 constitutes a petition under the law. Do you agree
7 with that?

8 MR. FORD: Object to the form. You can
9 answer.

10 THE WITNESS: Yes.

11 BY MR. LEATH:

12 Q. Don't you think that's a reasonable thing
13 to have a judge and a court to look at to determine
14 that?

15 MR. FORD: Same objection. You can
16 answer.

17 THE WITNESS: No.

18 BY MR. LEATH:

19 Q. You don't?

20 A. No.

21 Q. Why is that? Because you're the one that
22 can decide that?

23 A. No. Because the Town has done this on
24 several occasions. I'm not sure exactly how many
25 because I wasn't there in the early years of the Town,

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1 but I think the Town did this several times and has
2 done it since we did the Nebo annexation. No one has
3 ever objected. It's never been -- to my knowledge,
4 there's never been any case law that says you can't
5 annex a ten-foot strip. So I don't -- my personal
6 opinion is I don't think that's a legitimate grounds
7 for a lawsuit.

8 Q. So because an entity has done something in
9 the past, that gives it a right to do it in the future
10 regardless of whether or not it's legal?

11 MR. FORD: Object to form. You can
12 answer.

13 THE WITNESS: No.

14 BY MR. LEATH:

15 Q. And you think that this 1994 letter
16 constitutes a petition pursuant to the requirements of
17 the law?

18 A. Yes.

19 Q. Has any lawyer ever given you that opinion
20 or given that to the Town? I'm not saying in this
21 lawsuit. I'm not talking about these present lawyers.
22 I'm talking about other lawyers ever.

23 MR. FORD: I'm not sure of the extent of
24 that. To the extent that you're asking for some sort
25 of communication between the Town and its lawyers in

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1 the past, I need to object on the Town's basis. I'm
2 not sure if you're asking about some other lawyer
3 outside of the one representing the Town?

4 BY MR. LEATH:

5 Q. I'm asking about any attorney prior to
6 your coming to work for the Town of Awendaw. When you
7 worked with the City of Charleston, for example.

8 MR. FORD: You can answer.

9 THE WITNESS: I'm not sure exactly what
10 the question is.

11 BY MR. LEATH:

12 Q. The questions is: Has anybody ever given
13 you an opinion that a non-objection letter, like the
14 one at issue here, can constitute a petition pursuant
15 to the code requirement?

16 MR. FORD: And I'm instructing the witness
17 to answer the question as far as it relates to any
18 attorney not representing the Town of Awendaw in the
19 past at some point.

20 THE WITNESS: I'm sorry, but I still don't
21 understand exactly what the question is.

22 BY MR. LEATH:

23 Q. I think I'll drop it. You say these
24 ten-foot strips have been annexed in the past?

25 A. Uh-huh.

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1 Q. Yes?

2 A. Yes.

3 Q. Has the Town ever received anything other
4 than a non-objection letter from the Forest Service in
5 annexing those strips?

6 A. No.

7 Q. Has it ever received an actual petition?

8 MR. FORD: Object to form. You can
9 answer.

10 THE WITNESS: The Town considers the
11 letter a petition. The state law, there is no form
12 for a petition. It just simply says "a petition." It
13 does not give a sample petition. It does not give any
14 exact guidelines on what a petition is. That's up to
15 the Town to decide.

16 BY MR. LEATH:

17 Q. So if that's the case, wouldn't it be
18 reasonable to have a court interpret what the petition
19 is?

20 MR. FORD: Object to the form. You can
21 answer.

22 THE WITNESS: That's not my decision.

23 BY MR. LEATH:

24 Q. Well, you've already given plenty of
25 opinions on frivolous lawsuits. I want your opinion

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1 on that.

2 **A. Obviously, anything is liable for a**
 3 **court's decision.**

4 **Q. And that's why we have courts; right?**

5 **A. Right.**

6 **Q. I think I'm done.**

7 (The deposition was concluded at 12:14

8 p.m.)

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1 CERTIFICATE OF REPORTER

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4 I, Margaret F. Barnett, Professional Court

5 Reporter and Notary Public for the State of South

6 Carolina at Large, do hereby certify that the

7 foregoing transcript is a true, accurate, and complete

8 record of the testimony of the witness and of all

9 objections made at the time of the examination.

10

11 I further certify that I am neither related to

12 nor counsel for any party to the cause pending or

13 interested in the events thereof.

14

15 Witness my hand, I have hereunto affixed my

16 official seal this 10th day of August, 2010 at

17 Charleston, Charleston County, South Carolina.

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Margaret F. Barnett
 Notary Public
 My Commission expires
 February 22, 2020

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55:22 title [2] - 12:2, 33:21 TMS [1] - 46:25 today [6] - 15:21, 16:4, 16:6, 16:9, 16:19, 22:17 together [3] - 15:6, 17:10, 50:9 took [2] - 7:22, 8:2 top [4] - 24:4, 26:4, 26:6, 27:6 topics [1] - 65:14 towards [2] - 43:14, 47:13 tower [1] - 67:7 town [38] - 14:8, 15:11, 17:12, 22:12, 24:24, 26:12, 29:11, 29:13, 30:21, 32:1, 33:5, 38:19, 38:21, 38:23, 39:6, 39:7, 40:4, 42:22, 43:18, 44:3, 46:10, 46:13, 50:21, 52:18, 52:19, 56:11, 57:1, 57:4, 57:7, 58:4, 58:21, 62:14, 62:15, 63:19, 63:23, 64:19, 71:10 Town [84] - 3:12, 4:18, 4:22, 4:25, 5:24, 6:8, 11:23, 12:6, 12:25, 13:5, 13:9, 15:4, 15:7, 15:10, 15:23, 17:21, 18:2, 18:8, 18:24, 19:23, 20:7, 20:8, 20:15, 24:23, 29:5, 30:14, 30:17, 30:19, 30:25, 31:3, 31:7, 31:15, 33:21, 34:1, 35:5, 36:4, 37:12, 37:15, 37:19, 43:13, 44:8, 45:17, 47:23, 49:10, 54:3, 54:10, 54:21, 55:12, 55:16, 57:22, 58:24, 60:21, 61:6, 62:16, 63:7, 64:12, 64:13, 64:14, 64:20, 65:15, 65:19, 65:24, 66:1, 66:11, 66:16, 66:21, 68:19, 69:10, 70:25, 71:5, 71:22, 71:24, 73:23, 73:25, 74:1, 74:20, 74:25, 75:3, 75:6, 75:18, 76:3, 76:10, 76:15 TOWN [2] - 1:8, 2:10 Town's [7] - 35:12, 37:14, 37:15, 62:18, 67:18, 70:10, 75:1	town's [2] - 55:25, 59:7 Tract [2] - 67:1, 67:2 tract [10] - 15:11, 58:16, 58:17, 58:19, 58:21, 58:22, 59:17, 59:18, 64:8, 65:9 tracts [1] - 26:14 transcript [1] - 78:6 transfer [1] - 71:1 transferred [1] - 65:25 transition [1] - 58:6 transpired [1] - 58:14 Transportation [1] - 9:10 Treasurer [1] - 57:19 trial [1] - 5:7 tried [1] - 19:8 true [1] - 78:6 try [6] - 16:8, 20:21, 20:25, 46:9, 46:10, 69:16 trying [4] - 20:19, 24:24, 38:17, 42:18 turned [1] - 40:9 Two [1] - 31:6 two [13] - 10:14, 15:18, 25:9, 25:22, 35:10, 42:16, 50:8, 54:4, 57:9, 61:21, 63:19, 66:24, 71:22 two-sided [1] - 71:22 type [5] - 8:13, 11:9, 52:21, 56:2, 63:22 types [1] - 59:20 Typically [1] - 7:5	update [2] - 55:3, 55:19 updating [1] - 55:10 urban [1] - 7:18 US [9] - 30:12, 35:14, 38:13, 39:7, 39:8, 40:22, 41:7, 41:21, 42:6	wide [1] - 35:19 widely [1] - 62:13 William [2] - 5:17, 14:14 WILLIAM [2] - 1:8, 5:11 Wilson [4] - 16:22, 19:3, 34:7, 51:17 Wilson [1] - 3:15 wise [1] - 25:1 Witherbee [2] - 25:10, 25:23 Witness [1] - 78:12 WITNESS [24] - 22:6, 22:11, 27:22, 31:6, 34:20, 41:1, 41:13, 41:17, 41:25, 52:1, 56:5, 59:14, 65:19, 69:14, 70:24, 71:17, 71:21, 73:10, 73:17, 74:13, 75:9, 75:20, 76:10, 76:22 witness [3] - 70:5, 75:16, 78:7 won [1] - 9:14 Woodville [4] - 21:10, 21:15, 21:20, 22:13 word [1] - 62:1 works [3] - 25:12, 25:13, 29:10 workshops [1] - 62:12 WPC [1] - 22:25 wrap [2] - 58:13, 61:25 Wright [6] - 10:24, 11:6, 20:1, 20:6, 20:9, 20:11 write [2] - 26:8, 37:2 writes [1] - 29:2 writing [11] - 20:24, 30:15, 31:18, 39:16, 40:9, 40:10, 40:13, 41:18, 42:15, 45:16, 50:18 written [5] - 12:9, 26:21, 38:1, 39:24, 43:23 wrote [4] - 38:16, 39:11, 39:21, 45:15	10:15, 11:1, 11:22, 42:17, 46:6, 49:5, 53:14, 57:21, 73:25
Z				
zoned [3] - 52:14, 52:15, 52:16 Zoning [1] - 13:5 zoning [15] - 6:9, 6:25, 7:5, 9:18, 13:7, 14:7, 24:24, 52:18, 52:19, 52:20, 52:22, 60:17, 60:19, 60:22, 71:3				

MARGARET F. BARNETT
Independent Court Reporter
(843) 849-3007

AN ORDINANCE FOR THE TOWN OF AWENDAW
ORDINANCE NO. 09-09

AN ORDINANCE TO AMEND THE TOWN OF AWENDAW OFFICIAL
ZONING MAP TO CHANGE THE ZONING CLASSIFICATION OF PARCEL
TMS NO. 625-00-00-004, 006 & PART OF 041 LOCATED AT HWY 17 NORTH;

WHEREAS, The Town of Awendaw has the authority to amend the Official Zoning Map to change the zoning category shown on property as outlined in Article 1.3 of the Zoning Ordinance; and

WHEREAS, the Planning and Zoning Commission of the Town of Awendaw has recommended that the Zoning Map be amended;

NOW, THEREFORE, BE IT ORDERED AND ORDAINED BY THE COUNCIL OF THE TOWN OF AWENDAW, SOUTH CAROLINA, AND BY THE AUTHORITY OF SAID COUNCIL TO AMEND UNDER SECTIONS 6-29-340 AND 6-29-760 OF THE SOUTH CAROLINA CODE OF LAWS, THE TOWN OF AWENDAW OFFICIAL ZONING MAP:

Section 1. The property known as the Nebo Tract, TMS No. 625-00-00-004, 006 and approximately 21 acres of 041, located at Highway 17 North adjacent to Mt. Nebo AME Church, and containing approximately 359.51 acres is hereby rezoned from unzoned to Planned Development (PD) zoning classification.

Section 2. The uses allowed shall be as shown on the Nebo Settlement Development Standards approved by Awendaw Town Council on October 1st 2009.

Section 3. This change in zoning classification does not provide for the issuance of a Building Permit for construction of any structures. Prior to issuance of any permits for construction, plans must be submitted to the Town of Awendaw as outlined in the Nebo Settlement Development Standards.

1

**PLAINTIFF'S
EXHIBIT**

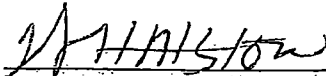
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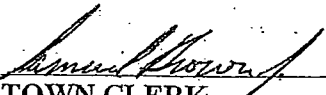
AN ORDINANCE FOR THE TOWN OF AWENDAW
ORDINANCE NO. 09-09

(continued)

Section 4. This Ordinance shall become effective upon ratification of the Town Council of Awendaw.

PASSED, APPROVED AND ADOPTED BY THE COUNCIL FOR THE TOWN
OF AWENDAW ON THIS 1st day of October, 2009.


MAYOR


TOWN CLERK

FIRST READING: September 8th 2009

SECOND READING: October 1st 2009

AN ORDINANCE FOR THE TOWN OF AWENDAW
ORDINANCE NO. 09-10

AN ORDINANCE APPROVING A DEVELOPMENT AGREEMENT FOR NEBO TRACT, TMS # 625-00-00-004, 006, & PART OF 041 PURSUANT TO THE SOUTH CAROLINA LOCAL GOVERNMENT DEVELOPMENT AGREEMENT ACT AUTHORIZING THE MAYOR OF THE TOWN OF AWENDAW, SOUTH CAROLINA TO EXECUTE SAID DEVELOPMENT AGREEMENT

WHEREAS, the South Carolina Local Government Development Agreement Act, South Carolina Code of Laws, Title 6, Chapter 31 (1976, as amended) Sections 6-31-10 through 6-31-160 (the "Act"), authorizes local governments to enter into development agreements with a developer as therein defined; and

WHEREAS, EBC LLC D/B/A EBCSC LLC, (the "Property Owner") owns certain lands suitable for mixed-use development; and

WHEREAS, pursuant to the Act, the Town of Awendaw ("Town") is authorized to enter into binding development agreements with developers having legal or equitable interests in real property; and

WHEREAS, the Town and the Property Owner have now concluded their negotiations with respect to the terms for a development agreement for the property owned by the Property Owner.

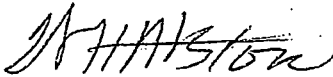
NOW, THEREFORE, BE IT ORDAINED by the Town of Awendaw Council, in a meeting duly assembled authorizes the Mayor to execute the development agreement, in substantially the form attached hereto as Exhibit A, and the Mayor's execution of such development agreement shall be conclusive evidence of such approval.

AN ORDINANCE FOR THE TOWN OF AWENDAW
ORDINANCE NO. 09-10

(continued)

ADOPTED this 1st day of October, 2009.

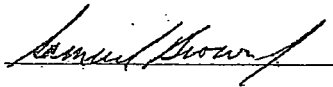
TOWN OF AWENDAW, SOUTH CAROLINA



William H. Alston
MAYOR
TOWN OF AWENDAW

(SEAL)

ATTEST:



Clerk of Council

First Reading:	September 8, 2009
Second Reading:	October 1, 2009
First Public Hearing:	August 24, 2009
Second Public Hearing:	September 8, 2009
Third Public Hearing:	October 1, 2009

AN ORDINANCE FOR THE TOWN OF AWENDAW
ORDINANCE NO. 09-11

AN ORDINANCE TO AMEND THE TOWN OF AWENDAW 2004
COMPREHENSIVE PLAN TO ADD THE NEBO TRACT, TMS NO. 625-00-00-
004, 006, AND PART OF 041 LOCATED ON HWY 17 NORTH;

WHEREAS, The Town of Awendaw has the authority to amend the Official
Comprehensive Plan as outlined in Article 1.3 of the Zoning Ordinance; and

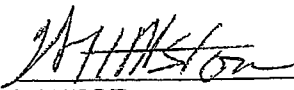
WHEREAS, the Planning and Zoning Commission of the Town of Awendaw
has recommended that the Comprehensive Plan be amended;

NOW, THEREFORE, BE IT ORDERED AND ORDAINED BY THE
COUNCIL OF THE TOWN OF AWENDAW, SOUTH CAROLINA, AND BY THE
AUTHORITY OF SAID COUNCIL TO AMEND UNDER SECTIONS 6-29-510-
530 AND 6-29-720 OF THE SOUTH CAROLINA CODE OF LAWS, THE TOWN
OF AWENDAW OFFICIAL ZONING MAP:

Section 1. The property known as the Nebo Tract, TMS No. 625-00-00-004, 006 and
approximately 21 acres of 041 located at Highway 17 North adjacent to Mt. Nebo AME
Church, and containing approximately 359.51 acres is hereby added to the
Comprehensive Plan as a mixed use Planned Development with densities and uses as
outlined in the Nebo Settlement Development Standards approved by Town Council on
October 1st 2009.

Section 2. This Ordinance shall become effective upon ratification of the Town Council
of Awendaw.

PASSED, APPROVED AND ADOPTED BY THE COUNCIL FOR THE TOWN
OF AWENDAW ON THIS 1st day of October, 2009.


MAYOR


TOWN CLERK

FIRST READING: September 8, 2009

SECOND READING: October 6, 2009

SCHEDULE A

Fairlawn Nebo Tract:

All that parcel or tract of land, situate in Charleston County and State of South Carolina, containing 99 acres, more or less, fronting on Highway #17 North, in Christ Church Parish, butting and bounding to the North on lands formerly of Clayfield Plantation, now known as Fairlawn Plantation, and U.S. Forest Service; to the East by lands formerly of Clayfield Plantation, now of the Georgia-Pacific Corporation and known as the Friday-Reid Tract; to the South on lands formerly of Edward M., Emily Kirk and William B. Moore, now U.S. Forest Service; and to the West on lands formerly of Riley and J.T. Freeman, now U.S. Forest Service. This tract is designated on the Auditor's Tax Map for Charleston County as Tax Map Parcel Number 625-00-00-004.

ALSO: All that certain piece, or parcel of land, being a portion of the Plantation known as Clayfield, formerly sold to Bernhard H. Bequest by Miss Charlotte Smith; measuring and containing according to a recent survey 239 acres, a little more or less fronting on Highway #17 North, in Christ Church Parish, butting and bounding North by lands formerly of the said Clayfield Plantation, now U.S. Forest Service; to the East on lands formerly of Clayfield Plantation, now U.S. Forest Service; to the South on U.S. Highway #17 and lands of the Mt. Nebo Church; and to the West on lands of Mt. Nebo Church and lands formerly of R.M. Venning, now U.S. Forest Service. This tract is designated on the Auditor's Tax Map for Charleston County as Parcel Number 625-00-00-006.

These tracts being the identical properties conveyed to Anne Marie Carton Boardman Trust under the Elizabeth Beidler Carton Trust U/A/D May 9, 1930 by deed of Congaree-Carton Limited Partnership dated November 27, 1989 and recorded in the Office of the Register of Deeds for Charleston County in Book H194, at page 71.

Fairlawn Tract I-B

All that tract of land containing 1,866.1 acres, more or less, situate in Christ Church Parish, Charleston County, South Carolina, being a portion of Fairlawn Plantation and being more particularly shown and delineated as Tract I-B as shown on a compilation plat of "Fairlawn" by Julian B. Allen, RLS, dated August 12, 1983, and recorded in the RMC Office of Berkeley County in Plat Cabinet I, page 135. This property bears Charleston County Tax Map Parcel Number 625-00-00-041.

This conveyance is subject to all visible and recorded covenants, rights of way and easements affecting said property including those matters set forth in the above referenced deed of Boise Cascade Timberlands-Southeast to Congaree-Carton Limited Partnership.

These tracts being the identical properties conveyed to Anne Marie Carton Boardman Trust under the Elizabeth Beidler Carton Trust U/A/D May 9, 1930 by deed of Congaree-Carton Limited Partnership dated November 27, 1989 and recorded in the Office of the Register of Deeds for Charleston County in Book H194, at page 71.

STATE OF SOUTH CAROLINA)
 CHARLESTON)
 COUNTY OF ~~SUMTER~~)

AFFIDAVIT FOR EXEMPT TRANSFER

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on the back of this affidavit and I understand such information.
2. The property being transferred is located at Christ Church Parish, Fairlawn Plantation,
 bearing Charleston County Tax Map Number 625-00-00-004, 006, 0041,
 was transferred by Anne Marie Carton Boardman to EBCSC LLC on
October 21, 1999 Trust under the Elizabeth Beidler
 Caron Trust U/A/D dated May 9, 1930.

3. The deed is exempt from the deed recording fee because (See Information section of affd):
See No. 8: Transferring realty to LLC (as trust beneficiary - sole member of LLC)
No consideration paid

4. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Attorney

5. I fully understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

John E. James, III
 Responsible Person Connected with the Transaction

John E. James, III

Print or Type Name Here

SWORN to before me this 11th
 day of April, 19 2000
Walter J. Venable
 Notary Public for South Carolina
 My Commission Expires: 12/31/03

Richardson v James

P.O. Box 1716

Sumter, SC 29151

(c)

h

O.K.
Grandfather's name
John James

h

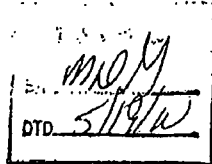
BK R 347PG365

FILED

R347-360

2000 MAY 17 PM 12:41

CHARLIE LYBRAND
REGISTER
CHARLESTON COUNTY SC



Recording

Fee 10.00

State

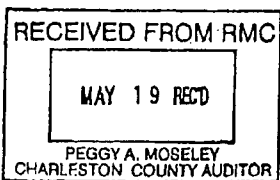
Fee

County

Fee

Postage

TOTAL 10.00



WITNESS, my hand and seal this 21 day of October, in the year of our Lord

One Thousand Nine Hundred Ninety-nine (1999).

SIGNED SEALED AND DELIVERED IN THE PRESENCE OF:

Witnesses:

Maria J. Nassos
Margaret EnMayer

Anne Marie Carton Boardman
Anne Marie Carton Boardman, as Trustee for
Anne Marie Carton Boardman* under the
Elizabeth Beidler Carton Trust U/A/D May 9,
1930.

STATE OF (Illinois)

PROBATE

COUNTY OF Salce

PERSONALLY appeared before me the undersigned witness who being duly sworn says that (s)he saw the within named Anne Marie Carton Boardman, as Trustee for Anne Marie Carton Boardman* under the Elizabeth Beidler Carton Trust U/A/D May 9, 1930, her act and deed, deliver the within written deed and that (s)he with the other witness witnessed the execution thereof.

*Trust

Maria J. Nassos

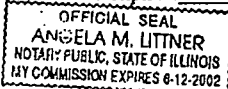
SWORN to before me this

21st day of October, 1999.

Angela M. Littner

Notary Public for ILLINOIS

My Commission Expires: 6-12-2002



GRANTEE'S ADDRESS: Co Shaw, McLeod, Belser and Hurlbutt, Inc.

Post Office Box 1919

Sumter, South Carolina 29151

TITLE NEITHER EXAMINED NOR CERTIFIED BY RICHARDSON & JAMES.

Tract: Fairlawn Nebo
Fairlawn 1-B

Please return to: RICHARDSON & JAMES (JEJ)

STATE OF SOUTH CAROLINA)
 TITLE TO REAL ESTATE
COUNTY OF CHARLESTON)

KNOW ALL MEN BY THESE PRESENTS, that Anne Marie Carton Boardman Trust under the Elizabeth Beidler Carton Trust U/A/D May 9, 1930, in the State aforesaid, for and in consideration of the sum of Five and 00/100ths (\$5.00) Dollars and no other consideration, to it in hand paid at and before the sealing of these presents by EBCSC LLC, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and released and by these presents does grant, bargain, sell and release unto the said EBCSC LLC, its successors and assigns forever:

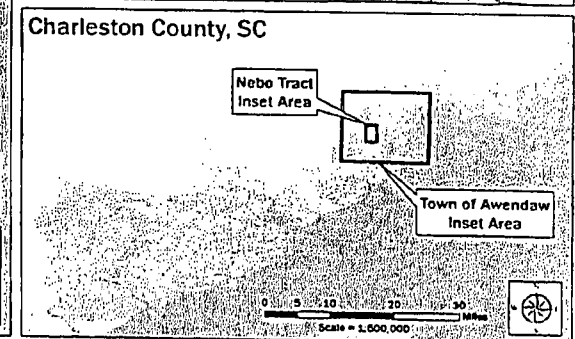
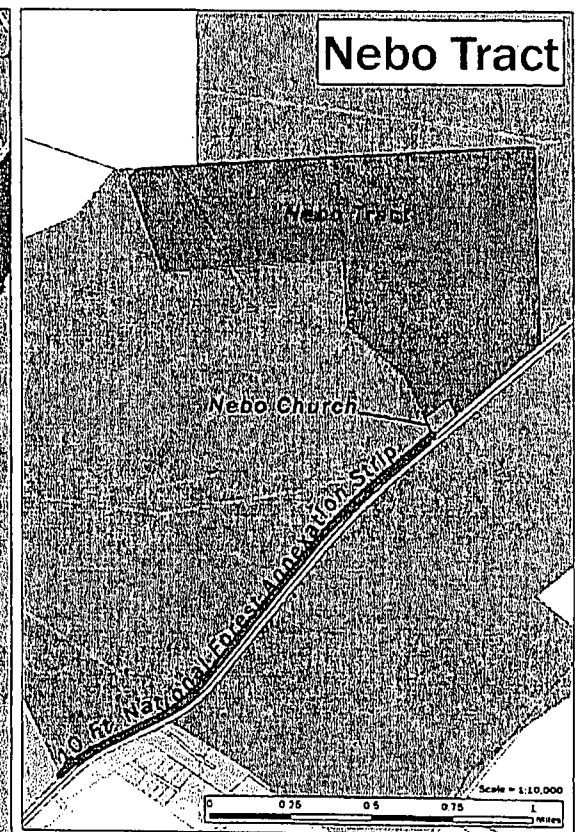
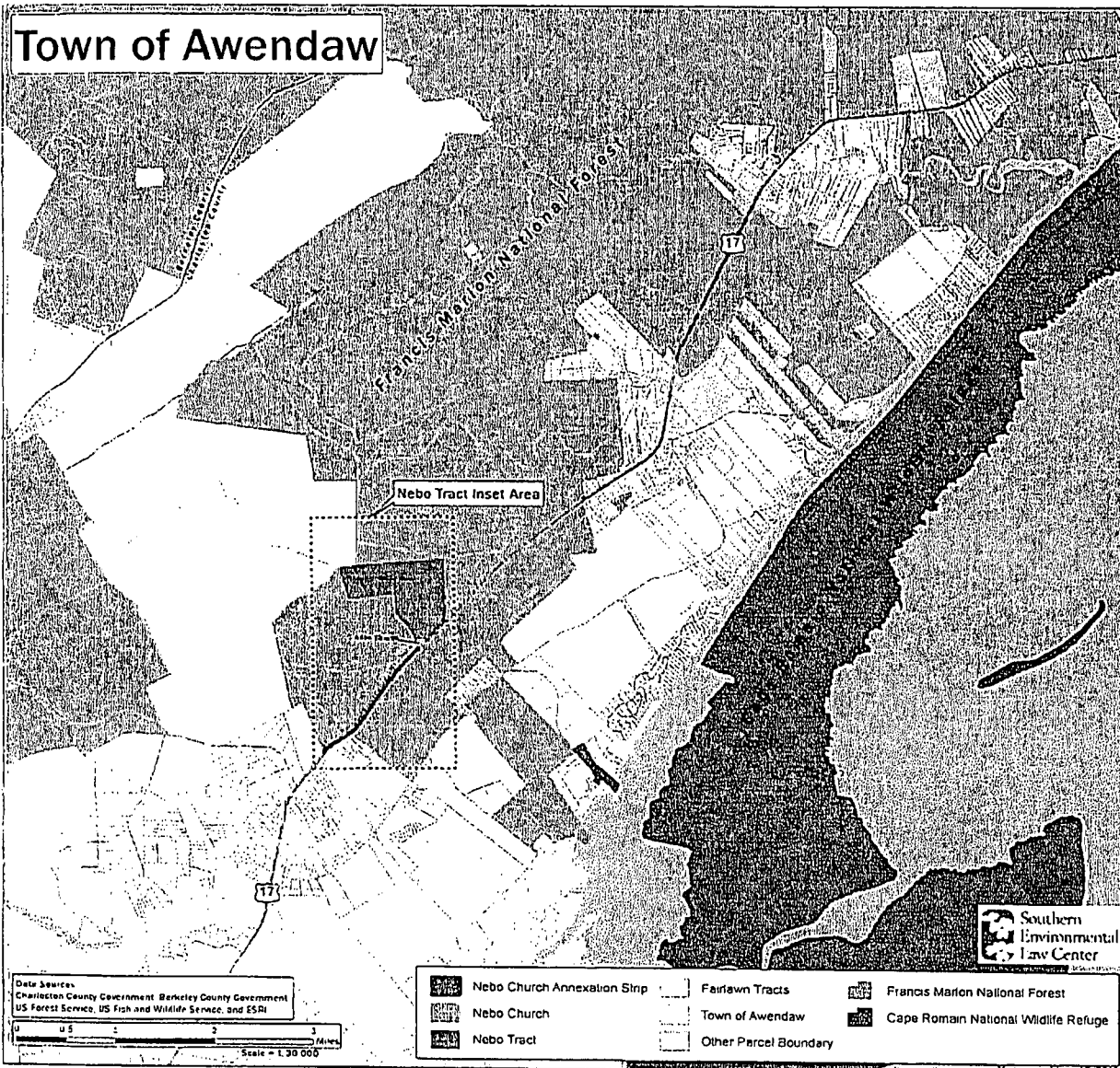
See Schedule A Attached

This conveyance is subject to all visible and to all recorded easements, rights-of-way and restrictions affecting the above described property.

Together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto said EBCSC LLC, its successors and assigns forever.

And Anne Marie Carton Boardman Trust under the Elizabeth Beidler Carton Trust U/A/D May 9, 1930, does hereby bind itself, its successors and assigns, to warrant and forever defend all and singular the said premises unto the said EBCSC LLC, its successors and assigns forever from and against itself and its successors and assigns and all other persons whomsoever lawfully claiming or to claim the same, or any part thereof.



**PLAINTIFF'S
EXHIBIT**

//

04-03

100 Percent Petition Form

TO THE MAYOR AND COUNCIL OF THE CITY/TOWN OF AWENDAW

The undersigned, being 100 percent of the freeholders owning 100 percent of the assessed value of the property in the contiguous territory described below and shown on the attached plat or map, hereby petition for annexation of said territory to the Town by ordinance effective as soon hereafter as possible, pursuant to South Carolina code Section 5-3-150(3).

The territory to be annexed is described as follows:

This property owned by the Trustee Board of Mt. Nebo AME Church is located at 5600 Hwy 17 North. This property is in Charleston County and is identified by the Charleston County Assessor's Office as Tax Map No. 625-00-00-005. This is a total of 3.12 acres.

[Signature] 6238 MAXVILLE Rd Awendaw S.C. 6-30-03
Signature Street Address, City Date

Fred GREEN JR
Print Name

[Signature] 6304 Maxville Rd 6/30/03
Signature Street Address, City Date

Robert L. Green
Print Name

No. of Residents

FOR MUNICIPAL USE:

Petition received by Felisha Woodberry, Date 4-2-04

Description and Ownership verified by Felisha Woodberry, Date 4-2-04

Recommendation: _____

PLAINTIFF'S
EXHIBIT

12

By: Felisha Woodberry, Date 4-2-04

1.D. / 13

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

LYNNE VICARY, KENT PRAUSE, and
SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,

Plaintiffs,

v.

TOWN OF AWENDAW, and EBC, LLC,

Defendants.

CASE. NO. 09-CP-10-7399

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2011 MAR 22 PM 11:10

AFFIDAVIT OF PAUL L. BRADLEY

PERSONALLY APPEARED BEFORE me Paul L. Bradley, who, after being duly sworn, deposes and says that:

1. I am the Forest Supervisor of the Francis Marion and Sumter National Forests in South Carolina. In my role as Forest Supervisor for the United States Forest Service (USFS), I am responsible for the management of the National Forests within the state of South Carolina. My office address is: USDA Forest Service, Francis Marion & Sumter National Forests, 4931 Broad River Road, Columbia, South Carolina 29212.

2. I am a 35-year federal employee and have spent the majority of my career working for the USFS. Previously, I have served as deputy forest supervisor on the Chattahoochee and Oconee National Forests in Georgia for a little more than two years. Before that, I was a district ranger for 17 years on the National Forests in North Carolina. I began my career within the USFS in 1981, working in Colorado on the White River National Forest both as a district minerals, lands and recreation staff officer and forest outdoor recreation planner. I have also worked for the U.S. Department of the Interior as a biologist and as a staff assistant in the

The Forest also is a popular destination for bird watching, nature study, hiking, walking, education, bicycling, and other recreational activities.

8. Due to the numerous benefits and values that the Francis Marion provides to the public, the USFS believes that it is important for the Court to understand underlying claims in this lawsuit. The USFS neither supports nor objects to the annexation of any property into the town so long as such annexation abides by the procedures provided by law. Although the USFS neither objects to nor supports lawful annexations, it is important for the Court to be informed that the actions of communities adjacent to National Forests have the potential to affect the ability of the USFS to effectively manage the Forest in ways that are sustainable for the long-term and most effective for the public. As communities approve denser development to occur adjacent to the Forest, it becomes increasingly difficult, for the USFS to utilize important natural resource and wildlife habitat management tools, such as prescribed fire, to attain its mission to effectively manage the Forest for the benefit of the public. For these reasons and others, the USFS considers the issues and claims raised in this lawsuit to be of significant public importance.

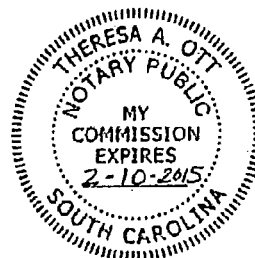
I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

FURTHER AFFIANT SAYETH NOT.

Paul L. Bradley
Paul L. Bradley

SWORN and subscribed to before me
this 17th day of March 2011.

Theresa A. Ott (L.S.)
Notary Public for South Carolina
My Commission Expires: Feb. 10, 2015



104-225-100

EXHIBIT "A"



United States
Department of
Agriculture

Forest
Service

Francis Marion
and Sumter
National Forests

1835 Assembly Street, Room 333
Columbia, South Carolina 29201
(803) 765-5222

Reply To: 5400

Date: May 3, 1994

Honorable William E. Alston
Mayor of Awendaw
647C Hwy 17 North
Awendaw, SC 29429

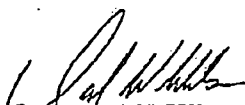
Dear Mayor Alston:

The Forest Service has no objection to the Town of Awendaw's annexation of a ten-foot wide parcel of the Francis Marion National Forest along Door and Sewee Roads, and U.S. Highway 17 northerly to Lofton Road and southerly to the National Forest boundary in Charleston County; also a ten-foot wide strip starting at Awendaw Church extending southeasterly along the National Forest boundary to Highway 17 and continuing northeasterly along the National Forest boundary to the Wando River; additionally, a ten-foot wide strip of land along the National Forest boundary, which is adjacent to private parcels on the north side of Highway 17, from Awendaw Church northeasterly to Lofton Road.

It is our understanding that this action will not encumber National Forest management now or in the future. Our stance of "no objection" is based on this understanding.

We appreciate the good working relationship with the Town of Awendaw, and look forward to working closely with you and the council members.

Sincerely,


DAVID W. WILSON
Forest Supervisor

cc:
FR, Wambaw



Caring for the Land and Serving People



United States
Department of
Agriculture

Forest
Service

Francis Marion and
Sumter National Forests

4931 Broad River Road
Columbia, SC 29212
803-561-4000

File Code: 5400

Date: February 16, 2011

Honorable Samuel N. Robinson
Mayor
Town of Awendaw
6971 Doar Road
PO Box 520
Awendaw, SC 29429

Dear Mayor Robinson:

The purpose of this letter is to clarify the position of the USDA Forest Service as stated on May 3, 1994, by Forest Supervisor, David W. Wilson, regarding annexation of portions of the Francis Marion National Forest. That letter states:

"The Forest Service has no objection to the Town of Awendaw's annexation of a ten-foot wide parcel of the Francis Marion National Forest along Doar and Sewee Roads, and U.S. Highway 17 northerly to Lofton Road and southerly to the National Forest boundary in Charleston County; also a ten-foot wide strip starting at Awendaw Church extending southeasterly along the National Forest boundary to Highway 17 and continuing northeasterly along the National Forest boundary to the Wando River; additionally, a ten-foot wide strip of land along the National Forest boundary, which is adjacent to private parcels on the north side of Highway 17, from Awendaw Church northeasterly to Lofton Road."

A complete copy of the letter is attached for your convenience.

The Forest Service neither objected to nor supported the decision by the Town of Awendaw to pursue annexation of the subject lands. More importantly, the Forest Service did not intend for the letter of May 3, 1994, to constitute a "petition of the federal government" to annex National Forest lands as required by S.C. Code Ann. § 5-3-140.

Please contact me at 803-561-4081 if you have any questions regarding this matter.

Sincerely,


PAUL L. BRADLEY
Forest Supervisor

Enclosure

cc: Orlando Sutton
Peggy Nadler

**PLAINTIFF'S
EXHIBIT**

14

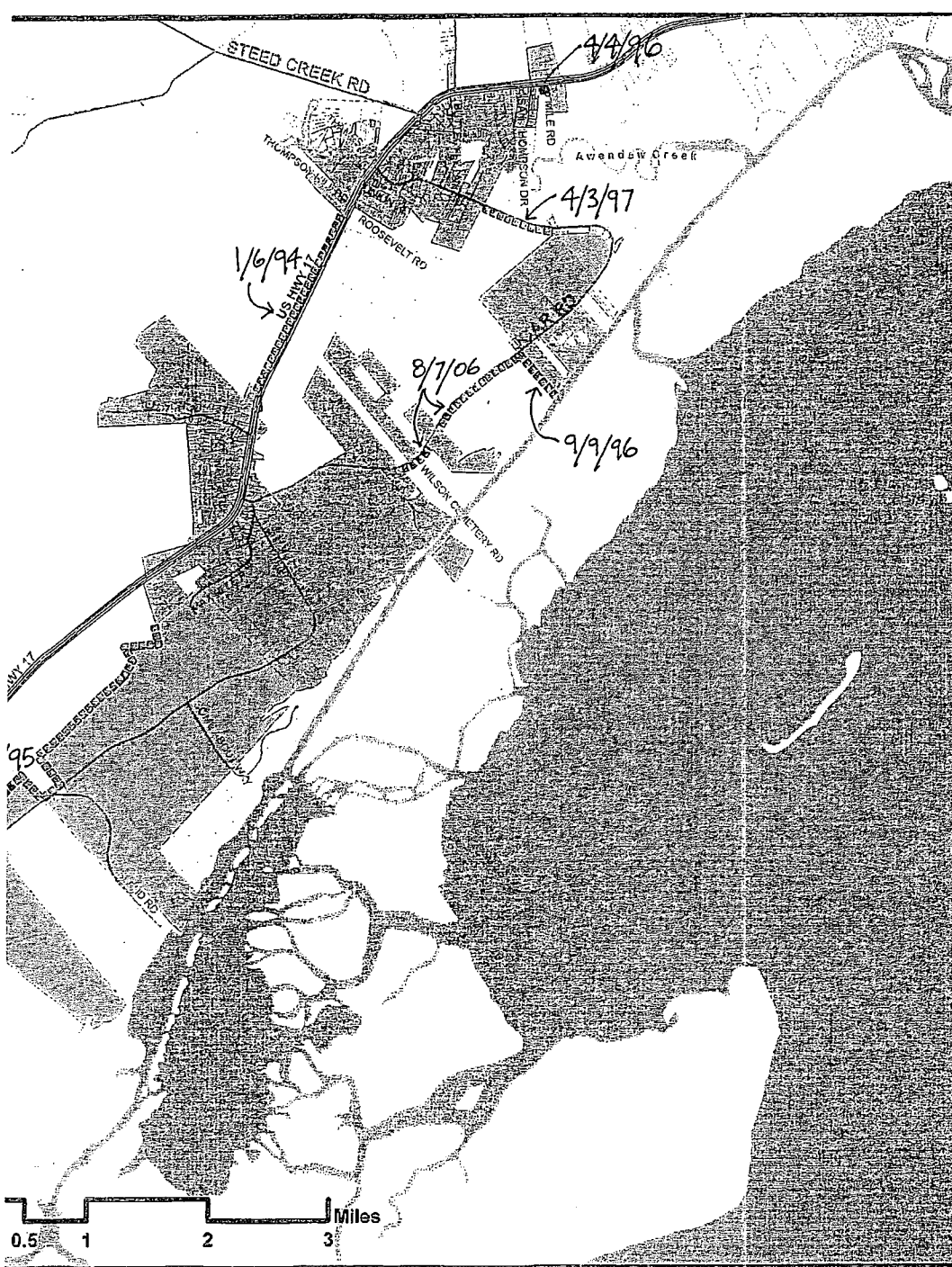


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**Map 2.2:
Annexation History**



Legend

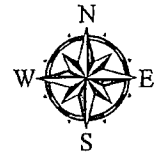
Annexation History

-  1992 - 1994
-  1995 - 1999
-  2000 - 2004
-  2005 - 2009

 10 Feet Annexation Strips in FMNF

Charleston County
Parcels

Berkley County
Parcels



BCDC G

BERKELEY-CHARLESTON-DORCHESTER
COUNCIL OF GOVERNMENTS
1322 Lockman Avenue, Suite 100
North Charleston, South Carolina 29405
(843) 629-0400 Fax: (843) 629-0305

Disclaimer: This map is a graphic representation of data obtained from various sources. All efforts have been made to warrant the accuracy of this map. However, the BCD Council of Governments disclaims all responsibility and liability for the use of this map.

Data Source: 2009 Charleston County GIS,
Town of Awendaw Planning, BCDCOG
Data path: V:\Planning Services\General
Planning Projects\Awendaw\2009 Comp
Plan GISMap 2.2 - Annexation History.mxd

**DEFENDANT'S
EXHIBIT**

2



United States
Department of
Agriculture

Forest
Service

Francis Marion
and Sumter
National Forests

1835 Assembly Street, Room 333
Columbia, South Carolina 29201
(803) 765-5222

Reply To: 5400

Date: May 3, 1994

Honorable William E. Alston
Mayor of Awendaw
6470 Hwy 17 North
Awendaw, SC 29429

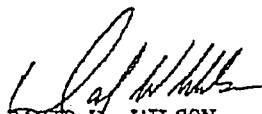
Dear Mayor Alston:

The Forest Service has no objection to the Town of Awendaw's annexation of a ten-foot wide parcel of the Francis Marion National Forest along Doar and Sewee Roads, and U.S. Highway 17 northerly to Lofton Road and southerly to the National Forest boundary in Charleston County; also a ten-foot wide strip starting at Awendaw Church extending southeasterly along the National Forest boundary to Highway 17 and continuing northeasterly along the National Forest boundary to the Wando River; additionally, a ten-foot wide strip of land along the National Forest boundary, which is adjacent to private parcels on the north side of Highway 17, from Awendaw Church northeasterly to Lofton Road.

It is our understanding that this action will not encumber National Forest management now or in the future. Our stance of "no objection" is based on this understanding.

We appreciate the good working relationship with the Town of Awendaw, and look forward to working closely with you and the council members.

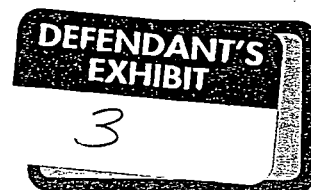
Sincerely,


DAVID W. WILSON
Forest Supervisor

cc:
DR, Wambaw



Caring for the Land and Serving People



FS-6200-28 (7-82)

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

LYNNE VICARY, KENT PRAUSE and
SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,

Plaintiffs,

vs.

CASE NO. 09-CP-10-7399

TOWN OF AWENDAW and EBC, LLC,

Defendants.

RULE 30(b)(6) COASTAL CONSERVATION LEAGUE
DEPOSITION OF: BY MEGAN J. DESROSIERS

DATE: November 9, 2010

TIME: 10:02 A.M.

LOCATION: Nexsen Pruet, LLC
205 King Street
Charleston, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: SANDRA K. BJERKE, RMR, RDR, CRR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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**DEFENDANT'S
EXHIBIT**

4

A. William Roberts, Jr. & Associates 800-743-DEPO
SCHEDULEDEPO.COM

1 national forest.

2 A. Yes.

3 Q. Is that right?

4 A. Yes.

5 Q. That you've described earlier, defined
6 earlier.

7 And is that one of the reasons that CCL
8 has challenged this development, because of the
9 danger that it will lead to more development in the
10 area?

11 A. Yes.

12 Q. All right. Now, are you generally
13 familiar with the Fair Lawn tract?

14 A. I'm generally familiar with it, yes.

15 Q. And are you generally familiar with
16 approximately how large it is?

17 A. I don't know the acreage number. I
18 know it's large, yes.

19 Q. Several thousand acres?

20 A. Yes, yes.

21 Q. All right. And is it in the
22 proclamation area of the national forest?

23 A. It is.

24 Q. And is it the fear of CCL that if Nebo
25 is developed, that it could lead to development of

1 Fair Lawn?

2 A. One of our fears, yes.

3 Q. And is that also a reason that this
4 lawsuit -- one of the reasons that this challenge
5 is being made against Nebo, is to prevent the
6 development of Fair Lawn tract?

7 A. Well, the primary reason is that we are
8 concerned about the development of Nebo's effect on
9 the Francis Marion.

10 Q. Of course.

11 A. But yes, always we have to look to the
12 future possibilities as well.

13 Q. And that is one -- at least one reason
14 why this challenge has been made?

15 MS. SALTZBURG: Objection. She's asked
16 and answered that.

17 THE WITNESS: Yes.

18 BY MR. TISDALE:

19 Q. Okay. Now -- all right. You've told
20 us, Megan, that the objection is being made to Nebo
21 because of the density and the necessity for
22 infrastructure. I understand that.

23 And I also understand you to be saying
24 that the larger issue has to do with future
25 development possibilities; right?

1 A. A little more than a year.

2 Q. Short time.

3 A. Yes.

4 Q. And she was at Georgetown?

5 A. She was in -- between Georgetown and
6 Charleston.

7 Q. All right. And Ms. Lareau, was she a
8 longtime employee or a short time?

9 A. She was a longtime employee.

10 Q. And you don't recall her position?

11 A. She was all different things. I think
12 when she left she might have been director of land
13 use.

14 Q. Okay. Now, one of the issues that
15 we're going to want to talk about in a few minutes
16 is the annexation situation. But before I get into
17 that, I wanted to ask you, one, does CCL own any
18 land in Awendaw?

19 A. No.

20 Q. All right. I understand that -- and
21 tell me if this is wrong. Just trying to save a
22 little time. That the annexation objection is
23 really to the annexation of a 10-foot strip of land
24 between -- that's owned by the Forest Service; is
25 that right?

1 A. The league.

2 Q. Who did you make it to?

3 A. The town.

4 Q. Town of Awendaw?

5 A. Yes.

6 Q. Did any of the records you have
7 reviewed, any of the knowledge you have indicate
8 whether anyone appealed from the annexation of the
9 10-foot strip back in 2004?

10 A. I didn't see any information about that
11 in the documents I reviewed.

12 Q. Okay. Do you -- so as far as you know,
13 was there an appeal or not an appeal?

14 A. As far as I know, there wasn't, but
15 that doesn't mean there wasn't. I just don't know
16 about it.

17 Q. You don't know of one.

18 A. Right.

19 Q. And is it -- are we clear that this
20 10-foot strip, to your knowledge, was then and is
21 now owned by the Forest Service?

22 A. Yes.

23 Q. U.S. Forest Service?

24 A. Yes, to my knowledge.

25 Q. And there's certainly not any

1 contention, is there, or is there any contention by
2 CCL that it owns the 10-foot strip?

3 A. No.

4 Q. No.

5 A. We don't own that 10-foot strip.

6 Q. And Mr. Prause doesn't own it, does he?

7 A. No.

8 Q. And Ms. Vicary doesn't own it, does
9 she?

10 A. No.

11 Q. Anytime you want to take a break, get
12 some water or something, we can.

13 A. Thank you.

14 Q. Now, I'm not asking for a legal
15 conclusion now, but is it your understanding,
16 Megan, that if that 10-foot strip annexation in
17 2004 was valid -- just if it was. Not saying
18 whether it was or wasn't. But if it was, then the
19 annexation, leading to the annexation of Nebo
20 tract, would also be valid?

21 MS. SALTZBURG: I'm going to object
22 just to the extent it is a legal question.

23 THE WITNESS: I mean, I guess so. I
24 mean, as far as I know, yes, but --

25 BY MR. TISDALE:

1 A. I don't.

2 Q. Okay. Have you been to Awendaw town
3 meetings?

4 A. I have not.

5 Q. Okay. Have you been to any other
6 Awendaw meetings with the government of Awendaw?

7 A. I don't think so.

8 Q. How many members of CCL reside in
9 Awendaw, if any?

10 A. I don't know.

11 Q. Do you have an estimate?

12 A. No.

13 Q. Okay. Is that something that CCL could
14 discern, or isn't it possible for CCL to figure out
15 how many of its members reside in Awendaw, if any?

16 A. We could figure that out.

17 Q. How would that process take place?

18 A. We have a database.

19 Q. And you would just run a search?

20 A. Yes.

21 Q. Has that ever been done, to your
22 knowledge?

23 A. It gets done from time to time, but it
24 hasn't been done recently.

25 Q. Okay. Does CCL have members who own

1 property in Awendaw?

2 A. As far as I know, yes.

3 Q. How do you --

4 A. The membership changes from month to
5 month according to whose membership lapses or whose
6 memberships gets paid. So the last time I checked
7 we did, but I don't know if we do today. I think
8 we do, but --

9 Q. How long ago would it have been that
10 you checked, just so I have some context.

11 A. Probably about eight or nine months
12 ago.

13 Q. Okay. Has CCL incurred any damages as
14 a result of the development agreement that you're
15 aware of?

16 A. CCL hasn't incurred damages any more
17 than another resident of the State of South
18 Carolina might incur if the Francis Marion is
19 damaged.

20 Q. I'm sorry. I don't understand.

21 A. The Francis Marion is a public
22 resource. Residents of South Carolina incur
23 damages if that resource is damaged.

24 Q. Diminished?

25 A. Yes.

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

LYNNE VICARY, KENT PRAUSE and SOUTH
CAROLINA COASTAL CONSERVATION LEAGUE,

Plaintiffs,

vs. CASE NO. 09-CP-10-7399

TOWN OF AWENDAW and EBC, LLC,

Defendants.

DEPOSITION OF: WALTER KENT PRAUSE, III

DATE: September 27, 2010

TIME: 9:00 a.m.

