STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas
Mikell Scarborough, Master-in-Equity

Case No. 2010-CP-10-5449
App. No. 2015-002550

Nathan Bluestein, Ettaleah Bluestein, M.D.,
Theodore Albenesius, III, and Karen Albenesius,

Appellants,

v.

Town of Sullivan's Island and Sullivan's Island Town Council,

Respondents.

APPELLANTS' FINAL BRIEF

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A. Did the Trial Court err in construing the Town's right to trim in Paragraph 2 as foreclosing the Plaintiffs' claims for enforcement of the Deed Restrictions?

B. Did the Trial Court err in construing the Town's right to make "more restrictive ordinances" in Paragraph 6 as authorizing the 1995 and 2005 Ordinances to allow overgrowth of the vegetation creating a maritime forest?

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A. Did the Trial Court misapprehend that the State OCRM Regulations do not totally prohibit trimming vegetation on the accreted land inside the Critical Line, but rather, it is a discretionary process?

B. Did the Trial Court overlook that these Plaintiffs cannot even apply for an OCRM "cutting permit" without the Town's permission?

C. Did the Trial Court fail to consider that any speculative inability to trim inside the Critical Line does not excuse the Town's obligations under the Deed Restrictions as to the accreted lands that lie outside of the Critical Line?

D. Did the Trial Court err in striking the Contract Clause claim based on its misinterpretation of the OCRM permit process?

III. Did the Trial Court err in granting summary judgment to the Defendant Town on the Plaintiffs' claim for breach of contract accompanied by a fraudulent act because the Tort Claims Act does not provide immunity from contract claims?

A. Did the Trial Court misapprehend that the Plaintiffs are asserting a claim for breach of contract accompanied by a fraudulent act, not a tort for fraud?

B. Did the Trial Court misapprehend that a claim for breach of contract accompanied by a fraudulent act is not a tort claim under the Tort Claims Act?

IV. Did the Trial Court err in granting judgment on the nuisance cause of action because the new trimming policies have allowed overgrowth that harbors a variety of pests, varmints and poses dangers to the Plaintiffs personally and the other citizens generally?

V. Did the Trial Court err in striking the Plaintiffs' Contract Clause claims because there is no justification for the Town to purposefully and voluntarily enter a contract and then revise their Ordinances to defiantly breach the core purpose of the 1991 Deed Restrictions?

INTRODUCTION

This case revolves around the trimming and pruning of vegetation on beachfront accreted land owned by the Town of Sullivan's Island. In 1991, the Town's trimming ordinance allowed abutting property owners to obtain permits for cutting and trimming of any and all varieties of shrubs and trees on the accreted land to a height of three feet. At that time, under that ordinance, the accreted land was comprised of sea oats and wildflowers, which allowed front row property owners to enjoy ocean views and breezes. In 1995 and 2005, the Town of Sullivan's Island rewrote the ordinances limiting the trimming and cutting of trees and shrubs on the accreted lands which have allowed a virtual maritime forest to grow, obscuring the ocean view of the front-row homes and creating a variety of nuisances including a habitat for an assortment of varmints and pests. The Plaintiffs, as front-row property owners, bring this action to compel the Town to abide by the prior ordinance in effect in 1991 which allowed cutting and trimming of any and all varieties of shrubs and trees to a height of three feet, as a means of restoring the ocean view and abating the nuisances from the overgrowth.

The Trial Court viewed this case, in a simplistic way, as a complaint over the Town's management of Town-owned land and a claim for loss of an ocean view, and held that the Plaintiffs do not have any enforceable right to a view. On this appeal from the Trial Court orders granting summary judgment to the Town, the Court needs to understand from the outset that this is not an ordinary zoning case. While the Plaintiffs are, in one sense, challenging the Town's enforcement of the trimming ordinances, this is a land contract case founded, at its core, in a unique Deed arising from the unique geology of the Island's shoreline.

The uniqueness of this barrier island and the Deed are publically recognized by the Town which describes Sullivan's Island as "unique in that the beachfront lands which have accreted over the years, are owned by the Town and held in a perpetual easement by the Lowcountry Open Land Trust protecting the natural environment along the Atlantic Ocean." [http://www.sullivansisland-sc.com/history] In fact, the Town now owns the accreted land pursuant to a Deed -- not a perpetual easement -- that was executed, in a two-step land transfer in 1991.