LOCATION: NEXSEN PRUET, LLC
205 King Street
Charleston, SC

TAKEN BY: Counsel for Defendant

REPORTED BY: Karen V. Andersen,
Registered Professional Reporter

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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**DEFENDANT'S
EXHIBIT**

5

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SCHEDULEDEPO.COM

1 A. I would say, as the crow flies, probably
2 two miles.

3 Q. East of 17?

4 A. Correct.

5 Q. Are you close to the water?

6 A. On the intracoastal waterway.

7 Q. Now, the issue that brings us here today
8 has to do with tract called the Nebo tract.

9 A. Right.

10 Q. You are familiar with that, aren't you?

11 A. Yes.

12 Q. And where is the Nebo tract in relation to
13 where you turn off to go down Seewee Road to get to
14 your house?

15 A. I would estimate it's probably midway
16 between Seewee Road and Doar Road, which is the other
17 way you can get to my house from Highway 17.

18 Q. Well, how far, as the crow flies, would
19 your house be from the Nebo tract, let's call it?

20 A. Probably five miles.

21 Q. Okay. And is the Nebo tract, the Nebo
22 Church, north of where you turn to go down Seewee
23 Road?

24 A. Yes.

25 Q. On 17?

1 other --

2 A. Well, as is stated in here, I live in the
3 town of Awendaw.

4 Q. Right.

5 A. I moved there for a particular reason: I
6 enjoy the lifestyle that is there; I enjoy the
7 quality of life; and the abundance of natural
8 resources provided by the national forest and the
9 Cape Romain National Wildlife Refuge, all of which
10 are affected by growth and development; and to what
11 extent that transpires has an effect upon those
12 natural resources and the quality of life of people
13 who live there.

14 Q. Right.

15 A. I like to hike and hunt and fish. I like
16 the rural character of where I live. The extent of
17 growth and development, as I mentioned, has an effect
18 upon those resources.

19 Q. Right.

20 A. And not just isolated, but from a ways
21 off. For example, particulate matter from a
22 coal-fired power plant can travel across different
23 states. It comes to an area there, depending upon
24 the type of development that is allowed to happen in
25 Awendaw, could actually promote it. The amount of

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

LYNNE VICARY, KENT PRAUSE and SOUTH
CAROLINA COASTAL CONSERVATION LEAGUE,

Plaintiffs,

vs. CASE NO. 09-CP-10-7399

TOWN OF AWENDAW and EBC, LLC,

Defendants.

DEPOSITION OF: LYNNE VICARY
DATE: September 27, 2010
TIME: 11:45 a.m.
LOCATION: NEXSEN PRUET, LLC
205 King Street
Charleston, SC
TAKEN BY: Counsel for Defendant
REPORTED BY: Karen V. Andersen,
Registered Professional Reporter

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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Columbia, SC (803) 731-5224	Greenville, SC (864) 234-7030	Charlotte, NC (704) 573-3919

**DEFENDANT'S
EXHIBIT**

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1 speculation.

2 THE WITNESS: So do I.

3 BY MR. FORD:

4 Q. Do you know or do you not know how much it
5 would be violated by the development?

6 A. I do not know.

7 Q. And do you or do you not know specifically
8 how much pollution you cited to would be increased by
9 the development?

10 MR. DeSCHERER: Same objection.

11 BY MR. FORD:

12 Q. Or do you just have a general idea that
13 would it would increase?

14 A. I have a general idea that it would
15 increase.

16 Q. Do you base that on anything more
17 specific, or just more people, more pollution?

18 A. Logic, yeah.

19 Q. I need you to answer.

20 A. It's logical that the more people you
21 have, the more refuse you are going to create. You
22 are going to burn more electricity, more garbage, run
23 more engines, lawnmowers.

24 Q. How far is the Nebo Church and Nebo tract
25 from your house?

1 A. As the crow flies, I would say probably
2 nine miles, eight or nine.

3 Q. You still think it would have a direct
4 impact on all these quality of life issues that
5 you've already mentioned?

6 A. Yes.

7 Q. Are you receiving any compensation or
8 payment for your participation in this lawsuit?

9 A. No, I am not.

10 Q. Are you receiving any reimbursement of any
11 kind?

12 A. No, I am not.

13 Q. Other than what we discussed here, have
14 you incurred any other damages, or are you afraid of
15 incurring any other damages? I just don't want to be
16 surprised later by something coming up that I haven't
17 asked you about as far as the damages you are
18 claiming you might incur related to these matters.

19 A. Well, this has been kept fairly quiet, and
20 we've been told not to discuss it, and I would hate
21 for a big thing to come out about it and my name to
22 be splashed in the paper and to come out and find my
23 tires slashed or something to that effect.

24 Q. What is "this" in that sentence, "this"
25 lawsuit?

1 said, just go in and speak from the heart.

2 Q. Well, you do understand that my client is
3 a party, a defendant in this lawsuit, and you do
4 understand that my client claims to have been damaged
5 greatly by this lawsuit. Do you understand that?

6 A. Yes.

7 Q. And the only reason I'm asking you these
8 questions is to find out why you think that. That is
9 the only reason. So it would seem -- and I'm making
10 a speech now that Mr. DeScherer is getting ready to
11 object to -- that we are entitled to answers about
12 that.

13 A. Okay. Why do I think that your client has
14 been damaged?

15 Q. No. My question to you was: How have you
16 been damaged and injured by the agreement and
17 annexation between the town and my client?

18 A. How have I been damaged?

19 Q. Yes.

20 A. I believe it's going to affect the quality
21 of life that I have in Awendaw.

22 Q. Okay.

23 A. I believe, as I stated before, that taxes
24 are going to go up. There's a real possibility that
25 I might be taxed out of my home.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CASE NO. 09-CP-10-7399

LYNNE VICARY, KENT)
PRAUSE, and SOUTH)
CAROLINA COASTAL)
CONSERVATION LEAGUE,)

Plaintiffs,)

vs.)

TOWN OF AWENDAW)
AND EBC, LLC,)

Defendants.)

30(b).(6)
DEPOSITION OF:
WILLIAM WALLACE

DATE: Thursday, July 22, 2010
TIME: 10:33 a.m.
LOCATION: Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC
REPORTER: Margaret F. Barnett
Professional Court Reporter
and Notary Public
(843) 769-0823

DEFENDANT'S
EXHIBIT

7

MARGARET F. BARNETT
Independent Court Reporter

1 I think that's it for us.

2 EXAMINATION

3 BY MS. JOWERS:

4 Q. Bill, I'm Amy Jowers. We've met before.
5 As you know, I represent EBC, LLC. I just have a
6 couple of questions for you. Referring back to the
7 annexation, 2004 annexation of the ten-foot strip and
8 the Nebo Church tract, was notice of that annexation
9 advertised in the normal way?

10 A. We don't normally advertise annexation
11 requests. The annexation, the notice that is given,
12 primarily, is put on the agenda for the Town Council.
13 The Town Council agenda is available for scrutiny 24
14 hours before each meeting is posted at the Town
15 Council, and certain entities like the Coastal
16 Conservation League receive copies of the agenda
17 either by e-mail or regular mail.

18 Q. To the best of your knowledge, did the
19 Forest Service appear at the town meetings and
20 hearings when the Town Council considered those
21 annexations?

22 A. No, they did not.

23 Q. Did the Forest Service take a position at
24 that time against those annexations?

25 A. They did not take a position against

MARGARET F. BARNETT
Independent Court Reporter

1 annexation, no.

2 Q. Did they contest them after the
3 annexations were done?

4 A. No.

5 Q. Did they appeal the annexation of the
6 ten-foot strip of land at that time?

7 A. No.

8 Q. Did the Forest Service appeal the
9 annexation of the Nebo Church tract?

10 A. No.

11 Q. To your knowledge, did anyone appeal
12 either of those annexations?

13 A. No.

14 Q. Switching topics just a little bit. How
15 has the development agreement between the Town and EBC
16 been breached at this point?

17 MR. FORD: Object to form. You can
18 answer.

19 THE WITNESS: The Town had certain things
20 that they were required to do as part of the
21 development agreement and the owners had certain
22 things. The owners have not been able to fulfil their
23 requirements. Primarily, for example, they were
24 required to donate land to the Town, and because of
25 the lawsuit, they have not transferred their

MARGARET F. BARNETT
Independent Court Reporter

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2009-CP-10-7399

Lynn Vicary, Kent Prause, and)
South Carolina Coastal Conservation)
League,)

Plaintiff,)

vs.)

Town of Awendaw,)

Defendant.)

**DEFENDANT TOWN OF AWENDAW'S
MOTION FOR DIRECTED VERDICT
ON THE ISSUE OF STATUTE OF
LIMITATIONS**

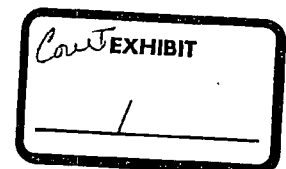
TO: W. JEFFERSON LEATH, ESQUIRE and CHRISTOPHER K. DeSCHERER, ESQUIRE as
ATTORNEYS FOR PLAINTIFFS

Defendant Town of Awendaw ("Awendaw"), by and through its undersigned attorney and pursuant to Rule 50(a) of the South Carolina Rules of Civil Procedure, hereby submits this Motion for directed verdict on the issue of statute of limitations. Defendant respectfully moves the Court for entry of an order directing a verdict in favor of Awendaw. In support of this motion Awendaw would show:

1. All the evidence viewed in its aspect most favorable to Plaintiffs shows as a matter of law that Plaintiffs have missed the 90-day deadline to challenge the 2004 annexations of two of the properties: the Ten-Foot Strip and the Nebo Church Tract.

FACTUAL BACKGROUND

This action involves the annexation of three properties by the Town of Awendaw, which Plaintiffs seek to invalidate. As background, in 2004 Awendaw annexed two properties: (1) a ten-foot strip of property contiguous with the Town's border that is owned by the United States Forest



Service (“Ten-Foot Strip”); and (2) a piece of property owned by the Mt. Nebo A.M.E. Church (“Nebo Church Tract”). *See Answer & Countercl. ¶ 75.* These properties were annexed by the “100% petition method” under S.C. Code § 5-3-150(3), which permits annexation when 100% of the annexed property owners permit the annexation (among other requirements). At that time, no appeal was taken by anyone. Those two properties have been part of Awendaw since 2004. *See id.*

Years later, in 2009, former Defendant EBC petitioned to have Awendaw annex a piece of property that EBC owns – called the “Nebo Tract” – by the 100% petition method. *See id. ¶ 69-71.* At the same time, EBC negotiated and entered into a Nebo Settlement Development Agreement (“Development Agreement”) with Awendaw. *See id. ¶ 68.* The Development Agreement allows EBC to develop and sell the Nebo Tract pursuant to certain terms negotiated with the Town. Awendaw adopted ordinances rezoning the Nebo Tract and amending Awendaw’s Comprehensive Plan to include the Nebo Tract. *See id.*

The individual Plaintiffs and representatives of Plaintiff Coastal Conservation League attended most, and perhaps all, of the public hearings and meetings conducted in connections with the 2009 proceedings.

Now, the Plaintiffs are contesting all three annexations and alleging violations of law in the rezoning of the properties. Plaintiffs also are contesting the approval of the Development Agreement and amendment to Awendaw’s Comprehensive Plan. *See Second Am. Compl. ¶ 1.* Plaintiff’s motivation in filing this suit is political: they seek to limit or prevent development in Awendaw.

LEGAL ARGUMENT

I. Plaintiff failed to contest the 2004 annexations of the Ten-Foot Strip and Nebo Church Tract within the time provided by the statute of limitations.

Section 5-3-270 provides:

When the limits of a municipality are ordered extended, no contest thereabout shall be allowed unless the person interested therein files, within sixty days after the result has been published or declared, with both the clerk of the municipality and the clerk of court of the county in which the municipality is located, a notice of his intention to contest the extension, nor unless, within ninety days from the time the result has been published or declared an action is begun and the original summons and complaint filed with the clerk of court of the county in which the municipality is located.

S.C. Code Ann. § 5-3-270.

The South Carolina Supreme Court has held that the “ninety-day deadline is the statute of limitations that usually applies in annexation matters.” *State ex rel. Condon v. City of Columbia*, 339 S.C. 8, 15, 528 S.E.2d 408, 411 (2000). Strict enforcement of the ninety-day limitations period is critical because it allows a municipality to move forward with certainty as to municipal boundaries. *See Mooney v. City of Greer*, 348 S.C. 184, 191, 558 S.E.2d 527, 531 n. 16 (Ct. App. 2002) (quoting *Hite v. Town of West Columbia*, 220 S.C. 59, 66, 66 S.E.2d 427, 430 (1951) (“[A]nnexation issues should be decided without undue delay, so that the town officials would be advised whether the affected area would become a part of the municipality. Many questions connected with municipal government, including that of taxation, would need to be known with reasonable promptness.”)). In *Town of Yemassee*, the Supreme Court emphasized the importance of the State’s policy on the finality of annexations and the statute of limitations governing annexations as contained in § 5-3-270. *See Town of Yemassee*, 391 S.C. 565, 707 S.E.2d 402, 409 (2011) (Ex. B).

In the present case, Plaintiffs – none of whom are owners of the Ten-Foot Strip or the Nebo Church Tract, and none of whom sought to contest the validity of the annexations of these parcels when they occurred in 2004¹ - now seek to challenge those annexations almost nine years later. Plaintiffs slept on, and waived, their ability to contest those annexations. Plaintiffs only now seek

¹ See Ex. G at 64:6-65:13(Wallace Dep.).

to challenge these earlier ordinances in order to further their political goals of preventing the development of the larger Fairlawn property. *See* Second Am. Compl. ¶ 20; Ex. A at 33:12-34:17 (Desrosiers Dep.). Given that the limitations period set forth in section 5-3-270 has long since expired, Plaintiffs' challenge to these annexations fails as a matter of law, and Defendant is entitled to a directed verdict in its favor on this issue.

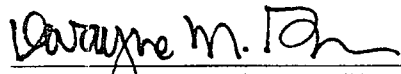
If Plaintiffs look to Judge Harrington's Order filed April 19, 2011 denying Defendants' Motion for Partial Summary Judgment as precedence in this case, it should be noted that "a denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial." *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994). The denial of summary judgment does not establish the law of the case; and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for directed verdict. *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993); *PPG Industries v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331 (Ct.App. 1988). *See also* Supreme Court of South Carolina Order, Appellate Case No. 2012-2111590, dated May 25, 2012. (Ex. H).

CONCLUSION

For these reasons, Defendant respectfully request that its Motion for Directed Verdict on the Issue of Statute of Limitations be granted.

[SIGNATURE BLOCK NEXT PAGE]

HAMPTON GREEN, LLC



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Attorney for Defendant Town of Awendaw

Charleston, South Carolina

15th

day of April, 2014

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2009-CP-10-7399

Lynn Vicary, Kent Prause, and
South Carolina Coastal Conservation
League,

Plaintiff,

vs.

Town of Awendaw,

Defendant.

**DEFENDANT TOWN OF AWENDAW'S
MOTION FOR DIRECTED VERDICT
ON THE ISSUE OF STANDING**

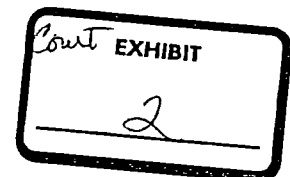
TO: W. JEFFERSON LEATH, ESQUIRE and CHRISTOPHER K. DeSCHERER, ESQUIRE as
ATTORNEYS FOR PLAINTIFFS

Defendant Town of Awendaw ("Awendaw"), by and through its undersigned attorney and pursuant to Rule 50(a) of the South Carolina Rules of Civil Procedure, hereby submits this Motion for directed verdict on the issue of standing. Defendant respectfully moves the Court for entry of an order directing a verdict in favor of Awendaw. In support of this motion Awendaw would show:

1. All the evidence viewed in its aspect most favorable to Plaintiffs shows as a matter of law that Plaintiffs lack standing to challenge the annexations of the three properties at issue because Plaintiffs are not owners of and do not have sufficient proprietary interests in or statutory rights to those properties. Nor does the annexation rise to the level of public concern necessary to satisfy the "public interest" exception to standing.

FACTUAL BACKGROUND

This action involves the annexation of three properties by the Town of Awendaw, which Plaintiffs seek to invalidate. As background, in 2004 Awendaw annexed two properties: (1) a ten-



foot strip of property contiguous with the Town's border that is owned by the United States Forest Service ("Ten-Foot Strip"); and (2) a piece of property owned by the Mt. Nebo A.M.E. Church ("Nebo Church Tract"). *See Answer & Countercl.* ¶ 75. These properties were annexed by the "100% petition method" under S.C. Code § 5-3-150(3), which permits annexation when 100% of the annexed property owners permit the annexation (among other requirements). At that time, no appeal was taken by anyone. Those two properties have been part of Awendaw since 2004. *See id.*

Years later, in 2009, former Defendant EBC petitioned to have Awendaw annex a piece of property that EBC owns – called the "Nebo Tract" – by the 100% petition method. *See id.* ¶ 69-71. At the same time, EBC negotiated and entered into a Nebo Settlement Development Agreement ("Development Agreement") with Awendaw. *See id.* ¶ 68. The Development Agreement allows EBC to develop and sell the Nebo Tract pursuant to certain terms negotiated with the Town. Awendaw adopted ordinances rezoning the Nebo Tract and amending Awendaw's Comprehensive Plan to include the Nebo Tract. *See id.*

The individual Plaintiffs and representatives of Plaintiff Coastal Conservation League attended most, and perhaps all, of the public hearings and meetings conducted in connections with the 2009 proceedings.

Now, the Plaintiffs are contesting all three annexations and alleging violations of law in the rezoning of the properties. Plaintiffs also are contesting the approval of the Development Agreement and amendment to Awendaw's Comprehensive Plan. *See Second Am. Compl.* ¶ 1. Plaintiff's motivation in filing this suit is political: they seek to limit or prevent development in Awendaw. They also seek to prevent the future development of another property, the Fairlawn property, of which the Nebo Tract is part of and which is owned in part by EBC. *See Second Am. Compl.* ¶ 20; Ex. A at 33:12-34:17 (Desrosiers Dep.).

LEGAL ARGUMENT

I. Plaintiffs lack standing to challenge the annexation of the properties.

Plaintiffs attempt to have this Court put the cart before the horse. They expend great energy in their Complaint arguing what they perceive to be defects in the annexation of the properties, while ignoring the threshold issue: standing. Prior to reaching the merits of a case, it is the obligation of a court to determine if the party has standing to bring the complaint. *See ATC South, Inc. v. Charleston County*, 380 S.C. 191, 194, 669 S.E.2d 337, 339 (2008) (“We are obligated before reaching the merits of the rezoning question to determine whether ATC has standing to press its complaint.”).

Before the Court are three annexation ordinances enacted pursuant to section 5-3-150(3) of the South Carolina Code Annotated, the 100% petition method. Under South Carolina Law, the ordinances have the presumption of validity. *See Bryant v. City of Charleston*, 295 S.C. 408, 411, 386 S.E.2d 899, 900 (1988). In an effort to establish standing, the Plaintiffs would have this Court look beyond the ordinances and weigh their validity. Further, Plaintiffs attempt to justify their standing by way of an attack on the methodology used in annexing the properties. *See Second Am. Compl.* ¶¶ 42–44, 47–50, 53–56. However, the Court cannot reach the validity of the annexation ordinances until the party challenging them can demonstrate that it has standing. *See State ex rel. Wilson v. Town of Yemassee*, 391 S.C. 565, 707 S.E.2d 402, 406 (2011) (citing *ATC South*, 380 S.C. at 194, 669 S.E.2d at 339) (copy attached as Ex. B).

Generally, standing can be achieved “(1) by statute; (2) through the rubric of ‘constitutional standing;’ or (3) under the ‘public importance’ exception.” *ATC South*, 380 S.C. at 195, 669 S.E.2d at 339. If a plaintiff fails to meet the requirements of any of these methods of acquiring standing, its claim fails, and the defendant is entitled to judgment as a matter of law as to the claims regarding

the annexations. *See Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994) (“Once it is determined a plaintiff has no standing to prosecute, the court must dismiss the action.”).

As discussed below, Plaintiffs do not meet these requirements.

A. Plaintiffs do not have statutory standing to challenge the annexations under § 5-3-150(3) because they are not owners of the properties and cannot show any infringement of their statutory rights of proprietary interests.

Plaintiffs do not have standing to challenge the annexations because they do not own any of the annexed properties. The properties were annexed by the 100% petition method, and “[i]n order to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights.” *State by State Budget & Control Bd. v. City of Columbia*, 308 S.C. 487, 489, 419 S.E.2d 229, 230 (1992) (holding Board had no standing to challenge annexation of five-foot strip of property because it was not an owner of such property).

In *St. Andrews Public Service District v. City Council of City of Charleston*, 349 S.C. 602, 564 S.E.2d 647 (2002), the South Carolina Supreme Court held that a party who does not reside or own property in an annexed area, and whose proprietary interests or statutory rights are not infringed, has no standing to challenge an annexation accomplished under the 100% petition method:

We now overrule *Quinn*, and hold that the only non-statutory party which may challenge a municipal annexation is the State, though a quo warranto action. In our view, the better policy is to limit “outsider” annexation challenges to those brought by the State “acting in the public interest.”

Id. at 648. Addressing the lower court’s questioning of the legality of the annexations, the Court reiterated that “the sole requirement for annexation is contiguity” and further reasoned that “[t]he wisdom of an annexation is a legislative, not judicial determination.” *Id.* at 605–606, 564 S.E.2d at 649. The South Carolina Supreme Court reinforced that holding:

In sum, we hold the circuit court properly rejected each of the Private Party Appellants' arguments in support of standing. An annexation by 100% petition may be challenged only by a person who "assert[s] an infringement of [his or her] own proprietary interests or statutory rights."

Town of Yemassee, 391 S.C. 565, 707 S.E.2d. 402, 408 (2011) (quoting *St. Andrews Public Service District*, 349 S.C. at 604, 564 S.E.2d at 648) (Ex. B).

Here, Plaintiffs cannot show any infringement of their statutory rights or proprietary interests. South Carolina statutory law does not afford Plaintiffs a private right of action to challenge a 100% petition annexation; and none of the Plaintiffs own any part of the annexed lands. See Ex. A at 42:14-19; 48:19-49:10 (Desrosiers Dep. plaintiff Coastal Conservation League does not own property in Awendaw); Ex. C at 15:18-20 (Prause Dep.: plaintiff Prause's property is approximately five miles from the Nebo tract); Ex. D at 64:24-65:2 (Vicary Dep.: plaintiff Vicary's house is roughly nine miles from the Nebo tract); Ex. E at 9:22-22 (Shaw Dep.: the Nebo tract is owned by the Boardman family.) Like the plaintiffs in *St. Andrews* and *Town of Yemassee*, the Plaintiffs herein are "outsiders" seeking to contest a municipal annexation in which they have no statutory right or proprietary interest. Plaintiffs therefore lack standing, and Defendant is entitled to a directed verdict in its favor on these issues.

B. Plaintiffs do not have constitutional standing, based on an alleged individualized injury to the aesthetic and recreational interests, to challenge the annexations.

Plaintiffs do not have constitutional standing. "The principle of standing under the United States Constitution is 'an essential and unchanging part of the case-or-controversy requirement of Article III.'" *ATC South*, 380 S.C. at 195, 669 S.E.2d at 339 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992)). The United States Supreme Court has set forth a three-part test to establish constitutional standing:

First, the plaintiff must have suffered an “injury in fact” – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a casual connection between the injury and the conduct complained of – the injury has to be “fairly... trace[able] to the challenged action of the defendant, and not ... the[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely”, as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Smiley v. S.C. Dep’t Health & Envtl. Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (quoting *Lujan*, 504 U.S. at 560-61, 112 S. Ct. 2130, 119 L.E.2d 351 (internal citations omitted); *Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t Natural Res.*, 345 S.C. 594, 550 S.E.2d 287 (2001). “The party seeking to establish standing carries the burden of demonstrating each of the three elements.” *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.

Plaintiffs allege they are injured because they cannot enjoy looking at the wildlife and plants on the annexed properties. Plaintiffs also believe that they may be injured, at some point, because the overall rural character of Awendaw may change somewhat (although they admit they do not know how much, if at all). *See, e.g.*, Second Am. Compl. ¶¶ 2, 14-16; Ex. C at 50:15-18 (Prause Dep.: “I like to hike and hunt and fish. I like the rural character of where I live. The extent of growth and development, as I mentioned, has an effect upon those resources.”); Ex. D at 37:20-21 (Vicary Dep.: “I believe it’s going to affect the quality of life that I have in Awendaw.”); Ex. A. at 115:16-117:3 (Desrosiers Dep.: “[Coastal Conservation League] hasn’t incurred damages any more than another resident of the State of South Carolina might incur if the Francis Marion is damaged.”)

The South Carolina Supreme Court rejected identical arguments. In *Town of Yemassee*, the plaintiffs argued and offered evidence that they have individualized injuries sufficient to allow constitutional standing because of among other things: damage to the ecological importance of the property; diminishment of important natural resources and habitats; displacement and reduction of

the wildlife on the property and surrounding properties; damage to public wetland resources, such as public oyster beds and fisheries; diminishment of plaintiffs' ability to watch and enjoy scenic views and wildlife; and increase of density to the area. *See* Ex. F at 10-11 ("Specific Facts Relating to Standing" in the final appeal brief of Coastal Conservation League and other plaintiffs to the South Carolina Supreme Court.) The South Carolina Supreme Court categorically rejected this argument and held that no constitutional standing exists under these circumstances:

Second, the Private Party Appellants argue they will suffer an individualized injury sufficient to support standing because they personally enjoy "the nature views and wildlife" on the annexed property and their enjoyment would be harmed by the development of the property into commercial and residential units. This alleged harm is shared by all, and like Appellants' public trust claim, this argument, if accepted, would effectively overrule our decision in *St. Andrews Public Service District*.

Town of Yemassee, 291 S.C. 565, 707 S.E.2d. 402, 407 (2011) (Ex. B).

So too here. The facts in *Town of Yemassee* are arguably much stronger than in the Plaintiffs' case here, yet the Supreme Court has ruled they do not qualify for constitutional standing. A directed verdict accordingly should be entered in favor of Defendant on this issue.

C. Annexation does not rise to the level of public concern necessary to satisfy the "public interest" exception to standing.

Plaintiffs do not fall under the "public interest" exception for standing. "Public interest" arguably is the most difficult way for a plaintiff to achieve standing, and requires a cautious balancing of the competing interest involved. *ATC South*, 380 S.C. at 198, 669 S.E.2d at 341.

An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). “The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of ‘future guidance’ that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance.” *ATC South*, 380 S.C. at 199, 669 S.E.2d at 341 (citations omitted).

In *County of Lexington v. City of Columbia*, the county brought a declaratory judgment action to determine the validity the annexation of property by 100% landowner petition pursuant to section 5-3-150(3). 303 S.C. 300, 300–301, 400 S.E.2d 146, 146–47 (1991). The Court determined that the plaintiff had failed to show an infringement of its own proprietary interest or statutory rights necessary to establish standing, and further held that under such instances “we find no issue of overriding public concern.” *Id.* Thus, the annexation of land by the 100% petition method pursuant to section 5-3-150(3) did not rise to the level of an overriding public concern, and did not trigger the public importance exception to standing.

Plaintiffs make the same unsuccessful arguments here. As in *County of Lexington*, under South Carolina case law the validity of 100% petition method annexations does not rise to the level of an “overriding public concern” necessitating “future guidance,” and Plaintiffs fail to meet the requirements for achieving standing under the public importance exception. For these reasons, Defendant are entitled to judgment as a matter of law and an entry of a directed verdict in favor of Defendant.

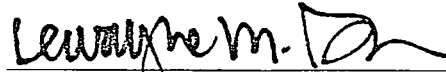
If Plaintiffs look to Judge Harrington’s Order filed April 19, 2011 denying Defendants’ Motion for Partial Summary Judgment as precedence in this case, it should be noted that “a denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial.” *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994). The

denial of summary judgment does not establish the law of the case; and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for directed verdict. *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993); *PPG Industries v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331 (Ct.App. 1988). See also The Supreme Court of South Carolina Order, Appellate Case No. 2012-2111590, dated May 25, 2012. (Ex. H).

CONCLUSION

For these reasons, Defendant respectfully request that its Motion for Directed Verdict on the Issue of Standing be granted.

HAMPTON GREEN, LLC



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Attorney for Defendant Town of Awendaw

Charleston, South Carolina

15th day of April, 2014

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

FILED
2011 MAR 22 AM 11:33
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

LYNNE VICARY, KENT PRAUSE, and)
SOUTH CAROLINA COASTAL)
CONSERVATION LEAGUE,)
)
Plaintiffs,)
)
v.)
)
TOWN OF AWENDAW, and EBC, LLC,)
)
Defendants.)

CASE. NO. 09-CP-10-7399

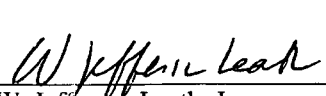
**NOTICE OF FILING SUPPLEMENTAL EXHIBITS IN SUPPORT OF
MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS MOTION FOR
PARTIAL SUMMARY JUDGMENT**

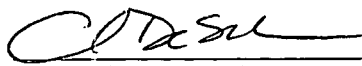
Plaintiffs respectfully give notice of filing the following Supplemental Exhibits in
Support of its Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment
and In Support of Plaintiffs' Cross Motion for Partial Summary Judgment.

Exhibit	Supp. Ex. No.
Affidavit of James M. Cubie	1
Affidavit of Megan J. Desrosiers	2
Affidavit of Jean B. Everett, Ph. D.	3
Affidavit of Robert Lee Frank II	4
Affidavit of Richard D. Porcher, Ph. D.	5
Affidavit of Kent Prause	6
Affidavit of Lynne Vicary	7
Deposition of Megan J. Desrosiers (Nov. 9, 2010)	8

Deposition of Walter Kent Prause III (Sept. 27, 2010)	9
Deposition of Shaw Bartow (Dec. 10, 2010)	10
Deposition of Lynne Vicary (Sept. 27, 2010)	11
Deposition of William Wallace, Jul. 22, 2010 (with selected exhibits)	12
Defendant Town of Awendaw's Responses to Plaintiffs' First Requests for Admissions (Apr. 30, 2010)	13
Letter from Carolyn Hatcher to Samuel Brown (Oct. 2, 2009)	14
Letter from Samuel Brown to Cathy Franks, enclosing a copy of the annexation (Sept. 30, 2009)	15
E-mail from Robin Jolley to Bo Shaw (Oct. 9, 2009)	16
E-mail from Bo Shaw to Robin Jolley (Dec. 9, 2009)	17
E-mail from Robin Jolley to Bo Shaw (Dec. 8, 2009)	18
E-mail from Robin Jolley to Bo Shaw (Jan. 25, 2010)	19
Robert A. Warner & Assoc., Inc. Invoice (Feb. 2, 2010)	20

Respectfully submitted this the 18th day of March, 2011.


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Attorneys for Plaintiffs

March 18, 2011
Charleston, South Carolina

Supp. Ex. 1

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

LYNNE VICARY, KENT PRAUSE, and)
SOUTH CAROLINA COASTAL)
CONSERVATION LEAGUE,)
)
Plaintiffs,)
)
v.)
)
TOWN OF AWENDAW, and EBC, LLC,)
)
Defendants.)
_____)

CASE NO. 09-CP-10-7399

AFFIDAVIT OF JAMES M. CUBIE

PERSONALLY APPEARED BEFORE me James M. Cubie who, after being duly sworn,
deposes and says that:

1. I am a property owner, resident, citizen, and taxpayer of the Town of Awendaw, Charleston County, South Carolina. My wife and I own our home, which is located 7329 Awendaw Landing Road, Awendaw, South Carolina 29429. I have personal knowledge of the matters herein, except those asserted on information and belief, which I believe to be true.

2. I am a member of the South Carolina Coastal Conservation League ("League"). I believe in and advocate the interests of the League. As a member of the League, I am committed to the conservation and protection of the Francis Marion National Forest ("Francis Marion," "National Forest," or "Forest") and rural areas in the vicinity of the "Nebo Tract."

3. I am familiar with the methods used to try to accomplish the annexation of the Nebo Tract into the Town of Awendaw, including the alleged annexation in 2004 of a ten-foot wide strip of the Francis Marion National Forest (extending along the frontage of Charleston

County Parcel Identification Numbers 629-00-00-224, 303, & 305 and continuing to Number 625-00-00-005) (hereinafter the "Ten-Foot Strip of the Francis Marion" or the "Ten-Foot Strip"). Upon information and belief, until October 1, 2009, the Nebo Tract was subject to the zoning and other ordinances of the County of Charleston. Upon information and belief, the Nebo Tract was zoned Agricultural Preservation District (AG-10), which permitted no more than one house per every ten acres of land or one house per every five acres of land under a Planned Development. In addition to attempting to annex the 359.51-acre Nebo Tract, the Town in October 2009 also attempted to rezone the property, amend its comprehensive plan, and enter into a development agreement for purposes of allowing residential and commercial development of the Nebo Tract. I attended the initial presentation of this proposed development and objected to it for the reasons described in this affidavit. Upon information and belief, the actions taken by the Town were intended to authorize residential and commercial development of the Nebo Tract, including up to 360 residential units and up to 90,000 square feet of gross floor area for commercial uses and 80,000 square feet of gross floor area for office uses. This type of intensive residential and commercial development adjacent to the Francis Marion National Forest would dramatically change this rural area in the vicinity of the Nebo Tract and would also negatively impact the Francis Marion National Forest.

4. My wife and I walk in the National Forest approximately four times per week. We walk both the I'on Swamp Trail and Forest Road ("FR") 232, which are both in the immediate vicinity of the Nebo Tract. FR 232 is approximately less than one-quarter mile from the Nebo Tract; the I'on (sometimes "Iron") Swamp Trail is approximately one-half mile northeast of the Nebo Tract. We also use Clay Field Road for walking and birding. Clay Field Road, which is located about one-half mile from the Nebo Tract, is an offshoot of I'on Swamp

Road and is one of the recommended locations for locating spring migrant warblers on the South Carolina coast. In addition to birds, we enjoy observing other wildlife in the Forest, such as bobcats, coyotes, and other animals. In the spring, my wife and I lead walks in the Forest at which time we take other people to see various species of wildflowers and birds. On these walks we typically observe interesting plants in the Forest, such as pitcher plants and carnivorous flowers, and birds, such as pine warblers and the federally-endangered red cockaded woodpecker. I also enjoy sailing on the upper reaches of the Wando River as far as Guerins Bridge Road near the National Forest boundary. The Forest is also known to support wild turkey populations, and once I learn how to make turkey calls, I plan to begin hunting for wild turkeys within the Forest. In short, the Forest provides my wife and me with many recreational and educational opportunities, which we regularly take advantage of, and we plan to continue using and enjoying the Forest in the future.

5. I am very familiar with the Nebo Tract. In fact, I drive by the property several times a week. If the Nebo Tract is developed in the manner proposed, I believe it will have severe impacts on the Francis Marion. The introduction of intensive residential and commercial development in such close proximity to the Forest will inevitably degrade the Forest, including its important natural habitats and wildlife populations. This type of development will also have the effect of changing the quiet character of the Forest by introducing large-scale development into an area that is essentially within the National Forest. I believe that the introduction of homes, businesses, cars, and trucks will displace wildlife populations. I am also concerned that construction activities on the Nebo Tract will negatively impact the Wando River. Siltation will reduce the depth of the water and limit recreation activities such as fishing. Further, if the Nebo Tract is developed in the manner proposed, I believe the United States Forest Service will be

unable to burn the Forest in order to maintain important fire-dependant habitats, such as the longleaf pine ecosystem. If the Forest Service is unable to manage longleaf pine habitat in the southern portion of the Forest, these habitats will be lost and I will no longer be able to enjoy them. The loss of longleaf pine habitat will harm many species of wildlife that depend on this ecosystem, including federally-protected red-cockaded woodpeckers, which has been determined to be endangered by the U.S. Fish and Wildlife Service. In these and other ways, the actions taken by the Town directly harm my interests in the Francis Marion.

6. I also believe that the proposed development of the Nebo Tract will greatly increase traffic in the area, especially on both U.S. Highway 17. This increased traffic will increase my commute times between Mt. Pleasant and my home. In fact, given the level of density proposed for the Nebo Tract, I am concerned that a traffic light would have to be installed on Highway 17, which would also serve to lengthen my commuting time. Indeed, when the developers of the Nebo Tract originally made their presentation to Town Council, they showed a number of new roads going all the way from the Nebo Tract through the Fairlawn Plantation (which indicates that the Nebo Tract is clearly related to the development of the whole Fairlawn property). These new roads and increased traffic and density will forever change the character of the areas surrounding the Nebo Tract, which will diminish my quality of life.

7. As a homeowner and taxpayer residing in Awendaw and Charleston County, upon information and belief, I believe there will be increased taxes imposed on property owners to construct and maintain the facilities and services that will be needed to support this project, and I do not think the tax revenues from the project would offset the additional costs. In fact, I anticipate that there will be a net loss of tax revenues in terms of increased demand for services. If the Nebo Tract is developed as provided for in the development agreement, I and the other tax

payers will suffer the consequences.

8. By allowing the Town to annex the Nebo Tract and develop the property as described above, I will suffer individualized injury that injures my interests as a member of the League and as a citizen, resident, property owner of the Town of Awendaw. I have and will suffer "injury in fact" that is fairly traceable to the Town's purported annexation of the Nebo Tract and of the Ten Foot Strip. It is certain that the injury will be redressed by a favorable decision in this case.

FURTHER AFFIANT SAYETH NOT.

James M. Cubie
James M. Cubie

SWORN and subscribed to before me
this 15th day of March 2011.

Notary Public for the State of South Carolina
My Commission Expires January 20th, 2019
[Signature] (L.S.)
Notary Public for South Carolina
My Commission Expires: 1/20/19

Supp. Ex. 2

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

LYNNE VICARY, KENT PRAUSE, and)
SOUTH CAROLINA COASTAL)
CONSERVATION LEAGUE,)
)
Plaintiffs,)
)
v.)
)
TOWN OF AWENDAW, and EBC, LLC,)
)
Defendants.)
_____)

CASE NO. 09-CP-10-7399

AFFIDAVIT OF MEGAN J. DESROSIERS

PERSONALLY APPEARED BEFORE me Megan J. Desrosiers, who, after being duly sworn, deposes and says that:

1. I am the Assistant Director of the South Carolina Coastal Conservation League ("League"). In short, I act as the League's chief operating officer and oversee all of the organization's operations. I have personal knowledge of the matters herein, except those asserted on information and belief, which I believe to be true.

2. The League is a nonprofit membership organization headquartered in Charleston, and with offices in Beaufort, Georgetown, and Columbia. The League is a conservation organization dedicated to the conservation, protection, and preservation of natural resources. The League's mission is to protect the natural environment of the South Carolina coastal plain and to enhance the quality of life in our communities by working with individuals, businesses and government to ensure balanced solutions. The League advocates sound growth management that is the product of environmentally aware regional planning that designates areas for rural

preservation and other areas for suburban and urban growth to prevent needless urban sprawl into rural areas.

3. I am familiar with the methods used to try to accomplish the annexation of the Nebo Tract into the Town of Awendaw, including the alleged annexation in 2004 of a ten-foot wide strip of the Francis Marion National Forest (extending along the frontage of Charleston County Parcel Identification Numbers 629-00-00-224, 303, & 305 and continuing to Number 625-00-00-005) (hereinafter the "Ten-Foot Strip of the Francis Marion" or the "Ten-Foot Strip"). Upon information and belief, until October 1, 2009, the Nebo Tract was subject to the zoning and other ordinances of the County of Charleston. Upon information and belief, the Nebo Tract was zoned Agricultural Preservation District (AG-10), which permitted no more than one house per every ten acres of land or one house per every five acres of land under a Planned Development. Upon information and belief, the actions taken by the Town were intended to authorize residential and commercial development of the Nebo Tract, including up to 360 residential units and up to 90,000 square feet of gross floor area for commercial uses and 80,000 square feet of gross floor area for office uses.

4. The League and its members have a vital interest in the protection of coastal resources, including the Francis Marion National Forest, which is located in the lower coastal plain of South Carolina in between Charleston and Georgetown.

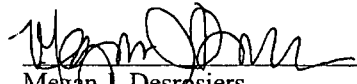
5. The League's membership includes citizens, residents, and property owners in the Town of Awendaw and throughout the coastal zone, who use and enjoy the National Forest. Two of these dues-paying members – Jean B. Everett, Ph.D. and James M. Cubie – have submitted affidavits explaining why they believe the actions challenged in this lawsuit will damage the National Forest and injure their respective interests in the Forest.

6. The actions taken by the Town, including, but not limited to, the annexations of the Ten-Foot Strip, the Nebo Tract, the rezoning of the Nebo Tract, the amendment to the comprehensive plan, and the entering into of a development agreement with EBC, LLC, will, upon information and belief, harm the Francis Marion and therefore injure the League and its members.

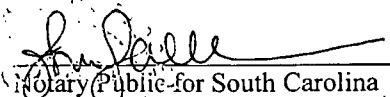
7. Prior to filing this lawsuit, the League's Board of Directors approved the League's participation in this legal action in accordance with our bylaws.

8. The injuries resulting from the actions taken by the Town can only be redressed by a favorable decision in this case.

FURTHER AFFIANT SAYETH NOT.


Megan J. Desrosiers

SWORN and subscribed to before me
this 18th day of March 2011.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: 1/20/19

Notary Public for the State of South Carolina
My Commission expires January 20th, 2019

Supp. Ex. 3

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

LYNNE VICARY, KENT PRAUSE, and)
SOUTH CAROLINA COASTAL)
CONSERVATION LEAGUE,)
)
Plaintiffs,)
)
v.)
)
TOWN OF AWENDAW, and EBC, LLC,)
)
Defendants.)
_____)

CASE. NO. 09-CP-10-7399

AFFIDAVIT OF JEAN B. EVERETT, Ph.D.

PERSONALLY APPEARED BEFORE me Jean B. Everett, Ph.D., who, after being duly sworn, deposes and says that:

1. I am a Senior Instructor within the Department of Biology at the College of Charleston in Charleston, South Carolina. I earned my Ph.D. from North Carolina State University in forest ecology and botany in 1994, and I earned a master's degree in environmental sciences with an emphasis in ecology from the University of Virginia in 1985. In 1980, I graduated magna cum laude from Virginia Polytechnic Institute and State University with a B.S. in forest resources management. My research interests include plant community and ecosystem interactions, forest ecology, seed banks, and restoration ecology, especially related to longleaf pine systems. I have been teaching at the university level for more than 20 years. The classes I teach within the Department of Biology include the foundation courses for biology majors, Botany, Plant Taxonomy, and Field Botany of the Lowcountry. I have completed more than twenty major contracts surveying for rare plants and rare plant habitats, mostly for the United

States Forest Service ("USFS") in the Francis Marion National Forest, South Carolina Department of Natural Resources and The Nature Conservancy. I have personal knowledge of the matters herein, except those asserted on information and belief, which I believe to be true. Any opinions, findings, conclusions or observations expressed herein are mine and do not necessarily reflect the view of any of the organizations with which I am affiliated.

2. I am a long-term member of the South Carolina Coastal Conservation League (the "League"). The League is a nonprofit membership organization headquartered in Charleston, and with offices in Beaufort, Georgetown and Columbia. The League is a conservation organization dedicated to the conservation and protection of natural resources in the Lowcountry of South Carolina.

3. I live at 9 Murphy's Court, Charleston, South Carolina 29403. I have resided in the Charleston area for approximately 28 years.

4. I am familiar with the methods used by the town of Awendaw to accomplish the annexation of the "Nebo Tract," which is a privately-owned inholding located within the proclamation boundary of the Francis Marion National Forest ("Francis Marion" or "Forest"). I have reviewed the complaint in this case, and I have visited the Francis Marion, including the areas of the Forest that are directly adjacent to the Nebo Tract, many times. As described in the complaint, in addition to attempting to annex the 359.51-acre Nebo Tract, the town has, upon information and belief, also rezoned the property, amended its comprehensive plan, and entered into a development agreement for purposes of allowing residential and commercial development of the tract in question. According to the complaint, the actions taken by the town were intended to authorize residential and commercial development of the Nebo Tract, including up to 360 residential units and up to 90,000 square feet of gross floor area for commercial uses and 80,000

square feet of gross floor area for office uses. Upon information and belief, it is also my understanding that in order to establish "contiguity" with the Nebo Tract, the town previously attempted to annex a strip of the Francis Marion National Forest.

5. I am very familiar with the Forest and the area surrounding the Nebo Tract. I regularly use the Forest in the immediate vicinity of the Nebo Tract for educational, professional, and recreational purposes. In fact, in my plant taxonomy class that I teach at the College of Charleston, I take my students to the Francis Marion seven or eight times per semester (80% of my field trips) to teach them about botany and how to conduct field work. I rely on the Francis Marion to support most of my other courses as well. The Francis Marion is one of the most ecologically valuable natural resources in the state (if not the entire East Coast), and it offers unrivaled opportunities within this region of the country to observe some of the most unique, diverse, and ecologically important ecosystems. On most of my field trips, I take my students to the southern portion of the Forest in which the Nebo Tract is located. This area of the Forest supports some of the most robust stands of publically-accessible longleaf pine not only within the Forest, but within the country.

6. Further, some of the most ecologically important and unique stands of longleaf pine are located just a couple of hundred feet from the edge of the Nebo Tract, and I regularly take my students to this area of the Forest to conduct their field work.. Longleaf pine ecosystems once dominated the Coastal Plain of the Southeastern United States. Nearly 90 million acres of this incredibly diverse, fire-dependent forest existed prior to European colonization. This forest ecosystem is one of the most diverse plant communities in the world, second only to tropical rain forests. Small scale plant diversity can reach 40 species per square meter. Longleaf ecosystems are nearly extirpated, with only 1.5-3% remaining ecologically viable.

7. The Francis Marion National Forest is one of the largest publicly owned and publicly accessible stands of longleaf left in the Southeast. It's the only large, publically accessible longleaf habitat in South Carolina. In addition to diverse longleaf habitats, the Francis Marion includes almost every ecosystem found on the Coastal Plain of South Carolina – including swamp forest, ponds, pocosin, maritime and beech forests.

8. In addition to using the Forest for professional and educational interests, I also use the Forest for recreational purposes. In the past, I have regularly visited the Forest for hiking, biking and nature photography, and I plan to continue doing so in the future to the extent my schedule allows.

9. National forests, like the Francis Marion, are publicly owned and managed for public benefit. The United States Forest Service (USFS) is the federal agency responsible for managing the national forests. Many of the ecosystems that I take my students to observe in the Forest are fire-dependant or fire-adapted. In other words, without regular burning, these ecosystems would simply not survive. In order to manage these habitats, the USFS must be able to utilize prescribed burns. Prescribed fire is used to replicate the natural fire regime under which these ecosystems emerged. Most data indicates a natural (lightning ignited) fire return interval of 1-3 years across the Southeast. Longleaf ecosystems are especially fire dependent and the plant community suffers losses of diversity and vigor in less than 3 years without fire. Given the proximity of the Nebo Tract to the Forest (the Nebo Tract is surrounded on three sides by the Forest), the actions taken by the town are a major concern. As stated previously, some of the most important and unique habitats within the National Forest are located within just a couple of hundred feet of the Nebo Tract.

10. If the Nebo Tract is developed in the manner provided for in the development

agreement at issue in this case, I am concerned that the USFS will be unable to continue using prescribed fire to manage longleaf pine and other Forest resources on the southern half of the Francis Marion. Intensive development of the Nebo Tract would create conflicts between homeowners and business owners concerned about safety and smoke and the USFS' need to regularly burn adjacent habitats. Based on my past observations, I believe that if the Nebo Tract is developed in the manner currently contemplated, the ability of the USFS to burn the southern half of the Francis Marion would likely be greatly diminished and it would not be possible for the USFS to effectively manage the southern half of the Forest. Without regular burning, I believe it is likely that much of the fire-dependent longleaf pine ecosystems in the southern portion of the Forest would perish within a few years. As such, I believe the actions taken by the Town directly threaten the long term viability of the southern portion of the Francis Marion, and as such these actions have impaired my professional, educational, and recreational interests in the Forest.

11. In addition to undermining the ability of the USFS to effectively manage the Forest, the actions taken by the town also threaten the Forest in other ways. For example, large-scale residential development will introduce cars, ATVs, lawn mowers, and other sources of noise that will likely affect wildlife populations and will impair the ability of the public to enjoy the Forest. In addition to noise pollution, the introduction of traffic, housing and commercial structures will certainly disrupt the viewshed and solitude that can currently be enjoyed by visitors to the Forest. Construction and other land-disturbing activities will also result in the discharge of polluted runoff, which will likely degrade aquatic resources in the Forest that can be found downstream of the Nebo development.

12. For these and other reasons, I believe that the actions taken by the town have injured my interests in the Francis Marion National Forest. The planned development of the Nebo Tract literally threatens the viability of one of the most important public natural resources in the region – a resource that I have relied on for years for educational, scientific, and recreational purposes. I am also deeply troubled by the manner in which the town has sought to annex a strip of the Forest itself in order to reach the Nebo Tract and whether the town will continue annexing strips of this publicly-owned resource. Given the ecological importance of this national forest, the clear threat that the planned development of the Nebo Tract poses to it, and the town's willingness to actually annex portions of the Forest itself I believe it is critically important for a court to review the actions of the town to ensure that the town has acted and will act in a manner that is consistent with its requirements under South Carolina law.

FURTHER AFFIANT SAYETH NOT.

Jean Everett
Jean B. Everett, Ph.D.

SWORN and subscribed to before me
this 15th day of March 2011.

Shirley (L.S.)
Notary Public for South Carolina
My Commission Expires: 1/20/19

Notary Public for the State of South Carolina
My Commission expires January 20th, 2019

Supp. Ex. 5

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

LYNNE VICARY, KENT PRAUSE, and)
SOUTH CAROLINA COASTAL)
CONSERVATION LEAGUE,)
)
Plaintiffs,)
)
v.)
)
TOWN OF AWENDAW, and EBC, LLC,)
)
Defendants.)
_____)

CASE. NO. 09-CP-10-7399

AFFIDAVIT OF RICHARD D. PORCHER, Ph.D.