The express purpose for the land transaction was "maintaining the natural character of the property" -- ***as it existed in February 1991*** -- which included vegetation at levels no higher than three feet. The intent of the parties as expressly stated in the Deed is a "desire to place restrictions upon the [the accreted land] for the purposes of, inter alia retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants, or wildlife" – ***as it existed in February 1991.***

Under basic contract law, these restrictions create obligations, which preclude the Town from enforcing the 1995 and 2005 trimming ordinances, that have so drastically changed the condition of the accreted land from how it existed in February 1991. By the same token, the

1991 Deed creates enforceable rights in the Plaintiffs, as property owners, to maintain the accreted land ***as it existed in February 1991***, which necessarily includes the right to trimming permits under the ordinance in effect in 1991, which will restore the ocean views and breezes to the front-row homeowners, and abate the nuisances.

STATEMENT OF THE CASE

This action arises from a 1991 Deed by which the Town of Sullivan's Island obtained ownership of certain ocean-front accreted lands and bound itself to certain restrictions and obligations aimed at preserving the conditions and character of the oceanfront area. The Plaintiffs are front-row property owners on Sullivan's Island, who bring this action as third-party beneficiaries under the terms of that Deed, seeking a declaration that the Town is obligated under the terms of the Deed to cut (or allow others to cut) all trees and shrubs on the accreted land to a height of three feet in accordance with the Town ordinance in effect at the time of the Deed was executed. [1]

The original complaint was filed on July 10, 2010, naming the Town of Sullivan's Island and Sullivan's Island Town Council as Defendants (collectively referred to as "the Town"), asserting claims for declaratory and injunctive relief, nuisance, and inverse condemnation. The issues ultimately became joined by a second amended complaint filed December 10, 2013, which also asserts causes of action including breach of contract and breach of contract accompanied by a fraudulent act, violation of the State and Federal Constitutional contract clauses, and violation of the S.C. Unfair Trade Practices Act. [ROA 51; Second Amended Complaint.] The

[1] The 1991 Deed expressly grants any property owner within the Town the right to enforce the Restrictions: "These Restrictions may be enforced by the Town, any property owner within the Town, or by any vote registered within the Town. Such persons may seek any appropriate remedy for any violation, including, but not limited to, injunctive relief to force a termination of the violation or to permit restoration of the area damaged by an prohibited activity." [ROA 98; 1991 Deed ¶ 5.] The Plaintiffs also have enforcement rights as registered voters.

Defendants filed an answer to the second amended complaint on December 16, 2013. [ROA 171; Answer.] The matter was referred to the Master-in-Equity by order of February 7, 2012. [ROA 1; Order of Reference.]

Both Plaintiffs and Defendants filed various motions for summary judgment on February 28, 2014, of which those pertinent to this appeal are:

- Plaintiffs' Motion for Partial Summary Judgment (as to Breach of Contract and Breach of Contract Accompanied by a Fraudulent Act) [ROA 187];
- Defendants' Motion for Partial Summary Judgment regarding Breach of Contract Accompanied by a Fraudulent Act Claim [ROA 724];
- Defendants' Motion to Strike Damages Relief Due to Lack of Ripeness In Light of OCRM "Critical Line" [ROA 729];
- Defendants' Motion for Summary Judgment on All Cause of Action Due to Plaintiff's Lack of Any Right to Control or Look Over Neighboring Parcels [ROA 738]; and
- Defendants' Motion for Partial Summary Judgment Regarding Nuisance Claims [ROA 811].

The Trial Court issued orders on the pertinent motions, including:

- Form 4 Order granting Defendants motion for summary judgment as to breach of contract accompanied by a fraudulent act, filed May 21, 2104 [ROA 2];
- Order Granting Summary Judgment to Defendants Regarding Breach of Contract by Accompanied by Fraudulent Act, filed December 4, 2014 [ROA 3];
- Order Granting Summary Judgment to Defendants based on Plaintiffs' Lack of Right to a View, filed July 30, 2015 [ROA 7];
- Order Granting Defendants' Motion to Strike Damages Claim Due to Location of OCRM Critical Line, filed July 30, 2015 [ROA 22];
- Form 4 Order, denying the Defendants' Motion for Summary Judgment on Plaintiffs' causes of action for Declaratory Judgment, Claim of Mandamus, Nuisance, Untimeliness,

and Contract Clause, filed August 4, 2015 [ROA 28]; and

- Form 4 Order, denying Plaintiffs' motion for summary judgment on breach of contract, filed August 5, 2015 [ROA 30].

The Plaintiffs filed a Motion for Reconsideration and Clarification on August 17, 2015, and the Town filed a new Motion for Summary Judgment Based on Plaintiffs' Admission and Deed Restriction Paragraph 6 with Incorporated Memorandum of Law, September 14, 2015. [ROA 851, 878; Motions.] The Trial Court issued its final orders, consisting of a Form 4 Order, denying Plaintiffs' motion for reconsideration, filed November 5, 2015 [ROA 43]; and a formal Order Granting Defendants' Motion for Summary Judgment on Plaintiffs' Nuisance, Breach of Contract, and Mandamus Claims, filed November 10, 2015, which ended the case [ROA 45].

The Plaintiffs timely served their Notice of Appeal on December 8, 2015. [ROA 881.]

STATEMENT OF THE FACTS

Pertinent Background regarding Accreted Lands on Sullivan's Island

Through a unique phenomenon of maritime geology, Sullivan's Island is one of just a few barrier islands on the South Carolina coast that has actually gained sand and land mass during the past century. While the Town has not faced the type of challenges that arise from beach erosion, the accretion has presented certain land management concerns and legal issues over the years, and this is not the first time that the subject of the accreted land on the Island has spawned legal disputes.

For example, during the 1920s, the Township of Sullivan's Island had laid out lots on accreted land and sold licenses for such lots. The holder of a license for a lot that had been ocean front until the accreted land had been parceled for development brought suit challenging the licenses to prevent construction on the lots. Schroeder v. O'Neill, 179 S.C. 310, 184 S.E. 679 (1936). Notably, the plaintiff did not assert any proprietary interest in the area of accretion

or any right to an ocean view; rather, the plaintiff sought to have the licenses declared null and void under statute because the lots were less than one-half acre, and because the licensees had not built a dwelling house within one year of the issuance of the licenses. The court rejected the claims and dismissed the action, leaving the licenses in effect.

In the years after World War II, license holders became property owners when the Town obtained federal and state authorization to sell the accreted land in fee. Over time, the accreted land continued to grow, and in the late 1960s/early 1970s, property owners were given opportunities to purchase the newly accreted land abutting their lots. As evidenced in the Town's official document – "Summary of Deed Restrictions"-- a study conducted by the South Carolina Coastal Council in the mid-1980s, showed an accretion rate ranging as much as 17.3 feet per year. [ROA 80; Summary.] During that time, the Town and residents began expressing concern about the future of the accreted land and a consensus was reached that "something should be done to protect it before it became a target for developers." [ROA 80.]

Contemplation of the inevitability that accretion would continue and the potential for development on the accreted land, and awareness of a legal dispute on neighboring Isle of Palms involving accreted land[2], all prompted the Town to explore options for protecting the land from

[2] In the case of Hill v. Beach Co., 279 S.C. 313, 306 S.E.2d 604 (1983), a dispute arose between lot owners and the private developer that owned certain accreted land and planned to develop it. Facing the loss of their uninhibited view and access across the accreted land, the lot owners brought an action to prevent the development. The court rejected the claim to a prescriptive right to ocean view, breezes, light and air; however, the court ruled that the lot owners did have an easement to access to the beach front by way of certain designated areas of ingress and egress. The Town has acknowledged that the residents of Sullivan's Island were aware of such disputes on Isle of Palms which was a factor in prompting the Land Trust transfer: "These residents surely were familiar with the uproar that had occurred on the Isle of Palms some years earlier when developer J. C. Long sold a new row of buildable lots on land that had accreted between the ocean and what had previously been the first row of houses. Sullivan's Island Town Council took action to preserve the [accreted land] for the public and to assure that no similar

development and thereby preserving both the condition of the land and the character/lifestyle of the Town.

A plan was devised that involved selling the accreted land to the Lowcountry Open Land Trust, a nonprofit corporation organized to preserve and conserve natural areas and dedicated to the preservation of scenic vistas and open spaces. In turn, the Land Trust would reconvey the accreted land back to the Town by deed with restrictions and enforcement rights. This two-step transfer of ownership was deemed "necessary to ensure enforceability of the restrictions and prevent a future Town Council with different motivations from changing or weakening the restrictions or doing away with them altogether." [ROA 80; Summary of Deed Restriction.] The plan also involved fundraising efforts to fund the Land Trust purchase of the accreted land. The transaction was authorized by the Town Council by ordinance in compliance with the law,[3] [ROA 81; Summary], and the Deeds were executed simultaneously on February 21, 1991. [ROA 84 & 96; Deeds Ex. 3 & 4.][4]

The Intended Purpose of the Deed from the Land Trust back to the Town

The primary purpose of the transfer and deed restriction plan was "maintaining the natural character of the property and protecting the [accreted land] from future development and

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construction of a "new front row" of houses would ever happen." [ROA 744; Town MIS Motion (right to a view), p. 6.]