PERSONALLY APPEARED BEFORE me Richard D. Porcher, Ph.D., who, after being
duly sworn, deposes and says that:

1. I am a Professor Emeritus of Biology at The Citadel in Charleston, South Carolina. I hold M.S. and Ph.D. degrees in biology from the University of South Carolina. I have also written numerous articles on the ecology of the Lowcountry of South Carolina and am senior author of *A Field Guide to Wildflowers of South Carolina*. I taught the following courses at The Citadel (1970-2003): Ecology, Environmental Science, and Vascular Flora of South Carolina. Over my professional career I received 45 research grants, including from, but not limited to, the U.S. Fish and Wildlife Service, The Belle W. Baruch Forest Science Institute of Clemson University, U.S. Army Corps of Engineers, U.S. Forest Service, S.C. Sea Grant Consortium, S.C. Department of Natural Resources, and The Nature Conservancy. I am a professional field botanist and was awarded the 2008 South Carolina Environmental Awareness Award established by the General Assembly.

2. I have reviewed the following documents in connection with this case: the complaint, the May 3, 1994 letter from David Wilson of the U.S. Forest Service ("USFS" or "Forest Service") to the Town of Awendaw, copies of the annexation ordinances that are at issue in this case, and a copy of a Geographic Information System ("GIS") map for the general area. Upon information and belief, it is my understanding that in October 2009, the town of Awendaw annexed a private in-holding that is surrounded on three sides by the Francis Marion National Forest ("Francis Marion" or "Forest"). Upon information and belief, this property is approximately 359.51 acres in size and is known as the "Nebo Tract." At that same time, the Town also rezoned the property, amended its comprehensive plan, and entered into a development agreement for purposes of allowing residential and commercial development of the tract in question. Upon information and belief, it is also my understanding that in order to establish "contiguity" with the Nebo Tract, the town previously attempted to annex a strip of the Francis Marion. These actions by the Town present a very serious threat to the ecological integrity of the Francis Marion.

3. I am very familiar with the Francis Marion National Forest, including the general area within which the Nebo Tract is located. The Forest is located in the lower coastal plain of South Carolina in between Charleston and Georgetown, South Carolina. The Forest is bounded to the north by the Santee River and the Intracoastal Waterway and to the east by the Atlantic Ocean. For years, I have led field trips in the Forest for persons interested in learning more about the ecology and history of the Forest. I was awarded seven grants by the Forest Service to study a variety of issues in the National Forest, including rare plants, unique natural areas, and endangered species. I conducted on an average for forty years approximately ten trips per year to the Forest with classes and environmental groups. I photographed approximately 100 species

of wildflowers in the Francis Marion for the wildflower book.

4. The Francis Marion is one of the most important ecological natural resources in the state of South Carolina. The Forest is characterized by a series of parallel ridges of sandy deposits with large areas of swamps, bays, and upland flats between the sandy ridges. See United States Department of Agriculture, U.S. Forest Service, Southern Region, Francis Marion National Forest: Revised Land and Resource Management Plan (1996) ("Forest Plan"). Other important habitats within the Forest include coastal marshes, river floodplains, Carolina bays, and limestone sinks. Forest Plan at 11. Limestone sinks support many rare plants such as the endangered pond berry. Forest Plan at 11. These low lying, poorly-drained areas within the Forest, such as the swamps, floodplains, upland flats, and coastal marshes provide wintering and breeding habitat for many species of waterfowl and wading birds. These areas also provide habitat for ospreys, bald eagles, and the northernmost established nesting population of the American swallow-tailed kite. Forest Plan at 11.

5. The Forest supports significant stands of longleaf pine flatwoods, one of the most diverse ecosystems in the United States. This fire-dependent ecosystem is found on the upland ridges throughout the Forest and supports the endangered American chaffseed and a primary core recovery population (third largest population in the U.S.) of the federally-protected red-cockaded woodpecker. Forest Plan at 11; United States Department of Agriculture, U.S. Forest Service, Southern Region, Francis Marion National Forest: Fiscal Year 2009 Monitoring and Evaluation Annual Report at 4 (2010). Pond cypress savannas and wet longleaf pine savannas are also fire-dependent communities; both are threatened by the proposed development authorized by the Town. These two communities are the most diverse communities in the Forest. Lack of fire will endanger their integrity.

6. In addition to providing habitat to endangered red-cockaded woodpeckers, the Forest also supports other federally-protected and sensitive species, such as the Flatwoods salamander, which has been nearly extirpated from South Carolina but was last documented in the Francis Marion.

7. The Forest is also one of the most important public recreational amenities in the state. The Forest provides public access for fishing, boating, swimming, and other activities. The Forest also includes wilderness areas and miles of trails for hiking, canoeing, camping, wildflower walks, and bicycling. The Forest provides one of the largest publicly-available areas in the state for hunting. In fact, wild turkeys within the Forest are considered among the purest strain of eastern wild turkey found in the United States. The Forest also has numerous historical sites, including remains of plantations, rice fields, rice mills, and slave villages. The abandoned inland rice fields and reservoirs are an unparalleled resource for historians. Hayden Smith, a candidate for a Ph.D. at the University of Georgia, is presently studying the Francis Marion's abandoned rice fields.

8. According to the complaint, in October 2009, the Town attempted to annex the Nebo Tract, entered into a development agreement with EBC, LLC, amended the Town's comprehensive plan, and rezoned the property. These actions were apparently intended to authorize residential and commercial development of the Nebo Tract, including up to 360 residential units and up to 90,000 square feet of gross floor area for commercial uses and 80,000 square feet of gross floor area for office uses. The Town's actions are a major concern, to say the least.

9. The actions challenged in this lawsuit, which facilitate the encroachment of significant development onto the Francis Marion, present serious concerns about a public

resource of statewide and national concern for a number of reasons. First, the introduction of intensive development onto a large tract of land that is virtually encircled by the Francis Marion, will fragment this important ecosystem. With residential and commercial development comes more people, more noise, more water use, more water pollution, more air pollution, more habitat disruption, more roads, etc. As in-holdings, like the Nebo Tract, are developed, this conversion will fragment the overall ecosystem leaving it in small, disjointed patches, which will serve to degrade the health of the entire ecosystem. As greater levels of development encroach onto the Forest, the Forest's ability to maintain healthy populations of a variety of plant and animal species will be reduced as the entire community is altered.

10. Second, intensive development adjacent to or within the Forest will likely result in physical harm to the Forest. For example, man-made, impermeable surfaces such as roadways, parking lots, driveways, rooftops, etc., are characteristically associated with a large proportion of the converted land surface of large-scale developments such as that proposed for the Nebo Tract. Measurable adverse effects in the physical and chemical environment in downstream waters, such as marsh tidal creeks and freshwater ecosystems, have been reported when significant percentages of lands upstream have been converted to these impervious surfaces. The development of tracts like the Nebo Tract will likely result in the discharge of harmful runoff, which can flow offsite and degrade aquatic resources in the Forest.

11. As a final example of why the Town's actions are so troublesome, it can be expected that the introduction of greater levels of development in close proximity to the Forest will undermine the Forest Service's ability to manage the Forest. As discussed previously, one of the most important habitats in the Francis Marion National Forest is the longleaf pine ecosystem. Prescribed burning is an essential management tool for maintaining this ecosystem

in a healthy condition. Without the ability to regularly burn this ecosystem, the USFS would be unable to effectively manage the habitat and the wildlife populations, such as red-cockaded woodpeckers, that depend on this ecosystem. If large-scale development is permitted to encroach onto the Forest, it can be expected that residents and businesses will raise concerns about the use of fire in close proximity to their homes and businesses. Not only does the use of fire in areas adjacent to development raise safety issues, but the amount of smoke generated from these fires will likely agitate homeowners and businesses on adjacent tracts that may be concerned about health impacts and air quality. Ultimately, conflicts between owners of developed areas and resource managers will likely develop, which in the long-term will make it difficult for the USFS to carry out their management objectives for the Forest.

12. For these and other reasons, I am deeply concerned regarding the actions of the Town that have been challenged in this case and what these actions mean for the future ecological integrity of the Francis Marion National Forest. Simply put, the Town's actions to allow intensive residential and commercial development within a large, privately-owned in-holding within the National Forest present a major threat to one of the most important natural resources in the state, if not the region.

FURTHER AFFIANT SAYETH NOT.

Richard D Porcher
Richard D. Porcher, Ph.D.

SWORN and subscribed to before me
this 16th day of March 2011.

 [Signature] (L.S.)
Notary Public for South Carolina
My Commission Expires: 1/20/19

Notary Public for the State of South Carolina
My Commission expires January 20th, 2019

Supp. Ex. 6

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

LYNNE VICARY, KENT PRAUSE, and
SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,

Plaintiffs,

v.

TOWN OF AWENDAW, and EBC, LLC,

Defendants.

CASE. NO. 09-CP-10-7399

AFFIDAVIT OF KENT PRAUSE

PERSONALLY APPEARED BEFORE me Kent Prause, who, after being duly sworn,
deposes and says that:

1. I am a property owner, resident, citizen, and taxpayer of the Town of Awendaw, Charleston County, South Carolina. I own my home, which is located at 804 Stone Point Road, Awendaw, South Carolina 29429, and I have lived there with my family since January 1997. I have personal knowledge of the matters herein, except those asserted on information and belief, which I believe to be true.

2. I am familiar with the methods used to try to accomplish the annexation of the Nebo Tract into the Town of Awendaw, including the alleged annexation in 2004 of a ten-foot wide strip of the Francis Marion National Forest (extending along the frontage of Charleston County Parcel Identification Numbers 629-00-00-224, 303, & 305 and continuing to Number 625-00-00-005) (hereinafter the "Ten-Foot Strip of the Francis Marion" or the "Ten-Foot Strip").

3. I moved to Awendaw to enjoy the quality of life that can found there. In

particular, I enjoy the recreational opportunities and abundance of natural resources that are provided by the Francis Marion National Forest ("Francis Marion," "National Forest," or "Forest") and Cape Romain National Wildlife Refuge. I use these natural areas for hunting and fishing, and I enjoy the rural character of where I live. I believe the decision to authorize intensive residential and commercial development on the Nebo Tract, which is located within the proclamation boundary of the Francis Marion, will have a damaging effect on the Forest. In turn, the degradation of the National Forest will then have an effect on the quality of life of people, like me, that live near and/or use these resources.

4. For example, I am concerned that the Town's decisions that have been challenged in this case will negatively affect aquatic resources within the Forest. Intensive, large-scale developments, like the proposed Nebo Tract, can have a significant impact on surrounding aquatic resources. In light of the proposal, I believe that the Nebo Tract will include the construction of significant amounts of impervious surfaces, such as roads, parking lots, drive ways, and roof tops. As rain falls onto these surfaces, pollutants that have been deposited there cannot infiltrate into the soil and are instead picked up and transported offsite in the form of polluted runoff. This runoff can enter downstream wetlands, streams, and other waters and pollute them. In addition, the velocity of polluted runoff coming off a large, intensely developed area, like the Nebo Tract, will likely damage surrounding areas and degrade the surrounding environment. In addition, constructing houses in such close proximity to the Forest as proposed on the Nebo Tract will preclude the Forest Service from adequately managing the Forest's resources by conducting controlled burns. For these reasons and others, I believe that the Town's actions, which have authorized a large, dense development that will be virtually surrounded by the Forest, will result in damage to the Forest, including the unique habitats that

are found there. Such damage harms my ability to enjoy the Forest and my quality of life.

5. In addition, upon information and belief, I do not believe the Town ever received a petition for annexation in connection with its attempt to annex the Ten-Foot Strip of the Francis Marion National Forest in 2004. Instead of a petition, the Town, upon information and belief, relied on a letter sent from the United States Forest Service to the Town of Awendaw that was written on May 3, 1994 – a decade before the Town attempted to annex the Ten-Foot Strip. This letter, in my view, cannot possibly constitute a petition for annexation since it did not affirmatively request annexation and does not accurately describe a parcel to be annexed. The notion that a Town can rely on a document that so clearly falls short of a petition for annexation and then proceed to manufacture contiguity with privately-owned in-holdings within federally-owned and protected lands is very troubling to me. Given the threat that this type of development poses to the Forest and the fact that the Town may continue to rely on this letter to annex other tracts within the Forest or in close proximity to the Forest, I believe this case raises matters of such public importance as to require their resolution and to provide the Town with much-needed future guidance.

6. I am concerned that the development of the proposed Nebo Tract will significantly increase the costs of living in my home. I believe that the Nebo development is likely to require a substantial increase in the level of municipal services, such as additional schools, police, and sewage disposal, for example. I am concerned that the cost of providing these services will significantly raise my tax bill. Even if my property taxes do not go up as a result of this new development, I am concerned that the costs of these additional services will be passed onto current residents in one form or another.

7. By allowing the Town to annex the Nebo Tract and develop the property as

described above, I will suffer individualized injury that injures my interests as a citizen, resident, property owner, and taxpayer in the Town of Awendaw. I have and will suffer "injury in fact" that is fairly traceable to the Town's purported annexations of the Nebo Tract and the Ten Foot Strip and the other actions challenged in this action. It is certain that the injuries will be redressed by a favorable decision in this case.

FURTHER AFFIANT SAYETH NOT.

Kent Prause
Kent Prause

SWORN and subscribed to before me
this 15th day of March 2011.

[Signature] (L.S.)
Notary Public for South Carolina
My Commission Expires: 1/20/19

Notary Public for the State of South Carolina
My Commission expires January 20th, 2019

Supp. Ex. 7

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

LYNNE VICARY, KENT PRAUSE, and)
SOUTH CAROLINA COASTAL)
CONSERVATION LEAGUE,)
)
Plaintiffs,)
)
v.)
)
TOWN OF AWENDAW, and EBC, LLC,)
)
Defendants.)

CASE. NO. 09-CP-10-7399

AFFIDAVIT OF LYNNE VICARY

PERSONALLY APPEARED BEFORE me Lynne Vicary, who, after being duly sworn,
deposes and says that:

1. I am a property owner, resident, citizen, and taxpayer of the Town of Awendaw, Charleston County, South Carolina. I own my home home, which is located at 8470 Doar Road, Awendaw, South Carolina 29429. My husband, who is now deceased, and I purchased our home in February of 2000. I have lived at this address since April 2000. I have personal knowledge of the matters herein, except those asserted on information and belief, which I believe to be true.

2. I am familiar with the methods used to try to accomplish the annexation of the Nebo Tract into the Town of Awendaw, including the alleged annexation in 2004 of a ten-foot wide strip of the Francis Marion National Forest (extending along the frontage of Charleston County Parcel Identification Numbers 629-00-00-224, 303, & 305 and continuing to Number 625-00-00-005) (hereinafter the "Ten-Foot Strip of the Francis Marion" or the "Ten-Foot Strip").

3. My family chose to move to Awendaw for the quality of life and the rural setting,

and I believe that the proposed development of the Nebo Tract will negatively affect many of the aspects of the community that originally drew me here in the first place. I regularly use and enjoy the Francis Marion National Forest ("Francis Marion" or "Forest"). On a typical day, I walk through the Forest, observing wildlife, such as pileated woodpeckers and fox squirrels. I also enjoy looking at the unique plants in the Forest, such as pitcher plants. I derive a lot of comfort from walking in the Forest, and I think the actions taken by the Town will result in significant damage to the Forest.

4. I also consume a lot of local shellfish, which I purchase from local commercial fishermen. I am concerned about the ways in which the proposed project will impact shellfish resources that are found downstream from the Nebo Tract. I am worried that the construction of impervious surfaces on the Nebo Tract will result in the discharge of large volumes of polluted runoff that will harm downstream shellfish resources. Like most intensively developed areas, I expect that the people who will decide to live on the Nebo Tract and the businesses that locate there will use pesticides, herbicides, and other toxic chemicals to control pests and weeds around their yards, homes, and properties. I am concerned that these toxic chemicals will wash off of the Nebo Tract and contaminate downstream shellfish resources during rainstorms.

5. I am further concerned that the proposed development of the Nebo Tract will exponentially increase traffic in Awendaw, which will further erode my quality of life. Along these lines, I am also concerned that if Nebo develops as it is currently proposed, it will necessitate the construction of hurricane evacuation routes, which will further erode the rural character of the area. I think it is important to control development, and I am concerned that the proposal to develop the Nebo Tract will transform the rural community in which I live. I also have concerns that development will increase crime in the area. Past experience tells me that

with construction, such as this, there will likely be an increase in crime and malicious mischief, which is obviously harmful to current residents as well.

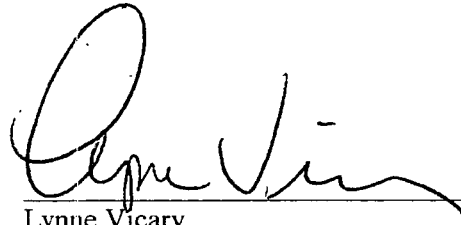
6. As a resident, homeowner, citizen, and taxpayer, I am concerned that the development of the proposed Nebo Tract will ultimately make it too expensive for me to continue living in my home. Given the scale of the proposed development of the Nebo Tract, I believe that the development will ultimately require a significant increase in the level of municipal services, such as additional police and fire services, sewage disposal, schools, additional capacity at the local landfill, and so on. Ultimately, I believe the cost of providing all of these additional services will outweigh any financial benefits to be gained by the Town or the local community. I am scared that my taxes will go up to pay for these additional services and that I will therefore be unable to stay in my home. Even if my property taxes are not raised, I am concerned that the costs of these services, such as sewer and additional landfill capacity, for example, will be passed onto current residents in one form or another.

7. By allowing the Town to annex the Nebo Tract and develop the property as described above, I will suffer individualized injury that injures my interests as a citizen, resident, and property owner in the Town of Awendaw. I have and will suffer “injury in fact” that is fairly traceable to the Town’s purported annexation of the Nebo Tract and of the Ten Foot Strip. It is certain that the injuries will be redressed by a favorable decision in this case.

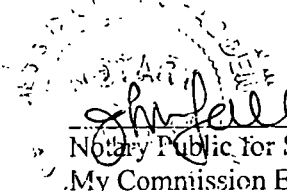
8. Moreover, I decided to become involved in this case because I was troubled by the Town’s attempt to annex the Ten-Foot Strip of the Francis Marion. I do not understand how it is possible for a Town to annex property that is owned by the federal government, and I am very concerned about the precedent this annexation might set and that the Town will continue annexing strips of the Forest in order to facilitate even more development that will further

undermine the ecological integrity of the Forest. Given the important public resources at stake in this case, I believe it is critically important for a court to review the actions taken by the Town to determine if the Town has followed the law.

FURTHER AFFIANT SAYETH NOT.


Lynne Vicary

SWORN and subscribed to before me
this 15th day of March 2011.


John Feller (L.S.)
Notary Public for South Carolina
My Commission Expires: 1/20/19

Notary Public for the State of South Carolina
My Commission expires January 20th, 2019

Supp. Ex. 8

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STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
LYNNE VICARY, KENT PRAUSE and
SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,
Plaintiffs,
vs
CASE NO. 09-CP-10-7399
TOWN OF AWENDAW and EBC, LLC,
Defendants.

RULE 30(b)(4) COASTAL CONSERVATION LEAGUE
DEPOSITION OF BY MEGAN J. DESROSIER
DATE November 9, 2010
TIME 10 02 A M
LOCATION Nexsen Pruet, LLC
205 King Street
Charleston, SC
TAKEN BY Counsel for the Defendant
REPORTED BY SANDRA K BIERKE, RMR, RDR, CRR

A WILLIAM ROBERTS, JR. & ASSOCIATES
Fast, Accurate & Friendly
Charleston, SC Hilton Head, SC Myrtle Beach, SC
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21
22 ALSO PRESENT:
23 Bartow Shaw
24 Robert Jolley
25 (INDEX AT REAR OF TRANSCRIPT)

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1 (DFT. EXH. 1, Notice of Taking 30(b)(6)
2 Deposition of Coastal Conservation League, marked
3 for identification.)
4 (DFT. EXH. 2, Nebo Settlement
5 Development Agreement By and Between Town of
6 Awcndaw, South Carolina and EBC, LLC - Original
7 Retained by Mr. Tisdale, marked for
8 identification)
9 MEGAN J. DESROSIER
10 being first duly sworn, testified as follows:
11 EXAMINATION
12 BY MR. TISDALE:
13 Q. Okay. Just for the record, would it be
14 all right if I call you Megan?
15 A. Yes.
16 Q. This is a very informal proceeding.
17 Your lawyers have probably already told you, and
18 the purpose of it is only for one thing, and that
19 is, to get information about the lawsuit between
20 CCL and Awendaw and the company called EBC.
21 So anytime that you have any question
22 about anything that I ask you, just let me know,
23 and I will try to clarify it.
24 A. Okay.
25 Q. And this is not a trial by fire or

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1 anything. So we got Coca-Colas, coffee and water.
2 Anytime you want to take a break, we'll do that.
3 A. Okay.
4 Q. As you may or may not know, there are
5 rest rooms right outside this door. So that's sort
6 of where we are.
7 MR. TISDALE: Now, does she want to
8 read and sign the transcript?
9 MS. SALTZBURG: Yes, I think she does.
10 MR. TISDALE: Okay. And we can make
11 arrangements about how to get that to her.
12 THE REPORTER: Yes.
13 MR. TISDALE. Now, with respect to one
14 of the exhibits that we will be asking her about at
15 some point, Exhibit No. 2 is entitled Nebo
16 Settlement, N-E-B-O, Development Agreement By and
17 Between the Town of Awendaw and EBC. It looks to
18 be inch and a half, two inches thick.
19 So counsel for all sides have agreed
20 that we, counsel for EBC, will keep that exhibit,
21 without the necessity of copying it at this point
22 But it is an exhibit to the deposition, No. 2,
23 okay?
24 Also present are representatives of
25 EBC, Robin Jolley and Bartow, B-A-R-T-O-W, Shaw,

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1 who are in the room with counsel.

2 Anything else before we begin?

3 MS. SALTZBURG: I don't think so. If
4 she wants to take a break and talk to us about that
5 development agreement since she hasn't seen it, can
6 she do that or --

7 MR. TISDALE: I believe that she
8 certainly would be entitled to talk with you about
9 the development agreement under the rule that says
10 any documents we have not given you before the
11 deposition that she's going to be asked about you
12 have a right to talk with her about during the
13 deposition.

14 MS. SALTZBURG: Okay.

15 MR. TISDALE: And that would certainly
16 be the case there, I think.

17 MS. SALTZBURG: Okay.

18 MR. TISDALE: Any other issues that we
19 need to resolve?

20 MS. SALTZBURG: I don't think so.

21 MR. TISDALE: Okay.

22 BY MR. TISDALE:

23 Q. All right. Well, we might as well --
24 as they say, we can't get finished until we start,
25 so --

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1 Megan, how long have you been employed
2 by CCL?

3 A. Since March of 2003.

4 Q. So that would be a little over seven
5 years.

6 A. About seven and a half, yeah.

7 Q. And what is your position at CCL? I'm
8 just going to say CCL.

9 A. Okay. I'm the assistant director.

10 Q. All right. And just generally, what
11 are your duties involved as assistant director?

12 A. Currently, I oversee the entire staff,
13 the program staff, the development and fundraising
14 staff, and the administration staff.

15 Q. Now, just a little about your
16 background. Where did you grow up?

17 A. I grew up outside of Pittsburgh,
18 Pennsylvania.

19 Q. And what was your education, college?

20 A. I went to Allegheny College, got a
21 bachelor of science in environmental science, and
22 then I got a master's degree from Brown University
23 in environmental policy.

24 Q. Okay. Brown out in Providence.

25 A. Yes.

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1 Q. All right. And were you working in any
2 capacity before you came to work for CCL?

3 A. I worked for two years between college
4 and graduate school at the American Farmland Trust.

5 Q. American what?

6 A. Farmland Trust.

7 Q. All right. And where was that?

8 A. Here in Charleston.

9 Q. Okay. When did you move to Charleston?

10 A. 1998.

11 Q. So as soon as you got your master's
12 degree, you came down here?

13 A. I came back.

14 Q. Came back.

15 A. Um-hum. I was here for two years.

16 Q. Okay.

17 A. Left.

18 Q. With Farmland Trust.

19 A. Yes.

20 Q. Went and got your master's?

21 A. Yes.

22 Q. Then came back and went directly to
23 work for CCL?

24 A. After a few months, yes.

25 Q. Okay. Now, we have sent counsel for

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1 CCL a list of issues that we wanted to ask CCL
2 about. And do you understand -- and I suppose
3 they've explained to you -- that you are here as a
4 representative of CCL?

5 A. Yes.

6 Q. Speaking for CCL?

7 A. I understand.

8 Q. And have you reviewed the list of
9 issues with them --

10 A. I have.

11 Q. -- that we have indicated we wish to
12 ask you about?

13 A. I have, yes.

14 Q. Okay. And do you believe that you are
15 the person most knowledgeable at CCL about the
16 matters that we've listed?

17 A. I do believe that, yes.

18 Q. Okay. Now, Exhibit 1 to the
19 deposition --

20 A. Thank you.

21 Q. And Lisa has a copy of that -- lists
22 the items that I just asked you about, does it not?

23 A. It does.

24 Q. Okay. Now, what I would like to ask
25 you about generally at the beginning of this

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1 deposition is about litigation generally between
2 CCL and Awendaw.
3 A. Okay.
4 Q. Do you know how many cases -- meaning
5 matters in litigation -- CCL has with Awendaw? Has
6 had with Awendaw, say in the last five years?
7 A. I don't know for sure, but I can think
8 of two.
9 Q. All right. And would you tell me what
10 those two are?
11 A. This, the Nebo.
12 Q. Okay.
13 A. And also the villages at Bulls Bay.
14 Q. All right. Is it your understanding or
15 not that there have been other litigation matters
16 with Awendaw and CCL, perhaps before you arrived?
17 A. I believe there may have been, yes.
18 Q. Okay. Do you know anything much about
19 those --
20 A. No.
21 Q. -- except that they existed?
22 A. Mostly that they existed.
23 Q. That they took place?
24 A. Yes.
25 Q. What was the matter about the villages

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1 at Bulls Bay? What did it involve?
2 A. As far as I can remember -- and I was
3 not the person who worked on that case. But as far
4 as I can remember, there was a development
5 proposed, and we opposed that development.
6 Q. Okay. Do you know -- do you remember
7 where the development was, how -- where is the
8 development that you opposed?
9 A. I can see it on a map. I don't know
10 the streets.
11 Q. Is it in the Town of Awendaw?
12 A. Yes.
13 Q. All right. Do you know where it would
14 be compared to where Nebo is, for example? Is it
15 on the other side of the road?
16 A. I think it is on the other side of 17,
17 yes.
18 Q. All right. So it would be on the east
19 side of 17?
20 A. Um-hum.
21 Q. And who at CCL was in charge of
22 handling that litigation?
23 A. Lisa Jones-Turansky.
24 Q. How do you spell her last name?
25 A. T-U-R-A-N-S-K-Y.

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1 Q. All right. Does she still -- is she
2 still employed by CCL?
3 A. She was -- she left for a while. She
4 just recently came back.
5 Q. What is her position?
6 A. She's the director of sustainable
7 agriculture program.
8 Q. Okay. And what was the objection that
9 CCL had to the villages at Bulls Bay development?
10 A. I believe that it was we were afraid of
11 the number of units that were going to be placed on
12 the villages' tract, and we were afraid that it
13 would threaten the natural resources surrounding
14 that property.
15 Q. Do you remember roughly how large the
16 development was acreagewise?
17 A. I don't know.
18 Q. Do you know how it compares to the size
19 of Nebo?
20 A. It was larger.
21 Q. Larger. All right. And what was the
22 outcome of that lawsuit?
23 A. We -- I don't know if we settled or we
24 dropped it because the property got protected.
25 Q. How did it get protected?

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1 A. The Greenbelt Program.
2 Q. What was the effect of the protection?
3 A. They put a conservation easement on the
4 property.
5 Q. The owners did?
6 A. I believe so.
7 Q. All right. I'm just trying to
8 understand it a little bit.
9 Were the number of units that were
10 allowed on the property reduced?
11 A. I believe so, yes.
12 Q. That was the solution, you think?
13 A. Yes.
14 Q. And you either dropped the suit or
15 there was an agreement to --
16 A. Yes.
17 Q. -- to accept that without further
18 litigation?
19 A. Yes.
20 Q. Okay. Now, has the CCL been involved
21 in any litigation up to now that you are aware of
22 concerning the validity of annexations of land?
23 A. Yes.
24 Q. Can you tell me about the CCL's
25 background in annexation litigation?

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1 A. Could you be more specific?

2 Q. Okay. Has it been in Charleston
3 County?

4 A. Well, not in the past -- not since I've
5 been at the Coastal Conservation League.

6 Q. All right. Well, tell me what you know
7 about the annexation litigation before the Nebo
8 tract annexation issue that CCL has been involved
9 in.

10 A. We participated in -- it's ongoing -- a
11 case in Yemassee.

12 Q. Yeah.

13 A. The Binden case.

14 Q. The what case?

15 A. Binden.

16 Q. B --

17 A. Annexation of the Binden tract.

18 Q. B-I-N-D-E-N?

19 A. B-I-N-D-E-N.

20 Q. Okay.

21 A. The town of Yemassee annexed a tract of
22 land called Binden using a 10-foot-wide strip from
23 the town boundary two miles long to Binden.

24 Q. And how long ago did that litigation
25 take place? I think you said it was ongoing?

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1 A. The Supreme Court ruled on it or is
2 considering ruling on it right now. They just
3 heard arguments a couple months ago.

4 Q. Who represents CCL in that litigation?

5 A. Trenholm Walker.

6 Q. Okay. And do you recall who represents
7 the Town of Yemassee?

8 A. I don't.

9 Q. Who at CCL is kind of supervising the
10 progress of that litigation staffwise?

11 A. Patrick Moore.

12 Q. Where does he live?

13 A. Columbia.

14 Q. Okay. And he's an employee of CCL?

15 A. Yes.

16 Q. And is the issue, as you understand it,
17 whether or not the annexation of a 10-foot strip in
18 Yemassee was legal?

19 A. That's one of the issues, yes.

20 Q. All right. What are the other issues,
21 if you know.

22 A. I don't know specifically.

23 Q. Okay. Was the case tried in a lower
24 court before --

25 A. It was.

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1 Q. -- going into the appeals courts?

2 A. (Witness moves head up and down.)

3 Q. And what was the outcome of the lower
4 court trial?

5 A. They're only talking about standing at
6 this point.

7 Q. Oh, they are?

8 A. Yes.

9 Q. And what was the ruling of the lower
10 court?

11 A. The lower court ruled that Coastal
12 Conservation League and the attorney general of
13 South Carolina did not have standing to challenge
14 the annexation.

15 Q. Okay. So I gather from what you said
16 that CCL did challenge the annexation?

17 A. Yes, we did.

18 Q. And the lower court ruled that you --
19 the CCL did not have standing to make that claim?

20 A. That's right.

21 Q. Do you remember what the reason was
22 that the lower court said that?

23 A. You know, I'm not an attorney.

24 Q. No I'm not -- right. I'm not asking
25 you for a legal --

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1 A. Yeah. But my recollection is that the
2 hundred percent annexation statute doesn't give
3 groups like the Coastal Conservation League
4 standing.

5 Q. Okay. All right. And has it already
6 gone to the court of appeals in Columbia?

7 A. It's at the -- it's the Supreme Court.
8 South Carolina Supreme Court just heard the
9 arguments.

10 Q. The South Carolina Supreme Court?

11 A. Yes.

12 Q. But did a -- and I don't want to get
13 bogged down on this, but usually when you make an
14 appeal it goes to a court of appeals --

15 A. Um-hum.

16 Q. -- and then sometimes goes to the
17 Supreme Court. Do you know if this was heard by a
18 court of appeals?

19 A. I can't imagine why it wouldn't be, but
20 I don't know.

21 Q. Don't know. Okay. Do you remember
22 roughly when that case started, the date?

23 A. I can probably -- no. I can -- no. It
24 was after 2005.

25 Q. When it started.

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1 A. Yes.

2 Q. Okay. And do you remember roughly when

3 a decision was made by the lower court?

4 A. No, I can't say for sure.

5 Q. All right. And you can't remember who

6 the lawyer is representing the Town of Yemassee?

7 A. I don't know. I never knew that.

8 Q. Is anyone involved in the lawsuit other

9 than CCL and the Town of Yemassee? Is there a

10 third party?

11 A. The attorney general of South Carolina

12 tried to intervene.

13 Q. Okay.

14 A. And there are two people, I believe,

15 residents of Yemassee, who have challenged the

16 annexation as well.

17 Q. Were those people recruited by CCL to

18 be involved in the lawsuit?

19 A. I don't know that we recruited them,

20 but they came to us and said they were interested

21 in participating.

22 Q. What are their names?

23 A. I don't know.

24 Q. Okay. All right. Now, do you know of

25 any other annexation litigation that CCL has been

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1 involved in before Nebo other than that one?

2 A. Named as a party? CCL named as a

3 party?

4 Q. Well, let's start with that.

5 A. No.

6 Q. All right. How about not named as a

7 party?

8 A. We are helping residents challenge an

9 annexation in Summerville, the annexation of the

10 Watson Hill tract by North Charleston.

11 Q. Okay. And how is CCL helping in that

12 litigation?

13 A. We are paying legal fees for an

14 attorney who represents those people.

15 Q. The people who are challenging the

16 annexation?

17 A. Yes.

18 Q. And who is that attorney?

19 A. William Harvey.

20 Q. Down in Beaufort?

21 A. Yes.

22 Q. All right. And is that in litigation,

23 to your knowledge?

24 A. It is.

25 Q. Has there been any ruling in that case?

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1 A. There has.

2 Q. Tell me what you can recall about it.

3 A. There was a summary judgment about a

4 procedural decision that was made by the Town of

5 Summerville. So the judge said that Summerville

6 counted the days that Summerville had -- that North

7 Charleston -- Summerville miscounted the days that

8 they had to give the public notice to their 75

9 percent annexation of a strip, not of Watson Hill.

10 Q. Well, was the ruling that annexation

11 was valid or invalid?

12 A. Didn't say one way or the other. It

13 just was that the days were counted incorrectly.

14 Q. About notice of the annexation or

15 something?

16 A. By the public -- the annexation statute

17 says 30 days need to be given for a 75 percent

18 annexation.

19 Q. Right.

20 A. The judge ruled that Summerville did

21 not give 30 days' notice.

22 Q. So, therefore, the annexation was --

23 A. The judge didn't talk about validity of

24 the annexation.

25 Q. Just made that ruling

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1 A. Yes.

2 Q. Okay. So there's been no final ruling

3 in that case?

4 A. No.

5 Q. Okay. Let's move to Awendaw for a

6 little bit now.

7 A. Okay.

8 Q. No more annexation issues that CCL is

9 involved in, to your knowledge, other than those

10 we've talked about?

11 A. Not since I've been at the league.

12 Q. Okay. And that's been six, seven

13 years?

14 A. Seven and a half years.

15 Q. Yeah. Now, is it the goal of CCL to

16 have the court declare the development agreement

17 void in this case?

18 MS. SALTZBURG: Object to the extent it

19 calls for a legal conclusion.

20 MR. TISDALE: Excuse me. Say what?

21 MS. SALTZBURG: Just object to the

22 extent it calls for a legal conclusion.

23 MR. TISDALE: Well, certainly I don't

24 want her to give a legal conclusion.

25 BY MR. TISDALE:

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Q. But let's just approach it another way: Referring to Exhibit 1, are you familiar with the development agreement?

A. I have not read the development agreement.

Q. Okay. Well, in this case my understanding is CCL is seeking to have the development agreement set aside.

Do you understand that?

A. I understand.

Q. All right. I mean, do you understand that is the goal of CCL?

A. I understand that in -- that that's what I've read in the papers that have been filed by our attorneys, yes.

Q. You understand that that is the position of CCL, to have this development agreement set aside.

A. I understand that that's what our legal documents say, yes.

Q. Okay. And you do agree that that is the position.

A. ... Yes.

Q. Okay. Now, what -- why does CCL wish to have the development agreement set aside?

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A. The setting aside of the development agreement is a -- the setting aside of the development agreement is -- you know, I guess I am going to contradict myself here. The main goal is to prevent the development of the Nebo tract.

Q. Okay. All right.

A. And so in that the development agreement is an agreement between the developer and the Town of Awendaw that facilitates that development, we would like to see the development agreement set aside.

Q. Okay. Well, let me ask you this: From the standpoint of CCL, who you represent, why does CCL wish to prevent the development of Nebo tract?

A. Because we are concerned about the effects of the development of the Nebo tract on the Francis Marion.

Q. Francis Marion National Forest?

A. Yes.

Q. While we're on that point, let me ask you this: Is the Nebo tract entirely in the -- within the national forest, Francis Marion National Forest?

A. The Nebo tract is within the proclamation boundaries.

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Q. What does that mean?

A. It's a boundary defined by the U.S. Forest Service of areas that are within -- or of areas that have an effect and are primarily within the larger vicinity of the Francis Marion National Forest.

Q. Okay. Now, understanding that not everybody who will be involved in deciding these issues will understand exactly what the national -- being in the national forest involves, I would like to ask you a few questions to help us all understand.

A. Okay

Q. Is there property in the national forest that is owned by the federal government?

A. There is.

Q. Is there property in the national forest that is owned by private entities, individuals and companies?

A. There is.

Q. All right. And is there any prohibition against the existence of private property inside the forest?

A. There is not.

Q. Okay. And this is not for a legal

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conclusion that I'm asking you, but just for an understanding.

Do people -- is it your understanding as a layperson that people who own private property in the forest have the same property rights that are given to property owners outside the national forest?

A. They have the property rights according to what the county and the local jurisdiction, whether it's a municipality or county, give them.

Q. Of course, regarding zoning and that sort of thing

A. Right.

Q. All right. Do you know roughly how large the Nebo tract is?

A. I know roughly how large it is, yes.

Q. What is your understanding?

A. A little more than 300 acres.

Q. All right. Now, why is it that given -- why is it that CCL does not wish to see the Nebo tract developed and why is it challenging the development of it?

A. We feel that the development that is proposed in the development agreement is too intense for -- for the development to be consistent

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1 with the overall goal of the Forest Service and the
2 needs for managing the Forest Service property.

3 Q. All right. Well, let's explore that
4 just a little bit and try to be a little bit more
5 definite.

6 Can you give me any specifics as to
7 what there is in the development agreement that CCL
8 objects to?

9 A. I have not read the development
10 agreement.

11 Q. All right. Well, if I can suggest, is
12 it the position of CCL that there will be too many
13 residential dwellings?

14 A. That is one of the concerns, yes.

15 Q. And how many residential dwellings do
16 you know would be allowed under the development
17 agreement, if you know.

18 A. What I remember is -- and I don't know
19 why I remember this number, and it may not be
20 correct, but what I remember is more than 300.

21 Q. Okay. Now, if 300 is objectionable,
22 how many would be unobjectionable?

23 A. What we have said in the past is that
24 we agree with the county zoning of the Nebo tract,
25 which was one unit per ten acres, which would allow

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1 one unit per five with the planned development.

2 Q. All right. Do you agree or don't agree
3 that the Town of Awendaw, if this land is in the
4 town -- and I understand there's an issue about
5 that that we'll talk about later.

6 But if this land is legally in the
7 town, is it not up to the town to set the number of
8 units that can be in this development?

9 MS. SALTZBURG: Objection; calls for a
10 legal conclusion.

11 BY MR. TISDALE:

12 Q. Okay.

13 A. I agree that towns who have
14 jurisdiction over properties set zoning for those
15 properties.

16 Q. Now, not asking you to agree with the
17 legality of the annexation that is in the town, but
18 if -- assuming for the purpose of my question that
19 it is in the town, do you agree that the town has
20 the legal right to set the configuration of the
21 development in terms of the number of units?

22 A. Yes, I do.

23 MS. SALTZBURG: Object; calls for a
24 legal conclusion, but you can answer.

25 THE WITNESS: I agree.

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1 BY MR. TISDALE:

2 Q. Now, other than the number of units in
3 the town -- excuse me -- number of units in the
4 development, allowed in the development agreement,
5 what else is there in the development agreement
6 that is objectionable to CCL in terms of this
7 planned development?

8 A. I'm sorry, but I have not read the
9 development agreement, so I cannot say
10 specifically.

11 Q. All right. So just so we'll be clear,
12 you do not know, as a representative of CCL, and
13 cannot tell us what is objectionable about the
14 development agreement except that it is too intense
15 for the area

16 MS. SALTZBURG: Object as to form.

17 THE WITNESS: I have not read the
18 development agreement. I have read our position
19 statement about the density that was proposed on
20 the Nebo tract, and that is our primary concern.

21 BY MR. TISDALE:

22 Q. Okay. Well, just for the record, and I
23 don't intend to be argumentative here I just want
24 to state it for the record; that on Exhibit 1 we
25 asked for a person to testify from CCL on the

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1 development of the Nebo -- most knowledgeable about
2 the development of the Nebo tract.

3 And No. 2 is the person most
4 knowledgeable about CCL's objections to the
5 development agreement.

6 And I gather from what you've already
7 told me that you are the person most knowledgeable.

8 A. I am.

9 Q. Okay. And is there anything then that
10 you can tell me about CCL's objections to the
11 development of the Nebo tract beyond what you have
12 told me?

13 MS. SALTZBURG: Objection; vague.

14 MR. TISDALE: Vague? Okay. I stand by
15 the question.

16 THE WITNESS: Outside of the
17 development agreement, because I have not read it,
18 what we are opposed to is the density, as I've
19 said, the need for -- the potential need for
20 infrastructure on the property, which may or may
21 not be a sewer line or may or may not be a package
22 treatment plant. Those are the two primary
23 concerns that we have had with the development of
24 the Nebo tract.

25 BY MR. TISDALE:

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1 Q. Okay. Just so I will understand, I
2 think that you said the first one was the density.
3 A. Yes.
4 Q. And that would simply be what it sounds
5 like it means.
6 A. The number of units.
7 Q. Number of units.
8 A. Yes.
9 Q. Residential units.
10 A. Yes. And commercial, yes.
11 Q. And commercial.
12 A. Yes.
13 Q. All right. But that is a general
14 objection, you say, not based on a reading of the
15 development agreement.
16 A. I have not --
17 MS. SALTZBURG: Objection to
18 characterization of her testimony.
19 THE WITNESS: I have not read the
20 development agreement.
21 BY MR. TISDALE:
22 Q. Right.
23 A. I have read newspaper articles, I have
24 read public notices.
25 Q. All right.

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1 A. I've read internal e-mails from our
2 staff.
3 Q. Now, explain to me the second objection
4 that you voiced just now about the sewage disposal.
5 A. I said infrastructure, yes.
6 Q. Infrastructure.
7 A. We are concerned that development on
8 the Nebo tract would require infrastructure that is
9 not consistent with the needs of the Francis Marion
10 National Forest.
11 Q. Now, explain that to me.
12 A. A package treatment plant, a sewer
13 line.
14 Q. Well, explain to me why that is
15 objectionable to CCL. What is the problem?
16 A. We fear that infrastructure extensions
17 of that nature will facilitate development beyond
18 the Nebo tract development.
19 Q. Can you elaborate on that a little bit?
20 A. Yes. When somebody -- when a town
21 extends a sewer line somewhere --
22 Q. Yeah.
23 A. -- there's -- very rarely is it to just
24 meet the capacity of that one tract of land.
25 Q. Right.

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1 A. Usually what it does is promote more
2 development along that same -- in that same area
3 along that same sewer line.
4 Q. Okay.
5 A. And that concerns us.
6 Q. All right. Let me -- and let me see if
7 I understand what you're saying. I think I
8 understand. But are you saying or do I understand
9 from what you're saying that this development of
10 Nebo will require the installation of certain
11 infrastructure, including sewer lines, No. 1?
12 A. I don't mean to interrupt you. You can
13 finish.
14 Q. No. Go ahead.
15 A. I don't know that it would require
16 sewer lines. I imagine that it would require
17 either sewer or a package treatment plant --
18 Q. All right.
19 A. -- because of the density necessary.
20 Q. Okay. Either a sewer line or a package
21 treatment plant; right?
22 A. Right.
23 Q. All right. So let's assume it would
24 require one of those, if not both. Why is that
25 objectionable to CCL? Elaborate on that a little

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1 bit. I'm having a hard time figuring out. What
2 makes that objectionable that there's
3 infrastructure to serve this development?
4 A. Because, as I said, when a sewer line
5 is extended or a package treatment facility is
6 built, it is very rare that the sewer line is or
7 the package treatment facility is only built to the
8 capacity that is necessary in that one tract of
9 land or parcel of land.
10 Q. In this case the Nebo.
11 A. Yes. And, therefore, often what
12 happens is the sewer line facilitates development
13 beyond that one isolated parcel of land of other
14 areas.
15 Q. All right. Am I to understand from
16 what you said, what you are saying, that CCL is
17 opposing Nebo because the infrastructure will lead
18 to more development in the area?
19 MS. SALTZBURG: Object as to form.
20 THE WITNESS: There -- that is one of
21 the reasons, yes. May is the word. It may lead to
22 development of other areas, yes
23 BY MR. TISDALE:
24 Q. Okay. And that would be in the
25 national forest, in the proclamation area of the

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1 national forest.
 2 A. Yes.
 3 Q. Is that right?
 4 A. Yes.
 5 Q. That you've described earlier, defined
 6 earlier.
 7 And is that one of the reasons that CCL
 8 has challenged this development, because of the
 9 danger that it will lead to more development in the
 10 area?
 11 A. Yes.
 12 Q. All right. Now, are you generally
 13 familiar with the Fair Lawn tract?
 14 A. I'm generally familiar with it, yes.
 15 Q. And are you generally familiar with
 16 approximately how large it is?
 17 A. I don't know the acreage number. I
 18 know it's large, yes.
 19 Q. Several thousand acres?
 20 A. Yes, yes.
 21 Q. All right. And is it in the
 22 proclamation area of the national forest?
 23 A. It is.
 24 Q. And is it the fear of CCL that if Nebo
 25 is developed, that it could lead to development of

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1 Fair Lawn?
 2 A. One of our fears, yes.
 3 Q. And is that also a reason that this
 4 lawsuit -- one of the reasons that this challenge
 5 is being made against Nebo, is to prevent the
 6 development of Fair Lawn tract?
 7 A. Well, the primary reason is that we are
 8 concerned about the development of Nebo's effect on
 9 the Francis Marion.
 10 Q. Of course.
 11 A. But yes, always we have to look to the
 12 future possibilities as well.
 13 Q. And that is one -- at least one reason
 14 why this challenge has been made?
 15 MS. SALTZBURG: Objection. She's asked
 16 and answered that.
 17 THE WITNESS: Yes.
 18 BY MR. TISDALE:
 19 Q. Okay. Now -- all right. You've told
 20 us, Megan, that the objection is being made to Nebo
 21 because of the density and the necessity for
 22 infrastructure I understand that.
 23 And I also understand you to be saying
 24 that the larger issue has to do with future
 25 development possibilities; right?

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1 A. Right.
 2 Q. Okay. Is there anything else about the
 3 development of Nebo that is objectionable to CCL
 4 other than what you have told me?
 5 A. Not that I can remember at the moment,
 6 no.
 7 Q. Okay. Now, you have told us that you
 8 have not read the development agreement.
 9 A. I have not.
 10 Q. All right. Has anybody that you know
 11 of at CCL read the development agreement?
 12 A. Not that I know of who currently works
 13 there, no.
 14 Q. How about anybody who currently does
 15 not work there?
 16 A. Who used to work there, yes. I --
 17 Grace Gasper read the development agreement and
 18 Jane Lareau read the development agreement.
 19 Q. Grace Gasper. G-A-S-P-E-R?
 20 A. Yes.
 21 Q. Jane Lareau L-A-R-E-A-U?
 22 A. That's right.
 23 Q. They're both former employees of CCL?
 24 A. Yes.
 25 Q. And both have read the development

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1 agreement?
 2 A. Yes.
 3 Q. Okay. Have you talked to them about
 4 it?
 5 A. Not recently.
 6 Q. Okay. But --
 7 A. Previously, yes.
 8 Q. And have you talked to them about what
 9 they viewed as objections to the development
 10 agreement?
 11 A. I have.
 12 Q. And can you tell us whether or not what
 13 they said was in accord with what you have
 14 expressed or different?
 15 A. Again, what I said is the only thing --
 16 well, what I said was I didn't read the development
 17 agreement.
 18 Q. I understand that.
 19 A. What you said is what might be in there
 20 is the number of units and the number of acres.
 21 Q. I understand.
 22 A. Okay. So that we did speak about that
 23 issue, and we also spoke about the infrastructure
 24 issue.
 25 Q. Was there anything else that they told

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1 you after their reading of the development
2 agreement that was objectionable other than what
3 you have already described?

4 A. I can't recall if there's anything
5 more.

6 Q. Okay. Nothing that you can remember
7 right now.

8 A. Right.

9 Q. Okay. Now, Ms. Vicary testified
10 earlier -- you're familiar -- you know --

11 MS. SALTZBURG: Objection to that.
12 Lacks foundation.

13 MR. TISDALE: Okay. I'm coming to that
14 in a minute.

15 BY MR. TISDALE:

16 Q. Ms. Vicary testified earlier that she
17 was concerned about the surface water runoff issue
18 in the Nebo development. Are you familiar with
19 that issue and do you consider that to be a
20 problem?

21 A. Yes, we are concerned about the surface
22 water runoff issue and the effect of the water on
23 the Francis Marion, yes.

24 Q. And the effect of -- explain that a
25 little bit.

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1 A. In general, we worry about the amount
2 of impervious surface on the Nebo tract and the
3 effect of the runoff on the water quality of the
4 wetlands within the Francis Marion National Forest.

5 Q. And is it your opinion or belief that
6 the development of the Nebo tract would adversely
7 affect the water runoff in the forest?

8 A. The water quality of the forest.

9 Q. Yeah.

10 A. Yes.

11 Q. Okay. And would it be fair to say that
12 that also is an objection to the development of the
13 Nebo tract by CCL?

14 A. Yes, yes.

15 Q. Okay. I'm just trying to find out what
16 all the objections are.

17 A. Right. Well, so originally when you
18 asked me about this, what I said was our primary
19 concern was the development of the Nebo tract's
20 effects on the Francis Marion National Forest, and
21 what you just described falls into that category.

22 Q. Okay. Is there anything else before we
23 move on to another topic?

24 A. I mean, if you want me to elaborate on
25 that category, I can.

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1 Q. I would like you to.

2 A. We're concerned about the effect of the
3 development of the Nebo tract's ability to manage
4 the forest with fire. We're concerned about the
5 effect of the development's -- the effect the
6 development may have on the wildlife in the forest
7 and the water quality of the forest.

8 Q. Okay. How would it affect the
9 wildlife?

10 A. Mainly because of the burning. If
11 there's development too close to the Francis
12 Marion, it makes it unable or difficult for the
13 Forest Service to burn without having an effect on
14 human health.

15 Q. You mean controlled burning?

16 A. Yes. And, therefore, the wildlife
17 would suffer. A lot of the wildlife in the forest
18 relies on the fire ecosystem.

19 Q. We don't need to get into a long
20 discussion, I don't think, about controlled
21 burning, but do you understand that controlled
22 burning takes place in the national forest to
23 maintain the quality of the forest?

24 A. I do understand that, yes.

25 Q. All right. And how would the

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1 development of Nebo adversely affect that? That's
2 what I'm not clicking on.

3 A. When there is human settlement, dense
4 human settlement close to an area that is burned,
5 oftentimes you have to worry about the human health
6 impacts of the burning on the people who live in
7 that area.

8 Q. Right.

9 A. And by having a dense development close
10 to the forest, we're afraid or concerned that the
11 people who live there or the people who move there
12 will not be happy with the Forest Service burning.

13 Q. Burning close to them?

14 A. Nearby, yes.

15 Q. And without the burning, the animal
16 life might be degraded; is that right?

17 A. That's right.

18 Q. Okay. Thank you. Now, is there
19 anything else that --

20 A. No, sir.

21 Q. Okay. Concerning the objections of CCL
22 to the development of Nebo?

23 A. No, sir.

24 Q. All right. And were Ms. Gasper and
25 Ms. Lareau employed by CCL when they read the

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development agreement, or not?

A. Ms. Lareau was not.

Q. Was not employed when she read the development agreement?

A. She was not, that's right.

Q. And how about Ms. Gasper?

A. She was.

Q. She was employed?

A. Yes.

Q. And she, so far as you know, is the only person employed by CCL at the time the development agreement was read by anyone at CCL.

A. That's right.

Q. Okay. What was her position, by the way? Ms. Gasper.

A. She was the director of land use in Georgetown.

Q. On the staff.

A. Yes.

Q. And how about Ms. Lareau?

A. When she was employed there?

Q. Yeah. If you know.

A. I don't know what it was when she left.

Q. How long, roughly, was Ms. Gasper employed by CCL?

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A. A little more than a year.

Q. Short time.

A. Yes.

Q. And she was at Georgetown?

A. She was in -- between Georgetown and Charleston.

Q. All right. And Ms. Lareau, was she a longtime employee or a short time?

A. She was a longtime employee.

Q. And you don't recall her position?

A. She was all different things. I think when she left she might have been director of land use.

Q. Okay. Now, one of the issues that we're going to want to talk about in a few minutes is the annexation situation. But before I get into that, I wanted to ask you, one, does CCL own any land in Awendaw?

A. No.

Q. All right. I understand that -- and tell me if this is wrong. Just trying to save a little time. That the annexation objection is really to the annexation of a 10-foot strip of land between -- that's owned by the Forest Service; is that right?

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MS. SALTZBURG: I object as to form. Calls for a legal conclusion.

MR. TISDALE: Calls for what?

MS. SALTZBURG: A legal conclusion.

MR. TISDALE: Okay. We'll approach it another way.

BY MR. TISDALE:

Q. Does CCL in this lawsuit challenge the annexation of the Nebo tract?

MS. SALTZBURG: I'm just going to object again to the extent that you're asking for a legal conclusion.

MR. TISDALE: I'm not asking for a legal. I'm asking what she understands CCL's position is in the lawsuit.

THE WITNESS: Our position, I believe, is -- again, I did not write the documents, but --

BY MR. TISDALE:

Q. Right.

A. -- I believe that we are concerned about the annexation of the Nebo tract, yes.

Q. Okay. Well, just for the record, No. 5 in Exhibit 1 asks for the person most knowledgeable about CCL's allegations that Awendaw has not complied with required annexation laws and

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regulations.

MS. SALTZBURG: Objection. She's answered that question twice now.

MR. TISDALE: Huh?

MS. SALTZBURG: Objection. She's answered that question.

MR. TISDALE: Well, that wasn't a question. I was just citing for the record what we had asked someone from CCL to testify about.

And I just wanted to be certain that I was asking her about the annexation challenges, that Awendaw has not complied with required annexation laws and regulations.

BY MR. TISDALE:

Q. Do you understand that category?

A. I do.

Q. Okay. What is it about the annexation that CCL objects to?

MS. SALTZBURG: Objection, just to the extent it calls for a legal conclusion.

MR. TISDALE: Okay.

THE WITNESS. You know, I can't say for sure what it is. When we were doing the research there were a number of things that we looked at, and I don't -- I can't remember for sure what it is

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1 exactly that Chris and Lisa put in the document.
 2 BY MR. TISDALE:
 3 Q. All right. Well, let me approach it
 4 another way and see if there's any way we can get
 5 some information about it.
 6 Is it your understanding that the Nebo
 7 tract has been annexed by the Town of Awendaw?
 8 A. It is, yes.
 9 Q. All right. Are you able to tell me why
 10 CCL is challenging that annexation? What is the
 11 basis for the challenge?
 12 A. I'm -- I'm -- it is not -- again, I'm
 13 not a legal expert on the --
 14 Q. I understand completely.
 15 A. -- issue. But my understanding is that
 16 we were not necessarily alarmed by the annexation
 17 of the Nebo tract from Mt. Nebo Church, but what
 18 alarmed us was the actual annexation of Mt. Nebo
 19 Church in 2004.
 20 Q. Okay. So without getting unduly
 21 complicated from a legal standpoint, and I don't
 22 want to get into a morass about legalities. But
 23 I'm just trying to understand what it is about the
 24 annexation, and you've said it's the 2004
 25 annexation that is the problem.

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1 What is your understanding of what the
 2 problem is of the 2004 annexation?
 3 A. My understanding is that we believe
 4 that there was never a petition filed by the Forest
 5 Service for the annexation of the 10-foot -- or
 6 whatever wide it is -- strip.
 7 Q. We can agree, I think, it's supposed to
 8 be a 10-foot-wide strip.
 9 A. Okay.
 10 Q. And that is it your understanding that
 11 that 10-foot-wide strip that was annexed in 2004 is
 12 a strip between the town and the Nebo church
 13 property?
 14 A. That's what it's supposed to be, yes.
 15 Q. Yeah. And this is not a trick or
 16 anything. I'm just trying to get it in some
 17 understandable way that we can communicate about
 18 it.
 19 And who do you understand owns -- if
 20 you do understand -- owns that 10-foot strip?
 21 A. The Forest Service.
 22 Q. Okay. U.S. Forest Service.
 23 A. (Witness moves head up and down.)
 24 Q. All right. And I think that you said
 25 CCL believes that the petition for that annexation

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1 in 2004 might not have been valid?
 2 MS. SALTZBURG: Objection to the
 3 characterization.
 4 BY MR. TISDALE:
 5 Q. Just understanding. I'm not asking for
 6 a legal opinion.
 7 A. What I understand is that the petition
 8 for the annexation of Mt. Nebo Church did not
 9 include a petition for the -- a signature for the
 10 annexation of that 10-foot strip leading to the
 11 church.
 12 Q. Okay. And was CCL aware of that
 13 claimed defect in 2004?
 14 A. I don't believe we were.
 15 Q. All right. When did CCL discover that,
 16 that issue?
 17 A. We discovered it when we looked at a
 18 Freedom of Information Act set of documents -- set
 19 of documents received through the Freedom of
 20 Information Act, probably in 2009.
 21 Q. Okay.
 22 A. Maybe two thousand and -- yeah. Let me
 23 think Probably 2009.
 24 Q. Okay. Just for the record, who made
 25 the FOIA, Freedom of Information Act, request?

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1 A. The league.
 2 Q. Who did you make it to?
 3 A. The town.
 4 Q. Town of Awendaw?
 5 A. Yes.
 6 Q. Did any of the records you have
 7 reviewed, any of the knowledge you have indicate
 8 whether anyone appealed from the annexation of the
 9 10-foot strip back in 2004?
 10 A. I didn't see any information about that
 11 in the documents I reviewed.
 12 Q. Okay. Do you -- so as far as you know,
 13 was there an appeal or not an appeal?
 14 A. As far as I know, there wasn't, but
 15 that doesn't mean there wasn't. I just don't know
 16 about it.
 17 Q. You don't know of one.
 18 A. Right.
 19 Q. And is it -- are we clear that this
 20 10-foot strip, to your knowledge, was then and is
 21 now owned by the Forest Service?
 22 A. Yes.
 23 Q. U.S. Forest Service?
 24 A. Yes, to my knowledge.
 25 Q. And there's certainly not any

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1 contention, is there, or is there any contention by
2 CCL that it owns the 10-foot strip?

3 A. No.

4 Q. No.

5 A. We don't own that 10-foot strip.

6 Q. And Mr. Prause doesn't own it, does he?

7 A. No.

8 Q. And Ms. Vicary doesn't own it, does
9 she?

10 A. No.

11 Q. Anytime you want to take a break, get
12 some water or something, we can.

13 A. Thank you.

14 Q. Now, I'm not asking for a legal
15 conclusion now, but is it your understanding,
16 Megan, that if that 10-foot strip annexation in
17 2004 was valid -- just if it was. Not saying
18 whether it was or wasn't. But if it was, then the
19 annexation, leading to the annexation of Nebo
20 tract, would also be valid?

21 MS. SALTZBURG: I'm going to object
22 just to the extent it is a legal question.

23 THE WITNESS: I mean, I guess so. I
24 mean, as far as I know, yes, but --

25 BY MR. TISDALE:

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1 Q. Well, speaking for the league --

2 A. Yes. As far as we know, yes.

3 Q. Okay. Do you know of any objections
4 CCL has to the annexation issues other than what
5 you have described about the 10-foot strip
6 petition?

7 A. Not that I can think of, no.

8 Q. Okay. Let's move on to some other
9 issues here.

10 When did CCL decide to engage in a
11 challenge of the Nebo development?

12 A. We decided to do that shortly after --
13 or maybe -- while the development was going through
14 first, second and third reading. I don't know
15 exactly the date.

16 Q. Okay. And just for the record, so
17 everybody who reads it will understand the context,
18 are you referring to the first, second and third
19 readings of the ordinances of Awendaw --

20 A. Yes.

21 Q. -- to allow the development?

22 A. To adopt the development agreement.
23 And it is my understanding, and I may not be
24 correct on this, that the annexation and the
25 development agreement ordinances were passed at the

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1 same time.

2 Q. My understanding also.

3 A. Yes.

4 Q. And so it was during that period of
5 time that those matters were being considered that
6 at some point CCL decided to challenge it.

7 A. Yes.

8 Q. All right. Now, do you know roughly
9 when that was?

10 A. I don't know when third reading was
11 passed, but I believe that it was in 2009.

12 Q. Third reading of the ordinance to allow
13 the development?

14 A. Yes. The annexation and development
15 agreement, yes.

16 Q. Annexation and development agreement?

17 A. Yes.

18 Q. And the change of revision in the
19 town's comprehensive plan?

20 A. Comprehensive plan, um-hum. Yes.

21 Q. Okay. How -- well, let's just talk
22 specifically about this case

23 How does CCL decide when to engage or
24 challenge issues such as this?

25 A. You mean legally, or when to take a

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1 position on a project?

2 Q. When to take a position on a project.
3 Well, both.

4 A. Okay.

5 Q. But beginning with when to take a
6 position.

7 A. Okay.

8 Q. I guess that would precede deciding to
9 litigate it, wouldn't it?

10 A. It does.

11 Q. All right.

12 A. Well, we monitor agendas for all the
13 towns and the counties in the areas where we work,
14 and we are also talking to people a lot.

15 And when there is a rumor of a
16 development coming down the line or when we see
17 something on an agenda, we inquire about it, and we
18 find out the details.

19 And we then look at the surrounding
20 area and whether the proposed development would be
21 consistent with the county's comprehensive plan,
22 which is something that we support.

23 And we look at -- in this case we
24 looked at not only the county's comprehensive plan,
25 but the Francis Marion, Cape Romain, the land uses

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1 around there, and we formed a position.

2 We also had residents in the Town of
3 Awendaw who were supportive of our position, which
4 helped us know that we wouldn't be the only people
5 standing up opposing the position, especially in a
6 town like Awendaw. It's hard for the Coastal
7 Conservation League to have any effect.

8 Q. Because of what?

9 A. Because we don't -- because the Town of
10 Awendaw listens to the residents of Awendaw first,
11 which they should.

12 Q. Right.

13 A. So that's how we decided to take a
14 position on this development.

15 If the work at the local level to
16 either have the project amended so that it is more
17 acceptable or have the project denied doesn't work,
18 that's when we decide whether we're going to file a
19 legal challenge.

20 Q. Okay. Now, who in Awendaw was
21 monitoring this project as it was being developed?

22 A. Grace Gasper.

23 Q. Was she doing that as a volunteer or
24 as --

25 A. No. I think she was doing that as a

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1 paid employee.

2 Q. Of the league.

3 A. Of the league, yes.

4 Q. And what specifically was she asked to
5 do?

6 A. She monitored the Town of Awendaw's
7 agenda in general.

8 Q. Who was her supervisor at CCL?

9 A. She had two. One was in Georgetown.
10 That was Nancy Cave, and I was her supervisor in
11 Charleston.

12 Q. All right. Nancy Case?

13 A. Cave.

14 Q. Cave. C-A-V-E.

15 A. Yes.

16 Q. And would it be you and/or Nancy Cave
17 to instruct her on what to do concerning monitoring
18 the project?

19 A. It would have been me.

20 Q. Okay. Now, I noted you answered this,
21 but you said she was no longer employed by the
22 league?

23 A. She's no longer employed.

24 Q. What is she doing now? Do you have any
25 idea?

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1 A. I don't know.

2 Q. Did she resign, or was she terminated,
3 or what?

4 A. She -- she was -- she -- I don't know.
5 She was terminated.

6 Q. Okay. I don't want to go into any
7 personal -- well, let's just -- I mean, was she
8 terminated because -- can you -- you might want
9 to -- I don't want to get into anything that's not
10 lawful. But if there's any way to find out why she
11 was terminated, it would be good to know.

12 MR. TISDALE: Is there any reason she
13 can't answer that?

14 MS. SALTZBURG: Not that I'm aware of.

15 MR. TISDALE: Huh?

16 MS. SALTZBURG: Not that I'm aware of,
17 no.

18 BY MR. TISDALE:

19 Q. All right. Why was she terminated?

20 A. She was terminated because she wasn't
21 fulfilling the requirements of her job description.

22 Q. That's pretty general.

23 A. Yeah.

24 Q. Anything in specific? Anything
25 specific that you can tell us?

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1 A. No. It was a number of things. I
2 mean, the reason it's general is because it wasn't
3 anything -- any one specific thing. There were a
4 number of --

5 Q. Did it have anything to do with the
6 Awendaw project?

7 A. No. Not specifically, no. In
8 general -- in general, she was not monitoring
9 things the way that we needed her to monitor them.
10 She wasn't staying on top of her work the way that
11 we needed her to.

12 Q. All right.

13 A. There was not one thing.

14 Q. Did you talk with her on a regular
15 basis about what was going on in her sphere?

16 A. I did.

17 Q. And that would include Awendaw?

18 A. Yes.

19 Q. All right. And did she attend all of
20 the hearings in connection with the development of
21 the Nebo tract that Awendaw conducted?

22 A. I don't know if she attended all of
23 them, but I know she attended most of them.

24 Q. And on the ones that she attended,
25 which are most of them, did she make regular

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1 reports to you on what was going on up there?

2 A. She did.

3 Q. And were those reports in writing or

4 oral?

5 A. Usually e-mail.

6 Q. All right. And I suppose y'all have

7 produced all those to us, have you not?

8 A. (Witness moves head up and down.)

9 MS. SALTZBURG: Yes, we have.

10 MR. TISDALE: Okay.

11 BY MR. TISDALE:

12 Q. All right. Now, who internally in

13 CCL -- we've gotten to the point that Ms. Gasper

14 was assigned to monitor the development of the Nebo

15 issues, and she was reporting to you.

16 At what point -- did you say earlier

17 that it was during the readings of the ordinances

18 and plan and so forth that y'all decided to

19 litigate this matter?

20 A. It was -- I don't know exactly at what

21 point, but it was either during those -- that time

22 or after, immediately after third reading of --

23 Q. After it was adopted.

24 A. Yes.

25 Q. And when we say adopted, we can agree

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1 that that means just the project was going forward?

2 A. That town council voted in favor of

3 moving forward, yes.

4 Q. Okay. Now, what is the procedure at

5 CCL for making a decision about what is litigated

6 and what is not litigated, leading to the question

7 of how was it decided that this matter be

8 litigated?

9 A. Right. We talked to -- the people who

10 were working on the project talked to each other,

11 and at that time it was Grace and me and Dana

12 and --

13 Q. Dana Beach?

14 A. Yes. And Jane Lareau was involved in

15 the discussions as well.

16 Q. As a consultant?

17 A. As a volunteer.

18 Q. Volunteer.

19 A. Yeah.

20 Q. Okay.

21 A. And we talked to each other about what

22 some particular issues might be with the project

23 and with the development agreement and what the

24 likely outcome of our efforts might be.

25 Q. Okay. And on the basis of that is a

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1 decision made to litigate or not litigate?

2 A. Yes.

3 Q. And who is responsible for making that

4 decision?

5 A. It's a team decision.

6 Q. Okay. By staff.

7 A. By staff, yes.

8 Q. Does the board of directors of the

9 league have anything to do with it?

10 A. We send a request for approval for

11 litigation.

12 Q. To who?

13 A. To the board of directors.

14 Q. Okay.

15 A. And after the staff has decided that

16 the recommendation would be to litigate, we write a

17 summary up for the board of directors and send it

18 to them and ask for their approval.

19 MR. TISDALE: Just off the record for a

20 minute

21 (Off-the-record conference.)

22 MR. TISDALE: Just to put on the record

23 right now, we would request -- and we'll put it in

24 writing if you want us to -- all the documentation

25 concerning the decision to litigate this matter

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3 supplied by counsel and/or the deponent.)

4 MR. DESCHERER: And that may be

5 privileged. I mean, we'll go back and look.

6 MR. TISDALE: If it's privileged we're

7 certainly not entitled to it, but I would think if

8 it was a communication from the staff to the board

9 of directors, that I don't think that would be

10 privileged.

11 MS. SALTZBURG: -- It may be privileged if --

12 they've had attorneys working with them on that.

13 MR. TISDALE: Well, if it was sent --

14 MS. SALTZBURG: We'll certainly go

15 through the documents and see.

16 MR. TISDALE: All right. No point in

17 us getting into an argument whether it's privileged

18 or not at this point before looking at the

19 documents

20 MR. FORD: If it's privileged it should

21 be on the privilege log.

22 MS. SALTZBURG: And it may well be.

23 MR. TISDALE: Well, whether it's on

24 there or not on there, if it's sent to people other

25 than lawyers, just -- I don't know why we're

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1 getting in this argument right now, but I don't see
2 how it could be privileged. But we can address
3 that issue once y'all look at it, okay?

4 MS. SALTZBURG: Right. We just would
5 like to maintain our objection to the extent that
6 things are privileged, but we'll certainly look
7 back at everything.

8 MR. TISDALE: Thank you. And we'll
9 write you a little -- at least an e-mail for this
10 request.

11 MS. SALTZBURG: That sounds good.

12 MR. TISDALE: And if you want something
13 more formal, we'll do that as well.

14 BY MR. TISDALE:

15 Q. When did a decision go to the board?

16 A. You know, I don't know the date. I
17 don't know the date.

18 Q. Okay. It would have been --

19 A. It would have been before --

20 Q. -- right --

21 A. It would have been before we filed our
22 first claim or --

23 Q. Complaint.

24 A. Yes, complaint.

25 Q. Complaint.

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1 A. Yes.

2 Q. And it probably would have been soon
3 after --

4 A. It would have.

5 Q. -- the town approved the project.

6 A. Yes.

7 Q. Okay. Now, by the way, one thing I
8 didn't say, but you probably know because your
9 lawyers probably told you.

10 During this deposition, if it will help
11 you to look at any documents or anything to answer
12 a question, you're completely free to do that.

13 A. Okay. Thank you.

14 Q. And if we don't have the document,
15 we'll try to find it.

16 A. Okay.

17 Q. Now, let me just ask you a few
18 questions about -- along these lines about how did
19 Ms. Vicary and Mr. Prause get involved as parties
20 to the lawsuit?

21 A. I believe that they were asked to be
22 part of the lawsuit by either Jane or Grace.

23 Q. Okay. And was that request by Jane or
24 Grace made by -- at the -- with the authority of
25 the Coastal Conservation League?

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1 A. Yes.

2 Q. Okay. And I think, you know, we took
3 their depositions, and they told us who asked them,
4 but I just can't remember. I thought one of them
5 said that you asked one of them, but I could be
6 wrong.

7 A. I didn't. I didn't know them before
8 this.

9 Q. Okay. So it was either Jane or
10 Grace --

11 A. Yes.

12 Q. -- who would have asked Mr. Prause and
13 Ms. Vicary to consider being plaintiffs in the
14 lawsuit with the league.

15 A. You know, I might have asked Kent. I
16 didn't know him

17 Q. Yeah.

18 A. But I might have asked Kent, now that
19 you mentioned it.

20 Q. That's not a point that's in dispute.

21 A. Okay.

22 Q. But I think he might have said that.

23 A. Yeah, that might have happened, but I
24 had forgotten about it.

25 Q. Yeah. Okay. Well, why is it that the

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1 league asked these individuals to join the lawsuit?

2 A. Because we -- in general, our practice
3 is to find people who live in the communities where
4 the -- whatever it is we're challenging or
5 appealing takes place.

6 We try and find citizens or residents
7 of those areas to join us in lawsuits. We believe
8 it will help our standing.

9 Q. To do what?

10 A. We believe it helps our standing.

11 Q. What does that mean?

12 A. If we have residents who live in an
13 area that -- where a rezoning has taken place, we
14 believe that showing their interest in the --
15 whatever it is, rezoning --

16 Q. The issue.

17 A. Yeah, the issue, will help give us the
18 credibility and -- the credibility we need to
19 participate as well

20 Q. Okay. What do you mean, the
21 credibility to participate?

22 A. The league is often worried about
23 whether or not we have standing when we challenge a
24 case.

25 Q. You mean legal standing?

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1 A. Legal standing, yes.
 2 Q. Okay.
 3 A. And so we feel that if we have
 4 residents who are participating along with us, it
 5 helps our chances at being granted standing in a
 6 case.
 7 Q. A legal standing.
 8 A. Yes.
 9 Q. Okay. And is that why Ms. Gasper --
 10 excuse me. Is that why Mr. Prause and Ms. Vicary
 11 were requested to join the league in this lawsuit?
 12 A. Yeah. You know, I think requested is a
 13 word here that -- we give people the opportunity to
 14 join a lawsuit.
 15 Q. Uh-huh.
 16 A. If they don't want to, they don't have
 17 to.
 18 Q. Right. Of course not.
 19 A. Yeah. But we give them the opportunity
 20 to do so.
 21 Q. Yeah.
 22 A. And we gave them the opportunities to
 23 do so. We told them about it and asked them if
 24 they wanted to join, and they said yes.
 25 Q. Right. And it was for the purposes

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1 that you've already described --
 2 A. Yes.
 3 Q. -- from the league's standpoint.
 4 A. Yeah, um-hum.
 5 Q. Okay. Well, now, y'all have produced
 6 to us the other day, I think, some e-mails that
 7 just have mainly a bunch of names. Not a bunch,
 8 but several names on it of people that I wanted to
 9 ask you about and find out how they were involved
 10 in this decision, okay?
 11 A. If you could show me them.
 12 Q. I am going to show it to you.
 13 A. Thank you.
 14 MR. TISDALE: Let's just go ahead and
 15 mark this as Exhibit 3.
 16 (DFT. EXH. 3, E-Mail Exchange, marked
 17 for identification.)
 18 MS. SALTZBURG: And just to clarify, if
 19 she'd like to speak to us about these --
 20 MR. TISDALE: Huh?
 21 MS. SALTZBURG: Just to clarify, if
 22 she'd like to have a chance to speak to us about
 23 any of these --
 24 MR. TISDALE: If she wants to talk to
 25 you about it, you're certainly -- she's certainly

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1 willing to do that. Would y'all like to take a
 2 little break for that purpose?
 3 MS. SALTZBURG: I think that's up to
 4 Megan.
 5 THE WITNESS: Sure.
 6 BY MR. TISDALE:
 7 Q. They're just e-mails that have been
 8 produce to us by y'all.
 9 MS. SALTZBURG: I'm not suggesting
 10 there's anything --
 11 THE WITNESS: I'm comfortable going
 12 forward.
 13 BY MR. TISDALE:
 14 Q. If you come to something you want to
 15 talk to your lawyers about --
 16 MS. SALTZBURG: Just an option.
 17 THE WITNESS: Okay. Thank you.
 18 BY MR. TISDALE:
 19 Q. -- let me know. Now, this Exhibit 3
 20 starts out at the top, just for identification
 21 purposes, as an e-mail from Michelle Sinkler, as I
 22 read it, to Dana Beach, Jane Lareau, Josh Martin,
 23 Grace Gasper, and you, correct?
 24 A. Yes. And I need to correct myself
 25 because I said that Jane and Grace were the only

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1 two people who read the development agreement.
 2 Josh Martin read it as well.
 3 Q. Okay. And also a copy to Eugenia
 4 Payne; right?
 5 A. Right.
 6 Q. Now, what is -- well, we'll come to it
 7 in a minute.
 8 But have you -- are you familiar with
 9 this string of e-mails?
 10 A. Yes.
 11 Q. All right. -- Who is Josh Martin? -- What
 12 is his position?
 13 A. Josh Martin works for us at the Coastal
 14 Conservation League here in Charleston. He's the
 15 director of land use.
 16 Q. Land use?
 17 A. Land use.
 18 Q. And on 9-2-09, if you look at the
 19 second-to-the-last page, he wrote --
 20 A. Second-to-the-last page. Okay.
 21 Second-to-the-last page.
 22 Q. Now this -- just for clarity of the
 23 record, his e-mail here is dated -- at the
 24 bottom -- I said he wrote it. It's actually,
 25 Michelle Sinkler; right? Says: Michelle Sinkler

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1 wrote.

2 A. Okay.

3 Q. Do you see that?

4 A. I do.

5 Q. All right. And that date was what?

6 A. 9-2-09.

7 Q. All right. Now, according to the face
8 page of the development agreement, it says final
9 approval -- Exhibit 2, final approval, October 1st,
10 2009.

11 A. Okay.

12 Q. So this from Ms. Sinkler would have
13 been just about a month before the development
14 agreement was approved; right?

15 A. Sounds like it, yes.

16 Q. Okay. Now, what was Ms. Sinkler's
17 position at CCL?

18 A. She didn't have a position at CCL at
19 that time.

20 Q. Well, what was her involvement here?

21 A. She was someone who was working with us
22 through a partner organization called the Donnelley
23 Foundation.

24 Q. Uh-huh.

25 A. And she was working to advise members

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1 of town council at the time and work with members
2 of town council to keep track of what was going on
3 in Awendaw and the effects it may have on the
4 Francis Marion National Forest.

5 Q. Okay. And so you just answered my next
6 question. She was watching for Donnelley
7 Foundation what was going on around Awendaw.

8 A. Yes.

9 Q. Okay. And who was she writing this to;
10 can you tell?

11 A. I can't tell, but looks like Josh was
12 one person.

13 Q. CCL 000855 is the page, just for
14 reference. And I suppose is -- would this give you
15 any indication of the onset of the consideration to
16 challenge the Nebo development?

17 A. I guess I don't know what you're
18 asking.

19 Q. Okay. Maybe the question was unclear.

20 A. Okay.

21 Q. Does what she says here on this page in
22 the paragraph that you have your index finger --

23 A. I see it.

24 Q. -- is that a statement from Michelle
25 Sinkler that she felt that something needed to be

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1 done to stop the Nebo development? If not, what is
2 it saying?

3 A. It is -- it does say that. It says
4 that she thinks that the Coastal Conservation
5 League -- I'm going to read -- and necessary
6 plaintiffs should be ready to file a lawsuit after
7 it's -- after the annexation, development
8 agreement, and comprehensive plan amendment were
9 approved.

10 Q. Sort of giving you a heads-up.

11 A. Um-hum. Right.

12 Q. And in there she does talk about the
13 possibility of a couple lawyers that might be
14 involved?

15 A. Yes.

16 Q. I mean -- excuse me -- might be
17 available to help?

18 A. Well, she wanted us to ask if they
19 would be, yes.

20 Q. One of them being Trenholm Walker, who
21 you mentioned was handling the annexation, the
22 issue down at Yemassee.

23 A. Yes

24 Q. Trenholm hadn't told me he lost that
25 case.

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1 A. It's only the standing --

2 Q. Oh.

3 A. -- that's before them. That was the
4 summary judgment on standing.

5 MR. FORD: That counts.

6 MR. TISDALE: What did you say, Ian?

7 MR. FORD: I said that counts.

8 MR. DESCHERER: It's also before the
9 Supreme Court.

10 MR. TISDALE: Hum?

11 MR. DESCHERER: It's before the Supreme
12 Court in South Carolina.

13 MR. TISDALE: Yeah. That's pretty high
14 authority.

15 MR. DESCHERER: That's right.

16 MR. TISDALE: Don't put this on the
17 record.

18 (Off-the-record conference.)

19 MR. TISDALE: We can go back on the
20 record.

21 BY MR. TISDALE:

22 Q. All right. So when Michelle wrote
23 this, would it have been to Josh Martin, do you
24 think?

25 A. It looks like it was to Josh Martin.

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1 Q. Yeah.
 2 A. Yeah.
 3 Q. And then let's go back up to the top of
 4 that page.
 5 A. Okay.
 6 Q. The one 855 at the bottom. Is this
 7 from Jane Lareau to Josh Martin, Michelle Sinkler,
 8 Dana Beach, you, and Grace, with a copy to Eugenia?
 9 A. Yes, it looks that way.
 10 Q. Eugenia still work at the league?
 11 A. Yes.
 12 Q. Okay. And what is Jane saying to
 13 y'all?
 14 A. She is saying that she read Josh's
 15 comments on the development agreement and code.
 16 Q. Okay.
 17 A. That they were very helpful, and she
 18 doesn't know what parts of the development
 19 agreement are illegal or how to gauge that.
 20 Q. All right.
 21 A. She's asking Dana and me if we can
 22 schedule a time to talk, and that's -- I mean, the
 23 rest of it is that.
 24 Q. Okay. Now, coming back to -- if you
 25 look at the little tiny numbers on the bottom of

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1 the page.
 2 A. Um-hum.
 3 Q. To 846.
 4 A. Okay.
 5 Q. This is, again, Michelle's same --
 6 Michelle Sinkler's same thing as on the earlier
 7 pages, but then Josh is saying on 9-2, the same
 8 day:
 9 Did all of you read my comments on the
 10 DA and code?
 11 That's the development agreement, DA;
 12 right?
 13 A. Yes.
 14 Q. And the code, meaning the annexation
 15 laws?
 16 A. I don't know what the code refers to.
 17 Q. Okay. And then Dana Beach also
 18 responded at 2:55 that day, did he not?
 19 A. He did.
 20 Q. And what does he say?
 21 A. He says:
 22 If there is a decent chance of winning,
 23 we can try this, but my sense is there is no chance
 24 of winning.
 25 Q. All right. And did you talk to Dana

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1 about why he did not think there was a chance of
 2 winning?
 3 A. I probably did at the time.
 4 Q. Do you remember what he said?
 5 A. I can probably make a good guess, but I
 6 don't remember what he said exactly.
 7 Q. Well, on the basis that it's an
 8 understanding, that it's a good guess, why don't
 9 you tell us.
 10 A. Typically, we don't like to get
 11 involved with things if there is a chance -- and I
 12 think what it says later, if there is a chance that
 13 town council could just go back and correct any
 14 errors that they made.
 15 Q. Correct. Um-hum.
 16 A. And so that's what he's probably
 17 referring to.
 18 MS. SALTZBURG. I'm going to object
 19 just on speculation.
 20 MR. TISDALE: Well, I understand that
 21 That's why I prefaced it by saying we understand
 22 that it's a guess.
 23 THE WITNESS: Okay.
 24 MR. TISDALE: I mean, we understand
 25 that she's guessing.

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1 MS. SALTZBURG: Just to the extent that
 2 she is guessing, we're objecting to that.
 3 MR. TISDALE: Objection is well taken.
 4 BY MR. TISDALE:
 5 Q. Now, Megan, just so I'll understand it,
 6 so the league, if possible, would not -- would try
 7 not to challenge something normally if it could
 8 just be corrected by the town council in going down
 9 the road; right?
 10 A. That's typically the way we look at
 11 things.
 12 Q. Yeah.
 13 A. But that doesn't mean that we don't
 14 ever legally challenge something.
 15 Q. Well, I understand that.
 16 A. Yeah.
 17 Q. That's the sort of theory.
 18 A. Something we think about.
 19 Q. No point in spinning wheels and end up
 20 in the same place.
 21 A. Right.
 22 Q. That makes sense. Now then, Dana Beach
 23 writes -- well, let's just go through this. Turn
 24 to Page 845.
 25 A. Okay.

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1 Q. What's Jane Lareau saying at the bottom
2 of 845?
3 A. She says -- do you want me to read it?
4 Q. Well, just -- you don't have to read it
5 word for word.
6 A. She says that we don't need to set up a
7 call. She wants to -- she wants Dana and I to
8 recommend -- she wants Dana and me to recommend
9 land use attorneys that we could call for an
10 opinion.
11 Q. Right.
12 A. She wants to know if Trenholm is
13 somebody we could call or Jeff Leath, and she's
14 offering that she and Michelle will call them.
15 Q. And suggests Jeff might be involved on
16 a -- might do it on a pro bono basis.
17 A. That's right.
18 Q. That did turn out to be the case, as I
19 recall, didn't it?
20 A. It is the case.
21 Q. Okay. And then Jane says Michelle and
22 she will --
23 A. Yeah, will call them.
24 Q. -- call them first to see if there are
25 any grounds.

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1 A. Um-hum.
2 Q. All right. And then what does Dana say
3 up at the top of that page?
4 A. He says don't ask Trenholm. Jeff may
5 do it. He is also saying that whoever chooses to
6 do it is going to want to have a fighting chance to
7 win, and then he's asking again do we have that.
8 Q. Okay. And turning to the next page,
9 844, does Grace answer Dana's question about
10 whether there's a fighting chance?
11 A. She does. She says that Michelle feels
12 that there are questionable issues with the
13 development agreement. We at least need an initial
14 assessment to see if we have any reasonable
15 challenges.
16 Q. Okay. And then just take us through
17 this string. What does Josh say?
18 A. So Josh asks what are those issues, and
19 Jane says Michelle will tell us as soon as she is
20 able.
21 Q. Okay.
22 A. And then finally Dana reiterates --
23 Q. Dana Beach.
24 A. Yes. Dana Beach reiterates:
25 These issues should be substantive. We

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1 don't want to spend time and money challenging,
2 say, a public hearing that should have been done on
3 Friday instead of Thursday just to have them redo
4 it correctly.
5 Q. Right.
6 A. Okay.
7 Q. So after all of this, it was decided at
8 some point to bring the lawsuit.
9 A. Yes.
10 Q. And at some point, without going into
11 any details about it, the Southern Environmental
12 Law Center was brought into the case; correct?
13 A. Yes.
14 Q. With Jeff Leath --
15 A. Yes.
16 Q. -- to represent the league
17 A. Yes.
18 Q. Okay. Now, go to the bottom of Page
19 845 with me for a minute.
20 A. Okay.
21 Q. Very bottom:
22 On 9-2-09 at 2:56 p.m. Josh Martin
23 wrote.
24 Is that what it says?
25 A. Yes.

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1 Q. And turn the page. What did he write?
2 A. I think it will be very difficult.
3 Q. And is that in answer to -- you
4 presume, to Dana Beach's e-mail of the same day at
5 2:55?
6 A. That's what I presume, yes.
7 Q. All right. And do you know why or what
8 was the basis of Josh Martin's opinion that the
9 litigation would be very difficult to win?
10 A. I don't know.
11 Q. Did you talk with Josh about it?
12 A. I didn't talk to him, but he did send
13 me a copy of his comments that he made on the
14 development agreement, and I imagine -- I'm almost
15 certain that he would have included that in his
16 comments.
17 Q. Okay. And if we don't have a copy of
18 Josh's comments, we would like a copy.
19 A. I think you have it.
20 (This page contains information to be
21 supplied by counsel and/or the deponent.)
22 MS. SALTZBURG: I think you have his
23 comments.
24 MR. TISDALE: Amy says we didn't.
25 MS. SALTZBURG: If you would like us to

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1 search for anything, we can do that.

2 MR. TISDALE: That's fine.

3 BY MR. TISDALE:

4 Q. All right. Now, on the basis of all of
5 this, I gather it was decided to challenge the
6 development agreement.

7 A. Yes.

8 Q. And challenge the annexation of the
9 property.

10 A. Yes.

11 Q. Okay.

12 A. So do you want me to put these in
13 order?

14 Q. It doesn't make any difference

15 A. Okay.

16 MR. TISDALE: Do we have copies of
17 this?

18 MS. JOWERS: Yes.

19 (DFT. EXH. 4, E-Mail Exchange, marked
20 for identification.)

21 BY MR. TISDALE:

22 Q. If you need to talk to Lisa about this,
23 you're entitled to, okay?

24 A. Okay.

25 Q. This seems to be, just looking at the

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1 page, an e-mail from Walter Prause, Walter K.
2 Prause. Now, he's the same as Kent Prause, is he
3 not, the plaintiff in the lawsuit?

4 A. I believe so.

5 Q. Okay. And this is to Jane Lareau,
6 right?

7 A. Yes.

8 Q. And it says @sccc1.org.

9 A. Yes.

10 Q. Is that Coastal Conservation League?

11 A. Yes.

12 Q. All right. But she was not an
13 employee?

14 A. No.

15 Q. A volunteer?

16 A. Volunteer.

17 Q. All right. And it says:

18 Dated: November 16th, '09 at 1:23:55.
19 Correct?

20 A. Correct.

21 Q. And it says:

22 Subject: Confidential.

23 Right?

24 A. Yes.

25 Q. And what is Kent Prause saying to Jane

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1 at the bottom?

2 A. It says:

3 Jane count me in if you need me. KP

4 Q. KP Now, let's see what they were
5 talking about and look at the next page. And if
6 you look at the third page you'll see that it says:
7 Thanks, Jane Lareau, at the end. So I guess we can
8 assume it was written by Jane Lareau. Do you
9 agree? At the last at the bottom.

10 A. Yeah, that's what it looks like, and it
11 says here on Monday, 16 November, Jane Lareau
12 writes.

13 Q. This is not too long, so if you don't
14 mind, would you just read this into the record for
15 us?

16 A. Sure. All, CCL --

17 Q. Hold on just a minute I'm sorry to
18 interrupt, but who do you think all is?

19 A. I don't know.

20 Q. Okay. We can ask Jane that, I guess.
21 Go ahead.

22 A. All, CCL is looking for plaintiffs who
23 live in Awendaw, pay property taxes, and use or
24 otherwise value the Francis Marion National Forest
25 in a legal action we are preparing with the

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1 Southern Environmental Law Center. I know not
2 everyone on this list is a resident of Awendaw.
3 I'm including you because you may know someone who
4 is a resident and would be willing to either sign
5 an affidavit saying the above, or enter into the
6 suit as a plaintiff. A few of you have already
7 done this with us before. Thank you. This is
8 regarding the issue of the Town of Awendaw and
9 annexing Forest Service property, and hence Nebo
10 Church. I've left Nell and Sam off this e-mail
11 because they are council members. They can know
12 what we are doing, but I'd rather they not be
13 involved on the record. As you can imagine, we
14 need your complete confidence and discretion.
15 Please no one discuss this out of our close group.
16 Just contact me if you are willing, or if you know
17 someone who is willing. We all know how important
18 this is. Thanks, Jane Lareau.

19 Q. Okay.. And Kent, of course, responded,
20 as you've already said, by saying:

21 Count me in if you need me.

22 A. Yes.

23 Q. All right. But we don't know who all
24 this went to, do we?

25 A. I don't know.

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1 Q. All right. Had you seen this before?
 2 A. No.
 3 Q. Okay. Does CCL have a list of people
 4 who are potential plaintiffs for litigation?
 5 A. No.
 6 Q. You just do it on a case-by-case basis?
 7 A. Yes.
 8 Q. Now, with respect to Ms. Vicary, Lynne
 9 Vicary, and Mr. Prause, who -- I won't use the word
 10 were recruited, but who were invited to join this
 11 litigation and agreed to do so -- would you agree
 12 to that description?
 13 A. Yes.
 14 Q. Are they bearing any of the costs of
 15 the litigation personally?
 16 A. No.
 17 Q. Are they -- has the Coastal
 18 Conservation League agreed to indemnify them in the
 19 case of any judgments against them?
 20 A. No.
 21 Q. All right. Has it been explained to
 22 them that they might have some liability?
 23 A. It's been explained, yes.
 24 Q. Okay. And they agree to participate,
 25 obviously, in the face of that possibility.

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1 A. Yes.
 2 Q. Okay. Now, I don't want to know any
 3 details or anything, but does the Southern
 4 Environmental Law Center represent CCL in other
 5 matters besides this matter?
 6 A. Yes.
 7 Q. How many matters?
 8 A. I don't know.
 9 Q. Well, where are they; do you know?
 10 What do they involve?
 11 A. Okay. So where are they? In terms of
 12 geographically?
 13 Q. Well, just trying to get a grip on the
 14 relationship a little bit. We know that S --
 15 A. SCLC.
 16 Q. Yeah. Represents y'all, CCL, in this
 17 case.
 18 A. Right.
 19 Q. Can you give me a general idea of what
 20 other litigation they represent CCL in?
 21 A. Currently, or have?
 22 Q. Well, let's start with currently.
 23 A. I don't know how many other cases.
 24 Probably two or three currently. Maybe -- maybe
 25 more. Not more than five.

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1 Q. In the low country?
 2 A. Yes.
 3 Q. Is your litigation generally related --
 4 when I say your I mean CCL -- generally confined to
 5 the low country of South Carolina?
 6 A. Yes.
 7 Q. And so you think right now they're
 8 representing you in three to five cases.
 9 A. Two to five, I would say.
 10 Q. Two to five.
 11 A. Yes.
 12 Q. And where would two be that you can
 13 recall?
 14 A. Well, the two I can think of right now
 15 are in Charleston.
 16 Q. All right. Nebo being one?
 17 A. Well, let me qualify that. We're not
 18 at litigation -- we're not at the point of
 19 litigation with the other one.
 20 Q. All right. Well, don't go into that.
 21 A. Okay.
 22 Q. I don't want to know about who y'all
 23 are getting ready to sue, say, with the issue as
 24 one of my clients.
 25 MR. DeSCHERER: It wouldn't be a total

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1 shock.
 2 MR. TISDALE: Huh?
 3 MR. DeSCHERER: It could be.
 4 MR. TISDALE: Really? Well, we need to
 5 have a conversation. Better not put this on the
 6 record. I have -- don't put this on the record.
 7 (Off-the-record conference.)
 8 MR. TISDALE: We can go back on the
 9 record.
 10 BY MR. TISDALE:
 11 Q. Okay. I was just asking you, I think,
 12 about --
 13 A. Other cases, yes.
 14 Q. With SC -- how many, roughly, have they
 15 represented you -- CCL in in the past that you know
 16 of besides the pending ones? It doesn't have to be
 17 exact. 5, 10, 20?
 18 A. Probably --
 19 MS. SALTZBURG: Object. Calls for
 20 speculation.
 21 THE WITNESS: Probably around 10.
 22 BY MR. TISDALE:
 23 Q. Okay.
 24 A. I mean, maybe more. Maybe a little
 25 bit -- probably more than 10

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1 Q. In litigation.
 2 A. Yeah.
 3 Q. Over a period of your familiarity with
 4 it.
 5 A. You know, I can't say for sure.
 6 Q. All right. We'd just have to look that
 7 up, it sounds like.
 8 A. Yeah, yeah.
 9 Q. Okay. Now, did -- you said that Grace
 10 Gasper was in charge of monitoring the situation at
 11 Awendaw about these activities concerning Nebo, the
 12 annexation, the development agreement, the
 13 comprehensive plan and so forth.
 14 A. Yes.
 15 Q. And she reported to you about what her
 16 activities were, didn't she?
 17 A. Yes.
 18 Q. And is it your understanding that she
 19 either attended all the proceedings about these
 20 matters or knew that they were going on?
 21 A. In 2009, yes, that is my understanding.
 22 Q. All right. That's what I was asking
 23 about.
 24 A. Um-hum.
 25 Q. In connection with the Nebo

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1 consideration of the items that we -- that I
 2 mentioned just now, Grace Gasper either attended
 3 the proceedings and reported to you or, at a
 4 minimum, knew that the proceedings were going on if
 5 she didn't attend.
 6 A. I think she did.
 7 Q. Yeah.
 8 A. It's my understanding that she did.
 9 Q. Yeah. And it's also true that Kent
 10 Prause attended most, if not all of the
 11 proceedings, did he not?
 12 A. I don't know.
 13 Q. Well, he testified about that, so we
 14 can look at his deposition.
 15 A. Okay.
 16 Q. All right. And would Grace Gasper
 17 report to you by like written e-mail
 18 correspondence, letters or --
 19 A. Written e-mail or phone call.
 20 Q. Okay. And I guess we've been given all
 21 of that. Chris says yes.
 22 A. Yes, you have.
 23 Q. All right. Now, are you aware that
 24 Grace Gasper met with Seamon & Whitesides about
 25 their plans for this development at one point?

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1 A. I am aware of that.
 2 Q. What was the purpose of that meeting
 3 and who initiated it?
 4 A. I don't know who initiated it.
 5 Q. What was the purpose of the meeting?
 6 A. The purpose of that meeting was for her
 7 to receive more information about the proposal for
 8 the development of the property, and I think
 9 that's -- I mean, I don't know if they met more
 10 than once. I can remember reading an e-mail where
 11 she said she was just going to listen.
 12 Q. To learn about the development plan.
 13 A. Yes.
 14 Q. And she would have reported on that
 15 meeting to you, I take it.
 16 A. Yes.
 17 Q. With an e-mail?
 18 A. Or a phone call, yes.
 19 Q. Or a phone call.
 20 A. Um-hum.
 21 Q. And are you aware of also that she met
 22 with Mr. Bo Shaw at least on one if not more
 23 occasions?
 24 A. Yes.
 25 Q. Do you know how many times she met with

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1 Mr. Shaw?
 2 A. I don't.
 3 Q. Do you know what those meetings were
 4 about?
 5 A. I don't.
 6 Q. Did you talk to her about it?
 7 A. I did. I mean, I imagine it's the same
 8 thing. I don't know specifically what they
 9 discussed. I imagine it was the same; for her to
 10 get information and learn more about what the
 11 proposal was.
 12 Q. Okay. And she understood and you
 13 understood, I guess, that Mr. Shaw was representing
 14 the landowner?
 15 A. Yes.
 16 Q. Nebo tract owner?
 17 A. Um-hum.
 18 Q. Then do you recall any conclusions that
 19 were reached by CCL as a result of these contacts
 20 with Seamon & Whitesides and Mr. Shaw?
 21 A. I don't think so, no. I don't recall.
 22 Q. Don't recall any conclusions?
 23 A. No.
 24 Q. It was just information?
 25 A. Yes.

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1 Q. Okay.

2 MR. TISDALE: All right. Let's -- I've
3 waited y'all out, and I'm going to declare a
4 five-minute break.

5 THE WITNESS: Okay.

6 MR. TISDALE: And we've made a lot of
7 progress and don't have a whole lot more to do, I
8 don't think.

9 THE WITNESS: Okay.

10 MR. TISDALE: So everybody just relax
11 for a minute.

12 (A recess transpired from 11:37 until
13 12:00.)

14 BY MR. TISDALE:

15 Q. Now, Megan, just to continue, if you
16 know about this, I want to ask you about it. There
17 were apparently two annexations on the Nebo tract:
18 One, the large annexation, and another one was
19 Tract 41 on a smaller bit of acreage.

20 Are you familiar with that issue at
21 all?

22 A. No.

23 Q. You don't know about that.

24 A. No.

25 Q. Okay.

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1 A. Do you have a map?

2 Q. It's not that important.

3 A. Okay.

4 Q. So once -- just to explain, once the
5 main tract was annexed, there was another tract
6 annexed much smaller to make -- of a sufficient
7 size so the development agreement would be good for
8 ten years rather than five years.

9 A. Okay.

10 Q. But you're not familiar with that issue
11 at all?

12 A. No, no.

13 Q. And you, therefore, would not have any
14 idea why CCL -- or what objections CCL would have
15 to that, do you?

16 MS. SALTZBURG: Object as to form.

17 MR. TISDALE: Hum?

18 MS. SALTZBURG: Objection to form.

19 BY MR. TISDALE:

20 Q. Do you know why CCL might object to
21 that second annexation --

22 A. No, I don't.

23 Q. -- of a smaller piece?

24 A. I mean, only if it -- I don't know, but
25 I could imagine that if it was because of -- it was

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1 relying on an annexation that we didn't think was
2 valid.