[3]"The Town ordinance authorizing the transaction required a minimum of 3 readings and ratification by Town Council. The readings were completed in December 1990 and Town Council gave final approval in December as well (Town Ordinance Section 4-4.3)." [ROA 81; Summary of Deed.]

[4] In contemplation of the transfers, the accreted land was divided into eleven parcels which are specifically referenced in the Deed. This lawsuit applies only to parcels located in sections A, C, and E, inasmuch as parcels in B and D adjacent to Fort Moultrie and Sullivan's Island Elementary School, do not relate to any of the claims presented in this lawsuit. [See ROA 116 & 1024; Map, Exhibit 5 to Second Amd. Complt.]

commercialization." [ROA 80; Summary.] The 1991 Deed describes the accreted land as having "aesthetic, scientific, educational, and ecological value ***in its present state*** as a natural area which has not been subject to development or exploitation." [ROA 96; Deed (emphasis added).] The parties' intention is expressly stated in the 1991 Deed, as a "desire to place restrictions upon the Property [the accreted land] for the purposes of, inter alia retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants, or wildlife." [Id.]

In order to effectuate that intent to preserve the conditions on the accreted land as it existed in February 1991, the Deed specifically provides for methods of documenting that condition:

> "[N]atural, scientific, educational, aesthetic, scenic and recreational resource," as used herein shall, without limiting the generality of the terms, mean the condition of the Property ***at the time of this grant***, evidenced by:
>
> A) The appropriate survey maps from the United States Geological Survey, showing the property line and other contiguous or nearby protected areas;
>
> B) An aerial photograph of the Property at an appropriate scale taken as close as possible to the date hereof; and
>
> C) On-site photographs taken at appropriate locations on the Property;
>
> and other documentation, which documentation shall be sufficient to establish the ***condition of the Property as of the date hereof*** which documentation shall be maintained in duplicate by both the Grantor and the Grantee hereof and made available to interested members of the public upon reasonable request for purposes of enforcing the restrictions contained herein. [ROA 96; 1991 Deed (emphasis added).]

From these provisions it is readily apparent that the overriding intent of the Town and the Land Trust was to literally and figuratively take a snapshot in time and preserve the accreted land in the same condition ***as it existed in February 1991***, for the benefit of the property owners as well as the benefit of the entire Township.

The 1991 Deed Restrictions

The 1991 Deed contains express restrictions which serve the purpose and intent to preserve the accreted land ***as it existed in February 1991***, including the height and nature of the vegetation, and limits any efforts or action by the Town to alter the condition or character of the accreted property subject to limited conditions and requirements:

> 1. Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the Property ***shall remain in its natural state, no changes shall be made to its topography or vegetation and no structures or improvements shall be erected on the Property.***
>
> 2. Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, ***the Town Council is given the unrestricted authority to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean and providing views of the ocean and beaches to its citizens.***
>
> 3. Notwithstanding the provisions of Paragraph 1 hereof. and subject to the limitations of this Paragraph 3 and of Paragraphs 2 and 4, the Town Council of Sullivan's Island (the "Council") ***shall have the right to improve, change, modify or alter the Property only if such actions are to further or effect one or more of the following enumerated public objectives or policies*** ("Public Policies"):
>
> a) Drainage
> b) Mosquito control
> c) Public walkways and emergency access to the Atlantic Ocean
> d) Beach renourishment
> e) Erosion control
> f) Vegetation management
> g) Educational programs
> h) Public safety
> 1) Public health; and
> j) Scenic enhancement.
>
> Prior to taking any action affecting the Property to further or effect a Public Policy ("Public Action"), the Council shall make specific written findings of fact;
>
> 1) that the proposed Public Action is proposed solely for the purpose of furthering or effecting one or more of the enumerated Public Policies,

2) that the proposed Public Action is necessary for the health, safety or general welfare of the Town,

3) that the benefits of the proposed Public Action outweigh the damage done to the aesthetic, ecological, scientific, or educational value of the Property in its natural state, and

4) that in making its findings of fact, the Council has given due and reasonable consideration to

i) the cumulative effect of the proposed Public Action and past Public Actions on the natural state of the Property,

ii) the alternative methods, if any, of furthering or effecting the proposed Public Policy which do not impact adversely on the natural state of the Property, and

iii) the probable results of not taking the proposed Public Action.

The above described written findings of fact must be made prior to each individual Public Action relating to the Property and shall be specific to the circumstances of the proposed Public Action and not merely conclusive in nature. In no event shall any Public Action violate the provisions of Paragraph 4 hereof.