3 Q. To begin with.

4 A. Right.

5 Q. Like a 10-foot strip in '04.

6 A. Right.

7 Q. Which is the objection to the whole
8 thing anyway.

9 A. Right.

10 Q. Okay. But that's the only thing you
11 can think of?

12 A. Yeah. I don't know anything about
13 that.

14 MS. SALTZBURG: Object to form.

15 BY MR. TISDALE:

16 Q. You don't know about it, and we'll
17 accept that.

18 A. Okay.

19 Q. Just as a general matter, who at CCL
20 would have close to as much knowledge as you about
21 this whole transaction? Next -- who would be next
22 in line for having the most knowledge about this
23 entire dispute between Awendaw, EBC and CCL?

24 A. And you want to know who there now or
25 who was there at the time?

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1 Q. No. Just who. Just who is the person,
2 whether they're there or not.

3 A. Well, Grace would have more information
4 than I.

5 Q. She would?

6 A. Yeah.

7 Q. Okay.

8 A. But she's not there.

9 Q. I understand.

10 A. And then Michelle Sinkler.

11 Q. And she's not there either.

12 A. She's there now.

13 Q. She just came back.

14 A. Yes.

15 Q. I thought I saw that in the newsletter
16 the other day.

17 A. Yes.

18 Q. So she is on the staff?

19 A. Yes.

20 Q. And do you think she would have about
21 the same amount of information as Grace?

22 A. No.

23 Q. Grace --

24 A. Grace would have more.

25 Q. Would have more.

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1 A. Yes.
 2 Q. We may want to take her deposition, but
 3 that will be between us and her, I guess.
 4 A. Okay.
 5 Q. Now, with regard to CCL's contact with
 6 the Forest Service and Agriculture Department,
 7 we've been -- we have been given some
 8 correspondence, I think, between the two.
 9 But have you or do you know anyone at
 10 CCL who has been in contact with the Forest Service
 11 and Agriculture Department about this matter?
 12 A. Yes. I have.
 13 Q. You have?
 14 A. (Witness moves head up and down.)
 15 Q. And what was the purpose of your
 16 contacting them concerning it?
 17 A. We wanted to let them know what was
 18 going on with the lawsuit.
 19 Q. And did you contact them by mail,
 20 e-mail, telephone, or in person?
 21 A. Telephone, e-mail, and in person.
 22 Q. Who have you been in contact with?
 23 A. Robert Bonnie.
 24 Q. B-O-N-N-Y?
 25 A. I-E.

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1 Q. All right. Anybody else?
 2 A. Matt Tilden.
 3 Q. T-I-L-D-E-N?
 4 A. Yes.
 5 Q. All right.
 6 A. And that's the only people that I have
 7 been in contact with. I know that Grace spoke with
 8 Orlando Sutton.
 9 Q. All right. Any other contacts that you
 10 know of?
 11 A. Not that I know of.
 12 Q. Now, what agencies are Robert Bonnie
 13 and Matt Tilden with?
 14 A. Robert Bonnie is with the Department of
 15 Agriculture.
 16 Q. All right.
 17 A. And Matt Tilden is an attorney
 18 representing the Forest Service.
 19 Q. Okay. And what's the time frame that
 20 you had these contacts?
 21 A. I don't know. I think if you -- this
 22 is an instance where I think that we have given you
 23 an e-mail that says -- my correspondence with
 24 Robert Bonnie, that would be dated.
 25 Q. Yeah, but I'm just trying to find

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1 out --
 2 A. So that would have been -- I would have
 3 had a phone call with him maybe the day before, and
 4 the e-mail would have been the day after
 5 Q. Can you remember roughly when it was?
 6 A. No.
 7 Q. It's obviously since November '09.
 8 A. Yeah. It would have been in the spring
 9 and summer.
 10 Q. Of this year?
 11 A. Yes.
 12 Q. 2010?
 13 A. Yes.
 14 Q. And what was the purpose of your
 15 contacting, in each individual case, Robert Bonnie
 16 and Matt Tilden?
 17 A. We wanted to let the Forest Service
 18 know what was happening with the annexation -- with
 19 the lawsuit, and we wanted to inform them about the
 20 annexation of the 10-foot strip on the Forest
 21 Service property in 2004.
 22 Q. Right. Were they unaware of it?
 23 A. Robert Bonnie wasn't aware of it.
 24 Q. How about Matt Tilden?
 25 A. I don't think Matt Tilden was aware of

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1 it.
 2 Q. All right. And I don't want a
 3 word-for-word recitation of what was said, but what
 4 was the nature of the conversation on both sides,
 5 with each?
 6 A. We gave Robert Bonnie a presentation
 7 about the Town of Awendaw's growth over the years
 8 and we talked to him about their use of strips for
 9 annexing and the impact that that growth of the
 10 Town of Awendaw may have on the forest. And we
 11 talked about the Nebo lawsuit and how we were
 12 involved. And he asked questions and --
 13 Q. Was this a face-to-face presentation?
 14 A. It was.
 15 Q. Where did it take place?
 16 A. Where?
 17 Q. Where?
 18 A. In Washington, D.C.
 19 Q. All right. At the Agriculture
 20 Department?
 21 A. Yes.
 22 Q. And what did you say his position was?
 23 A. I don't know the name. He's a deputy
 24 secretary for something.
 25 Q. All right. Has there been any

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1 follow-up after that presentation?

2 A. With him? Yes.

3 Q. And tell me about that, if you will.

4 A. He and Dana had a phone conversation
5 and have exchanged a few e-mails.

6 Q. Okay.

7 A. He and I have exchanged phone calls.
8 We haven't spoken again, but we've left each other
9 messages.

10 Q. And what is the status of that
11 communication right now?

12 A. We're waiting for him to get back to
13 us.

14 Q. And what is he going to get back to you
15 about?

16 A. He was going to see if the Forest
17 Service -- if the Department of Agriculture, the
18 Forest Service, was -- if this case or the issue
19 was something that the Forest Service may want to
20 be involved with.

21 Q. This case.

22 A. Yes.

23 Q. All right. And you don't recall when
24 the first contact with him was made?

25 A. With Robert Bonnie?

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1 Q. Yeah.

2 A. Sometime in the spring or the summer.

3 Q. I assume of this year.

4 A. I don't know the date.

5 Q. And when do you expect to hear from
6 him?

7 A. I don't --

8 MS. SALTZBURG: Objection; speculative.

9 THE WITNESS: I don't have a date. I
10 don't know.

11 BY MR. TISDALE:

12 Q. I mean, has he said how long it would
13 take him to get back to you?

14 A. No.

15 Q. And just so I'll understand, has it --
16 has the possibility of the Agriculture Department
17 joining this lawsuit been suggested to him?

18 A. Yes.

19 Q. Okay. Now, how about the case with
20 Matt Tilden and the Forest Service? Has a
21 presentation been made to him?

22 A. It has.

23 Q. And where is he located?

24 A. He's in Atlanta.

25 Q. All right. And was that presentation

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1 made in Atlanta?

2 A. Yes.

3 Q. And were you involved in making that
4 presentation?

5 A. Yes.

6 Q. Who else was involved in the
7 presentation?

8 A. Chris.

9 Q. Chris DeScherer?

10 A. Um-hum.

11 Q. Was Chris also -- and you also involved
12 in the one with Robert Bonnie?

13 A. Yes.

14 Q. And have you made the same suggestion
15 to Matt Tilden, that the Forest Service look into
16 the possibility of joining the litigation?

17 A. Yes.

18 Q. What is the status of that request?

19 A. We're still waiting to hear back.

20 Q. Without trying to tie the time down
21 again, were these presentations made generally in
22 the same time frame?

23 A. No. Matt was sometime in the summer.
24 Maybe July or August.

25 Q. Okay. And did Matt tell you anything

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1 about whether or not the Forest Service had any
2 objection to any annexations?

3 A. He didn't -- he didn't -- I don't think
4 he knew. I mean, he knew just what we knew, which
5 were the 1994 letter.

6 Q. From Orlando Sutton?

7 A. Um-hum. Oh, I don't know who wrote it.

8 Q. Well, whoever wrote it from the Forest
9 Service to the Town of Awendaw?

10 A. Yeah.

11 Q. And did you make a copy of that letter
12 available to both these gentlemen?

13 A. We did.

14 Q. Okay. And did either of these
15 gentlemen state a position with regard to the
16 annexation that was made in 2004?

17 A. No.

18 Q. Okay. Now, in one or both of the
19 depositions of the individual plaintiffs,
20 Ms. Vicary and Mr. Prause, but I think it was
21 Ms. Vicary, but I'm not certain. But anyway,
22 raised the issue of property taxes and how this
23 development of Nebo tract might raise the property
24 taxes in the Town of Awendaw.

25 Are you familiar with that issue?

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1 A. I'm not familiar with her concerns
2 about it specifically, but in general, yes.
3 Q. All right. And is this a position that
4 CCL takes, that the development of Nebo tract or
5 similar developments could raise -- have the effect
6 of raising the property tax?
7 A. It's a claim that we make, yes, um-hum.
8 Q. And what is the basis of that claim?
9 A. In order to pay for the services
10 necessary to serve the development like police,
11 fire, EMS, sewer, water, roads, often the burden of
12 that infrastructure ramp-up or increase is borne by
13 the residents of the area who live there.
14 It may also be borne by the county
15 residents if the county is paying for that
16 infrastructure upgrade.
17 Q. And has CCL taken that position with
18 regard to the Awendaw/Nebo development?
19 A. Legally?
20 Q. Well, any way. It doesn't matter.
21 A. We've made that claim, yes.
22 Q. You have made that claim.
23 A. Yes.
24 Q. And have you commissioned any study
25 that would substantiate that claim --

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1 A. No.
2 Q. -- or is it simply a claim?
3 A. Not that I know of. We have not.
4 Q. Has Grace Gasper or anyone else
5 representing CCL made available to you a study that
6 has been commissioned by the owners of the Nebo
7 tract on this issue?
8 A. Not that I can recall.
9 Q. You've never heard of a study by
10 Permar?
11 A. Oh, yes, yes. The Permar study, yes.
12 Q. And that is on that issue, is it not?
13 A. Yes, it is.
14 Q. Do you have any disagreement with the
15 conclusions of that study?
16 A. I'm not familiar enough to say.
17 Q. Okay. Are you familiar with the
18 conclusion of that study to the effect that, in
19 fact, the development will generate more revenues
20 than the costs of the infrastructure?
21 A. I'm not familiar -- I mean, I have -- I
22 remember at the time that we had discussed that,
23 but I also know that in other cases that we've been
24 dealing with over the years that there are studies
25 similar to that and that we always have to look at

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1 the specifics of what exactly they're measuring and
2 what the claims are in the analysis and the
3 numbers, basically, before we agree or disagree
4 with a study like that.
5 Q. But you don't have any position on the
6 Permar study, CCL?
7 A. Not that I can recall, no.
8 Q. You just don't have any --
9 A. I don't remember that we said one way
10 or the other whether we agree with it.
11 I remember that we discussed having
12 somebody possibly analyze the study, but I don't
13 think we ever did that.
14 Q. You have not.
15 A. I don't think so.
16 Q. Okay. Now, besides having your
17 representative, CCL's representative attend the
18 proceedings of the Town of Awendaw, has CCL made
19 any other investigation of the claimed defects in
20 the process of the adoption of the development
21 agreement, the annexation, and the comprehensive
22 plan, other than attendance at meetings?
23 A. You know, I'm not quite sure what
24 you're asking me. We FOIA'd the documents.
25 Q. Hum?

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1 A. We submitted a Freedom of Information
2 Act request for documents.
3 Q. Yes, yes, to the town.
4 A. To the town, yes. We've reviewed
5 those --
6 Q. Right.
7 A. -- in addition to attending the
8 meetings
9 Q. That's the sort of thing I had in mind.
10 A. Okay. Yeah, we did that.
11 Q. Can you think of anything else that was
12 done?
13 A. We submitted a Freedom of Information
14 Act request to the Forest Service.
15 Q. And we received the benefit of that, I
16 think.
17 A. Okay.
18 Q. I think we got those documents.
19 A. That's all I can remember.
20 Q. Okay. Now, the only other thing that
21 I -- unless Amy has some advice for me after this
22 next question.
23 In the complaint it is alleged that
24 EBC, my client, our client, is violating the First
25 Amendment rights of CCL.

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1 MS. SALTZBURG: Object to
2 characterization of the complaint.

3 MR. TISDALE: Well, if not in the
4 complaint, in motion papers that have been filed,
5 and that may be the case.
6 BY MR. TISDALE:

7 Q. CCL has taken the position that EBC is
8 infringing the First Amendment rights of Coastal
9 Conservation League.

10 Do you have any information about the
11 basis for that claim?

12 MS. SALTZBURG: Object as to form. You
13 can answer.

14 THE WITNESS: Are you referring to
15 EBC's counterclaim against us? Is that what the
16 motion --

17 BY MR. TISDALE:

18 Q. I guess that's what it's referring to.
19 I mean, I don't know.

20 It is alleged in motion papers in a
21 response to the motion to dismiss that was filed by
22 CCL against EBC's counterclaim that the
23 counterclaim was infringing the First Amendment
24 rights of CCL. And we, frankly, have been
25 scratching our heads about that, and I'm asking

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1 you, as a representative of CCL, do you know the
2 basis for that claim?

3 MS. SALTZBURG: Object. Calls for a
4 legal conclusion.

5 MR. TISDALE: Yeah.

6 THE WITNESS: I don't.

7 MR. TISDALE: Okay. Give me just one
8 second.

9 THE WITNESS: Okay.

10 MR. TISDALE: Just give us 30 seconds.

11 (A recess transpired from 12:17 until
12 12:19.)

13 MR. TISDALE: Okay. I just want to
14 thank you very much for taking the time to have
15 this discussion.

16 THE WITNESS: Thank you.

17 MR. TISDALE: Is Ian going to be
18 allowed to ask questions at this deposition?

19 MR. DESCHERER: Sure. Of course.

20 MR. FORD: Great. Thank you.

21 MR. TISDALE: We got it on the record,
22 Ian.

23 MR. FORD: For now. Just submitting
24 the discovery.

25 Megan, my name is Ian Ford. I

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1 represent the Town of Awendaw. I just have some
2 follow-up questions, and because Tom Tisdale has
3 done such a good job, I'm just going to be touching
4 on various topics.

5 THE WITNESS: Okay.

6 MR. FORD: So if I jump around, that's
7 why, and if you need context, let me know. Fair
8 enough?

9 THE WITNESS: Okay. Yep.

10 EXAMINATION

11 BY MR. FORD:

12 Q. You had talked about concern of the CCL
13 about controlled burning in the Francis Marion
14 around Awendaw. Do you remember that?

15 A. I remember.

16 Q. Do you or CCL have any data particular
17 as to Awendaw that has led you to that fear?

18 A. We don't have data particularly
19 specific to Awendaw, but we have studies from other
20 areas.

21 Q. What are those studies?

22 A. I don't have the information in my
23 head, where they're from, but --

24 Q. Is it fair to say CCL has generalized
25 fears about burning that they're now applying to

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1 the situation in Awendaw?

2 MS. SALTZBURG: Object as to form.

3 BY MR. FORD:

4 Q. You can answer.

5 A. We have generalized concerns about
6 Awendaw's effects on the Francis Marion National
7 Forest as it relates to burning and wildlife
8 management.

9 Q. Okay. But my understanding is that you
10 don't have any specific data as to Awendaw and how
11 that might -- it might be affected in that
12 particular situation?

13 A. Not that I know of.

14 Q. I'm correct?

15 A. Yes.

16 Q. Okay. There's a double negative.

17 A. Sorry.

18 Q. No. It's my fault.

19 Would you have the same answer as to
20 the water runoff and the other concerns you said as
21 to the development of the -- of Nebo in the Francis
22 Marion National Forest?

23 A. We don't have studies specific to
24 Awendaw, but we have studies specific to other
25 areas that we can't -- I mean, we assume apply.

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1 The same principles apply to Awendaw as to other
2 areas.

3 Q. And has an analysis been done as to how
4 those studies might apply to the Awendaw situation
5 specifically?

6 A. No.

7 Q. Okay. So, again, it's a generalized
8 concern, but no specific analysis has been done; is
9 that --

10 MS. SALTZBURG: Object.

11 MR. FORD: Let me ask the question,
12 please.

13 BY MR. FORD:

14 Q. There's a generalized concern, but no
15 specific analysis has been done as to the Awendaw
16 situation?

17 MS. SALTZBURG: Objection. That's not
18 a question. It's a statement.

19 MR. FORD: It is a question. Put a
20 question mark at the end.

21 THE WITNESS: That's correct.

22 BY MR. FORD:

23 Q. Thank you. Have you been to Awendaw?

24 A. I have.

25 Q. Okay. Do you live in Awendaw?

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1 A. I don't.

2 Q. Okay. Have you been to Awendaw town
3 meetings?

4 A. I have not.

5 Q. Okay. Have you been to any other
6 Awendaw meetings with the government of Awendaw?

7 A. I don't think so.

8 Q. How many members of CCL reside in
9 Awendaw, if any?

10 A. I don't know.

11 Q. Do you have an estimate?

12 A. No.

13 Q. Okay. Is that something that CCL could
14 discern, or isn't it possible for CCL to figure out
15 how many of its members reside in Awendaw, if any?

16 A. We could figure that out.

17 Q. How would that process take place?

18 A. We have a database.

19 Q. And you would just run a search?

20 A. Yes.

21 Q. Has that ever been done, to your
22 knowledge?

23 A. It gets done from time to time, but it
24 hasn't been done recently.

25 Q. Okay. Does CCL have members who own

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1 property in Awendaw?

2 A. As far as I know, yes.

3 Q. How do you --

4 A. The membership changes from month to
5 month according to whose membership lapses or whose
6 memberships gets paid. So the last time I checked
7 we did, but I don't know if we do today. I think
8 we do, but --

9 Q. How long ago would it have been that
10 you checked, just so I have some context.

11 A. Probably about eight or nine months
12 ago.

13 Q. Okay. Has CCL incurred any damages as
14 a result of the development agreement that you're
15 aware of?

16 A. CCL hasn't incurred damages any more
17 than another resident of the State of South
18 Carolina might incur if the Francis Marion is
19 damaged

20 Q. I'm sorry. I don't understand.

21 A. The Francis Marion is a public
22 resource. Residents of South Carolina incur
23 damages if that resource is damaged.

24 Q. Diminished?

25 A. Yes.

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1 Q. Up to this date, has the CCL incurred
2 any damages as a result of the development
3 agreement?

4 A. No.

5 Q. Okay. Up to this date, has CCL
6 incurred any damages as a result of the annexations
7 that are at issue in this action?

8 A. Not up to this date.

9 Q. And I assume implicit in that is the
10 assumption that there will be some sort of future
11 damages; is that fair?

12 A. That's fair.

13 Q. And what are those damages?

14 A. We are concerned that the damages will
15 relate to damages to impaired water quality, to the
16 wildlife quality in the Francis Marion, and
17 quantity.

18 Q. And the controlled burning?

19 A. The controlled burning is related to
20 both those things.

21 Q. That's wildlife.

22 A. Yes.

23 Q. Anything else?

24 A. I mean, the species in general.

25 Q. Wildlife?

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1 A. Not just wildlife, but plant as well.

2 Q. Okay. Wildlife, including plants.

3 A. Yeah.

4 Q. Okay. Same question as I asked
5 earlier, those concerns specific to Awendaw. Have
6 you done any specific study or have any specific
7 data to support the concerns as to Awendaw
8 specifically?

9 A. No.

10 Q. Have you ever been to the property that
11 was annexed?

12 A. I have not. Well, which -- you mean
13 the Nebo property.

14 Q. I do.

15 A. Not the church.

16 Q. I mean both, actually.

17 A. Okay. I've been by them. I've not
18 been on them.

19 Q. You've driven on the road.

20 A. Yes, and I've looked at them.

21 Q. Okay. My next question is: Have you
22 ever spent any time on those properties?

23 A. No.

24 Q. How about the 10-foot strips?

25 A. I don't know. Probably not. I don't

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1 know. Can't say for sure.

2 Q. Okay.

3 A. I've been in the forest, so --

4 Q. You've been in the forest. To your
5 knowledge, have you ever been on the 10-foot
6 strips?

7 A. Not intentionally.

8 Q. The method of annexation that you're
9 challenging here, do you know whether it's been
10 used elsewhere?

11 A. The method of annexation that we're
12 challenging. You mean the hundred percent method?

13 MS. SALTZBURG: Object.

14 BY MR. FORD:

15 Q. Yes. And the contiguous challenge that
16 you're making.

17 MS. SALTZBURG: Objection; vague.

18 BY MR. FORD:

19 Q. Your challenges to the annexation. Do
20 you know whether this method of annexation has been
21 used elsewhere?

22 A. I know it's -- the hundred percent
23 annexation method has been used elsewhere, yes.

24 Q. And has CCL challenged it elsewhere?

25 A. We have.

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1 Q. And is that the Supreme Court case you
2 talked about earlier?

3 A. That's the Binden case, yes.

4 Q. Any other challenges to this type of
5 annexation that you're aware of by CCL?

6 A. Not that I can think of, no.

7 Q. Do you know one way or the other how
8 many times this method of annexation has been used
9 elsewhere, if at all?

10 MS. SALTZBURG: Objection; speculation.

11 THE WITNESS: I have no idea.

12 MR. FORD: I'm just asking what she
13 knows.

14 THE WITNESS: I have no idea.

15 MS. SALTZBURG: Just preserving our
16 objections.

17 BY MR. FORD:

18 Q. Do you know how long this method of
19 annexation has been used elsewhere?

20 A. No.

21 Q. If the annexation was done differently,
22 meaning if it was done through a different method
23 rather than a hundred percent and the 10-foot
24 strip, would CCL withdraw its objection to the
25 annexation?

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1 MS. SALTZBURG: Objection as to form.
2 It calls for a legal conclusion.

3 THE WITNESS: I don't know.

4 BY MR. FORD:

5 Q. I guess my question is, is CCL's
6 objection here over the procedures that were used
7 by the Town of Awendaw, or is the objection to the
8 annexation, period?

9 MS. SALTZBURG: I'm going to object to
10 the extent it calls for a legal conclusion.

11 MR. FORD: You can say object to form,
12 but there are no speaking objections under South
13 Carolina rules, okay?

14 BY MR. FORD:

15 Q. Do you need me to repeat the question?

16 MS. SALTZBURG: If I need to object to
17 form, I can do that.

18 MR. FORD: That's fine.

19 BY MR. FORD:

20 Q. My question, just for the record is, is
21 CCL's objection to the procedure that was used, or
22 to the substance of the annexation, or both?

23 MS. SALTZBURG: And just for the
24 record, I'll object as to form.

25 THE WITNESS: The objection is -- to

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1 the annexation is related to our concerns about
 2 future development of the property.
 3 BY MR. FORD:
 4 Q. Okay. So it's not so much to the
 5 method of annexation so much as an objection to the
 6 fact that the annexation took place at all.
 7 A. I mean, it's both, but what got us to
 8 learn about the improper procedure, what we view as
 9 an improper procedure was our objection to the
 10 potential threat that the annexation posed on the
 11 Francis Marion.
 12 Q. So if it had been done through a
 13 different procedure, would CCL be okay with the
 14 annexation?
 15 A. I don't know.
 16 MS. SALTZBURG: Objection.
 17 THE WITNESS: No, it would not.
 18 BY MR. FORD:
 19 Q. It would not. It doesn't matter what
 20 the procedure is.
 21 A. It doesn't matter what the procedure
 22 is.
 23 Q. Thank you. That's what I'm getting at.
 24 Town meetings in Awendaw. Where do they take
 25 place?

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1 A. As far as I know, town hall.
 2 Q. Is the town hall the only government
 3 building in Awendaw?
 4 A. I don't know.
 5 Q. Do you know of any other government
 6 buildings in Awendaw other than town hall?
 7 A. I mean -- no, I don't.
 8 Q. Do you know of any other place where
 9 town meetings have taken place in Awendaw other
 10 than town hall?
 11 A. Not to my knowledge.
 12 Q. Did CCL ever ask Awendaw to correct
 13 what it alleges to be the procedural errors with
 14 the annexation of the properties in this matter?
 15 A. Not to my knowledge.
 16 Q. Okay. Do you know why that is?
 17 A. Because our primary objection is not to
 18 the procedure. It's to the threat that the
 19 procedures lead to the Francis Marion National
 20 Forest.
 21 Q. Did CCL representatives speak at any of
 22 the Awendaw town hall meetings that were part of
 23 the development agreement or the annexation?
 24 A. They did, but I don't know which ones.
 25 Q. Okay. Do you know who those

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1 representatives were?
 2 A. I can't say for sure, but I think they
 3 were Jane Lareau and Grace Gasper.
 4 Q. And Ms. Lareau and Ms. Gasper, to your
 5 knowledge, spoke at some of the town hall meetings?
 6 A. Yes.
 7 Q. Tell me how you know that.
 8 A. Just from reading e-mails about the
 9 subject matter.
 10 Q. So they reported to you that they had
 11 spoken at the town hall meetings?
 12 A. Well, I shouldn't say they reported to
 13 me that they had spoken. They reported to me that
 14 they were preparing statements for. And so I would
 15 imagine that was because they knew they would be
 16 permitted to speak.
 17 Q. Just so I know, do you know that they
 18 did speak?
 19 A. No.
 20 Q. Okay. That's what I'm trying to get
 21 at. You think they might have, but you don't know
 22 one way or the other whether CCL representatives
 23 spoke at town hall meetings.
 24 MS. SALTZBURG: Objection as to form.
 25 THE WITNESS: I know that if they

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1 didn't speak, they submitted comments in the form
 2 of a letter.
 3 BY MR. FORD:
 4 Q. Do you know generally the substance of
 5 those comments or what they would have spoken
 6 about?
 7 A. I've read them, yes.
 8 Q. And summarize those for me, if you
 9 would, please.
 10 A. Well, I can't tell you for sure what
 11 all of the -- I mean, I think we've prepared
 12 comments a number of times in relation to this
 13 case, but they have to do with things that
 14 Mr. Tisdale and I were speaking about earlier.
 15 And that is, the number of units, the
 16 amount of commercial space, the threat to the
 17 Francis Marion National Forest, the concerns about
 18 infrastructure.
 19 I'm sure that one of the statements
 20 involved the potential for increased taxes to
 21 county residents and maybe Awendaw residents.
 22 Q. So they -- to your knowledge, they
 23 would have spoken about the things you've testified
 24 already about today.
 25 A. Yes.

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1 Q. Okay. Anything else that you're aware
2 of --
3 A. Not that I know of.
4 Q. Let me just get the question out so
5 someone reading it later can make sure.
6 Are you aware of anything else, other
7 than what you've told us today, that they would
8 have spoken about?
9 A. No.
10 Q. I'm changing topics.
11 Is CCL involved in any way in efforts
12 to videotape Awendaw town hall meetings?
13 A. No.
14 Q. Okay. Has CCL encouraged or retained
15 anyone to videotape or otherwise record Awendaw
16 town hall meetings?
17 A. No.
18 Q. Okay. Is CCL aware of anybody's effort
19 to record or videotape Awendaw town meetings?
20 A. Only -- I mean, I know about it from
21 what I've read about in the newspaper.
22 Q. And what was that that you read?
23 A. That somebody was recording the -- or
24 was trying to record the meeting, and they weren't
25 allowed to.

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1 Q. But that's all you know about it?
2 A. That's all I know.
3 Q. Have you understood all the questions
4 that were asked of you today?
5 A. I have.
6 Q. Is there anything else of importance
7 related to this lawsuit that you haven't been asked
8 about or we haven't discussed today? And it's a
9 general question, and I know your lawyer's going to
10 object.
11 But what I'm getting at: I don't want
12 to come to the trial of this matter and have you
13 come in and start talking about something important
14 that just because we didn't ask you about it. So
15 it's a broad question.
16 Is there anything else important about
17 this lawsuit that you haven't testified to or been
18 asked about today?
19 MS. SALTZBURG: And I do object as to
20 form.
21 THE WITNESS: No.
22 BY MR. FORD:
23 Q. Okay. And have you testified as to
24 everything you remember sitting here today at this
25 time?

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1 A. Yes.
2 Q. Okay. So if your lawyers now come on
3 and start prompting you with questions from the
4 complaint, the answers to those questions most
5 likely will be strongly influenced by the fact that
6 they're going to start prompting you with the
7 second amended complaint.
8 MS. SALTZBURG: Object as to form
9 BY MR. FORD:
10 Q. You've told us everything you remember
11 right now
12 A. Yes.
13 MR. FORD: Thank you. That's all I
14 have.
15 MR. TISDALE: Before you start, let me
16 just ask Amy one thing.
17 MR. DESCHERER: Can we have about five
18 minutes?
19 MR. TISDALE: You can have as long as
20 you want
21 (A recess transpired from 12.34 until
22 12:57.)
23 MS. SALTZBURG: We can go back on.
24 EXAMINATION
25 BY MS. SALTZBURG.

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1 Q. Megan, do you remember being asked
2 about these e-mails? I think it's Exhibit 3.
3 A. Yes, I remember
4 Q. And do you remember Mr. Tisdale was
5 asking you about asking attorneys like Trenholm
6 Walker for help?
7 A. Yes.
8 Q. And can you look back at -- it's CCL
9 00846. The part where it says:
10 I think it would be worth it to engage
11 a land use attorney, in parentheses, Trenholm,
12 question mark, to take a look at this stuff.
13 A. Yes.
14 Q. What did you mean, to take a look at
15 this stuff?
16 A. Well, I didn't write this.
17 Q. Sorry. Do you -- let me rephrase that.
18 Do you know what the author of this
19 e-mail meant or what the league wanted in terms of
20 taking a look at things?
21 A. Well, this e-mail is from Michelle
22 Sinkler, and she was advising us to talk to
23 Trenholm or somebody else because she felt that
24 there may be significant issues with the
25 development agreement.

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1 And she cites that in another one of
2 these e-mails. Well, in the same e-mail where she
3 says -- well, maybe I'm misremembering.

4 But what she says is she thinks it may
5 be worth it to have Trenholm look at the
6 development agreement.

7 And I think what she means, she thinks
8 Trenholm may be qualified to help us discern
9 whether or not we would have -- there are any legal
10 issues with the development agreement.

11 Sorry. I went around in a circle,
12 but --

13 MS. SALTZBURG: This is a copy of the
14 second amended complaint in this lawsuit, and you
15 printed it for us. I don't know if Ian would like
16 a chance to look at it.

17 MR. FORD: I've seen it. Thank you.

18 MR. TISDALE: We can go ahead and make
19 it an exhibit to the depo if you want to.

20 MS. SALTZBURG: Sure. That would be
21 great.

22 (PLF. EXH. 5, Second Amended Complaint,
23 marked for identification.)

24 BY MS. SALTZBURG:

25 Q. Do you remember being asked about

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1 problems or whether the league thought there were
2 problems with a piece of -- or a separate
3 annexation of a piece of a parcel?

4 A. Just recently, yes. Not that -- yes.
5 Later in the -- yes. Was it Tract 41? Is that
6 right?

7 Q. I think it's 041. You can review this
8 if you want to.

9 MR. TISDALE: What paragraph is she
10 looking at?

11 MS. SALTZBURG: Sorry. She is looking
12 at Paragraphs 51 through 56.

13 THE WITNESS: Okay.

14 MR. TISDALE: Thank you.

15 THE WITNESS: Okay.

16 BY MS. SALTZBURG:

17 Q. Do you know whether that relates to the
18 2009 annexation for the Nebo tract?

19 MR. FORD: Object to form.

20 THE WITNESS: I don't -- I don't know
21 if I understand. This -- go ahead. I don't think
22 I understand the question.

23 BY MS. SALTZBURG:

24 Q. Do you know if that issue is the same
25 as your concerns about the other two annexation

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1 parcels that you were asked about earlier or if it
2 relates to different issues? Or I guess that's not
3 a question. Sorry.

4 Do you know if that claim relates to
5 the actions in 2009 by the town or if it also
6 relates back to the 2004 annexation ordinances?

7 MR. FORD: Object to form.

8 THE WITNESS: It appears that this --
9 from reading this, it appears that our objections
10 to this annexation have to do with the amount --
11 the number of acres that were annexed and the
12 number that were petitioned to be annexed.

13 BY MS. SALTZBURG:

14 Q. And do you remember -- in what year do
15 you know that that happened?

16 A. It appears that it happened in 2009

17 Q. And does the league have any concerns
18 about development on the Nebo church property?

19 A. No.

20 Q. Are you concerned about anything on
21 that property that might impact the national
22 forest?

23 A. There's nothing proposed on that
24 property, no, that we would be concerned about.

25 Q. What property are you concerned about

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1 in terms of impacts to the national forest?

2 A. We're concerned about the Nebo tract
3 as -- the tract that's involved in this case.

4 MS. SALTZBURG: I think that's all we
5 have.

6 MR. TISDALE: Congratulations.

7 MS. JOWERS: You're done.

8 MR. TISDALE: Anybody else got any
9 questions? Thank y'all.

10 THE WITNESS: Thank you.

11 MR. TISDALE: It was agreed that we
12 would maintain custody of Exhibit 2.

13 MR. DeSCHERER: Okay.

14 (The witness, after having been advised
15 of her right to read and sign this transcript, does
16 not waive that right.)

17 (The deposition was concluded at
18 1:06 p.m.)

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SIGNATURE OF DEPONENT

DEPONENT: MEGAN J. DESROSIERS
 DEPOSITION DATE: November 9, 2010
 REPORTER: Sandra K. Bjerke
 CASE CAPTION: Vicary vs. Town of Awendaw

(Please return both Signature of Deponent pages.)

I, the undersigned, MEGAN J. DESROSIERS, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE LINE CHANGE REASON

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SIGNATURE OF DEPONENT (CONTINUED)

DEPOSITION DATE: November 9, 2010
 REPORTER: Sandra K. Bjerke
 CASE CAPTION: Vicary vs. Town of Awendaw

PAGE LINE CHANGE REASON

MEGAN J. DESROSIERS Date

I, Sandra K. Bjerke, Notary Public for the State of South Carolina at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent page within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.

Sandra K. Bjerke, RMR, RDR, CRR
 My Commission Expires
 June 18, 2020

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CERTIFICATE OF REPORTER

I, Sandra K. Bjerke, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 15th day of November, 2010 at Charleston, Charleston County, South Carolina.

Sandra K. Bjerke, RMR, RDR, CRR
 My Commission Expires
 June 18, 2020

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Between Town of Awendaw, South		
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(Original Retained by		
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SIGNATURE OF DEPONENT

DEPONENT: MEGAN J. DESROSIERS
 DEPOSITION DATE: November 9, 2010
 REPORTER: Sandra K. Bjerke
 CASE CAPTION: Vicary vs. Town of Awendaw

(Please return both Signature of Deponent pages.)

I, the undersigned, MEGAN J. DESROSIERS, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON
9	13	villages to Villages	capitalize
10	9	villages to Villages	capitalize
	11	villages to Villages	capitalize
11	12	villages to Villages	capitalize
	11	of "the" sustainable	omitted word
12	41	"when" it was	wrong word
	53	opposing the	word omitted/
13		"development proposal"	wrong word
	20	league to League	capitalize
14	48	" "	"
	50	" "	"
15	54	" "	"
	54	" "	"
16	54	" "	"
	59	" "	"
17	63	" "	"
	64	" "	"
18	64	" "	"
	65	" "	"
19	66	" "	"
	73	" "	"
20	76	" "	"
	79	" "	"
21	128	" "	"
	130	" "	"
22	131	" "	"
	86	SCLC to SELC	wrong letter
23	104	were to was	wrong word
	115	damaged to diminished	wrong word
24	121	Objection "as to form"	phrase omitted
	33	Fair Lawn to Fairlawn	one word
25	34	" "	"
	34	" "	"

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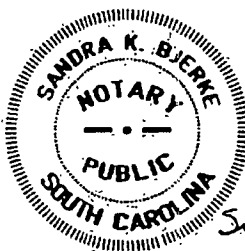
SIGNATURE OF DEPONENT (CONTINUED)

DEPOSITION DATE: November 9, 2010
 REPORTER: Sandra K. Bjerke
 CASE CAPTION: Vicary vs. Town of Awendaw

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Megan J. Desrosiers 12/14/2010
 MEGAN J. DESROSIERS Date

I, Sandra K. Bjerke, Notary Public for the State of South Carolina at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent page within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.



Sandra K. Bjerke

Sandra K. Bjerke, RMR, RDR, CRR
 My Commission Expires
 June 18, 2020

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

LYNNE VICARY, KENT PRAUSE, and
SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,

Plaintiffs,

v.

TOWN OF AWENDAW, and EBC, LLC,

Defendants.

CASE NO. 09-CP-10-7399

STIPULATION OF DISMISSAL

FILED
2012 SEP -6 PM 4:26
JULIE J. ARMSTRONG
CLERK OF COURT

**STIPULATION OF DISMISSAL OF PLAINTIFFS LYNNE VICARY, KENT PRAUSE,
AND SC COASTAL CONSERVATION LEAGUE AND DEFENDANT EBC, LLC**

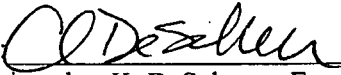
WHEREAS, that the Plaintiffs Lynne Vicary, Kent Prause, and S.C. Coastal Conservation League ("Plaintiffs") and Defendant, EBC, LLC ("EBC") have agreed to a dismissal of this action upon the conditions set forth in the Settlement Agreement, which is incorporated herein by reference and is attached hereto as Exhibit A; and under the authority of Rule 40(j), SCRCPP, and

WHEREAS, Plaintiffs have agreed and stipulate to a dismissal of all claims asserted by the Plaintiffs against EBC, and EBC has agreed and stipulate to a dismissal of all counterclaims asserted by EBC against the Plaintiffs in this action pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure and upon the conditions set forth in Exhibit A hereto.

NPCHAR1:1006160.1-STIP_D-(TST) 038791-00001

WE STIPULATE:

SOUTHERN ENVIRONMENTAL LAW CENTER

By: 
Christopher K. DeScherer, Esq.
South Carolina Bar No. 77753
43 Broad Street, Suite 300
Charleston, SC 29401
(843) 720-5270

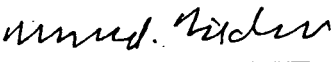
September 5, 2012
Date

W. Jefferson Leath, Esq.
South Carolina Bar No: 003244
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Attorneys for Plaintiffs

WE STIPULATE:

NEXSEN PRUET, LLC

By: 
Thomas S. Tisdale, Esq.
South Carolina Bar No. 5584
P.O. Box 486
Charleston, SC 29402

September 5, 2012
Date

Attorney for Defendant EBC, LLC

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

LYNNE VICARY, KENT PRAUSE, and
SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,

Plaintiffs,

v.

TOWN OF AWENDAW, and EBC, LLC,

Defendants.

CASE. NO. 09-CP-10-7399

SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into on the 4th day of September, 2012, by and between plaintiffs Lynne Vicary, Kent Prause, and the South Carolina Coastal Conservation League ("League") (collectively, the "Plaintiffs") and defendant EBC, LLC ("EBC") to settle all claims asserted by Plaintiffs against EBC and all counterclaims asserted by EBC against Plaintiffs in the above-captioned matter. This Settlement Agreement is between the Plaintiffs and defendant EBC and does not resolve any of the claims that have been asserted by the Plaintiffs against the defendant Town of Awendaw ("Town").

WHEREAS, EBC, a limited liability company organized under the laws of Illinois, owns the "Nebo Tract," a private in-holding of approximately 355.34 acres in size, which is surrounded on three sides by the Francis Marion National Forest, can be identified by Charleston County Parcel Identification Number 625-00-00-006, and is also depicted as "B3" on the map that is included hereto as Exhibit A;

WHEREAS, on July 10, 2009, EBC filed two petitions with the defendant Town of Awendaw to annex two portions of the Nebo Tract (Charleston County Parcel Identification Numbers 625-00-00-004 and 006) into the Town, and on September 14, 2009, EBC filed a third petition seeking annexation of another piece of the Nebo Tract (a portion of the property bearing Charleston County Parcel Identification Number 625-00-00-041);

WHEREAS, on or about October 1, 2009, the Town of Awendaw adopted a series of ordinances pursuant to which the Town allegedly annexed the Nebo Tract, entered into a development agreement with EBC, amended the Town's comprehensive plan, and rezoned the property;

WHEREAS, Plaintiffs instituted an action on November 25, 2009 in the Court of Common Pleas of Charleston County, South Carolina, styled LYNNE VICARY, KENT PRAUSE, AND SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, *Plaintiffs*, v. TOWN OF AWENDAW and EBC, LLC, *Defendants*, Civil Action No. 09-CP-10-7399 (the "Lawsuit") for purposes of challenging the legality of ordinances enacted by the Town pursuant to which the Town allegedly annexed the Nebo Tract, entered into a development agreement with EBC, amended the Town's comprehensive plan, and rezoned the Nebo Tract;

WHEREAS, on January 22, 2010, EBC filed an Answer and Counterclaim against Plaintiffs, including counts for tortious interference with contractual relations, abuse of process, and violation of South Carolina Frivolous Proceedings Act;

WHEREAS, EBC is currently negotiating an agreement (the "Conservation Agreement") with The Nature Conservancy and other entities to permanently protect approximately 6022.13 of the 7749.7 acres of lands known as the "Fairlawn Plantation" through outright purchases and

conservation easements (a map depicting the tracts that comprise the Fairlawn Plantation is attached hereto as Exhibit A);

WHEREAS, on July 12, 2012, the Charleston County Greenbelt Bank Board recommended that Charleston County approve funds needed to consummate the Conservation Agreement subject to certain conditions, including a condition that the issues in this Lawsuit between the Plaintiffs and EBC be resolved within sixty days of such recommendation;

WHEREAS, Charleston County Council must approve of the Greenbelt Bank Board's recommendation in order to provide the funding necessary for the Conservation Agreement and the conveyance of the within described real property;

WHEREAS, the Conservation Agreement and the sale of the real property is contingent upon Charleston County Council approving the July 12, 2012 funding recommendation of the Greenbelt Bank Board;

WHEREAS, pursuant to the Conservation Agreement, there are three (3) properties that are part of the Fairlawn Plantation – which are identified as C6, C3, and B4 – for which the landowners, including EBC, are requesting rezoning by Charleston County from RM (resource management) to RR-3 (rural residential);

WHEREAS, the Plaintiffs and EBC wish to avoid the risk, uncertainty, and cost of litigation and to settle all the issues in the pending Lawsuit between Plaintiffs and EBC, and desire to compromise and settle all claims which they have against each other or may have alleged against each other with regard to the disputes upon the terms and provisions set forth herein;

NOW, THEREFORE, in consideration of the above-stated premises, the promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Plaintiffs and EBC agree as follows:

1. The Plaintiffs and EBC agree to dismiss all claims asserted by the Plaintiffs against EBC and all counterclaims asserted by EBC against the Plaintiffs in this Lawsuit from the active docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. The Plaintiffs and EBC agree further that Plaintiffs or EBC may restore these claims and/or counterclaims within one year of the date they are stricken from the active docket in the event that EBC and The Nature Conservancy fail to execute the Conservation Agreement and/or fail to consummate and properly record the outright purchases and conservation easements that are described in the Conservation Agreement and intended to permanently protect the 6,022.13 acres of the Fairlawn Plantation.
2. EBC agrees to provide copies of the Conservation Agreement and properly recorded deeds and easements to Plaintiffs once the Conservation Agreement is executed and once the outright purchases and easements are properly recorded.
3. Plaintiffs agree not to challenge the development of the Nebo Tract as provided for in the agreement entitled "Nebo Settlement Development Agreement By and Between Town of Awendaw, South Carolina and EBC, LLC D/B/A EBCSC LLC" (the "Development Agreement") and dated October 1, 2009. Plaintiffs agree further not to object to the use of package sewer plants on the Nebo Tract as long as the capacity and service of such treatment facilities are limited to the Nebo Tract, that the facilities use the best available technology, and that the operator of such facilities meets the following criteria: (a) public organization with public accountability; (b) high level of staff expertise to include

professional supervision; and (c) operating experience and expertise. Plaintiffs, however, reserve their rights to challenge any proposal to extend sewer service to the Nebo Tract in the future. Plaintiffs' agreement not to challenge the development of the Nebo Tract and not to object to the use of package sewer plants on such property is also contingent upon the execution of the Conservation Agreement, including the proper recording of outright purchases and/or easements, consistent with Paragraph No. 1 above.

4. Plaintiffs agree not to object to the use of package sewer plants on the Nebo Church tract (Charleston County Parcel Identification Number 625-00-00-005) as long as the capacity and service of such treatment facilities are limited to church-related purposes on the Nebo Church tract, that the facilities use the best available technology, and that the operator of such facilities meets the following criteria: (a) public organization with public accountability; (b) high level of staff expertise to include professional supervision; and (c) operating experience and expertise. Plaintiffs, however, reserve their rights to challenge any proposal to extend sewer service to the Nebo Church tract in the future. Plaintiffs' agreement not to object to the use of package sewer plants on the Nebo Church tract property is also contingent upon the execution of the Conservation Agreement, including the proper recording of outright purchases and/or easements, consistent with Paragraph No. 1 above.
5. Plaintiffs agree not to challenge the landowners' requests to rezone tracts C6, C3, and B4 on the attached map from RM to RR-3. Plaintiffs further agree not to object to the use of package sewer plants on these tracts of land as long as the capacity and service of such treatment facilities are limited to tracts C6, C3, and B4, that the facilities use the best available technology, and that the operator of such facilities meets the following criteria:

- (a) public organization with public accountability; (b) high level of staff expertise to include professional supervision; and (c) operating experience and expertise. Plaintiffs, however, reserve their rights to challenge any proposal to extend sewer service to tracts C6, C3, and B4 in the future.
6. EBC agrees to withdraw the application to rezone tracts C6, C3, and B4 prior to any action on it by Charleston County Council unless Charleston County Council approves of the Greenbelt Bank Board's recommendation to provide the funding necessary for the Conservation Agreement. Nothing in this Settlement Agreement shall prevent or preclude the landowners from filing subsequent applications for the rezoning of the within described tracts of land should the Conservation Agreement described herein not be approved by County Council. Further, EBC agrees that unless the Conservation Agreement is approved and the above-described 6,022.13 of 7,749.7 acres of lands within the Fairlawn Plantation are protected through outright purchases and conservation easements, the rezoning will not be approved or accepted. The intent of this Settlement Agreement is to allow the Plaintiffs full rights to object to the rezoning if the Conservation Agreement is not executed.
7. Plaintiffs and EBC agree that the effective date of the Development Agreement shall be extended by a length of time equivalent to the period of time between the initiation of this Lawsuit and the date of this Settlement Agreement (November 25, 2009 through September 4, 2012).

IN WITNESS WHEREOF, the undersigned have executed this document on the respective
dates noted.

Lynne Vicary
Lynne Vicary

9/4/12
Date

Kent Prause
Kent Prause

9/5/12
Date

On behalf of the SC Coastal Conservation League:

Edward Dan Beach

9/4/12
Date

On behalf of EBC, LLC:

Date

IN WITNESS WHEREOF, the undersigned have executed this document on the respective
dates noted.

Lynne Vicary

Date

Kent Prause

Date

On behalf of the SC Coastal Conservation League:

Date

On behalf of EBC, LLC:

R. + B. ↓

9/4/2012
Date

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-7399
Appellate Case No. 2014-002118

Lynne Vicary, Kent Prause, and South Carolina Coastal
Conservation League, ... Respondents,

v.

Town of Awendaw, ... Appellant.

PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Town of Awendaw, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Corrected Record on Appeal

Counsel Served: Attorneys for Respondents

W. Jefferson Leath, Jr., Esq. Leath Bouche & Seekings, LLP P.O. Box 59 Charleston, SC 29402-0059	Christopher K. DeScherer Southern Environmental Law Center 463 King Street, Suite B* Charleston, SC 29403 Via Electronic Mail and U. S. Mail


Meredith S. Keane
Senior Paralegal

April 29, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Case No 2009-CP-10-7399
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RECEIVED

MAY 04 2015

SC Court of Appeals

Lynne Vicary, Kent Prause, and South Carolina Coastal
Conservation League, ... Respondents,

v.

Town of Awendaw, and EBC, LLC

Of whom Town of Awendaw is the Appellant..... Defendants

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Case No 2009-CP-10-7399
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Of whom Town of Awendaw is the Appellant.....	Defendants

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ERR AS A MATTER OF LAW IN FINDING THAT THE RESPONDENTS HAVE STANDING TO CHALLENGE THE ANNEXATION ORDINANCE?
- II. DID THE CIRCUIT COURT ERR AS A MATTER OF LAW IN FINDING THAT THERE WAS NO PETITION FOR THE 2004 ANNEXATION?
- III. DID THE CIRCUIT COURT ERR IN FINDING THAT APPELLANT FALSELY CLAIMED THAT IT HAD A PROPER PETITION TO ANNEX THE US FOREST SERVICE PROPERTY?
- IV. DID THE CIRCUIT COURT ERR AS A MATTER OF LAW IN FINDING THAT THE TOWN IS ESTOPPED FROM ASSERTING A STATUTE OF LIMITATIONS DEFENSE?
- V. DID THE CIRCUIT COURT ERR AS A MATTER OF LAW IN FINDING THAT THE STATUTORY TIME PERIOD FOR CHALLENGING THE 2004 ANNEXATION WAS TOLLED?

STATEMENT OF THE CASE

This case began with a Complaint for declaratory judgment and injunctive relief brought by Lynne Vicary, Kent Prause, and South Carolina Coastal Conservation League (“Respondents”), against defendants Town of Awendaw (the “Town”) and EBC, LLC d/b/a/ EBCSC, LLC (“EBC”), of whom the Town is the Appellant, on November 25, 2009 seeking to invalidate the October 1, 2009 Ordinances approved by Appellant that rezoned a parcel of land known as part of the Nebo Tract in Charleston County, South Carolina, authorized a development agreement for the Nebo Tract, and amended Appellant’s Comprehensive Plan regarding the Nebo Tract. The First and Second Amended Complaints sought to also invalidate the annexation of the Nebo Tract through a challenge of the annexation of US Forest Service land and Mount Nebo Church¹ property more than five (5) years prior to the Nebo Tract annexation R. 29

The circuit court’s order of July 24, 2014 (the “Final Order,” R. 14) found that, based on Respondents’ allegations of certain intentional misconduct and illegal action by the Appellant, Respondents acquired taxpayer standing and the public importance exception from the constitutional standing requirements to pursue the challenge of the 2004 annexations by the Appellant of a 10-foot strip of United States Forest Service property and the property of the Mount Nebo Church, and the 2009 ordinances of Appellant that annexed the Nebo Tract and approved a Comprehensive Plan amendment, rezoning, and a development agreement for the Nebo Tract. The circuit

¹ Mount Nebo Church has not been made a party to this action. Its property was annexed with the ten (10’) foot strip of Forest Service property in 2004, and is contiguous to the Nebo Tract. If upheld, the circuit court’s ruling will remove the Church property from the Town.

court also ruled that the statute of limitations for challenging the 2004 Annexation Ordinances was tolled and that Appellant was estopped from asserting the statute of limitations defense based on Respondents' allegations of certain fraudulent representations by Appellant regarding the annexation petition utilized in conjunction with the 2004 annexation of the Forest Service property ("1994 Petition").

The trial court reviewed Respondents' claim against the 2004 annexation of the ten (10') foot strip of Forest Service property, finding that because Appellant had not received a petition that meets the substantive requirements of S.C. Code Ann. § 5-3-150 (3) as construed by the court, that the annexation was *void ab initio*, that the annexation of the Nebo Tract failed because the invalidation of the 2004 Forest Service and Nebo Church annexation deprived the Nebo Tract of the required contiguity, and that the ordinances concerning the development agreement, rezoning and Comprehensive Plan for Nebo Tract were each *ultra vires* acts and *void ab initio* because the Nebo Tract annexation did not occur as a matter of law.

Following is the procedural history of the case, which was heard before the lower court without a jury

A Notice of the Intention to Contest Extension of the Town was filed by Respondents on November 25, 2009. The Summons and Complaint was filed on November 25, 2009 for declaratory judgment and injunctive relief alleging non-compliance with the Local Development Agreement Act, violation of the procedures for amendment of the Town Comprehensive Plan, and arbitrary rezoning. A First Amended Complaint was filed on December 22, 2009 for declaratory judgment and injunctive relief alleging the Nebo Tract annexation was void for various reasons, non-

compliance with the Local Development Agreement Act, violation of the procedures for amendment of the Town Comprehensive Plan, and arbitrary rezoning.

Appellant Answered the First Amended Complaint on January 22, 2010 raising eleven (11) affirmative defenses. (R. 54.) Respondents filed a Second Amended Complaint on April 23, 2010 for declaratory judgment and injunctive relief alleging the Nebo Tract annexation was void for various reasons, non-compliance with the Local Development Agreement Act, violation of the procedures for amendment of the Town Comprehensive Plan, and arbitrary rezoning. (R. 29.) Appellant answered the Second Amended Complaint on May 21, 2010 incorporating its answer to the First Amended Complaint and answering only the revised paragraphs of the Complaint. (R. 67.)

Defendant EBC and Appellant filed a Motion for Partial Summary Judgment on December 22, 2010. Respondent filed a Motion for Partial Summary Judgment on March 11, 2011. Defendant EBC's and Appellant's Motion for Partial Summary Judgment was denied on April 19, 2011. (R. 1.) An Order denying Appellant's Motion for Reconsideration was entered on July 19, 2011. An Order denying Respondent's Motion for Partial Summary Judgment was filed on September 17, 2013.

Appellant's Notice of Appeal of the denial of its Motion for Partial Summary Judgment was filed with the Court of Appeals on July 29, 2011. An Order remitting the case from the Court to the lower court was entered on July 10, 2012, which Order included denial of Appellant's Petition for Re-Hearing. (R. 10.)

A Stipulation for Dismissal and Settlement Agreement as to Defendant EBC was filed September 6, 2012². (R. 354.) A non-jury trial was held April 16, 2014. (R. 71.) The Final Order was issued on July 24 and filed on July 28, 2014. (R. 14.)

Appellant filed a Motion for Reconsideration on August 6, 2014. An Order denying Appellant's Motion for reconsideration was entered on September 22, 2014. (R. 27.)

A Consent Order for Substitution of Appellant's Counsel was filed on September 23, 2014, and issued by the lower court on October 16, 2014.

The Notice of Appeal was filed and served on October 1, 2014.

² Because Defendant EBC and Respondents voluntarily settled their claims and counterclaims, EBC was dismissed from the case below. Stipulation of Dismissal. Therefore the Statement of the Case procedural history does not include the EBC pleadings related to its defense and counterclaims.

ARGUMENT

I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE RESPONDENTS HAVE STANDING TO CHALLENGE THE ANNEXATION ORDINANCE.

A. Standard of Review.

Depending on the nature of the underlying controversy, a declaratory judgment suit is either equitable or legal in nature. See, e.g., Ballenger v. City of Inman, 336 S.C. 126, 130, 518 S.E.2d 824, 826-7 (Ct. App. 1999) (internal citation omitted). The Respondents challenge the validity of Appellant's ordinances to annex property, to rezone it and to approve a development agreement. The remedy sought by the Respondents, the invalidation of the ordinances adopted by the Town, sounds in equity. See, e.g., Myers v. Patterson, 315 S.C. 248, 251, 433 S.E.2d 841, 843 (1993) (a suit to restrain public officers from taking actions unauthorized by law sounds in equity), Bethel M. E. Church v. City of Greenville, 211 S.C. 442, 444-5, 45 S.E.2d 841, 842 (1947) (a suit to declare void a resolution by city council to vacate a portion of a street is a suit in equity). In an action at equity tried by a judge without a jury, an appellate court may reverse the circuit court's findings of facts in accordance with its own view of the preponderance of the evidence. Lambries v. Saluda County Council, 409 S.C. 1, 8, 760 S.E.2d 785, 788 (2014) (internal citation omitted). Additionally, as Respondents' basis for seeking to void the ordinances involves the interpretation of a statute, an appellate court will review that question of law *de novo*. Id.

Moreover, a municipal ordinance is valid and upon review should be upheld if the municipality had the "power to enact the local ordinance" and if the ordinance is "consistent with the Constitution and general law of the State." Aakjer v. City of

Myrtle Beach, 388 S.C. 129, 133, 694 S.E.2d 213, 215 (2010) (internal citation omitted); Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 197 (2002) (internal citation omitted). Our Supreme Court precedent has been long established that a municipal annexation can be deemed “void” only where the specific provision of Title V, Chapter 3 of the South Carolina Code of Laws authorizing the annexation is unlawful. St. Andrews Pub. Serv. Distr. v. City Council of Charleston, 349 S.C. 602, 605, 564 S.E.2d 647, 648 (2002) (citing Quinn v. City of Columbia, 303 S.C. 405, 401 S.E.2d 165 (1991) (overruled in other part in St. Andrews)). See also Beaufort County v. Trask, 349 S.C. 522, 527-8, 563 S.E.2d 660, 663 (Ct. App. 2002). The circuit court erred as a matter of law in finding that the 2004 and 2009 Annexations are *void ab initio* because neither Respondents nor the circuit court claimed that the annexation procedure established in S.C. Code Ann. § 5-3-150 (3) is unlawful in any part.

Where the 2004 Annexation ordinance is complete and unambiguous on its face, Tr. Pl. Ex. No. 8 pp 3-4 (Apr. 16, 2014, R. 187), the circuit court cannot as a matter of law consider extrinsic or parol evidence to contradict it, and it erred as a matter of law in relying entirely on parol evidence to invalidate it, Final Order pp. 3, 4, 7, 8, 10-12. (R. 16, 17, 20, 21, 23-24.) Horry Tel. Coop., Inc. v. City of Georgetown, 408 S.C. 348, 354, 759 S.E.2d 132, 135 (2014) (“[m]unicipal records properly authenticated or verified are the only competent evidence of the proceedings of the transactions of governing bodies” (quoting Berkeley Elec. Coop., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992))) South Carolina precedent holds that an objection to parol evidence can be first raised on appeal because

its admission is prohibited by a rule of substantive law, not merely by a rule of evidence. Muckelvaney v Liberty Life Ins. Co., 261 S C 63, 198 S E.2d 278 (1973); In re Estate of Holden, 343 S C. 267, 539 S.E.2d 703, (2000). See II B., *infra*.

B. Respondents Have No Statutory Standing and the Only Non-Statutory Party Which May Challenge a Municipal Annexation is the State of South Carolina Acting in Public Interest to Challenge an "Absolutely Void" Annexation Ordinance.

Respondents neither claim nor establish statutory standing to challenge the 2009 Nebo Tract Annexation or the bootstrapped challenge of the 2004 Annexation. Under S.C. Code Ann. § 5-3-270 a plaintiff challenging an annexation must be a “person interested therein.” Under long standing precedent a statutory “challenger must assert an infringement of its own proprietary interests or statutory rights.” St. Andrews Pub. Serv. Distr v. City Council of Charleston, 349 S.C 602, 604, 564 S.E.2d 647, 648 (2002) (citing State by State Budget & Control Bd. v. City of Columbia, 308 S C 487, 489, 419 S.E.2d 229, 230 (1992)). Respondents have not alleged or shown any infringement of their own proprietary interests or statutory rights arising out of any annexation ordinances, and therefore do not have statutory standing under S.C Code Ann. § 5-3-270 to challenge any of them. Respondents cannot acquire statutory standing based solely on the South Carolina Uniform Declaratory Judgments Act, and the circuit court should have “reject[ed] any averment” by Respondents that the “proceeding under the Declaratory Judgment Act has any impact on [the] standing analysis.” Bodman v. State, 403 S.C. 60, 67 n1, 742 S.E.2d 363, 366 n1 (2013); see also County of Lexington, S.C v. City of Columbia, 303 S.C. 300, 301 400 S E.2d

146, 147 (1991) (a plaintiff cannot acquire statutory standing merely by pursuing a statutory declaratory judgment).³

Where the circuit court found that Respondents are entitled to pursue their challenges against the 2009 Nebo Tract Annexation and the 2004 Annexation based on taxpayer standing and the public importance exception from the general standing requirements, Final Order pp. 6 & 8, it violated the bright-line precedent of a three-prong test perfected by the South Carolina Supreme Court in a trilogy of rulings, prescribing that the only non-statutory party which may challenge any municipal annexation is the State of South Carolina when acting in public interest to challenge an annexation ordinance that is absolutely void. (R. 19, 21.) St. Andrews Pub. Serv. Distr. v. City Council of City of Charleston, 349 S.C. 602, 605, 564 S.E.2d 647, 648 (2002); State ex rel. Condon v. City of Columbia, 339 S.C. 8, 14, 528 S.E.2d 408, 411 (2000); Quinn v. City of Columbia, 303 S.C. 405, 407, 401 S.E.2d 165, 166-7 (S.C. 1991) (overruled in part in St. Andrews)⁴.

³ Respondents neither claim nor establish statutory standing to challenge the 2009 or 2004 annexations under the applicable standard. Moreover, Respondents neither claim nor establish statutory standing: under S.C. Code Ann. § 6-29-760 (C), granting standing to an “owner of adjoining land or his representative” to challenge the 2009 Nebo Tract Rezoning; under Chapter 29 of Title 6 of the South Carolina Code of Laws to challenge municipal ordinances to adopt or amend the Comprehensive Plan; or under Chapter 31 of Title 6 of the South Carolina Code of Laws to challenge the 2009 Nebo Tract Development Agreement.

⁴ Appellant argued correctly to the circuit court that the applicable law on standing in such annexation cases is primarily the St. Andrews case in its brief in support of its Motion for Directed Verdict on Standing, Court's Tr. Exh. 1. (R. at 259.) However, the circuit court summarily dismissed those defenses in a footnote, Order pp. 2,3, and determined that Respondents had standing without any reference whatsoever to this controlling jurisprudence. (R. at 15-16.) Nowhere in its Final Order did the circuit court explain why the controlling precedent of the St. Andrews case would not apply in this case.

In St. Andrews the Court firmly closed the door to private parties who claim non-statutory standing (such as taxpayer standing) or the public importance exception to challenge municipal annexations: “We now overrule Quinn, and *hold* that the *only non-statutory party which may challenge a municipal annexation is the State*, through a quo warranto action. In our view, the better policy is to limit ‘outsider’ annexation challenges to those brought by the State ‘acting in the public interest.’” Id. at 605, 564 S.E.2d at 648 (overruling, in part, Quinn v. City of Columbia, 303 S.C. 405, 401 S.E.2d 165 (1991)) (emphases added). That the State of South Carolina can invoke the public importance exception as a non-statutory party in a quo warranto action was previously acknowledged in State ex rel. Condon v. City of Columbia, 339 S.C. at 14, 528 S.E.2d at 411, and that an annexation ordinance cannot be deemed “absolutely void” unless the specific annexation enabling provision of Title V, Chapter 3 of the South Carolina Code of Laws is found to be unlawful, in Quinn v. City of Columbia, 303 S.C. at 407, 401 S.E.2d at 166-7. During the decade following St. Andrews, there have been only two reported annexation cases, of which State ex rel. Wilson v. Town of Yemassee, 391 S.C. 565, 707 S.E.2d 402 (2011) emphasized the need for strict adherence to the narrowly defined public importance exception from the general standing rules.⁵ Id. at 572-4, 707 S.E.2d 402 at 406-7.

Because Respondents fail to meet the first prong of the St. Andrews test—none of them is the State of South Carolina—they are unambiguously prohibited from pursuing their annexation claims under the exclusive standing framework established in

⁵ The other case, Town of Summerville v. City of North Charleston, 378 S.C. 107, 662 S.E.2d 40 (2008) examined an annexation pursuant to S.C. Code Ann. § 5-3-150 (1) which includes broader statutory standing provisions than § 5-3-150 (3) utilized by Appellant here.

St. Andrews over a decade ago. Instead, Respondents argue and the court found that the Quinn door closed in St. Andrews should be re-opened to these non-statutory, private-party plaintiffs whose claims it found to be distinguished from St. Andrews and from Town of Yemassee on the basis that the claim against the 2004 Annexation was intentionally deceitful conduct by Appellant. Order, p. 5-7. (R. 18-19.)

C. The Public Importance Exception from the Standing Requirements is not Applicable.

An exception from the statutory and Constitutional standing requirements based on particularized injury may be granted to a plaintiff where the issue raised is of such public importance that its resolution is needed for future guidance. Freemantle v. Preston, 398 S.C. 186, 193-4, 728 S.E.2d 40, 44 (2012) (citing ATC South, Inc. v. Charleston County, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)(internal citations omitted) In Freemantle, our Supreme Court South articulated a strict two-prong test for evaluating the “need for future guidance” which does not exist independently of the plaintiff’s (1) “need for” and (2) “entitlement to” injunctive relief. Id. at 194, 728 S.E.2d at 44. Freemantle also prohibits Respondents from achieving the public importance exception based on their allegations of municipal fraud. Id. 398 S.C. at 191 & 193-4, 728 S.E.2d at 43-44 (ruling that claims of collusion, breach of fiduciary duties, illegal gift of county funds, misfeasance, malfeasance, conspiracy, violations of public policy, and of violations of the South Carolina Freedom of Information Act by a resident taxpayer challenging a county’s expenditure of public funds did not “warrant invocation of the public importance exception”)

Instead of the applicable test, the circuit court improperly relied upon a standing framework previously utilized in procurement and taxpayer cases where a private party could acquire standing to challenge allegedly illegal governmental acts, Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); Sloan v. School Dist. of Greenville County, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), which framework has been superseded by Freemantle and is not applicable to annexation claims in the first place as the only the State of South Carolina is authorized by St Andrews to pursue a non-statutory public interest claim. The circuit court erred as a matter of law where it found, persuaded by Respondents' allegations of "municipal deception", "intentional bad faith", "intentional deceit," "unclean hands" and "misrepresentation" by Appellant, Final Order at 5, 7, 10, that Respondents are entitled to the public importance exception to pursue their challenge of the 2004 and 2009 annexations, where Respondents neither pleaded nor established either prong of the Freemantle test, and where Freemantle prohibits the invocation of the public importance exception based on Respondents' allegations of municipal deception. (R. 18, 20, 23.)

The circuit court erred by finding that "future guidance" is needed to "protect unique flora and fauna contained in the National Forest which is owned, maintained, and conserved for the benefit of all Americans," and that such guidance can be achieved by resolving "whether the Town's practice of expanding its municipal limits into the National Forest is *ultra vires*", Final Order at 8—9, where Respondents have failed to prove any injury to the National Forest arising out of the 2009 or 2004

Annexations⁶ ~~(R. 22-23.)~~ The Nebo Tract is not part of the National Forest, and the ten (10') foot strip of Forest Service land cannot be developed. There is no "entitlement to" injunctive relief based on the facts presented below. Moreover, no "future guidance" is needed to resolve a "recurring controversy likely to continue resurfacing in the future" against the Town's use of the 1994 Petition because Respondents cannot point to any South Carolina legal authority that prohibits the use of the 1994 Petition under S.C. Code Ann. § 5-3-150 (3) or that constrains a municipality from working with landowners to reach agreement and consensus on an annexation of their property under that section

D. Respondents Fail to Meet the Test for Constitutional Standing.

If the St. Andrews bar to Respondents challenge is considered not to apply, Respondents fail to meet the three requirements established for constitutional standing: "(1) the plaintiff must have suffered an injury in fact; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision." Sloan v. Greenville County, 356 S.C. 531, 549, 590 S.E.2d 338, 348 (S.C. Ct. App. 2003) (citing Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, at 601, 550 S.E.2d 287, at 291 (2001) (internal citations omitted)). Respondents claim that the injury to their taxpayer and environmental concerns arises out of the "development" of the Nebo Tract, Tr. Tr. 77-8-78:3, but no "development" of the Nebo Tract would occur without some future "*independent action of some third*

⁶ Moreover, Respondents actually agreed to the development of the Nebo Tract, extension of the development agreement and the rezoning in the Stipulation of Dismissal of EBC and Respondents. Stipulation pp. 4-6. ~~(R. at 359-361.)~~

party not before the court”, ATC South, Inc. v. Charleston County, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (U.S. 1992) (emphasis added). The circuit court abused its discretion in finding that Respondents have standing to challenge the 2004 and 2009 Annexations because the “resolution of plaintiffs’ claims is necessary to protect unique flora and fauna contained in the National Forest,” Final Order p. 8, ~~(R. 21)~~ where the record is uncontroverted that the injury alleged by Respondents is entirely hypothetical and unsubstantiated, where the court did not find that the Respondents had demonstrated any injury to the National Forest arising out of the 2004 or 2009 Annexation Ordinances or any Appellant action to substantiate their constitutional standing or public interest claim, and where the Respondents conceded that no development has been approved for the Nebo Tract by the Town since 2009, Tr. Tr. p. 77:20-24 (Apr 16, 2014). ~~(R. 147)~~ Moreover, the Stipulation of Dismissal with EBC and Respondents allows the very development complained of Stipulation, pp.4-6. Therefore, there is no injury that can be redressed by the court’s decision

The court further erred in finding that because the taxpayer injury alleged by the Respondents would be shared by “a class of persons within the Town” it entitles them to standing to challenge the 2004 and 2009 Annexation Ordinances as illegal governmental acts under Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App 2003) and Sloan v. School Dist. of Greenville County, 342 S.C. 515, 537 S.E.2d 299 (Ct App. 2000). Final Order p. 6. Any Sloan averment of taxpayer standing pursuant to an injury that is shared by all of the jurisdiction’s taxpayers was overruled by the Supreme Court in ATC South, Inc. v Charleston County, 380 S.C

191, 198, 669 S.E.2d 337, 340-41 (2008) (where the alleged fiscal injury to the plaintiff taxpayer arising out of a property rezoning approval is common to all property owners in the county, the “feature of commonality defeats the constitutional requirement of a concrete and particularized injury” (citing U.S. Supreme Court in Frothingham v. Mellon, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923)), and again in Freemantle v. Preston, 398 S.C. 186, 191 and 193-4, 728 S.E.2d 40, 43-44 (2012) (where the resident taxpayer challenged an allegedly excessive actual expenditure of public funds by the county, the alleged injury was common to all taxpayers of the county and that commonality defeated the constitutional requirement of a concrete and particularized injury required to establish taxpayer standing)).

E. The Challenges of the Remaining Three Ordinances Are Moot.

The circuit court did not review the merits of the counts in Respondents’ Second Amended Complaint regarding the ordinances (a) to approve the development agreement for the Nebo Tract; (b) to amend the Town’s Comprehensive Plan; and (c) to rezone the Nebo Tract. Instead, the court found that these ordinances were *ultra vires* acts and *void ab initio*, Final Order pp. 12, 13, based on its invalidation of the 2004 annexation of the ten (10’) foot strip of United States Forest Service land and the resulting absence of contiguity by the Nebo Tract to any incorporated area of the Town.

(R 25:26.)

Because defendant EBC is not a party to this appeal and was dismissed as a party to the proceedings below prior to the trial, Appellant has not permitted any development authorized by the Nebo Tract Development Agreement Ordinance even though the Stipulation of Dismissal between EBC and Respondents would allow it. The

challenge of the Development Agreement Ordinance would seem to be moot for purposes of this appeal

Likewise, the challenge to the Nebo Tract rezoning ordinance would appear to be moot for purposes of this appeal, because the vesting of the planned development zoning entitlement is directly derived from the Nebo Tract development agreement and Respondents achieved a settlement with EBC on this issue. Finally, because of the statutory requirement that municipalities update their Comprehensive Plans periodically, the Town is soon required to undertake such update that will give the Respondents as well as the public at large with the opportunity to comment on the Comprehensive Plan provisions for the Nebo Tract. Therefore, the challenge to the amendment of the Comprehensive Plan would appear to be moot for purposes of this appeal as well.

Therefore, the Town is not including arguments on appeal concerning the circuit court order concerning its voiding of these other three ordinances concerning the Nebo Tract, but only the 2004 and 2009 Annexation Ordinances. To the extent this Court overturns the circuit court over its finding that the annexations in 2009 and 2004 are void and deems Respondents' challenges to the other ordinances are not moot, the Court could remand to the circuit court for a hearing on the merits for each other ordinance. However, this Court could also determine from the record that Respondents abandoned or failed to prove their case on the other ordinances and overturn the circuit court's ruling on them.

II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN FINDING THAT THERE WAS NO PETITION FOR THE 2004 ANNEXATION.

A. The Circuit Court Committed an Error of Law by Adopting New Substantive Requirements for Annexation Petitions Where the Legislature is Silent.

The circuit court erred as a matter of law by construing S.C. Code Ann. § 5-3-150 (3) to include requirements for annexation petitions that conflict with the plain language of that section. Therefore the circuit court committed an error of law in finding that the 1994 Petition is not a “petition” under S.C. Code Ann. § 5-3-150 (3), and consequently invalidating the 2004 Annexation, and by extension the 2009 Nebo Tract Annexation, as *void ab initio*. S.C. Code Ann. § 5-3-150 (3) does not mandate a particular form for a petition, but provides:

Notwithstanding the provisions of subsections (1) and (2) of this section, any area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a petition signed by all persons owning real estate in the area requesting annexation. Upon the agreement of the governing body to accept the petition and annex the area, and the enactment of an ordinance declaring the area annexed to the municipality, the annexation is complete. No member of the governing body who owns property or stock in a corporation owning property in the area proposed to be annexed is eligible to vote on the ordinance. This method of annexation is in addition to any other methods authorized by law.

Where the legislature is clearly capable of differentiating between the substantive petition requirements among the various separate statutory annexation

procedures,⁷ the court erred as a matter of law by obliterating the legislative differentiation of § 5-3-150 (3) by superimposing certain requirements that are expressly confined to § 5-3-150 (1) and others that are based on no South Carolina authority.⁸ German Evangelical Lutheran Church of Charleston v. City of Charleston, 352 S.C. 600, 607, 576 S.E.2d 150, 153 (2003) (finding that where the legislature has exempted certain real properties from improvement districts, the court cannot expand that class). The 2004 Petition, that is, the 1994 U.S. Forest Service letter, Tr. Exh. 1, is signed by the Forest Service as owner of the property annexed describing its property

⁷ South Carolina legislature has expressly prescribed specific and different substantive requirements for petitions to annex multicounty park property; property of the State of South Carolina; and property annexed pursuant to less than unanimous consent. S.C. Code Ann. §§ 5-3-115, -140, -150 (1), and -300. Just as intentionally, the legislature rejected such specific requirements for petitions or for petitions used to annex property upon a unanimous consent (the procedure utilized by the Town), S.C. Code Ann. § 5-3-150 (3), or to annex property belonging to a corporation, school district, religious group, or to the federal government (an alternative procedure also available to the Town), S.C. Code Ann. §§ 5-3-120, -130, -140, and -260. Not even a petition but merely jurisdictional "consent" is required for the annexation of right-of-way area § 5-3-110. Similarly, it has been suggested that under § 5-3-150 (3) utilized by the Town in conjunction with the 2004 USFS Annexation, "consent" by the property owner is sufficient to meet the requirement of a signed petition. 62 Op. Att'y Gen. 2001 (1966), 1966 WL 9296 (S C A G.).

⁸ The court relies upon the trial testimony by Mr. Robert Lee Frank, a registered land surveyor, Tr. Tr. pp. 40:12-41:21 (Apr. 16, 2014, R. at 110-111) in finding that the 1994 USFS Petition "does not even contain a valid legal description of any property and is too vague to describe any identifiable strip", Final Order at 12, (R. at 25), where S.C. Code Ann. § 5-3-150 (2) specifically mandates that the substantive requirements of a "legal description" and "a description of the area to be annexed" apply only to those certain and entirely different proceedings under § 5-3-150 (1), not utilized in the 2004 USFS Annexation. The court furthered this error in finding that the "Town failed to establish that the strips of National Forest land described in the [1994 Petition] include the Ten-Foot Strip at issue in this case," Final Order p. 4, where it's not the Town's burden to do so and not required by § 5-3-150 (3). Ballenger v. City of Inman, 336 S.C. 126, 131, 518 S.E.2d 824, 827 (Ct. App. 1999) ("The burden is upon the party attacking the annexation to show that there has not been a compliance with the law.") Moreover, the area was clearly described. Tr. P. 51.14 - 53.14. (R. at 121-123).

to be annexed. (R. 179.) The long history of use of the letter as the petition without objection by anyone,⁹ including the U.S. Forest Service, provides a basis to construe the letter as a petition for purposes of accomplishing what the statute clearly provides, that is, a simple mechanism for a property owner and a municipality to agree on annexation without any public involvement beyond the passage of local legislation, the Annexation Ordinance, to accomplish it. The ruling that a petition must be “requesting annexation” to be complete, Final Order p 11, is not consistent with the plain language of or the Legislative intent for this section, and is not logical when the clear agreement between property owner/Forest Service and municipality/Appellant is that annexation will occur (R. 24.)

B. The Circuit Court Erred by Relying Upon Extrinsic Evidence as a Basis for Its Decision.

Respondents claim that the 2004 Annexation was not accomplished pursuant to a “petition” as stated on the face of the 2004 Annexation Ordinance and introduced a 2011 letter from an employee of the U.S. Forest Service, Tr. Exh. 14, to attempt to show the signature of the Forest Service on the 1994 Petition was not intended to be used for annexation (R. 237.) With respect to the “proceedings of the transactions of governing bodies” such as the Town, the “only competent evidence” consists of “[m]unicipal records property authenticated or verified.” Horry Tel. Coop , Inc. v. City of Georgetown, 408 S.C. 348, 354, 759 S.E.2d 132, 135 (2014) (quoting Berkeley Elec. Coop , Inc. v. Town of Mount Pleasant, 308 S.C. 205, 208, 417 S.E.2d 579, 581

⁹ No challenges were brought against any of the other six annexations of U.S. Forest Service property pursuant to the 1994 Petition that took place between 1994 and 2009. Tr. Tr. pp 51:2 – 53:14; 60:9 – 61:4; 86:25 – 87:9 (R. at 121-123; 130-131; 156-157); Def Tr. Ex. No. 2 (Apr. 16, 2014, R. at 239).

(1992)). The letter is clearly parol evidence and reliance on it by the circuit court is an error of law. Allowing such proof of intent by a different person years after the clear understanding of it between the parties cannot be upheld. South Carolina precedent holds that an objection to parol evidence can be first raised on appeal because it's admission is prohibited by a rule of substantive law, not merely by a rule of evidence Muckelvaney v. Liberty Life Ins Co, 261 S.C. 63, 198 S.E 2d 278 (1973) In re Estate of Holden, 343 S.C. 267, 539 S.E.2d 703, (2000) Admitting the parol evidence procured by the Respondent in 2011 regarding the 1994 Petition to overturn the 2004 Annexation is reversible error Berkeley Elec. Co-op., Inc. v Town of Mount Pleasant, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992)

III. THE CIRCUIT COURT ERRED IN FINDING THAT APPELLANT FALSELY CLAIMED THAT IT HAD A PROPER PETITION TO ANNEX THE US FOREST SERVICE PROPERTY.

The circuit court erred by finding that the Appellant falsely claimed to have a petition for the 2004 Annexation. There was no intentional deceit or misrepresentation by Appellant that it used the 1994 letter from the Forest Service to be a petition. Tr. p. 50 18 – 51.16; p 64:21 – 65:9. (R. 120-121, 134-135.) Respondents claimed and the circuit court agreed that the letter was not a petition under § 5-3-150 (3). The legal issue on appeal concerns this statute and Appellant's use of the affirmative act of the Forest Service of signing and sending the letter as discussed with Appellant. Until the 2011 correspondence from a different employee attempted to construe the intent of the letter supplied to Appellant in 1994, the Forest Service has never indicated an issue or objection to the use of or withdrawn its 1994 Petition, or objected to any of the annexations by the Town in reliance on the 1994 Petition. Appellant communicated

with the Forest Service prior to using the 1994 Petition when it was used in 1994, 1995, twice in 1996, and 1997 before it was used again in 2004. Tr. Tr. p. 56:18 – 57:12. ~~(R. at 126-127)~~ Respondent's allegation and the circuit court's finding that use of the 1994 Petition was "intentional deceit" or misrepresentation must fail under the construction of the statute and the facts in the Record¹⁰. The ruling is derived solely from an impermissible interpretation of the statute.

The requirement of a "petition" as part of the various annexation procedures authorized by Title V, Chapter 3 of the S.C Code of Laws must be construed to enable the federal agency and the annexing municipality to act as authorized by the specific statutory section Duke Power Co. v Laurens Elec. Coop., Inc., 344 S.C 101, 106-7, 543 S.E.2d 560, 563 (Ct. App. 2000) (a construction of a statute cannot render it futile or superfluous) (citing TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S C 611, 620, 503 S.E.2d 471, 476 (1998)) The court compounded these errors of law in finding that "the Town had no authority to reach out on its own accord" to seek out the 2004 USFS Annexation, Final Oder p. 12, where the Town is authorized by the law to actively pursue annexations, Ballenger v. City of Inman, 336 S.C. 126, 129, 518 S E 2d 824, 826 (Ct App. 1999) (a petition brought to a residence by a municipal employee for the purpose of soliciting signatures is valid), and in finding that "Section 5-3-150 authorizes the Town only to accept annexation petitions and does not allow involuntary annexations", Final Order at 12, where subsection (1) of the section

¹⁰ The circuit court states the Respondents' assertions are not about a defective annexation petition, but about a pattern of municipal deception. Final Order, p. 5 This assertion is countered by the lack of proof of any such intentions, and by the forty-five (45) years of relevant experience of Appellant's Director of Planning and now Town Administrator. Tr. Tr. p. 45:5 – 48:24. ~~(R. at 115-118)~~

authorizes annexations based on less than unanimous consent. (R: 25) The circuit court further erred in failing to consider the particular clause in which the term “petition” appears and how it relates to the entirety of the annexation enabling legislation codified in Title V, Chapter 3 of the S.C. Code of Laws. Hughes v. Western Carolina Reg. Sewer Auth., 386 S.C. 641, 646-47, 689 S.E.2d 638, 641 (Ct. App. 2010) (When confronted with an undefined term in a statute, a court will consider the language of the particular clause in which the undefined term appears and also its meaning in conjunction with the purpose of the whole statute.). Where the same word appears more than once in a statute, it can have different meanings as necessary to “avoid an absurd result.” Smalls v. Weed, 293 S.C. 364, 370, 360 S.E.2d 531, 534 (Ct. App. 1987). The circuit court reached an absurd result where it construed the annexation petition requirements under § 5-3-150(3) in a manner that conflicts with the express consent of the Forest Service, a construction that makes the annexation of federally owned property under § 5-3-150(3) impossible and that could not have been intended by the South Carolina Legislature. Moreover, the interpretation of the statute by the circuit court cannot turn the Forest Service's and Appellant's understanding and use of the 1994 Petition, based on ten years of experience with it between 1994 and 2004, into an action that it was not. Appellant had no intention to deceive anyone, and did not evidence any intentional misrepresentation of its use of the 1994 Petition with the Forest Service or the public. Tr. Tr. p 86:25 -- 87:9. (R: 156-157) The circuit court's finding of municipal deception is clear error and must be reversed

IV. THE CIRCUIT COURT ERRED IN FINDING THAT THE TOWN IS ESTOPPED FROM ASSERTING A STATUTE OF LIMITATIONS

DEFENSE WHERE THE RESPONDENTS FAILED TO PLEAD AND PROVE THE REQUIRED ELEMENTS FOR EQUITABLE ESTOPPEL.

The circuit court committed an error of law in finding that Appellant is estopped from asserting a statute of limitations defense against Respondents' challenge of the 2004 Annexation "[g]iven the Town's misrepresentation" regarding the 1994 petition, Final Order p. 10, where Respondents failed to plead and prove the common law elements for equitable estoppel. The circuit court improperly applied Republic Contracting Corp. v. S. C. Dept. of Highways and Pub. Transp., 332 S.C. 197, 503 S.E.2d 761, (Ct. App. 1998) to Respondents' equitable claims by analyzing the alleged substantive merits of these claims, Final Order p. 10, where the two prongs of the Republic Contracting test require a showing that (1) the intent of Appellant was to delay the appeal by these specific Respondents, and that (2) these specific Respondents delayed their appeal in reliance on Appellant's communications with them Id. at 211, 503 S.E.2d at 768-9. Republic Contracting is limited to the context of construction liability cases, id. at 212, 769, and expressly rejected by Town of Yemassee in the annexation context. 391 S.C. at 578, 707 S.E.2d at 409. In fact, Republic Contracting directly supports Appellant's statute of limitations defense, because neither Appellant nor the Town of Yemassee "induc[ed] the [Respondents] either to believe that an amicable adjustment of the claim will be made without suit or to otherwise forbear exercising the right to sue" or "lulled [Respondent] into a sense of security, preventing it from filing suit before the running of the statute of limitations." Id. Respondents expressed no objections to the 2004 annexation, for over five years, not until 2009, when reaching back to it was necessary in the absence of independent justifications to attack the 2009 Nebo Tract annexation Pl. Tr. Ex. No. 9 p. 65.11 - 13 (Apr. 16,

2014). (R. 190, 206.) The Respondents neither pleaded nor established any communications with Appellant within the 90-day appeal period following the 2004 annexations that would have persuaded them to delay their challenges against Appellant. Mere allegations by Respondents of “municipal deception”, “intentional bad faith”, “intentional deceit,” “unclean hands” and “misrepresentation” by the Appellant concerning the 1994 Petition, as found by the circuit court, Final Order at 5, 7, 10, are not sufficient as a matter of law under Republic Contracting to estop Appellant’s defense of statute of limitations. (R. 18, 20, 23.)

Moreover, a decade after Republic Contracting relied upon by the circuit court, American Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct. App. 2009) stated the three-prong test that plaintiffs are required to meet to overcome the statute of limitations defense, cautioning that equitable tolling is “reserved for extraordinary circumstances” and “rarely applied” in this state. Id. at 582-3, 674 S.E.2d 181 at 184 (citing Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 230, 659 S.E.2d 213, 219 (Ct. App. 2008); *See also* Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 119, 687 S.E.2d 29, 34 (2009).). The circuit court erred as a matter of law in finding Appellant is estopped from raising the statute of limitations defense when there is no evidence to support the requirements for estoppel: “(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) justifiable reliance upon the government’s conduct; and (3) a prejudicial change in position.” Id. (citing Morgan v. S.C. Budget & Control Bd., 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008)). Moreover, Respondents neither pleaded nor proved that as to the 2004 Annexation that their “delay in bringing the

action was induced” by the Appellant, an element required before the Appellant “may be estopped from claiming the statute of limitations as a defense.” Id. (citing Wiggins v. Edwards, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994)) Clearly a challenge of the 2004 Petition in the 2004 Annexation was of no interest to any of Respondents until the Nebo Tract was annexed in 2009. More telling is the fact that Appellant had, with Forest Service knowledge each time, used the same Petition for six (6) other annexations of property described in the 1994 Petition since 1994 with no objections. Tr. Tr. p. 56:18 – 57:12. ~~(R. 126-127.)~~ Even if Respondents somehow had standing to appear before the circuit court, the court erred by ruling that equitable estoppel applies to Appellant’s statutory defenses.

V. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE STATUTORY TIME PERIOD FOR CHALLENGING THE 2004 USFS ANNEXATION WAS TOLLED.

The circuit court committed an error of law in finding that the time period for challenging the 2004 Annexation is tolled “[g]iven the Town’s misrepresentation and failure to provide notice regarding these annexations” Final Order at 10. In Ex parte State ex rel. Wilson v. Town of Yemassee, 391 S.C. 565, 578, 707 S.E.2d 402, 409 (2011) the South Carolina Supreme Court expressly rejected this “discovery rule” proposed by the plaintiffs there—including the Respondent Coastal Conservation League—that expands the operation of the post-annexation notice provision established in S.C. Code Ann. § 5-3-90 by staying the commencement of the 90-day appeal period until the provision of the notices to the former local jurisdiction, Charleston County. Final Order, p. 10. ~~(R. 23.)~~ The late notices given to Charleston County provide no basis whatsoever for tolling the statutory limitation for challenging the annexation. No

rights of Respondents can be harmed in any way by a late notice between governmental bodies concerning property of third parties. Moreover, the record contains evidence conclusively establishing that the 2004 Annexation and the 2004 Mt. Nebo Church Annexation were published in accordance with the applicable statutory requirements, causing the commencement of the 90-day limitations period upon the final reading of the ordinances on May 10, 2004. Tr. Tr. pp. 54:1-55:3; p. 64:6-17¹¹; Pl. Tr. Ex. No. 8 pp. 2-3; Pl. Tr. Ex. No. 9. (R. 124-125, 134, 186, 190.) The tolling of the statute of limitations must be reversed.

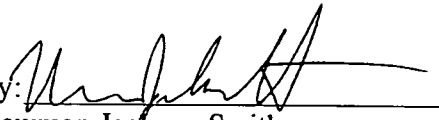
CONCLUSION

Based on the foregoing, Town of Awendaw respectfully requests that this Court reverse the Order of the Circuit Court.

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¹¹ The 2004 annexation ordinance adopted by the Town received first reading on April 15, 2004 and final reading on May 10, 2004, all readings at Town Council meetings were open to the public and the meeting agendas were posted in advance of the meetings, and no public hearing on these annexation ordinances is required under § 5-3-150 (3) or by any other provision of Title 5 of S.C. Code of Laws.

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Charleston, South Carolina

May 4, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J. C. Nicholson, Jr., Circuit Court Judge

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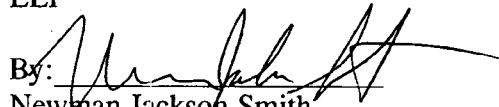
Case No. 2009-CP-10-7399
Appellate Case No. 2014-002118

Lynne Vicary, Kent Prause, and South Carolina Coastal Respondents,
Conservation League,
v.
Town of Awendaw, and EBC, LLC Defendants,
Of whom Town of Awendaw is the Appellant

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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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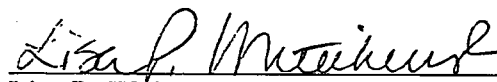
PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Town of Awendaw, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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ARGUMENT

I. The Respondents' argument that annexation in 2009 was void *ab initio* fails because the 2004 annexation was valid.

Respondents argue that this Court can affirm the lower court "solely based on the fact that the annexation was void *ab initio*" (Respondents' Initial Brief at 31), and relies on Bostick v. City of Beaufort, 307 S.C. 347, 415 S.E.2d 389 (1992) to support that finding. Reliance on Bostick is misplaced. There the City of Beaufort used Section 5-3-150(1), the seventy-five percent method of annexation, and was found not to have complied with that section's requirements that the petition describe the area and that it be included in a plat attached thereto. The court found that the Bostick's property was not described and was not shaded on the plat attached to the petition. This was found to be a substantive defect in the petition. Here, Section 5-3-150(3) has no such requirements. The Town's acceptance of the letter signed and mailed by the Forest Service to the Town as the petition for annexing the ten foot strips described therein is not a substantive defect in the petition and the annexation of the ten foot strip in 2004 is valid. The annexation ordinance on its face is not defective and the ordinance is not void *ab initio*. The intent of the Town and the Forest Service to annex the ten foot strips is clear and unambiguous.

The primary holding of the Circuit Court was not that the annexation 2009 was void *ab initio*, but the erroneous holding that the town's acceptance of the Forest Service letter as a petition for all of the land described therein was municipal deception

and intentionally bad faith or fraud.¹ From this erroneous holding flows the holding that both 2004 and 2009 annexations did not happen as a matter of law and were *void ab initio*. The Respondents cite the trial court's holding that the annexations were *void ab initio* as a basis that its action was not time barred, and incorrectly admonish the Appellant for not addressing it in its Initial Brief, R.I.Br. at 31. A careful reading of the Appellant's Initial Brief, at 9-10, highlights the governing precedent, preserved by St. Andrews Public Service Dist. v. City Council of City of Charleston, 349 S.C. 602, 605, 564 S.E.2d 647 648 (2002), that an annexation ordinance cannot be deemed "absolutely void" unless the specific annexation enabling provision of Title V, Chapter 3 of the South Carolina Code of Laws is found to be unlawful. Quinn v. City of Columbia, 303 S.C. 405, 407, 401 S.E.2d 165, 166-7 (1991). See also Beaufort County v. Trask, 349 S.C. 522, 527-8, 563 S.E.2d 660, 663 (Ct. App. 2002) (an annexation of property owned by the State of South Carolina in the absence of consent or signature by the State is not "void" because the municipality can perfect the annexation in compliance with the statutory procedures). Neither the Respondents nor the circuit court claimed that the annexation enabling legislation is unlawful legislation in any part or that the Town does not have the authority to annex the property. Respondents merely claim that acceptance of the petition and adoption of the annexation ordinance were "illegal or unauthorized government acts", R.I.Br. at 18.

¹ The Respondents attempt to support their argument for standing and timeliness by appealing to the findings of the "Harrington Order," Respondents' Initial Brief at 2 fn1, where this interlocutory order was expressly not relied upon by the trial court, Final Order at 2 fn1 (R-15), and where the South Carolina Supreme Court ruled that the Harrington Order does not "finally determine anything about the merits of the case." Remittitur (filed July 10, 2012). (R-10)

The circuit court compounded this error of law by finding that the Town's approvals constituted *ultra vires* acts, Final Order at 12, where *ultra vires* actions are only those that are "not within the powers of a municipal corporation to make under any circumstances or for any purpose." (R-25) Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant, 308 S.C. 205, 210, 417 S.E.2d 579, 582 (1992). Because the Town's ordinances are not void *ab initio* under the governing precedent, the Respondents are subject to the governing standard for equitable estoppel, for which Respondents have neither plead nor proved.

II. The Respondents' challenge of the 2004 annexation was not timely.

Respondents argue its challenge of the annexation was timely because the annexation was void. Presumably Respondents refer to the 2004 annexation since there is no dispute that the 2009 challenge was timely brought. Because the 2009 annexation was not void *ab initio*, because the 2004 annexation was valid, there is no way that the Respondents' challenge can be considered timely. Respondents argue that because the annexation by the Town was *ultra vires*, the standing of Respondents based on public importance and taxpayer standing is a correct holding of the lower court. As shown above, the annexation was not an *ultra vires* act, and Respondents have no standing to raise any grounds that their challenge of the 2009 annexation includes a timely challenge of the 2004 annexation. Moreover, the finding that Respondents have standing must fail because the very damages complained of—from a taxpayer's standpoint (assuming the Respondents' allegations that taxes would be needed to

support the Nebo Tract development)², the very basis of the Circuit Court's ruling (final Order, page 6; Respondent Initial Brief at 9; R. 19)—were resolved by the Settlement Agreement both signed by both the Developer/Land Owner EBC and Respondents. Paragraph 3 of the Settlement Agreement provides for a package treatment plant for sewage disposal that would preclude use of the Town's system; Paragraph 5 of the Settlement Agreement allows rezoning and development of the property as planned; and Paragraph 7 of the Settlement Agreement extends the term of the Development Agreement for the duration of the litigation with EBC (Exhibit A,

² Uncontroverted testimony by Respondent Coastal Conservation League establishes that it was not familiar with this publicly available information about the positive effect of the Nebo Tract development to the Town and its taxpayers, nor made any efforts to assess the accuracy of its taxpayer injury claims:

Q. ... And is this a position that CCL takes, that the development of Nebo tract or similar developments could raise -- have the effect of raising the property tax?

A. It's a claim that we make, yes, urn-hum.

Q. And have you commissioned any study that would substantiate that claim -
A. No.

Q. [The Permar study] is on that issue, is it not?

A. Yes, it is.

Q. Do you have any disagreement with the conclusions of that study?

A. I'm not familiar enough to say.

Q. Okay. Are you familiar with the conclusion of that study to the effect that, in fact, the development will generate more revenues than the costs of the infrastructure?

A. I'm not familiar -- I mean, I have -- I remember at the time that we had discussed that, but I also know that in other cases that we've been dealing with over the years that there are studies similar to that and that we always have to look at the specifics of what exactly they're measuring and what the claims are in the analysis and the numbers, basically, before we agree or disagree with a study like that.

A. I don't remember that we said one way or the other whether we agree with it. I remember that we discussed having somebody possibly analyze the study, but I don't think we ever did that.

Plaintiff's Suppl. Exhibit 8 105:3 - 107:13 (deposition of Megan Desrosiers, Nov. 9, 2010) (filed Mar. 22, 2011). (R. 343.)

Settlement Agreement, to Stipulation of Dismissal). (R:356.) Only the claim that the development of private property, the Nebo Tract, as now agreed to by Respondents in the Settlement Agreement, would endanger the Francis Marion National Forest remains, making the challenge of the ten foot strip moot. Such claims of injury cannot stand under the taxpayer standing granted by the Circuit Court. Respondents are in no different stance than other taxpayers regarding such erroneous claims of injury to their enjoyment of the National Forest.

Moreover, the record is entirely void of any evidence of any specific type of concrete and particularized environmental injury to the National Forest or to any of the Respondents, and of any evidence of when such injury might occur.³ The respondents concede that no development has been approved for the Nebo Tract by the Town since

³ Plaintiff's Suppl. Exhibit 1., par. 5-7 (affid. James M. Cubie, March 15, 2011) (filed March 22, 2011) (R:279-280).

If the Nebo Tract is developed in the manner proposed, I believe it will have severe impacts on the Francis Marion. ... I believe that the introduction of homes, businesses, cars, and trucks will displace wildlife populations. I am also concerned that construction activities on the Nebo Tract will negatively impact the Wando River. ... I believe the United States Forest Service will be unable to burn the Forest in order to maintain important fire-dependant habitats, such as the longleaf pine ecosystem. ... I am concerned that a traffic light would have to be installed on Highway 17, which would also serve to lengthen my commuting time. ... I believe there will be increased taxes imposed on property owners to construct and maintain the facilities and services that will be needed to support this project, and I do not think the tax revenues from the project would offset the additional costs.

Plaintiff's Suppl. Exhibit 5., par. 9 - 11 (affid. Richard D. Porcher, Ph.D., March 16, 2011) (filed March 22, 2011) (R:300-301):

With residential and commercial development comes more people, more noise, more water use, more water pollution, more air pollution, more habitat disruption, more roads, etc.... Second, intensive development adjacent to or within the Forest will likely result in physical harm to the Forest. ... The development of tracts like the Nebo Tract will likely result in the discharge of harmful runoff, which can flow offsite and degrade aquatic resources in the Forest. ... it can be expected that the introduction of greater levels of development in close proximity to the Forest will undermine the Forest Service's ability to manage the Forest.

2009, Tr. Tr. p. 77:20-24 (Apr. 16, 2014; R. 147), have "presented no evidence their opportunity to view and enjoy the [natural resource] would be diminished," and their injury is conjectural because "it is not certain" that the Town's actions will result in the scope and scale of environmental injury hypothesized by the Respondents. Sea Pines Ass'n for Protection of Wildlife, Inc. v. South Carolina Dept. of Natural Resources, 345 S.C. 594, 602, 550 S.E.2d 287, 292 (2001).

Respondents argue that Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (2012) applies to support its argument (Initial Brief Respondents at 16) but only presents terms of public importance based on alleged injury to the Francis Marion National Forest. The ten foot strip of Forest Service lands annexed by the Town in 2004 will see no development whatsoever. The private land, the Nebo Tract, that was annexed in 2009 may see development, but unless such development is a nuisance such that it could be enjoined as a matter of underlying property law in South Carolina, no injunctive relief can be supported. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Clearly, private property adjacent to the National Forest can be developed, as it has in many other instances, and such development cannot be found to be a nuisance. Finally, there can be no standing when the injury complained of has been settled away.

III. The Respondents' request for the additional sustaining ground that a strip annexation cannot satisfy the requirements of contiguity is contrary to governing precedent.

In violation of the governing precedent, Respondents request that the Court affirm the trial court's ruling on the additional sustaining ground that "a strip annexation cannot satisfy the requirements of the statutory definition of contiguity in

any event" because "[a] narrow, ten-foot strip cannot provide the 'continuous border' necessary for contiguity under South Carolina law." Respondents' Initial Brief at 28. Respondents cite S.C. Code Ann. § 5-3-305 and point out that its definition of "contiguous property" was last codified in 2000, and argue that the word "adjacent" in the statutory requirement nullifies the remaining provisions of the statutory section which provide that intervening elements do not destroy contiguity that exists "but for" for the intervening elements and that "adjacency" to the incorporated area is somehow a separate and superseding requirement for contiguity. As cited by the Respondents' Initial Brief, their own trial exhibit (Plaintiffs' Exhibit 11; R-232) establishes that the 2004 annexation is adjacent and contiguous to the incorporated Town of Awendaw precisely as allowed by S.C. Code Ann. § 5-3-305 for the intervening element of US HWY 17.

Respondents fail to acknowledge the subsequent case law that has construed the requirement of "contiguous property" as codified in S.C. Code Ann. § 5-3-305. Under the governing precedent of St. Andrews, 349 S.C. at 606, 564 S.E.2d at 649, "the sole requirement for annexation is contiguity" and no separate demonstration of adjacency of some sort is required. Where "two parcels touch even at just one point, they are contiguous" for the purpose of the statutory requirement of contiguity, and "even when two properties touch at one point, the border they share is continuous" and the Court cannot read into the definition a requirement that the "parcels' boundaries must overlap to some degree." Cabiness v. Town of James Island, 393 S.C. 176, 196 n8, 712 S.E.2d 416, 427 n8 (2011). The 2000 codification of the definition in no way expands the Court's authority to construe the statute, and the Court cannot impose additional

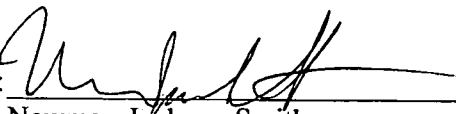
requirements not established in the statute, such as requirements of "substantial physical touching" or "a common boundary." Bryant v. City of Charleston, 295 S.C. 408, 410, 368 S.E.2d 899, 900 (1988) (*cited in* St. Andrews, 349 S.C. at 606, 564 S.E.2d at 649, reiterating the sole requirement of contiguity). Neither does the codification expand the Court's authority to construe the requirement of contiguity to prohibit the annexation of properties that are linear in shape, where, as codified "[t]here is no limitation in our annexation statute as to the extent or shape of the territory which may be annexed and there is nothing from which any such limitation may be implied." Tovey v. City of Charleston, 237 S.C. 475, 483-4, 117 S.E.2d 872, 876 (1961).

CONCLUSION

Respondents have failed to show that the lower court's ruling that the Town of Awendaw engaged in a pattern of municipal deception that makes the annexation ordinance void *ab initio* should be affirmed. This Court should overturn the lower court and uphold the annexation.

[SIGNATURE PAGE FOLLOWS]

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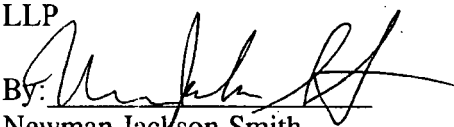
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S.C. Code Ann. § 5-3-305..	1, 2, 28, 29, 32

STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court was correct in holding that Respondents had standing to challenge *ultra vires* acts by the Town as a matter of public importance and as taxpayers where the Town's actions threatened the Francis Marion National Forest and the Town intends to continue its *ultra vires* conduct
- II. Whether the trial court was correct in holding that it was illegal in 2004 for the Town to use a May 3, 1994 letter from the U.S. Forest Service as a substitute for a petition to annex National Forest lands when the Forest Service declined to give the Town the petition it was seeking
- III. Whether the trial court was correct in holding that it was illegal in 2004 for the Town to use a May 3, 1994 letter from the U.S. Forest Service as a substitute for a petition for annexation when expert testimony at the trial, which was unrebutted by any expert Testimony provided by the Town, showed that the 1994 letter did not even describe the National Forest lands at issue.
- IV. Whether this Court should affirm the trial court's decision on the additional sustaining ground that a strip annexation cannot satisfy the requirements for contiguity as defined in S.C. Code Ann. § 5-3-305.
- V. Whether the trial court was correct in holding that the Town cannot invoke the statute of limitations to defend its *ultra vires* actions.

STATEMENT OF THE CASE

Introduction

This appeal involves matters of significant public importance. At its core, this case is not about a defective annexation petition; rather, this appeal is about a pattern of municipal deception, which the Appellant Town of Awendaw ("Town" or "Appellant") has admittedly engaged in for years and intends to continue. Although the Town would like to shield its deceptive actions from judicial review by relying on standing cases that apply to annexations made in good faith, the trial court rightly held that this case is properly viewed as an action for declaratory relief that Respondents were entitled to bring under the public importance exception

to standing and as taxpayers. The trial court also correctly determined that the Town cannot successfully defend its actions by claiming that the passage of time can transform an *ultra vires* act into a legal one where the Town falsely stated to the public that it had obtained a petition for annexation from the United States Forest Service (“Forest Service”) – a necessary prerequisite to a valid annexation – when it never did.¹ The trial court was also correct in holding that the purported annexation of a ten-foot wide strip of the Francis Marion National Forest was *ultra vires* and *void ab initio* because the Town engaged in intentional misconduct in claiming that it had received a petition for annexation when it had not and where expert testimony introduced at trial explained that the 1994 letter relied upon by the Town as a petition for annexation does not even describe the ten-foot strip of the National Forest at issue. In addition, as an additional sustaining ground for upholding the lower court decision, this Court should find that the strip annexation method purportedly attempted here does not satisfy the requirements for “contiguity” as defined in S.C. Code Ann. § 5-3-305. And finally, the trial court rightly declared that the municipal ordinances challenged below to annex the Nebo Tract; approve a development agreement for the Nebo Tract; amend the Town’s Comprehensive Plan to include the agreed-upon development; and rezone the Nebo Tract are also *ultra vires* and *void ab initio*.

Facts

This appeal involves a series of *ultra vires* actions by the Town, beginning in 2004 with an unlawful, alleged annexation of property within the Francis Marion National Forest (“Francis Marion,” “National Forest,” or “Forest”) and culminating in October 2009 with the purported

¹ Notably, Judge Nicholson was the second judge to rule in Respondents’ favor on the same issues of standing and timeliness. Previously, in denying the Town’s motion for summary judgment, Judge Kristi Lea Harrington also found in Respondents’ favor, holding that Respondents did have standing and that their challenge was timely. See ROA 0001 – 09 (Order, Judge K.L. Harrington (Apr. 19, 2011) (hereinafter “Harrington Order”)).

annexation of a 359.51-acre, privately-owned in-holding known as the “Nebo Tract” that is virtually encircled by the National Forest. ROA 0014 (Trial Court Order, Judge J.C. Nicholson, Jr (July 28, 2014) (hereinafter “Order”) at 1). The Nebo Tract borders some of the Francis Marion’s rarest and most unique habitats. ROA 0016 (Order at 3); *see also* ROA 0291 (Affidavit of Jean B. Everett, Ph.D (hereinafter “Everett Aff.”) at ¶ 5). Development of the Nebo Tract would have many detrimental effects on the Forest, the principal one being that it would interfere with the Forest Service’s ability to continue using prescribed burns to manage the Francis Marion’s vital long-leaf pine habitat. ROA 0292 – 93 (Everett Aff. at ¶ 10)

The Nebo Tract is presently undeveloped. It has long formed part of unincorporated Charleston County and been subject to the County’s rural zoning requirements, which limit development to preserve the area’s rural character. *See* ROA 0152 – 54 (Trial Transcript (Apr. 16, 2014) (hereinafter “Tr”) at 82 17-83 8, 83:21 – 84:1); ROA 0285 (Affidavit of Megan Desrosiers (hereinafter “Desrosiers Aff”) at ¶ 3).

In 2009, EBC, LLC,² the owner of the Nebo Tract, requested that the Town annex the Nebo Tract under the 100% petition method in S.C Code Ann. § 5-3-150(3). Under South Carolina law, annexation can be completed only through acceptance of a petition. On October 1, 2009, the Town passed an ordinance purporting to accept the petition and annex the Nebo Tract *See* ROA 0185 (EBC Annexation Ordinance).

² At the onset of this litigation on November 25, 2009, Respondents named EBC as a defendant in this matter, and on January 22, 2009, EBC asserted counterclaims against Respondents. On September 4, 2012, Respondents and EBC entered into a settlement agreement with respect to the claims brought against one another. ROA 0356 – 66 (Settlement Agreement between Respondents and EBC (Sept. 4, 2012) (hereinafter “Settlement Agreement”). However, the Town was not part of that agreement, so Respondents’ claims challenging the annexation and rezoning of the Nebo Tract, as well as the development agreement and amendment to the Town’s comprehensive plan, proceeded to trial

The annexation was part of an overall effort to make intensive residential and commercial development of the tract possible. Accordingly, that same day, the Town also passed ordinances rezoning the Nebo Tract as a “planned development” and declaring its Comprehensive Plan amended to allow the Nebo Tract Planned Development, and approved a development agreement with EBC. *See* ROA 0221 – 25 (Town Ordinances Nos. 09-09, 09-10, & 09-11). Together these actions purportedly allow for up to 360 residential units and up to 90,000 square feet of gross floor area for commercial uses and 80,000 square feet of gross floor area for office uses. ROA 0290 – 91 (Everett Aff. at ¶ 4).

In this case, the Town has attempted to manufacture contiguity with the Nebo Tract – the third domino in a string of three unlawful annexations – by allegedly annexing a ten-foot wide strip of the Francis Marion (hereinafter the “Ten-Foot Strip of the Francis Marion” or the “Ten-Foot Strip”). The Ten-Foot Strip is part of the National Forest and is actively managed for the benefit of the public by the Forest Service. This Ten-Foot Strip is approximately 1.25 miles long, and is the first domino in this illegal chain. *See* ROA 0188 (Ten-Foot Strip Annexation Ordinance); ROA 0232 (Nebo Map). The Ten-Foot Strip is allegedly contiguous with the second domino in the chain – the “Nebo Church Tract” – which purportedly connects the Nebo Tract to the Ten-Foot Strip. Respondents provided a map depicting this string of alleged annexations to the trial court. *See* ROA 0232 (Nebo Map). In sum, the annexation of the Nebo Tract relies entirely on the alleged contiguity established by the two previous illusory annexations in 2004 of the Nebo Church Tract and the Ten-Foot Strip.

The Town attempted to annex each of these three tracts using the 100% petition method. For more than two months in late 2003 and early 2004, the Town repeatedly requested that the Forest Service enable the Town to annex the Ten-Foot Strip so that it could also annex the Nebo

Church Tract. *See, e g*, ROA 0197 – 99 (Deposition of William Wallace (July 2, 2010) (hereinafter “Wallace Dep.”) at 32-39); ROA 0180 (Nov. 25, 2003 Letter from Dan Martin (Town) to Orlando Sutton (Forest Service) stating that earlier strip annexations “missed” the church and were based on “unclear” documentation in any event), ROA 0181 (Jan. 23, 2004 Letter from W.H. Alston (Town) to Sutton (Forest Service) reiterating that the Town “need[ed] the Forest Service’s] assistance” to annex the church); ROA 0182 (Feb. 12, 2004 Letter from Wallace (Town) to Sutton (Forest Service) stating that annexing part of the Forest was the “only possible way” the Town could annex the Nebo Church Tract because “[t]he church [wa]s not contiguous to the existing town limits and [could not] be annexed without first annexing other parcels between it and the town boundary”); ROA 0183 (Feb. 12, 2004 Letter from Martin (Town) to Sutton (Forest Service) emphasizing the Town’s “understanding that the Service is generally opposed to annexation” and attempting to reassure the Forest Service about impacts to Forest management); ROA 0199 – 200 (Wallace Dep. at 39:14-16 & 42:12-43 2, describing conversations that took place between the Town and the Forest Service).

Despite this lengthy campaign, the Forest Service declined to grant the Town’s requests. The Town admitted that “it turned out that they [Forest Service] would not give us anything in writing saying that they desired to be annexed.” ROA 0199 (Wallace Dep. at 40:9-11). *See also* ROA 0017 (Order at 4, finding that “[a]lthough the Town represented to the public that it received a 100% petition from the Forest Service, it never did”). Not only did the local and regional Forest Service representatives refuse to request annexation of any property, they also declined to put even a neutral, no-objection position in writing. ROA 0200 (Wallace Dep. at 42:14-16, admitting that “the Forest Service would not provide [the Town] anything in writing” and reasoning this was “because it would have to go all the way to Washington”).

Subsequently, three of the Town's representatives met, either in person or by telephone, and decided to make use of a decade-old letter written in 1994 from a Forest Service representative stating that the agency had "no objection" to the annexation of ambiguously-described property referenced as Forest strips (hereinafter the "1994 Letter") ROA 0240 (May 3, 1994 Letter from David Wilson (Forest Service) to Alston (Town)). ROA 0200 (Wallace Dep. at 44); ROA 0131 – 32 (Tr. at 61:21 – 62:1). At trial, Respondents' expert surveyor, Robert Lee Frank explained that the location of the strips described in the 1994 Letter does not provide a valid legal description of any property at issue in this matter and fails to describe the Ten-Foot Strip of the Francis Marion. ROA 0017 (Order at 4); ROA 0110 – 11 (Tr. at 40:21 – 41:21). Notably, at trial, the Town did not rebut Mr. Frank's testimony with any expert testimony of its own. Furthermore, the Forest Service subsequently confirmed that the 1994 Letter was never intended to be a petition for annexation. *See* ROA 0237 (Feb. 16, 2011 Letter from Paul Bradley (Forest Service) to Samuel Robinson (Town), stating that "the Forest Service did not intend for the letter of May 3, 1994, to constitute 'a petition of the federal government' to annex National Forest lands ...").

The Town representatives were familiar with the 1994 Letter at the time they wrote the above-quoted letters pleading with the Forest Service, ROA 0200 (Wallace Dep. at 43:20-44:1), but it was only after they failed to obtain the required petition from the Forest Service in 2004 that they decided to use the 1994 Letter as a means of annexing additional Forest land.

On May 10, 2004, the Town passed an ordinance stating that a "proper petition has been filed" for annexation of the Ten-Foot Strip and purporting to accept the petition ROA 0017 (Order at 4); ROA 0188 (Ten-Foot Strip Annexation Ordinance). Relying on the Ten-Foot Strip for contiguity, the Town passed another ordinance purporting to annex the Nebo Church Tract on

the same day. ROA 0187 (Nebo Church Tract Annexation Ordinance). The Town knew it did not have the authority to reach out on its own and annex the Ten-Foot Strip – as the Town itself has explained, “[t]hat’s not the way the process works. The town does not send people a request and say, we want you to annex. The person who owns the property *asks* [through] a petition to the town to annex their property.” ROA 0025 (Order at 12, citing Wallace Dep. at 29:10-13).

Moreover, the Town itself did not even notify Charleston County that it had assumed control over the Ten-Foot Strip and Nebo Church Tract *until October 2009* – a full five years after the alleged annexations were consummated. *See* ROA 0186 (Sept. 30, 2009 Letter from Samuel Brown (Town) to Cathy Franks (Charleston County Planning Department)). As a result, as of October 2009, Charleston County had not removed the Ten-Foot Strip or Nebo Church Tract from its maps. ROA 0203 (Wallace Dep. at 55:7-19), ROA 0023 (Order at 10).

The Town has indicated in correspondence to the Forest Service and at trial that it intends to continue to rely on the 1994 Letter in the future as a purported annexation petition. *See* ROA 0181 (Jan. 23, 2004 Letter from Alston (Town) to Sutton (Forest Service) requesting use of Ten-Foot Strip to annex Nebo Church and enable “other future annexations”), ROA 0144 (Tr. at 74:6-9, Wallace responding “Yes” when asked if “the town intends in the future to use this 1994 letter if it deems it necessary regardless of any petitions from the federal government to annex land”).

Procedural History

Respondents brought this action on November 25, 2009 against the Town and EBC. On January 22, 2009, EBC filed counterclaims against Respondents, and on December 22, 2010, EBC and the Town filed a motion for partial summary judgment against Respondents, arguing that Respondents lacked standing to mount this challenge and that such challenge was barred by

the statute of limitations. The trial court denied the motion for partial summary judgment on April 19, 2011. ROA 0001 – 09 (Harrington Order)

EBC and the Town appealed the Court's denial of their partial summary judgment motion, and that appeal was denied on November 11, 2011. Subsequently, on March 21, 2012, the Court of Appeals denied a request to rehear the appeal. EBC and the Town filed a petition for certiorari in the South Carolina Supreme Court, which was similarly denied on May 25, 2012

After the denials of their appeals by the Court of Appeals and the Supreme Court, EBC and Respondents filed a Settlement Agreement on September 6, 2012 pursuant to Rule 40(j) of the Rules of Civil Procedure in which EBC dismissed its counterclaims against Respondents, and Respondents dismissed their claims against EBC. The Town was not a party to the Settlement Agreement, and Respondents' claims against the Town remained pending.

After Respondents' motion for summary judgment against the Town was denied, the remaining claims against the Town proceeded to trial on April 16, 2014. On July 28, 2014, Judge Nicholson ruled that pursuant to the South Carolina Declaratory Judgment Act, S C Code Ann §§ 15-53-10 to 15-53-140, the annexation of the Ten-Foot Strip was void and of no effect because the Town never received a petition for annexation from the Forest Service. ROA 0025 (Order at 12). Because the annexation of the Ten-Foot Strip was *ultra vires* of the Town's authority, the subsequent annexations of the Nebo Church Tract and the Nebo Tract were also invalid because these tracts lacked contiguity with the Town. *Id.* And finally, because the annexation of the Nebo Tract did not occur as a matter of law, it followed that the other ordinances enacted by the Town on October 1, 2009 to (1) approve a development agreement for the Nebo Tract, (2) amend the Town's Comprehensive Plan to include the agreed-upon development, and (3) rezone the Nebo Tract were each *ultra vires* acts and *void ab initio*. ROA

0025-26 (Order at 12-13). On August 4, 2014, the Town filed a motion for reconsideration, which was denied by the trial court on September 22, 2014. ROA 0027-28 (Order Denying Town's Motion for Reconsideration, Judge Nicholson (Sept. 22, 2014)). On October 1, 2014, the Town filed a Notice of Appeal.

ARGUMENT

In appeals from equitable cases, the Court of Appeals may find facts in accordance with its own view by a preponderance of the evidence and reviews questions of law *de novo*. *Doe v Clark*, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995), *Mitul Enters , L P v Beaufort Cnty Assessor*, 410 S.C. 430, 433, 764 S.E.2d 720, 721-22 (Ct. App. 2014). Importantly, the applicable scope of review regarding factual findings in appeals of equitable matters “*does not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses.*” *Greer v Spartanburg Technical Coll*, 338 S.C. 76, 79, 524 S.E.2d 856, 858 (Ct. App 1999) (emphasis added). “Appellants have the burden of convincing this court that the trial court committed error,” and “this court may affirm the trial court’s ruling upon any ground appearing in the record ” *Id.* at 79-80, 524 S.E.2d at 858 (citations omitted)

I. **The Trial Court Correctly Ruled that Respondents Qualified for Public Importance and Taxpayer Standing.**

The trial court correctly held that Respondents had standing to bring this challenge under the public importance exception to standing and as taxpayers challenging government action under the South Carolina Declaratory Judgment Act, S.C. Code Ann §§ 15-53-10 to 15-53-140 ROA 0014, 17 – 22 (Order at 1, 4 – 9). In its Order, the trial court agreed with Respondents that this case is not about a defective annexation petition or an ordinance enacted in good faith; rather, this case is about a pattern of years of municipal deception by the Town, which will

continue ROA 0018 (Order at 5). Respondents did not “seek to prove that annexations made by the Town in good faith are defective.” *Id* Instead, Respondents argued below “that the alleged annexation of the Ten-Foot Strip of the National Forest never happened as a matter of law because the Town never received – despite its representations to the contrary – the required petition for annexation ” *Id*. The trial court agreed with Respondents that this case was more in line with South Carolina cases that have authorized challenges based on the public importance of the matter and where taxpayer actions have been allowed to proceed to challenge illegal government action ROA 0019 – 22 (Order at 6 – 9).

As the Supreme Court has repeatedly recognized, “*the rule of standing is not an inflexible one.*” *Sloan v Wilkins*, 362 S.C. 430, 436, 608 S.E.2d 579, 583 (2005) (quotations and citations omitted) (emphasis added), *abrogated by Am Petroleum Inst v S C Dep’t of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009). “Standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance,” *id* (quotations and citations omitted), and “[t]axpayers must have some mechanism of enforcing the law” and holding “public officials accountable for their acts ” *Sloan v Dep’t of Transp* , 379 S C 160, 170, 666 S.E.2d 236, 241 (2008). As explained in greater detail below, the trial court’s conclusion that Respondents had public importance and taxpayer standing to bring this challenge is correct and directly in line with these Supreme Court precedents. As such, the Town’s efforts to shield its deceptive actions from review by the courts of this State must fail

A. The Trial Court Correctly Distinguished the Supreme Court’s *St. Andrews* Decision and its Progeny.

The Town complains that in finding that Respondents qualified for the public importance exception and taxpayer standing, the trial court “violated the bright-line precedent of a three-prong test perfected by the South Carolina Supreme Court in a trilogy of rulings, prescribing that

the only non-statutory party which may challenge any municipal annexation is the State of South Carolina when acting in [the] public interest to challenge an annexation ordinance that is absolutely void.” Town’s Initial Brief (hereinafter “Town Br.”) at 9. As explained below, the *St Andrews* line of cases, as well as *Town of Yemassee*, are clearly distinguishable.

This appeal is completely different from *St Andrews* and its progeny for the following reasons. First, *St Andrews* and *Town of Yemassee* each involved annexations that municipalities attempted to carry out in good faith, not municipal deception that is at issue here. For example, in *St Andrews*, the Supreme Court granted certiorari to consider whether municipal annexations using roadways to achieve contiguity are authorized by statute. *St Andrews Pub Serv Dist v The City Council of The City of Charleston*, 349 S.C. 602, 603, 564 S.E.2d 647, 647 (2002). In taking up this issue, the Court articulated the general rule of standing for annexation challenges. *Id.* at 604, 564 S.E.2d at 648; *see also* S.C. Code Ann. §§ 5-3-150(1) and (3). The Court explained that the rules for standing vary depending on whether the method of annexation was carried out via the 75% or 100% method – under the 75% method, the challenger must be a municipality or one of its residents, or reside or own property in the annexed area, while under the 100% method, the challenger must assert an infringement of its own proprietary interests or statutory rights. 349 S.C. at 604, 564 S.E.2d at 648. In addition, the Court clarified that the better policy was to find that the only non-statutory party that may challenge a municipal annexation is the State, through a *quo warranto* action. *Id.* at 605, 564 S.E.2d at 648.

The Supreme Court in *Town of Yemassee* simply applied the general standing rule for 100% annexations as articulated in *St Andrews*. The *Town of Yemassee* decision involved tracts of land annexed via the 100% petition method in which the plaintiffs argued that the municipality failed to comply with the signature requirements of the 100% method. *State ex rel*

Wilson v Town of Yemassee, 391 S.C. 565, 573, 707 S.E.2d 402, 406 (2011). Specifically, the plaintiffs argued that the annexation should have been treated as made by the 75% method, as opposed to the 100% method, since the annexed lands included state-owned marshlands in addition to privately-held properties. *Id* at 573, 707 S E 2d at 406. In denying standing to the plaintiffs, the Court in *Town of Yemassee* reaffirmed the Supreme Court's general rule from *St Andrews* that "in order to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights." *Id* at 572-74, 707 S.E.2d at 406-7.

As *two* circuit court judges in this matter have already recognized, both *St Andrews* and *Town of Yemassee* are clearly distinguishable because they involve fundamentally different circumstances than are present in this appeal. *See* ROA 0003 (Harrington Order at 3); ROA 0020 (Order at 7). The plaintiffs in both *St Andrews* and *Town of Yemassee* brought challenges to annexation attempts that allegedly did not comply with applicable statutory requirements. Importantly, neither of those cases included any finding that those municipalities engaged in any deceit or misrepresentation in enacting those challenged annexations. Unlike *St Andrews* and *Town of Yemassee*, this is not a case contesting an irregularity or good-faith error in accepting an annexation petition or quibbling over whether an annexation was made through the 75% or 100% petition method.

Here, there was no annexation ever completed because the owner of the Ten-Foot Strip – the U.S. Forest Service – never took the action necessary to initiate the process. Instead of a 100% petition method, there was, in effect, a 0% petition method. *See* ROA 0237 (Feb. 16, 2011 Letter from Bradley (Forest Service) to Robinson (Town) saying that "the Forest Service did not

intend for the letter of May 3, 1994, to constitute ‘a petition of the federal government’ to annex National Forest lands”).

Significantly, not only did the Forest Service not submit a petition for the Ten-Foot Strip, but the Town, after failing to convince the Forest Service to give it what it wanted, turned around and issued an ordinance that falsely stated that the Town had received a petition. See ROA 0188 (Ten-Foot Strip Annexation Ordinance, saying “WHEREAS, a proper petition has been filed with the Town Council by 100 percent of the freeholders owning 100 percent” of the Ten-Foot Strip). As Judge Nicholson explained in his Order, “[t]his case stands in sharp contrast to *Town of Yemassee* where there was no intentional deceit alleged ” ROA 0020 (Order at 7).³ For all of these reasons, the trial court properly concluded that the standing rules announced in *St Andrews* and *Town of Yemassee* simply are not applicable

B. The Trial Court Correctly Determined that Respondents Met the Standard for the Public Importance Exception for Standing.

The trial court’s holding that Respondents meet the test for public importance standing was also correct and should be upheld. See ROA 0020 – 22 (Order at 7 – 9). Indeed, it is difficult to imagine circumstances more precisely tailored to application of the public interest exception. According to the South Carolina Supreme Court, “[s]tanding is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance ” *ATC South, Inc v Charleston Cnty* , 380 S.C 191, 198, 669 S.E.2d 337, 341 (2008) (quotations and citations omitted). The public importance exception

³ When the Town argued in their motion for summary judgment that Respondents lacked standing (and that their challenge was untimely), Judge Harrington agreed that this case was distinguishable from *St. Andrews* and *Town of Yemassee*. In its ruling, the court said, “[t]he statutory provisions governing standing and timing exist to serve as shields for legitimate annexation attempts. No case supports [the Town’s] efforts to transform them instead into a sword that municipalities can wield to eviscerate the strict limitations on municipal authority delineated by the General Assembly.” ROA 0003 (Harrington Order at 3)

recognizes that “[c]itizens must be afforded access to the judicial process to address alleged injustices.” *Id.* at 199, 669 S.E.2d at 341 (quoting *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)). It entails a careful, case-by-case balancing of the interests of judicial economy on the one hand and the need to ensure checks against abuses of government power on the other. *Id.* at 199, 669 S.E.2d at 341 (cautioning against overly formalistic standing analysis)

In *ATC South*, the Supreme Court addressed the public interest exception in the zoning context and explained that the “key” to this balancing is “whether a resolution is needed for future guidance.” *Id.* Remarkably, the Town cites to *ATC South* to support its contention that there is no overriding public concern nor need for future guidance in the case at bar. Such an argument fails for two primary reasons. First, resolution of Respondents’ claims is needed to conserve rare, nationally important public resources in the Francis Marion, as the trial court recognized. *See* ROA 0021 (Order at 8, stating that “resolution of plaintiffs’ claims is necessary to protect unique flora and fauna contained in the National Forest, which is owned, maintained, and conserved for the benefit of all Americans” (citing Tr. at 83:12-14)); *see also* ROA 0291, 293 (Everett Aff. at ¶¶ 5, 11, saying that “the actions taken by the Town directly threaten the long term viability of the southern portion of the Francis Marion,” which “is one of the most ecologically valuable natural resources in the state (if not the entire East Coast)”).⁴

Second, Respondents’ claims also concern a recurring controversy likely to continue resurfacing in the future. In fact, the Town admitted to having annexed other Forest strips in the past without a petition requesting their annexation. ROA 0208 (Wallace Dep. at 73 23-25,

⁴ Jean B. Everett, Ph.D. is a senior instructor within the Department of Biology at the College of Charleston. A longtime member of Respondent Coastal Conservation League, Dr. Everett submitted an affidavit in support of the League’s standing in this matter on March 21, 2011. Dr. Everett uses the National Forest near the Nebo Tract to teach her students, and she believes the actions taken by the Town will injure her educational, professional, and recreational interests in the National Forest.

stating that “the Town has done this on several occasions”) And, its correspondence with the Forest Service indicates an intent to do so again. See ROA 0181 (Jan. 23, 2004 Letter from Alston (Town) to Sutton (Forest Service) requesting use of Ten-Foot Strip to annex Nebo Church and enable “other future annexations”); ROA 0144 (Tr at 74:6-9, Wallace responding “Yes” when asked if “the town intends in the future to use this 1994 letter if it deems it necessary regardless of any petitions from the federal government to annex land”) Perhaps more importantly, the Town defends this practice on the grounds that a court has not yet ruled it illegal ROA 0208 (Wallace Dep. at 74:1-7). It is therefore necessary for this Court to uphold the trial court’s decision to prevent the Town from employing *ultra vires* actions to expand its municipal limits into the National Forest

1. The Town’s Reliance on the Supreme Court’s Decision in *Freemantle* is Misplaced.

In trying to upend the trial court’s holding that Respondents are entitled to public importance standing, the Town relies heavily on the Supreme Court’s decision in *Freemantle v Preston*, 398 S.C 186, 728 S.E.2d 40 (2012) The Town’s treatment of the *Freemantle* decision is deeply flawed, as a proper reading of *Freemantle* supports the trial court’s conclusion that Respondents have public importance standing.

The Town claims that in *Freemantle* the “Supreme Court articulated a strict two-prong test for evaluating the ‘need for future guidance’ which does not exist independently of the plaintiff’s (1) ‘need for’ and (2) ‘entitlement to’ injunctive relief,” and that somehow the lower court failed to apply this new test. Town Br. at 11 (quoting *Freemantle*, 398 S.C. at 191, 193-94, 728 S.E.2d at 43-44) The Town goes on to contend that *Freemantle* “superseded” the cases

relied on by the trial court and “prohibits the invocation of the public importance exception based on Respondents’ allegations of municipal deception.” Town Br. at 11-12 ⁵

If anything, the *Freemantle* decision provides a good example of how the public importance exception to standing should be applied and strongly supports the trial court’s conclusion here. In *Freemantle*, the Court explained that, “[f]or a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance” and “[t]his nexus between the public importance exception and the need for future guidance from the Court is invariably linked to a need for and entitlement to injunctive relief.” 398 S.C. at 194, 728 S.E.2d at 44 (quotations and citations omitted).

The Court in *Freemantle* found that the plaintiff lacked public importance standing because the plaintiff “sought *monetary damages for himself* in his common law causes of action, while claiming to represent the taxpayers of Anderson County.” *Id.*, 728 S.E.2d at 44 (emphasis added). According to the Court, the plaintiff’s request for monetary damages “directly conflicts with the purpose and spirit of the public importance exception” and thus the plaintiff did not qualify for public importance standing. *Id.*, 728 S.E.2d at 44

There is nothing about the *Freemantle* Court’s discussion regarding the required nexus between the public importance exception and the need for future guidance or injunctive relief that would justify disturbing the lower court’s finding here. In fact, the *Freemantle* Court’s language on this point strongly supports the trial court’s conclusion. In this appeal, there is a clear and inextricable connection between the public importance of this case and the need for

⁵ As an initial matter, *Freemantle* did not overrule or supersede any of the cases relied upon by the trial court in rendering its decision. There is nothing in *Freemantle* suggesting that the Court was overruling any of the cases cited by the Court on this issue.

future guidance. As explained by the trial court, resolution of Respondents' claims was of high public importance and was "necessary to protect unique flora and fauna contained in the National Forest, which is owned, maintained, and conserved for the benefit of all Americans." ROA 0021 (Order at 8). Moreover, this issue of public importance is directly related to the need for future guidance since the Town admitted to having annexed other lands in the past in the same deceitful manner and indicated "an intent to do so again." *Id.*⁶ For these reasons, the assertion that *Freemantle* annunciated some sort of new rule that prohibits Respondents from achieving public importance standing is false.

C. The Trial Court Correctly Held that Respondents Have Standing to Challenge *Ultra Vires* Municipal Acts as Taxpayers.

The Town contends that the trial court wrongly concluded that Respondents are entitled to standing as taxpayers. A review of the relevant precedents on taxpayer standing, however, shows that Respondents were, in fact, entitled to standing as taxpayers, as the trial court determined.

"A taxpayer's standing to challenge unauthorized or illegal government acts has been repeatedly recognized in South Carolina." *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000). *See also Sloan v. Dep't of Transp.*, 379 S.C. at 169, 666 S.E.2d at 241 (same). "For a plaintiff to have taxpayer standing, the party must demonstrate some overriding public purpose or concern to confer standing to sue on behalf of her fellow taxpayers." *Sloan v. Greenville Cnty.*, 356 S.C. 531, 549, 590 S.E.2d 338, 347 (Ct. App. 2003).

⁶ The Town also argues that "*Freemantle* . . . prohibits Respondents from achieving the public importance exception based on their allegations of municipal fraud," Town Br. at 11, but the Town fails to point to any language in *Freemantle* that would dictate such a result. As explained above, while it is true that the Supreme Court rejected the plaintiff's assertion of public importance standing in *Freemantle*, it did so based on the particular facts of that case where there was no relationship between the professed public importance and the monetary relief sought 398 S.C. at 194, 728 S.E.2d at 44.

Further, a party seeking to establish standing must generally show that (1) the plaintiff has suffered an injury in fact; (2) the injury and the conduct complained of are causally connected; and (3) it is likely, rather than merely speculative, that the injury will be redressed by a favorable decision.” *Id* at 549, 590 S.E.2d at 348 (citations and internal quotations omitted)

The *Sloan v School District of Greenville County* decision provides a good example of how the injury requirement has been satisfied in the context of a declaratory judgment action brought by a taxpayer. In that case, the plaintiff brought an action against the school district seeking a declaratory judgment that the district violated its procurement regulations by entering construction contracts without following the required sealed bidding procedure *Id* at 517-18, 537 S.E.2d at 300. The plaintiff had no private interest in the contracts and had not submitted a bid for the construction work. *Id.* at 518, 537 S.E.2d at 300. The court held first that plaintiff had standing to sue as an individual taxpayer because taxpaying citizens of Greenville County have a “direct interest in the proper use and allocation of tax receipts by the District” and that the injury is one in which the taxpayers of the county – not the public at large – are the individual sufferers *Id* at 522, 537 S E 2d at 303. According to the court, “taxpayers constitute a class specially damaged by the alleged unlawful act and therefore have a special interest in the subject matter of the suit, distinct from that of the general public.” *Id* at 519-20, 537 S E.2d at 301 (citations and quotations omitted). *See also Sloan v Greenville Cnty*, 356 S.C. at 551, 590 S E.2d at 349 (finding plaintiff had standing to sue where plaintiff had a substantial interest in whether county followed procurement procedures and where “[r]esolution of this issue will likely have an impact on government practices beyond the confines of the case itself”).

The trial court was correct in finding that this case is analogous to the *Sloan* line of cases in the following ways. First, Respondents here have challenged illegal or unauthorized

government acts. Second, like the *Sloan* plaintiffs, the individual Respondents and members of Respondent S.C. Coastal Conservation League are municipal taxpayers who would be called upon to pay for expanded services required to serve the Nebo development. Respondents have expressed reasonable concerns that the challenged actions, including the unlawful annexations and the rezoning of the Nebo Tract for intensive residential and commercial development, will require the expenditure of public funds, as the Town would need, for example, to upgrade the electric service – which is currently inadequate to serve such a large development – and provide for a sewer line or package sewer treatment plant. See ROA 0016 (Order at 3); ROA 0255 (Deposition of Lynne Vicary (Sept. 27, 2010) (hereinafter “Vicary Dep”) at 37.15-25). See also ROA 0313 (Affidavit of Lynne Vicary (hereinafter “Vicary Aff.”) at ¶ 6, explaining that she is worried the proposed Nebo Tract will make it too expensive for her to continue living in her home and that costs of additional municipal services, such as sewer and additional landfill capacity, will be passed on to current residents); ROA 0255 (Vicary Dep at 37 23-25, expressing similar concerns); ROA 0307 (Affidavit of Kent Prause (hereinafter “Prause Aff.”) at ¶ 6, expressing similar concerns); ROA 0280 – 81 (Affidavit of James Cubie (hereinafter “Cubie Aff”) at ¶ 7, expressing similar concerns about increased taxes). For these reasons, this appeal is squarely in line with *Sloan* and its progeny, and the trial court was right to find that Respondents had taxpayer standing.

In trying to overturn the trial court’s holding that Respondents lack taxpayer standing, the Town argues that Respondents’ injuries will actually be caused by a third party developer, not the Town itself. See Town Br. at 13. However, this argument ignores the fact that Respondents’ injuries are directly caused by the increase in development density permitted by the Town’s unlawful annexations and subsequent rezoning. If the property remains within Charleston

County's jurisdictional limits, the development density will be greatly reduced, thus alleviating the injuries Respondents will suffer. Because the Town's purported annexations and rezoning are the but for cause of Respondents' injuries, upholding the trial court's invalidation of these actions will redress those injuries, regardless of any action by a third party developer ⁷

The Town also contends that "[a]ny *Sloan* averment of taxpayer standing pursuant to an injury that is shared by all of the jurisdiction's taxpayers was overruled by the Supreme Court in *ATC South, Inc v Charleston County*, 380 S.C. 191, 198, 669 S.E.2d 337, 340-41 (2008) "

Town Br at 14 This argument also falls flat As an initial matter, although the *ATC* Court rejected ATC's claim of taxpayer standing in that particular case, nowhere in the *ATC* decision does the Supreme Court expressly abolish or overrule the *Sloan* line of cases

Further, if for some reason this Court were to find that *ATC* now requires taxpayers to show a more concrete and particularized injury than the injury complained of in *ATC*, the trial court's decision on taxpayer standing should still stand, as Respondents here have alleged specific injuries in addition to those that they have suffered as taxpayers. ROA 0152 – 54 (Tr. 82:11-84:1, Respondent Kent Prause testifying at trial that he is injured by the Town's actions allowing for far greater intensity of development on the Nebo Tract) See also ROA 0251

⁷ The Town also suggests that the Settlement Agreement reached between Respondents and EBC "allows the very development complained of." Town Br at 14; see also *id.* at 12, n. 6. This argument is a red herring. The Town overlooks the fact that the Settlement Agreement explicitly states that it "*does not* resolve any of the claims that have been asserted by the [Respondents] against the defendant Town of Awendaw ("Town")." ROA 0356 (Settlement Agreement at 1) (emphasis added). The Settlement Agreement does not resolve any issues related to the Town's unlawful actions, including the purported annexation of the Nebo Tract, the development agreement between EBC and the Town, the rezoning of the Nebo Tract, or the amendment to the Town's Comprehensive Plan. Although Respondents and EBC dismissed all claims brought against one another, Respondents' claims against the Town were preserved and allowed to proceed to trial with the understanding that if the trial court ruled for Respondents, all of the challenged ordinances could be declared *void ab initio* and the Nebo Tract would remain within Charleston County under the County's rural zoning scheme

(Deposition of Kent Prause (Sept. 27, 2010) (hereinafter “Prause Dep.”) at 50:5-18, explaining how the extent of growth and development threatens to impact the natural resources he enjoys, such as the National Forest).⁸

Moreover, even if this Court were to find that *ATC* overruled the *Sloan* line of cases and that taxpayer standing no longer exists under South Carolina law, this Court should still uphold the trial court’s decision by reaffirming that Respondents qualify under the public importance exception for standing given the threat to the National Forest and the Town’s insistence that they will keep treating the 1994 Letter from the U.S. Forest Service as a petition for annexation until a Court directs them to do otherwise.

II. The Town’s Argument that the Other Challenged Ordinances Relating to the Nebo Tract are Moot is Erroneous.

The Town asserts that the trial court did not review the merits of Respondents’ Amended Complaint regarding the ordinances (a) to approve the development agreement for the Nebo

⁸ The Town claims that these injuries are “hypothetical and unsubstantiated,” and that Respondents have failed to “demonstrate[] any injury to the National Forest.” Town Br. at 13. However, it is well-established that in cases involving harm to natural resources, it is not necessary to prove that the harm has already occurred, rather, “plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (internal citations omitted). See also *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 860 (9th Cir. 2005) (“an increased risk of harm can itself be injury in fact for standing, and nothing necessitates a showing of existing environmental harm . . . [T]o require actual evidence of environmental harm, rather than an increased risk based on a violation of [a] statute, misunderstands the nature of environmental harm...” (internal citations and quotations omitted)); *Cent. Delta Water Agency v. U.S.*, 306 F.3d 938, 950 (9th Cir. 2002) (“as the Fourth Circuit noted in *Gaston Copper*, plaintiffs need not wait until the natural resources are despoiled before challenging the government action leading to the potential destruction”). These injuries are caused by the illegal annexation of properties by the Town and the resulting change in zoning to allow for increased development density, which would harm the environment and the National Forest and would not occur but for the Town’s illegal actions. A ruling from this Court upholding the trial court’s order would redress Respondents’ injuries by maintaining the Nebo Tract within the jurisdictional limits of Charleston County and maintaining its rural density zoning.

Tract; (b) to amend the Town's Comprehensive Plan; and (c) to rezone the Nebo Tract, Town Br. at 15, and that these claims are now moot, *id.* at 15-16. This argument has no merit.

As explained by the trial court, the Town, like any other municipality in South Carolina, only has the powers granted to it by Article VIII of the South Carolina Constitution. ROA 0023 – 24 (Order at 10 – 11, citing *Hospitality Ass'n v Cnty of Charleston*, 320 S.C. 219, 225-26, 464 S.E.2d 113, 117-18 (1995)). Actions outside these powers are void and have no effect. ROA 0024 (Order at 11, citing *Bostick v City of Beaufort*, 307 S.C. 347, 350, 415 S.E.2d 389, 391 (1992)). The Town lacks the authority to annex property unless it is contiguous with the Town's border and the Town receives a petition from the owner of the property requesting annexation. In order to annex the Nebo Tract, the Town tried to manufacture contiguity via the Ten-Foot Strip and the Nebo Church Tract. Because the annexation of the Ten-Foot Strip never occurred as a matter of law, there never was any contiguity between the Town and the Nebo Tract. Further, since the Nebo Tract is not within the Town's jurisdiction (and never has been), it is axiomatic that the Town lacked the authority to enact the ordinances identified above. The challenges to these ordinances are not moot. To the contrary, the trial court correctly held that these ordinances purportedly enacted by the Town on October 1, 2009 are each *ultra vires* and *void ab initio*. ROA 0025 – 26 (Order at 12 – 13).

III. The Trial Court Properly Concluded that there was No Petition for the 2004 Annexation and that the Town Engaged in Deceitful Conduct.

The Town next argues that the trial court committed legal error by imposing heightened requirements to determine if a proper petition for annexation was made here, and by relying on a 2011 letter from the Forest Service explaining that it never intended the 1994 Letter to be an annexation petition. Both of these arguments are flawed; the trial court properly determined that there was no petition requesting annexation as required by the plain language of § 5-3-150(3),

and its consideration of the 2011 letter to buttress this conclusion was proper. The trial court also properly concluded that the Town engaged in deceitful conduct and this Court should affirm that finding.

A. The Trial Court Did Not Impose Heightened Requirements in Determining That There was No Petition for Annexation Here.

The Town first argues that “[t]he circuit court erred as a matter of law by construing S.C. Code Ann. § 5-3-150(3) to include requirements for annexation petitions that conflict with the plain language of that section.” Town Br. at 16. The Town contends that “§ 5-3-150(3) does not mandate a particular form for a petition,” *id.*, and that the court “superimpos[ed] certain requirements that are expressly confined to § 5-3-150(1),” *id.* at 17.

Contrary to the Town’s argument, the trial court never referenced or applied the requirements for annexation petitions made pursuant to § 5-3-150(1). Instead, the trial court based its ruling on the plain language of § 5-3-150(3). *See* ROA 0024 (Order at 11). As the trial court explained, section § 5-3-150(3) requires a “petition ‘*requesting annexation*’”⁹ *Id.* (emphasis in original). The trial court concluded that “[i]t is undisputed that the Town never received anything from the Forest Service requesting annexation of the Ten-Foot Strip.” *Id.* In other words, the trial court did not hold that the petition failed to satisfy certain technical elements required for annexation petitions, but instead simply found that there was no legitimate petition for annexation at all. In the words of the trial court, “[t]he 1994 letter the town tried to

⁹ The Town contends that “[t]he ruling that a petition must be ‘requesting annexation’ to be complete, Final Order, p. 11, is not consistent with the plain language of or the Legislative intent for this section . . .” Town Br. at 18. This is a particularly bizarre argument given that the plain language of the statute uses this exact phrasing. *See* S.C. Code Ann. § 5-3-150(3) (“[A]ny area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a *petition* signed by all persons owning real estate in the area *requesting annexation*. Upon the agreement of the governing body to accept the petition and annex the area, and the enactment of an ordinance declaring the area annexed to the municipality, the annexation is complete.”) (emphases added).

use as a ‘petition’ is no such thing.” *Id*; *see also id* (“As a matter of law, annexation of the Ten-Foot strip never occurred because it could not be accomplished without a petition.”), ROA 0016 (Order at 3, saying that the 1994 Letter is “a decade-old letter...stating that the agency had ‘no objection’ to the annexation of ambiguously-described properties” that the Town decided to use after it could not obtain a petition requesting annexation).

The Town takes issue with the trial court’s reference to expert testimony from Mr. Robert Lee Frank, a land surveyor, explaining that the 1994 Letter does not contain an adequate description of the land for purposes of annexation. *See* Town Br. at 17, n. 8. The Town argues that by referring to this testimony, the court imposed stricter requirements for annexation petitions than those found in § 5-3-150(3). While the trial court did reference Mr. Frank’s testimony, this reference was in addition to its main holding that there was never a petition requesting annexation as required by § 5-3-150(3). In any case, Mr. Frank’s testimony further supports the court’s conclusion that the 1994 Letter was not an annexation request because it did not properly identify the land to be annexed. It is common sense that any annexation petition – not just those provided for in §§ 5-3-150 (1) and (2) – must define the property to be annexed so that it is identifiable. In sum, the court’s holding that there was no petition requesting annexation – which properly applies S.C. Code Ann. § 5-3-150(3) to the facts here and does not impose any heightened requirement for annexation petitions – should be affirmed.

B. The Trial Court Properly Considered the 2011 Forest Service Letter.

The Town next argues that Respondents should not be allowed to introduce the 2011 U.S. Forest Service letter explaining that the Forest Service never intended for its 1994 Letter to constitute a petition to annex National Forest lands. The Town argues that this is impermissible

parol evidence because it is “proof of intent by a different person years after the clear understanding of it between the parties.” Town Br. at 19.

This argument lacks merit for several reasons. First, the 2011 letter is not parol evidence because it is not being used to demonstrate the original intent of the parties in a contract dispute. Rather, this case concerns the propriety of the Town’s purported annexation of National Forest lands and seeks equitable relief. On these facts, the parol evidence rule is inapplicable. See *Wells Fargo Bank Minn , Nat’l Ass’n v Luther*, No. 2005-UP-123, 2005 WL 7083446 at *4, n. 3 (S.C. Ct. App Feb. 17, 2005) (“[T]he parol evidence rule only applies to the construction of written agreements... In this case, we are not construing a written agreement, but determining the extent of an equitable mortgage and fashioning a remedy in equity. Thus, we are not bound by the parol evidence rule.”) (internal citation omitted). Second, even if the 2011 letter is considered parol evidence, it is admissible to establish allegations of fraud in the execution or inducement of a written contract. See *U S Leasing Corp v Janicare, Inc* , 294 S.C. 312, 316-17, 364 S E 2d 202, 205 (Ct. App. 1988) Respondents alleged such deceit in the Town’s attempt to annex here, and thus the 2011 letter is admissible to support these allegations. Likewise, the 2011 letter is admissible given the ambiguity, at best, in the 1994 Letter. See *Penton v J F Cleckley & Co* , 326 S.C 275, 280, 486 S E 2d 742, 745 (1997) (holding that where a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties). For all of these reasons, the Court should disregard the Town’s arguments that the 2011 letter is improper parol evidence.¹⁰

¹⁰ In addition to these reasons, it is worth noting that the Town did not raise a legal objection to the introduction of this evidence at trial. See ROA 0162 – 63 (Tr. at 92 – 93)

C. The Trial Court Properly Concluded that the Town Engaged in Deceitful Conduct.

The Town next takes issue with the trial court's finding that the Town engaged in deception or misrepresentation in falsely claiming to have a petition for the 2004 annexation. *See* ROA 0017, 24 (Order at 4, 11) This argument is nothing more than a rehashing of the prior two points – that, in the Town's view, it had a proper petition for annexation and the 2011 Forest Service letter cannot be used to demonstrate otherwise. As such, the Court should disregard the argument for the reasons stated above

The Court should also reject this argument because the trial court properly concluded that the Town had engaged in deceitful conduct. Contrary to the Town's suggestion, the facts in the record adequately demonstrate this. It is undisputed that the Town was unable to obtain a proper annexation petition for the Ten-Foot Strip from the Forest Service. *See* ROA 0199 (Wallace Dep. at 40:9-11, Town admitting that "it turned out that they [Forest Service] would not give us anything in writing saying that they desired to be annexed"); ROA 0200 (Wallace Dep. at 42:12-16, same). It is also undisputed that, despite the failure to obtain an annexation request in writing, on May 10, 2004, the Town passed an ordinance stating that a "proper petition has been filed" for annexation and purporting to accept the petition. ROA 0017 (Order at 4); ROA 0188 (Ten-Foot Strip Annexation Ordinance) As the trial court concluded, "[a]lthough the Town represented to the public that it received a 100% petition from the Forest Service, it never did." ROA 0017 (Order at 4). *See also* ROA 0134, 137 (Tr. at 64, 67:2-5).

Thus, as the trial court concluded, the record clearly supports a finding that the Town engaged in deceitful conduct. This Court should not disturb the trial court's well-reasoned factual findings on appeal. *See Greer v Spartanburg Technical Coll*, 338 S.C. at 79, 524 S.E.2d at 858 (holding that the court's broad scope of review of factual findings in equity cases "does

not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses” and that the court “may affirm the trial court’s ruling upon any ground appearing in the record”).

IV. **The 1994 Letter of the Forest Service Does Not Even Describe the Ten-Foot Strip of the National Forest.**

The trial court also properly held that the 1994 Letter relied upon by the Town as a petition for annexation for the Ten-Foot Strip fails to include a sufficient description of property ROA 0025 (Order at 12). At trial, Respondents presented the expert testimony of Robert Lee Frank, a registered land surveyor in the state of South Carolina ROA 0108 – 10 (Tr. at 38:10 – 40:11). In his testimony, Mr. Frank explained that he was asked to examine the descriptions of properties included in the 1994 Letter, which the Town relied on as a petition for annexation for the Ten-Foot Strip. ROA 0110 – 11 (Tr. at 40:12 – 41:11). Mr. Frank testified that the description of properties in the 1994 Letter was not sufficient for carrying out the purported annexation of the Ten-Foot Strip for one primary reason – the 1994 Letter does not describe the Ten-Foot Strip of the Francis Marion. ROA 0111 – 12 (Tr. at 41:9 – 42:22).

Mr. Frank’s testimony was unrebutted at trial by any expert testimony presented by the Town. Mr. Bill Wallace, the Town Administrator, testified regarding the descriptions contained in the 1994 Letter, yet he was not qualified as an expert at trial. Mr. Wallace testified that he believes the descriptions in the letter are clear, but even he conceded that the language in the 1994 Letter would not suffice for a legal transaction ROA 0121 (Tr. at 51:19 – 22).

This Court should affirm the trial court’s holding that the 1994 Letter did not include a sufficient description of the Ten-Foot Strip and that the annexation of the Ten-Foot Strip was *ultra vires* and *void ab initio* not only because the trial court had the opportunity to review the credibility of the witnesses at trial, but also for the additional reason that the Town failed to rebut

Mr. Frank's expert testimony with any expert testimony of its own. ROA 0025 (Order at 12).

See, supra, Greer v Spartanburg Technical Coll, 338 S.C. at 79, 524 S.E.2d at 858

V. **This Court Should Affirm the Trial Court on the Additional Sustaining Ground that a Strip Annexation Cannot Satisfy the Requirements of Contiguity under South Carolina Law.**

This Court should affirm the trial court's ruling on the additional sustaining ground that a strip annexation cannot satisfy the requirements of the statutory definition of contiguity in any event. *See I'On, LLC v Town of Mt Pleasant*, 338 S.C. 406, 526 S E 2d 716 (2000) (saying respondent, as prevailing party in the trial court, may raise on appeal any additional reasons the appellate court should affirm the trial court's ruling, regardless of whether those reasons have been presented to or ruled on by the trial court). A narrow, ten-foot strip cannot provide the "continuous border" necessary for contiguity under South Carolina law. *See* S.C. Code Ann § 5-3-305.

In 2000, the South Carolina General Assembly codified the definition of contiguous for purposes of annexation as follows.

For purposes of this chapter, "contiguous" means property which is *adjacent to a municipality and shares a continuous border*. *Contiguity is not established by a road, waterway, right-of-way, easement, railroad track, marshland, or utility line which connects one property to another*, however, if the connecting road, waterway, easement, railroad track, marshland, or utility line intervenes between two properties, *which but for the intervening connector would be adjacent and share a continuous border*, the intervening connector does not destroy contiguity.

Id (emphases added).

Section 5-3-305 altered the prior law as it had been judicially interpreted and applied, which had considered lands to be contiguous and subject to annexation even though they were separated by significant distances as long as any connecting right of way, road, or other strip of

land in between was annexed as well. Section 5-3-305 now requires that the border of the annexed land be both adjacent *and* continuous to the boundaries of the annexing municipality

The Nebo Tract is not contiguous with the municipal limits of the Town of Awendaw, as provided by Section 5-3-305. *See* ROA 0232 (Nebo Map), ROA 0189 (Map depicting Ten-Foot Strip and Nebo Church Tract) Because the Ten-Foot Strip of the Francis Marion is not adjacent *and* continuous with the limits of the Town, it cannot provide contiguity with the Nebo Church Tract and, in turn, the Nebo Tract. As such, the purported annexation of the Nebo Tract is void, not authorized by law, and is an *ultra vires* act of the Town on this additional sustaining ground.¹¹

VI. The Trial Court's Holding that the Respondents' Action was Timely Must be Upheld.

As an initial matter, there is no dispute that Respondents timely challenged the purported annexation of the Nebo Tract As required by statute, plaintiffs filed a Notice of Intention to Contest Extension of Town of Awendaw's Municipal Limits on November 25, 2009, within 60 days of the purported annexation of the Nebo Tract on October 1, 2009, and also filed their First Amended Complaint to add Plaintiffs' annexation claims on December 22, 2009, within 90 days of the purported Nebo Tract annexation. *See* S.C. Code Ann. § 5-3-270. The Town argues though, that because Respondents did not challenge the 2004 annexations of the Ten-Foot Strip

¹¹ Notably, the question of whether the strip annexation here satisfies the requirements of Section 5-3-305 is of considerable public importance and will arise again in similar contexts but continuously avoid review if not answered in this case. This and other similar purported annexations are greatly expanding the boundaries of municipalities into remote rural areas through an illegal interpretation of Section 5-3-305 by pretending there is contiguity when there is none and creating imaginary corridors that are not separately platted parcels and are solely the contrivance of municipalities. A ruling on this important public issue is necessary for guidance in this case and for future guidance in other similar cases.

and the Nebo Church Tract within the statute of limitations, they are barred from raising those arguments at this juncture.

With respect to the Ten-Foot Strip and the Nebo Church Tract, the trial court's holding regarding timeliness was two-fold. The trial court's first and primary holding was that Respondents' challenges to those purported annexations were not barred by the statute of limitations because there was never a valid act to annex these properties, and "the passage of time cannot transform a void and unauthorized annexation into a valid one." ROA 0022 (Order at 9). As the trial court explained, this is because municipalities like the Town have only the powers granted them by Article VIII of the South Carolina Constitution and by state legislation. ROA 0023 (Order at 10, citing *Hospitality Ass'n*, 320 S.C. at 225-26, 464 S.E.2d at 117-18). Actions outside these powers are void and have no effect. *See Bostick*, 307 S.C. at 350, 415 S.E.2d at 391. In *Bostick*, the Court explained that in the annexation context, procedural or technical deficiencies – such as the omission of a date – may be retroactively corrected, but where, as here, an annexation is "fatally flawed" and a "nullity upon origination," no subsequent action makes it valid. *Id.* at 350, 415 S.E.2d at 391. Thus, because there was no valid annexation of the Ten-Foot Strip or Nebo Church Tract, the statute of limitations does not bar Respondents' claims. *See* ROA 0022 – 23 (Order at 9 – 10); *see also Cabazon Band of Mission Indians v City of Indio, Cal*, 694 F.2d 634, 637-38 (9th Cir. 1982) (holding that a plaintiff "was not required to take action within any prescribed statutory time to establish invalidity" where a city attempting to complete an annexation "had no authority to act at all" absent requisite federal consent); *People ex rel Forde v Town of Corte Madera*, 115 Cal.App.2d 32, 38, 251 P.2d 988, 991 (1952) ("no life can be breathed into... void... [annexation] proceedings by the failure to contest them").

The trial court's secondary holding as to why Respondents' arguments regarding the Ten-Foot Strip and Nebo Church Tract were not time-barred relied on equitable principles. In the words of the trial court, "statutes of limitations are not automatic bars to claims, but rather, they are affirmative defenses that can be waived and are subject to equitable doctrines, including estoppel and tolling." ROA 0023 (Order at 10). The trial court also concluded that even if the statute of limitations applied, the Town was prevented by principles of equity from asserting such a defense because it engaged in deceitful conduct. *See id.*

Tellingly, on appeal, the Town never mentions the first and primary holding – that the annexations were *void ab initio* and a challenge to them was not barred for this reason. Instead, the Town focuses exclusively on the court's equitable estoppel and tolling holdings. The Town argues that the court erred because Respondents cannot satisfy the technical requirements of estoppel laid out in *American Legion Post 15 v Horry County*, 381 S.C. 576, 584, 674 S.E.2d 181, 185 (Ct. App. 2009). But this completely misses the point for several reasons. First, the trial court's holding can be affirmed solely based on the fact that the annexation was *void ab initio* and thus no statute of limitations applied. Additionally, the test articulated in *American Legion* was not designed to apply to factual settings like the present, where an act by a government entity is null and void from the outset and the government has misrepresented the action it has taken to the public. This Court need not reach the strict 3-prong estoppel test of *American Legion*, and should disregard the Town's hypertechnical arguments that Respondents did not "plead[] nor prove[]" the elements of estoppel. Town Br at 23.

The Town's arguments regarding tolling are similarly unpersuasive. Where, as here, a court determines that a party has acted in bad-faith and engaged in intentional deception, the court may apply equitable principles to limit affirmative defenses. *See Hooper v Ebenezer Sr*

Servs & Rehab Ctr, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009) (“The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other...[E]quitable tolling may be applied where it is justified under all the circumstances.”) (internal citations and quotations omitted).

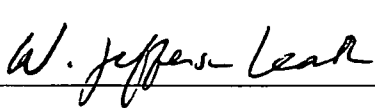
In sum, the Court should affirm on the grounds that the statute of limitations is simply not a bar on these facts, where the annexations are void and the Town engaged in intentionally deceitful conduct.

CONCLUSION

This Court should affirm the trial court’s ruling that the annexation of the Ten-Foot Strip was void and of no effect because the Town never received a petition for annexation from the Forest Service for this strip of the National Forest and because the 1994 Letter from the Forest Service did not even describe the Ten-Foot Strip at issue. Because the annexation of the Ten-Foot Strip was *ultra vires* of the Town’s authority, the subsequent annexations of the Nebo Church Tract and the Nebo Tract fail because these tracts lack contiguity with the Town. Moreover, as an additional sustaining ground, this Court should clarify that strip annexations, such as the one attempted here, do not satisfy the requirements for contiguity as defined in S.C. Code Ann. § 5-3-305. And finally, because the annexation of the Nebo Tract did not occur as a matter of law and this property has never been successfully brought under the Town’s jurisdiction, this Court should sustain the lower court’s declaration that the other ordinances enacted by the Town on October 1, 2009 to (1) approve a development agreement for the Nebo

Tract, (2) amend the Town's Comprehensive Plan to include the agreed-upon development, and
(3) rezone the Nebo Tract were each *ultra vires* acts and *void ab initio*.

Respectfully submitted this 4th day of May, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J C Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-7399
Appellate Case No 2014-002118

Lynne Vicary, Kent Prause, and South
Carolina Coastal Conservation League,..... Respondents,

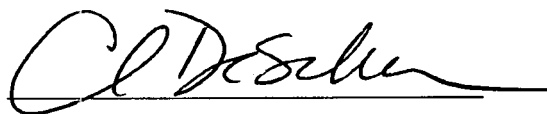
v.

Town of Awendaw, and EBC, LLC..... Defendants,
Of Whom Town of Awendaw is Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have served all counsel in this action with a copy of
Respondents' Final Brief as indicated below by mailing a copy of the same by U S Mail,
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lynne Vicary, Kent Prause, and South Carolina Coastal
Conservation League, Respondents,

v.

Town of Awendaw, and EBC, LLC, Defendants,

Of whom Town of Awendaw is the Appellant.

Appellate Case No. 2014-002118

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5436
Heard February 11, 2016 – Filed August 3, 2016

REVERSED

Newman Jackson Smith, of Nelson Mullins Riley &
Scarborough, LLP, of Charleston, for Appellant.

W. Jefferson Leath, Jr., of Leath Bouch & Seekings,
LLP, of Charleston; and James B. Holman, IV and
Christopher K. DeScherer, both of Southern
Environmental Law Center, of Charleston; all for
Respondents.

LOCKEMY, C.J.: The Town of Awendaw (the Town) appeals the circuit court's final order, arguing the court erred in finding (1) Lynne Vicary, Kent Prause, and the South Carolina Coastal Conservation League had standing; (2) the Town never

received a proper petition requesting the 2004 annexation; (3) the Town falsely claimed it had a proper petition to annex the United States Forest Service (the Forest Service) property; (4) the Town was estopped from asserting a statute of limitations defense; and (5) the statutory time period for challenging the 2004 annexation was tolled. We reverse.

FACTS/PROCEDURAL BACKGROUND

Beginning in 2004, the Town made a series of three land annexations, starting with the annexation of a strip of the Francis Marion National Forest (the National Forest) and culminating in October 2009 with the annexation of a 359.51-acre tract (the Nebo Tract). The Nebo Tract is encircled by the National Forest and is owned by EBC, LLC.

The Town attempted to create the required contiguity between its own border and the Nebo Tract by annexing the ten-foot wide and 1.25 mile long strip of the National Forest (the Ten-Foot Strip). The Ten-Foot Strip is contiguous with the Nebo Church Tract¹, which connects the Nebo Tract to the Ten-Foot Strip.

The Town annexed the three tracts (Nebo Tract, Nebo Church Tract, and Ten-Foot Strip) purportedly using the 100% petition method outlined in section 5-3-150(3) of the South Carolina Code (2004).² In early 2004, the Town requested the Forest Service enable the Town to annex the Ten-Foot Strip in order for the Town to also annex the Nebo Church Tract. Despite the Town's admission that the Forest Service did not provide them anything in writing expressing their desire that the Ten-Foot Strip be annexed, the Town used a 1994 letter it received from a Forest Service representative stating the agency had "no objection" to the annexation of several strips of property described therein. According to land surveyor Robert Frank, none of the strips described in the 1994 letter were the Ten-Foot Strip at issue in this case.

¹ The Nebo Church Tract is owned by Mount Nebo AME Church.

² Pursuant to section 5-3-150(3), "any area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a petition signed by all persons owning real estate in the area requesting annexation."

On May 10, 2004, the Town passed an ordinance stating a "proper petition h[ad] been filed" for annexation of the Ten-Foot Strip and accepting the petition. The Town also passed an ordinance that same day annexing the Nebo Church Tract.

In 2009, EBC requested the Town annex the Nebo Tract under the 100% petition method. On October 1, 2009, the Town passed an ordinance accepting the petition and annexing the Nebo Tract. The Town also enacted ordinances (1) rezoning the Nebo Tract as "planned development," (2) declaring its Comprehensive Plan amended to allow the Nebo Tract as planned development, and (3) approving a development agreement with EBC.

On April 23, 2010, Lynne Vicary, Kent Prause, and the South Carolina Coastal Conservation League (collectively, Respondents)³ filed a second amended complaint against the Town and EBC. Respondents alleged that by unlawfully annexing the Nebo Tract and allowing for intensive residential and commercial development of the property, the Town has harmed and "will continue to harm one of the most important ecological areas on the Atlantic coast, including the [National Forest], a sensitive resource of national significance that is owned and managed for the benefit of the public." Respondents asserted the Town's 2004 annexation of the Ten-Foot Strip was void because the Town never received a petition requesting annexation from the Forest Service, and therefore, the subsequent annexations of the Nebo Tract and the Nebo Church Tract failed because those tracts lacked contiguity with the Town. Respondents requested the court declare the Nebo Tract annexation ordinance void and issue a declaratory judgment "adjudicating the invalidity of the annexation and all accompanying ordinances regarding the Nebo Tract, including the ordinance approving the Development Agreement, the amendment of the Comprehensive Plan, and the purported rezoning, and a permanent injunction enjoining acts in furtherance of any of the illegally enacted ordinances and requiring that the Nebo Tract be returned to the *status quo* prior to the illegal annexation and rezoning"

On December 22, 2010, the Town and EBC filed a motion for partial summary judgment arguing Respondents lacked standing and their challenge was barred by the statute of limitations. The circuit court subsequently denied the motion. On September 6, 2012, Respondents and EBC entered into a settlement agreement wherein EBC dismissed its counterclaims against Respondents and Respondents dismissed their claims against EBC.

³ Vicary and Prause are residents of the Town. The League has members who are residents of the Town.

The case proceeded to trial on April 16, 2014. Following trial, the circuit court issued an order declaring (1) Respondents had standing; (2) the action was timely filed; and (3) the Town's annexation of the Ten-Foot Strip was void because the Town never received a petition of annexation from the Forest Service. The court declared "[b]ecause the annexation of the Ten-Foot Strip was *ultra vires* of the Town's authority, the Town's subsequent annexations of the Nebo Church Tract and the Nebo Tract fail because these tracts lack contiguity with the Town." The court further held

because the Nebo Tract did not occur as a matter of law, it follows that the other ordinances enacted by the Town on October 1, 2009 to (1) approve a development agreement for the Nebo Tract, (2) amend the Town's Comprehensive Plan to include the agreed-upon development, and (3) rezone the Nebo Tract are each *ultra vires* and *void ab initio*.

Thereafter, the Town filed a Rule 59(e), SCRCP, motion to reconsider. The circuit court denied the Town's motion on September 22, 2014. The Town appealed.

STANDARD OF REVIEW

"Declaratory judgments in and of themselves are neither legal nor equitable." *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). "The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Id.*

The present case is an action in equity. *See Sloan v. Greenville Cty.*, 356 S.C. 531, 544, 590 S.E.2d 338, 345-46 (Ct. App. 2003) (finding a declaratory judgment action brought by a taxpayer citizen requesting declaratory relief is an action in equity). In an appeal from an action in equity tried by a judge, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775-76 (1976). "While this standard permits a broad scope of review, an appellate court will not disregard the findings of the [circuit] court, which saw and heard the witnesses and was in a better position to evaluate their credibility." *Buffington v. T.O.E. Enters.*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009).

LAW/ANALYSIS

The Town argues the circuit court erred in finding Respondents had standing to challenge the 2004 annexation ordinance. We agree.

"To have standing, one must have a personal stake in the subject matter of the lawsuit." *Sloan v. Greenville Cty.*, 356 S.C. at 547, 590 S.E.2d at 347 (quoting *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S. C. Dep't of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001)). "Standing may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing'; or (3) under the 'public importance' exception." *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

The circuit court determined Respondents had standing under the public importance exception and as taxpayers challenging government action under the South Carolina Uniform Declaratory Judgment Act⁴. On appeal, the Town argues Respondents did not have statutory standing. Citing to *St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston*, 349 S.C. 602, 564 S.E.2d 647 (2002) and *Ex parte State ex rel. Wilson v Town of Yemassee*, 391 S.C. 565, 707 S.E.2d 402 (2011), the Town asserts the only non-statutory party which may challenge a municipal annexation is the State of South Carolina acting in the public interest to challenge an absolutely void annexation ordinance. The Town further contends Respondents lacked constitutional standing and the public importance exception is not applicable.

On appeal, Respondents argue they had standing under the public importance exception and as taxpayers challenging government action under the Declaratory Judgment Act. See S.C. Code Ann. § 15-53-30 (2005) ("Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."); see also *Sloan v. Greenville Cty.*, 356 S.C. at 551, 590 S.E.2d at 349 (holding taxpaying citizen of Greenville County had a direct interest in the County abiding by procurement procedures set out in the County code); *Sloan v. Sch. Dist. of Greenville Cty.*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000) (finding taxpayer in Greenville County had standing to sue as an individual taxpayer who had interest in the proper use and allocation of tax receipts by the school district and holding "[a] taxpayer's standing to challenge unauthorized or illegal governmental acts has been

⁴ S.C. Code Ann. §§ 15-53-10 to -140 (2005).

repeatedly recognized in South Carolina" and taxpayers in the past have been held to "constitute a class specially damaged" by illegal, ultra vires acts). Respondents argue *St. Andrews* and *Yemassee* are distinguishable from the present case because they involved annexations municipalities attempted to carry out in good faith, not through deceitful conduct.

We agree with the Town that Respondents lacked standing. Our case law provides that "to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights," and the State of South Carolina is the only non-statutory party which may challenge a municipal annexation. See *St. Andrews*, 349 S.C. at 604-05, 564 S.E.2d at 648.

In *St. Andrews*, the supreme court granted certiorari to consider whether municipal annexations using roadways to achieve contiguity are authorized by statute. 349 S.C. at 603, 564 S.E.2d at 647. In deciding this issue, the court articulated the general rule of standing for annexation challenges. *Id.* at 604, 564 S.E.2d at 648; see also S.C. Code Ann §§ 5-3-150(1), (3) (2004). The court explained the rules for standing vary depending on whether the method of annexation is carried out via the 75% or 100% method. *St. Andrews*, 349 S.C. at 604, 564 S.E.2d at 648. Under the 75% method, the challenger must be a municipality or one of its residents, or reside or own property in the annexed area; while under the 100% method, the challenger must assert an infringement of its own proprietary interests or statutory rights. *Id.* In addition, the supreme court held, "the only non-statutory party which may challenge a municipal annexation is the State, through a quo warranto action." *Id.* at 605, 564 S.E.2d at 648 (emphasis omitted). The court found "the better policy is to limit 'outsider' annexation challenges to those brought by the State 'acting in the public interest.'" *Id.*

In *Yemassee*, the supreme court applied the general standing rule for 100% annexations as articulated in *St. Andrews*. 391 S.C. at 572, 707 S.E.2d at 406. The *Yemassee* case involved tracts of land annexed via the 100% petition method in which the plaintiffs argued the municipality failed to comply with the signature requirements of the 100% method. 391 S.C. at 573, 707 S.E.2d at 406. Specifically, the plaintiffs asserted the annexation should have been treated as made by the 75% method, as opposed to the 100% method, since the annexed lands included state-owned marshlands in addition to privately-held properties. *Id.* In denying standing to the plaintiffs, the supreme court reaffirmed its ruling from *St. Andrews* that to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights. *Id.* at 572-74, 707 S.E.2d at 406-07.

Here, Respondents have failed to show any infringement of their own proprietary interests or statutory rights. In addition, because none of Respondents are the State of South Carolina, they are prohibited from challenging the Town's annexations pursuant to *St. Andrews* and *Yemassee*. Respondents contend *St. Andrews* and *Yemassee* are distinguishable from the present case because those cases involved annexations carried out in good faith, not through deception. We disagree and note Respondents failed to cite any case law to support this argument. Additionally, although Respondents contend they met the standard for the public importance exception for standing, *St. Andrews* clearly provides the State, *acting in the public interest*, is the only non-statutory party which may challenge a municipal annexation.

CONCLUSION

We reverse the circuit court's determination that Respondents had standing. In light of our disposition of the case, it is not necessary to address the Town's remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of prior issue is dispositive).

REVERSED.

WILLIAMS and MCDONALD, JJ., concur.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-7399
Appellate Case No. 2014-002118

Lynne Vicary, Kent Prause, and South Carolina
Coastal Conservation League Respondents,

v.

Town of Awendaw, and EBC, LLC..... Defendants,
Of Whom Town of Awendaw is Appellant.

RESPONDENTS' PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Lynne Vicary, Kent Prause, and the South Carolina Coastal Conservation League (collectively, “Respondents”) respectfully petition for rehearing and reconsideration of this Court’s August 3, 2016 Opinion (“the Opinion”) reversing the decision of the Charleston County Court of Common Pleas ruling that a string of three purported annexations made by the Town of Awendaw (“the Town”) were void and of no effect.

INTRODUCTION

This case concerns the Town of Awendaw’s malfeasant attempt to annex property within the Francis Marion National Forest by making false statements that a proper petition for annexation was filed by the United States Forest Service (“Forest Service”), when in fact the Forest Service “would not give [the Town] anything in writing saying that [it] desired to be annexed.” *See* ROA 0199 (Wallace Dep at 40:9-11); ROA 0237 (Feb. 6, 2011 Letter from Paul Bradley, Forest Service, to Samuel Robinson, Town) (“[T]he Forest Service did not intend for the letter of May 3, 1994 to constitute ‘a petition of the federal government’ to annex National Forest lands...”). Respondents sought a declaration that the purported annexation is void and was never properly initiated because the Town had never received a valid petition requesting annexation, and had publicly lied about this fact by claiming that it had received a petition. The trial court ruled in Respondents’ favor, finding that Respondents had standing to bring their claims under the public importance exception and as taxpayers challenging government action under the South Carolina Uniform Declaratory Judgment Act. *See* ROA 0017-22, 25.

After oral argument on February 11, 2016, the Court of Appeals reversed on the sole ground that Respondents did not have standing to challenge the string of annexations under *St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston*, 349 S.C. 602, 564 S.E.2d 647 (2002) and *Ex parte State ex rel. Wilson v. Town of Yemassee*, 391 S.C. 565, 707 S.E. 2d 402

(2011). The Court concluded that the Town “purportedly us[ed] the 100% petition method” for annexation outlined in S.C. Code § 5-3-150(3), and that only those with “proprietary interests or statutory rights” or the State can file actions challenging 100% method annexations under *Town of Yemassee* and *St. Andrews*. See *Vicary*, 2016 WL 4123978 at *1, *4. The Court declined to consider whether Respondents had standing based on the well-recognized public importance exception or on the basis of taxpayer standing, instead creating a rule where so long as a municipality claims that it has conducted a 100% method annexation – whether this is true or, as here, patently false – only the State can challenge such arbitrary and deceptive government conduct.

This Court’s decision reversing the trial court contains three central errors that warrant reconsideration.

1. The Court of Appeals Erred by Applying *St Andrews* and *Yemassee* Standing Requirements where No 100% Method Annexation Was Ever Initiated.

The Court first erred by relying on *St. Andrews* and *Town of Yemassee* to preclude Respondents’ standing to challenge annexations “purportedly” made pursuant to the 100% annexation method. 2016 WL 4123978 at *1.

As this Court is aware, the “100% petition method allows a municipality to annex property upon the signature of all persons who own real estate in the annexed area.” *Town of Yemassee*, 391 S.C. at 570, 707 S.E. 2d at 405. The 100% annexation method is a unique process that “provides neither an express notice provision nor an authorization for third parties to challenge the annexation.” *Id.* at 572, 707 S.E. 2d at 406. As explained in *Town of Yemassee*, these restrictions on notice and the ability to challenge 100% annexations are “readily understood in light of the requirement that **all** property owners in the annexed area consent by signing the annexation petition.” *Id.* (emphasis in original). “In sum, the 100% petition method

is a ‘fast track’ for annexation that may be used only when all of the property owners consent.”
Id.

St. Andrews and *Yemassee* articulate specific requirements for establishing standing to challenge 100% method annexations made in good faith by municipalities. Both cases ultimately hold that citizens must allege a sufficient infringement of their “proprietary interests” or “statutory rights” to have standing and “that the only non-statutory party which may challenge a municipal annexation is the State, through a quo warranto action.” *St Andrews*, 349 S.C. at 605, 564 S.E. 2d at 648; *Town of Yemassee*, 391 S.C. at 573-4, 707 S.E. 2d at 406-407. The Opinion applies these holdings to conclude that Respondents had not suffered any infringement of their own proprietary interests or statutory rights and “because none of Respondents are the State of South Carolina, they are prohibited from challenging the Town’s annexations pursuant to *St Andrews* and *Yemassee*.” 2016 WL 4123978 at *4.

But *St. Andrews* and *Town of Yemassee* are not applicable here. This case does not concern procedural defects in a properly initiated 100% annexation, such as whether the proper signatures were obtained on an otherwise valid or partially valid annexation petition. *See, e.g., Town of Yemassee*, 391 S.C. at 404, 707 S.E. 2d at 569 (challenging lack of State signature on annexation petition signed by other owners). Instead, this case involves a situation where there was never a valid petition for annexation in the first place – and whether any citizens at all may challenge deceptive, nefarious government conduct that goes beyond the realm of mistake and into the world of malfeasance.

St. Andrews and *Town of Yemassee* involved annexations that municipalities attempted to carry out in good faith, not the municipal deception that is at issue here. For example, in *St. Andrews*, the Supreme Court considered whether municipal annexations using roadways to

achieve contiguity are authorized by statute. *St. Andrews*, 349 S.C. at 603, 564 S.E. 2d at 647. In taking up this issue, the Court articulated the general rule of standing for annexation challenges. *Id.* at 604, 564 S.E. 2d at 648; *see also* S.C. Code Ann. §§ 5-3-150(1),(3). The Court explained that the rules for standing vary depending on whether the method of annexation was carried out via the 75% or 100% method – under the 75% method, the challenger must be a municipality or one of its residents, or reside or own property in the annexed area, while under the 100% method, the challenger must assert an infringement of its own “proprietary interests or statutory rights.” 349 S.C. at 604, 564 S.E. 2d at 648.

The Supreme Court in *Town of Yemassee* applied the standing rule for 100% annexations as articulated in *St. Andrews*. The *Town of Yemassee* decision involved tracts of land annexed via the 100% petition method in which the plaintiffs argued that the municipality failed to comply with the technical signature requirements of the 100% method. *Town of Yemassee*, 391 S.C. at 573, 707 S.E. 2d at 406-7. Specifically, plaintiffs argued that the annexation should have been treated as made by the 75% method as opposed to the 100% method since the annexed lands included state-owned marshlands in addition to privately-held properties. *Id.* In denying standing to the plaintiffs, the Court in *Town of Yemassee* reaffirmed the holding from *St. Andrews* that “in order to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights.” *Id.* at 572-74, 707 S.E.2d at 406-7.

In sum, the plaintiffs in both *St. Andrews* and *Town of Yemassee* brought challenges to annexations that allegedly did not comply with applicable statutory requirements. Importantly, neither of those cases involved a situation where, due to government misconduct, there was not even a partially valid annexation petition to begin with, as is the case here, and the municipality

overtly deceived the public about this fact. Here, the annexation process was never commenced because the petition that was misleadingly said to initiate it did not, in fact, exist.

Respectfully, the Opinion appears to wholly misapprehend this fact and omits evidence that Respondents presented demonstrating that the Forest Service never initiated an annexation. *See, e.g.*, ROA 0237 (Feb.16, 2011 Letter from Paul Bradley (Forest Service) to Samuel Robinson (Town) (“[T]he Forest Service did not intend for the letter of May 3, 1994, to constitute ‘a petition of the federal government’ to annex National Forest lands”); ROA 0199 (Wallace Dep at 40:9-11). Strangely, the Opinion recounts facts that support Respondents argument that there was no annexation – for example, the Opinion notes that the Town “purportedly” used the 100% petition method, 2016 WL 4123978 at *1; explains the “Town’s admission that the Forest Service did not provide them anything in writing expressing their desire that the Ten-Foot Strip be annexed;” *id.*; and finds that “none of the strips described in the 1994 letter were the Ten-Foot Strip at issue in this case.” *Id.* But after making these factual conclusions, the Opinion goes on to apply 100% annexation case law that is not applicable to the facts found by the court. The extreme facts here show that, instead of a 100% petition method, there was a 0% petition method. *St. Andrews* and *Yemassee* do not apply.

Moreover, not only did the Forest Service not submit a petition for the Ten-Foot Strip, but the Town, after failing to convince the Forest Service to give it what it wanted, turned around and issued an ordinance that falsely stated that the Town had received a petition. *See* ROA 0188 (Ten-Foot Strip Annexation Ordinance stating that “a proper petition has been filed with the Town Council by 100 percent of the freeholders owning 100 percent” of the Ten-Foot Strip). As Judge Nicholson explained in his Order, “[t]his case stands in sharp contrast to *Town of*

Yemassee where there was no intentional deceit alleged.” ROA 0020.¹ Yet the Opinion misapprehends – or at least never mentions – this deceptive conduct.²

Pursuant to the Opinion, a municipality need only pronounce that it is conducting an annexation pursuant to the 100 % method – no matter whether this is true or patently false – and it is insulated from challenge by anyone except the State in a *quo warranto* action. This is so even when a municipality has engaged in a pattern of falsification and deception and no annexation ever occurred as a matter of law – and even when the municipality announces that, unless stopped by a court, it intends on repeating these actions in the future.

In sum, unlike *St. Andrews* and *Town of Yemassee*, this is not a case involving an irregularity or good-faith error in accepting an annexation petition or quibbling over whether an annexation was made through the 75% or 100% petition method. The Court should reconsider its ruling that *St. Andrews* and *Town of Yemassee* provide the only basis for establishing standing on these facts.

2. The Court of Appeals Erred by Not Considering Whether Respondents Had Public Importance or Taxpayer Standing.

The Court of Appeals also erred by declining to evaluate whether the Respondents qualified for the public importance exception to standing or for taxpayer standing. Rather than

¹ When the Town argued in their motion for summary judgment that Respondents lacked standing (and that their challenge was untimely), Judge Harrington agreed that this case was distinguishable from *St. Andrews* and *Town of Yemassee*. In her ruling, she wrote, “[t]he statutory provisions governing standing and timing exist to serve as shields for legitimate annexation attempts. No case supports [the Town’s] efforts to transform them instead into a sword that municipalities can wield to eviscerate the strict limitations on municipal authority delineated by the General Assembly.” ROA 0003 (Harrington Order at 3).

² As the Supreme Court acknowledged in *Town of Yemassee*, that case did not involve “a nefarious motive on the part of the Town.” 391 S.C. 578, n. 7. For this reason alone, *Town of Yemassee* has limited value in the context of the present case, which does involve a highly nefarious motive by the Town.

conducting this inquiry, the Opinion concludes that “because none of Respondents are the State of South Carolina, they are prohibited from challenging the Town’s annexations pursuant to *St. Andrews* and *Yemassee*.” 2016 WL 4123978 at *4. In other words, the Court decided this case solely on the basis of annexation standing, which the Court termed “statutory” standing.

But South Carolina law is clear that “[s]tanding may be acquired: (1) by statute; (2) through the rubric of ‘constitutional standing’; or (3) under the ‘public importance’ exception.” *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Cases routinely consider whether plaintiffs have standing under any one of these three bases. *See, e.g., Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E. 2d 40, 43 (2012) (considering whether plaintiff had standing by statute, through constitutional means, or under the public importance exception). Yet here the Court of Appeals mistakenly ended its inquiry after deciding that Respondents did not have statutory standing under *Town of Yemassee* or *St. Andrews*.

Public importance standing recognizes that “the rule of standing is not inflexible and standing may be conferred where the issue is one of public importance.” *South Carolina Public Interest Foundation v. South Carolina Transp. Infrastructure Bank*, 403 S.C. 640, 645-46, 744 S.E.2d 521, 524 (2013). “The public importance exception grants standing to a party who has not suffered a particularized injury where the issue involved is of such public importance that its resolution is required for future guidance.” *Id.* “Whether an issue of public importance exists necessitates a cautious balancing of . . . competing policy concerns underlying the issue of standing.” *ATC S.*, 380 S.C. at 198-200, 669 S.E.2d at 341 (2008) (quoting *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)). “The key to public importance analysis is whether a resolution is needed for future guidance . . . [y]et the very nature” of the doctrine “resists a formulaic approach, as each case must turn on ‘the competing policy concerns’” of standing. *Id.*

For example, in *Baird v. Charleston County*, doctors alleged that the Charleston County government had committed an illegal act by issuing hospital bonds beyond the County's statutory authority. 333 S.C. 519, 524-26, 511 S.E.2d 69, 72 (1999). The Court found that this allegation was sufficient to establish public importance standing because allegations of illegal government action are of public importance. *Id.* at 531, 75. The relevance of illegal government action for public importance standing has been repeatedly emphasized by the Court. *See e.g., South Carolina Public Interest Foundation*, 744 S.E.2d at 524 (finding an allegation of unconstitutional government action "the precise instance where the public importance exception should apply"). *Baird* also found that the alleged illegal government action harmed a "profound public interest." *Baird*, 333 S.C. at 531, 511 S.E.2d at 75. There the issuance of illegal hospital bonds was of public importance because it affected public health and welfare. *Id.* To determine the public interests at stake, the Court looked to the overall public policy embodied by the allegedly violated statute — the Hospital Bonds Act — and its stated purpose "to promote the public health and welfare." *Id.* The Court found that alleged illegal government action that implicated widely applicable public interests was sufficient to establish public importance standing.

Like *Baird*, it is hard to imagine a case that would better fit the public importance exception to standing than the present one. First, allegations of illegal government action are "the precise instance where the public importance exception should apply." *S.C. Pub. Interest Found.*, 403 S.C. at 646. Respondents argue precisely this sort of illegal government action in conducting an annexation of a federally-protected forest when no annexation petition was ever received. Likewise, resolution of Respondents' claims is needed to conserve rare, nationally important public resources in the Francis Marion National Forest, as the trial court recognized.

See ROA 0021 (Order at 8) (“resolution of plaintiffs’ claims is necessary to protect unique flora and fauna contained in the National Forest, which is owned, maintained, and conserved for the benefit of all Americans”); see also ROA 0291, 0293 (Everett Aff. at ¶¶ 5, 11) (“the actions taken by the Town directly threaten the long term viability of the southern portion of the Francis Marion,” which “is one of the most ecologically valuable natural resources in the state (if not the entire East Coast)”).³

Second, the need for “future guidance” exists when an issue “transcends a purely private matter and rises to the level of public importance,” *S.C. Pub. Interest Found.*, 403 S.C. 640, 645-46, 744 S.E.2d 521, 524 (2013) (quoting *ATC S.*, 380 S.C. at 199, 669 S.E. 2d at 341), as when the questions involved are of “wide concern, both to [government] personnel and to the public.” *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 (quoting *Thompson v. S.C. Comm’n on Alcohol and Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976)). The annexations at issue here are highly controversial and involve a recurring controversy likely to continue resurfacing in the future. In fact, the Town admits to having annexed other Forest strips in the past without a petition requesting their annexation. ROA 0208 (Wallace Dep. at 73:23-25) (stating that “the Town has done this on several occasions.”). And, its correspondence with the Forest Service indicates an intent to do so again. See ROA 0181 (Jan. 23 2004 Letter from Alston (Town) to Sutton (Forest Service)) (requesting use of Ten-Foot Strip to annex Nebo Church and enable “other future annexations”); ROA 0144 (Tr. at 74:6-9) (Wallace responding “Yes” when asked if “the town

³ Jean B. Everett, Ph.D. is a senior instructor within the Department of Biology at the College of Charleston. A longtime member of Respondent Coastal Conservation League, Dr. Everett submitted an affidavit in support of the League’s standing in this matter on March 21, 2011. Dr. Everett uses the National Forest near the Nebo Tract to teach her students, and she believes the actions taken by the Town will injure her educational, professional, and recreational interests in the National Forest.

intend[s] in the future to use this 1994 letter if it deems it necessary regardless of any petitions from the federal government to annex land”). Perhaps more importantly, the Town defends this practice on the grounds that a court has not yet ruled it illegal. ROA 0208 (Wallace Dep. at 74:1-7). It is therefore necessary for this Court to reconsider its holding that Respondents cannot assert their claims given that they clearly satisfy the requirements for public importance standing.⁴

In sum, the Court of Appeal erred in failing to evaluate whether Respondents had public importance or taxpayer standing on the facts here. There is nothing in the annexation statute that limits the applicability of public importance or taxpayer standing, and this holding should be reconsidered.

3. To The Extent that the Court of Appeals Declined to Consider Alternative Bases for Respondents’ Standing Based on *Town of Yemassee* and *St. Andrews*, these Cases Were Wrongly Decided.

As noted above, neither *Town of Yemassee* nor *St. Andrews* dictates a conclusion that Respondents lack standing on the facts presented here. The Court’s reliance on these cases to bar Respondents from establishing standing through the public importance exception or taxpayer standing just because there was “purportedly” a 100% annexation is misplaced, as neither case requires this result. But in any case, if *Town of Yemassee* and *St. Andrews* are construed to preclude Respondents’ standing here, these cases are erroneous in their conclusion that there is an exclusive “statutory standing test for challenges to 100% annexations.” *St. Andrews*, 349 S.C. at 605, 564 S.E. 2d at 648.

⁴ For these same reasons, the Court should have considered whether Respondents had taxpayer standing. As the trial court reasoned, “the individual plaintiffs and members of the League are municipal taxpayers who will be called upon to pay for expanded services required to serve the Nebo development that the Town has purportedly annexed and rezoned. The Supreme Court has confirmed that there is a strong public interest in allowing taxpayers, just like the plaintiffs here, to bring suit to prevent the expenditure of public funds to support *ultra vires* acts.” ROA 0019.

Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation. See *Freemantle*, 398 S.C. at 194–95, 728 S.E. 2d at 44-45; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n. 2, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (stating the issue of statutory standing as “whether this plaintiff has a cause of action under the statute”).

While *Town of Yemassee* and *St. Andrews* discuss “statutory standing” for challenges to 100% method annexations, the relevant statute confers no such standing on any party. Instead, the statute merely provides the method for 100% annexations, but says nothing about who may sue to challenge such an annexation. The entire statutory text governing 100% annexations reads as follows:

[A]ny area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a petition signed by all persons owning real estate in the area requesting annexation. Upon the agreement of the governing body to accept the petition and annex the area, and the enactment of an ordinance declaring the area annexed to the municipality, the annexation is complete. No member of the governing body who owns property or stock in a corporation owning property in the area proposed to be annexed is eligible to vote on the ordinance. This method of annexation is in addition to any other methods authorized by law.

S.C. Code Ann. § 5-3-150(3).⁵

Thus, contrary to the holding of *St. Andrews* and *Town of Yemassee*, there is no “statutory standing” for 100% method annexations. Rather, *St. Andrews* and *Town of Yemassee* have

⁵ By comparison, the statutory text for 75% annexations does provide both the method for accomplishing a 75% annexation, and statutory standing to certain parties. See S.C. Code Ann. § 5-3-150(1)(5) (“[T]he municipality or any resident of it and any person residing in the area to be annexed or owning real property of it may institute and maintain a suit in the court of common pleas, and in that suit the person may challenge and have adjudicated any issue raised in connection with the proposed or completed annexation.”). Other provisions of the annexation statute suggest that there is a broader right for interested persons to challenge annexations as well. See, e.g., S.C. Code Ann. § 5-3-270 (setting time frame in which “person interested therein” may challenge any type of annexations).

created a jurisprudential test for standing for 100% method annexations that is not derived from the language of the statute. *See, e.g., St. Andrews*, 349 S.C. at 604, 564 S.E. 2d at 648 (holding that a challenger to a 100% petition annexation “must assert an infringement of its own proprietary interests or statutory rights.”). But this judicially-created method of establishing standing cannot erase other methods of demonstrating standing recognized in South Carolina, including public importance or taxpayer standing. *See ATC S.*, 380 S.C. at 195, 669 S.E. 2d at 339. In other words, because the annexation statute contains no express language governing who has standing to challenge 100% annexations, the courts may not write out Respondents’ ability to demonstrate standing pursuant to recognized South Carolina standing law. The Court of Appeals was wrong to rely on *Town of Yemassee* and *St. Andrews* to create this sort of bar.

Moreover, the Court of Appeals’ interpretation of *Town of Yemassee* and *St. Andrews* conflicts with the very purpose of public importance standing, which recognizes that “[c]itizens must be afforded access to the judicial process to address alleged injustices.” *ATC S.*, 380 S.C. at 199, 669 S.E. 2d at 341 (quoting *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 (2004)). Similarly, the ruling conflicts with the purpose of taxpayer standing, which allows taxpayers who are directly affected by government conduct to bring challenges to that conduct when there is some overriding public purpose or concern and a need for future guidance. *See, e.g., Sloan v. Sch. Dist. of Greenville Cty.*, 342 S.C. 515, 537 S.E.2d 299 (Ct.App. 2000) (allowing taxpayer standing to challenge allegedly illegal government contracts).

Finally, the Opinion creates absurd results, whereby unlawful government conduct that could be challenged by affected citizens in *any* context *other* than annexation now cannot be challenged by anyone but the State because the unlawfulness is related to a “purported” annexation. For example, if the deceptive government conduct here had arisen in the state

contracting context, Respondents would be able to challenge it via public importance standing. *See Sch. Dist. of Greenville Cty.*, 342 S.C. at 520, 537 S.E.2d at 301 (“A taxpayer’s standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina”).⁶ But under the Court’s Opinion, Respondents may not do so here because this involves a “purported” annexation – even though the annexation statute says nothing about limiting public importance standing or constitutional standing. *Vicary*, 2016 WL 4123978 at *3-4 (disregarding Respondents’ arguments regarding the unauthorized and deceitful nature of the government conduct challenged here).

The Court’s conception of *Town of Yemassee* also creates absurd results within the annexation statute itself. As noted above, “whether a statute confers standing is an exercise in statutory interpretation.” *See Freemantle* at 194–95, 728 S.E.2d at 44–45. Here, the Court interprets *Town of Yemassee* to mean that, despite silence on who has standing to challenge 100% annexations in the statute, no party but those with “proprietary interests or statutory rights” may challenge such annexations (or the State through a quo warranto action). The Court’s rationale – and *Town of Yemassee*’s holding – would apply equally to all forms of annexations other than the 75% method, the only annexation method for which the statute provides clear, affirmative language limiting who may file a challenge. Accordingly, under the Court’s logic, annexations of property owned by a corporation could only be challenged by “the stockholders of the corporation,” who are the only delineated party with “statutory rights.” *See* S.C. Code

⁶ As noted above, Respondents brought this action under the South Carolina Declaratory Judgment Act seeking a declaration that the alleged annexations never occurred as a matter of law, and that the Town engaged in deceptive conduct in representing that it had received a valid petition for annexation. Respondents’ allegations and request for relief under the South Carolina Declaratory Judgment Act are similar to allegations and remedies sought in the *Sloan* cases cited above. The Opinion thus conflicts with S.C. Supreme Court law allowing these types of claims to be brought pursuant to the Declaratory Judgment Act and based on public importance standing.

Ann. § 5-3-120. Neighboring property owners who alleged harm from the annexation and could satisfy the other requirements of establishing constitutional standing would be barred from any challenge under the Court's logic. Similarly, the annexation of property within a multicounty park could only be challenged by the "State Fiscal Accountability Authority" and not broader state or public entities who could demonstrate harm from the annexation. *See* S.C. Code Ann. § 5-3-115. The judicially-created limitation of standing to "statutory" parties becomes even more unworkable when considered in the context of annexations-by-election, since those annexations involve action – and inaction – by various overlapping or disparate subgroups of citizens. *See, e.g.* S.C. Code Ann. §§ 5-3-30, 300. It defies belief to think in enacting a lengthy statute with nearly a dozen distinct procedures for different kinds of annexations meant to include – by omission – a unique and highly restrictive limitation on standing that applies to all annexations procedures (except one) regardless of the absurdities that would result.

In effect, the Opinion creates a rule where all of these forms of annexation would be essentially unreviewable by harmed citizens just because the statute is silent on who can file a challenge. The Opinion thus deprives parties of the right to establish constitutional, public importance, or taxpayer standing because the statute is silent on standing to challenge annexations other than those conducted by the 75% method. This result flies in the face of other Supreme Court precedent allowing parties to establish constitutional standing, for example, if no statutory standing exists. *See Youngblood*, 402 S.C. at 317, 741 S.E. 2d at 518. As explained above, there is no statutory basis for removing recognized methods of establishing standing – or this absurd result – contained in S.C. Code § 5-3-150(3).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that their petition for rehearing and reconsideration be allowed, that the Court affirm the trial court's decision, which declares that the purported annexations by the Town were *void ab initio*.

This 17th day of August 2016.



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Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

AUG 18 2016

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-7399
Appellate Case No. 2014-002118

Lynne Vicary, Kent Prause, and South Carolina
Coastal Conservation League Respondents,

v.

Town of Awendaw, and EBC, LLC..... Defendants,
Of Whom Town of Awendaw is Appellant.

CERTIFICATE OF SERVICE

I certify that I have served Respondents Lynne Vicary, Kent Prause, and South Carolina Coastal Conservation League's Petition for Rehearing on all parties by depositing a copy in the United States Mail, postage prepaid, on August 17, 2016, addressed to their attorneys of record, as indicated below:

Newman Jackson Smith, Esq.
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street, Suite 600
Charleston, SC 29401-2239

This 17th day of August 2016.



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August 17, 2016

VIA FEDERAL EXPRESS – PRIORITY OVERNIGHT

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
AUG 18 2016
SC Court of Appeals

Re: Lynn Vicary v. Town of Awendaw
Appellate Case No.: 2014-002118

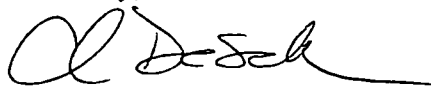
Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of Respondents Lynne Vicary, Kent Prause, and South Carolina Coastal Conservation League's Petition for Rehearing and Certificate of Service in the above-referenced matter. Also enclosed is a check in the amount of \$25.00 to cover the associated filing fee. Please return a file-stamped copy to our office in the enclosed self-addressed, stamped envelope.

By copy of this correspondence, I am serving the same upon all counsel of record. If you have any questions or if there is anything further I should provide, please do not hesitate to contact me at 843-720-5270 or cdescherer@selcsc.org.

Thank you kindly for your assistance with this matter.

Sincerely,



Christopher K. DeScherer

CKD/arp
Enclosures

cc: W. Jefferson Leath, Esq.
Newman Jackson Smith, Esq.

The South Carolina Court of Appeals

Lynne Vicary, Kent Prause, and South Carolina Coastal
Conservation League, Respondents,

v.

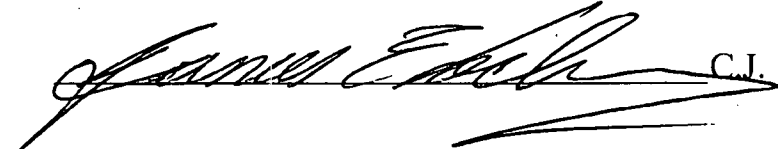
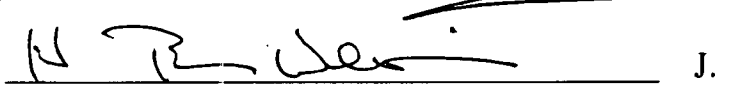
Town of Awendaw, and EBC, LLC, Defendants,

Of whom Town of Awendaw is the Appellant.

Appellate Case No. 2014-002118

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Newman Jackson Smith, Esquire
W. Jefferson Leath, Jr., Esquire

FILED
September 23, 2016

Christopher Kaltman DeScherer, Esquire
James Blanding Holman, IV, Esquire
Julie J. Armstrong