4. In all events, the following activities, improvements and structures shall be prohibited on the Property:

a) any building or structure with a roof

b) Asphalt pavement, concrete pavement or pavement of a non-porous material

c) electrical power lines, wires, conduit, stations or pads

d) sewer lines, pipes or lift stations

e) water lines, pipes or lift stations

f) commercial activities in any way related to the buying or selling of things, goods or services.

Notwithstanding the provisions of Paragraph 4(c), (d) and (e) the Council may allow utility easements for electrical, sewer and waterlines to cross through the Property, provided no utility services are provided as a result to any improvements on the Property.

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> 6. During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of law for any person to violate the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof. ***The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions.***

[ROA 96-99; 1991 Deed (emphasis added).] The Deed Restrictions have an initial 50-year term with provision for automatic renewal for additional periods of 50 years or until the restrictions are repealed by 75% vote of registered island voters AND unanimous approval of Town Council.[5]

The Town's Trimming Ordinances

As of the date of the 1991 Deed, the Town zoning ordinance provided that residents/owners of the front-row lots, such as owned by the Plaintiffs, could obtain permits to prune, cut and trim all varieties of trees and to a height of no less than three (3) feet without any restriction as to the time of year. [ROA 147; 1981 SI §21-39(A)(5).]

Just a few years later, the Town Council – with new members -- radically rewrote the trimming ordinance. [ROA 441; 1995 SI §21-39.] As rewritten, the ordinance added limitations on the time of year when trimming could be done and the species of trees that could be trimmed,

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[5] 8. These Restrictions may be modified or repealed only upon an affirmative vote of both (a) seventy-five (75%) percent of the registered voters of the Town who vote in the referendum held pursuant to the terms hereof, and (b) one hundred (100%) percent or the members of Town Council. For purposes of these Restrictions, a registered voter in the Town shall mean any voter eligible to vote in Town elections who is registered 30 days prior to the referendum held pursuant to the terms hereof. At least 45 days prior to any referendum held pursuant to the terms hereof, the Council shall adapt reasonable regulations concerning the manner of voting hereunder. Nothing herein shall prohibit the Council from adopting regulations which allow voting by ballot on a designated day or days or by circulation of written petitions over a period of time. [ROA 99; Deed.]

but most significantly, the Town changed the height limitation from three feet to seven feet.[6] [ROA 443; 1995 SI §21-39D, 21-39E.] Ten years later the Town again amended the trimming ordinance, most notably, changing the height limitation from seven to five feet. [ROA 451; 2005 SI §21-71C(3).]

Both the 1995 and the 2005 versions of the trimming ordinance expressly reference the limiting power of the 1991 Deed restrictions:

- There shall be no … destruction or removal of vegetation by any means except trimming and pruning of shrubs and trees as provided this ordinance, and no manmade changes to topography in an RC-1 area, ***except as is provided in the Title to Real Estate dated February 12, 1991, conveying said land to the Town of Sullivan's Island.*** [ROA 442; 1995 SI §21-39B (emphasis added).]

- The provisions of this Ordinance are applicable only to the RC-1 land area of the Town, and the Town of Sullivan's Island retains full authority of RC-1 land, ***subject to the conditions, restrictions, and covenants set forth in the Title to Real Estate dated February 12, 1991, conveying said land to the Town of Sullivan's Island.*** [ROA 445; 1995 SI §21-39P (emphasis added).]

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- The provisions of this Article are applicable to the RC-1 Area District of the Town. The Town of Sullivan's Island retains full authority over RC-1 Area District, ***subject to the conditions, restrictions, and covenants set forth in the Title to Real Estate dated February 12, 1991, conveying said land to the Town of Sullivan's Island.*** [ROA 451; 2005 SI §21-70 (emphasis added).]

- There shall be no … destruction or removal of vegetation by any means except trimming and pruning of shrubs and trees as provided this Ordinance, and no manmade changes to topography in an RC-1 area, ***except as is provided in the Title to Real Estate dated February 12, 1991, conveying said land to the Town of Sullivan's Island.*** [ROA 451; 2005 SI §21-71 (emphasis added).]

Even while expressly acknowledging the 1991 Deed restrictions, the Town proceeded to

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[6] The 1995 revision also added significant requirements and conditions, i.e. all trimming had to be performed by commercial contractors licensed by the Town for the specific purpose of trimming the vegetation on the Island, and the Town engaged a consultant to monitor and inspect the work performed under each permit. [ROA 443; 1995 Reg. § 21-39F, H.] The $250 permit application fee in addition to the cost of commercial contractors (who are required to be bonded), have greatly increased the cost of trimming and pruning.

make drastic changes to the trimming ordinance with a "we can do what we want to" attitude. The Town's brazen approach is evidenced in the Town's attempts to avoid the 1991 Deed restrictions and to eviscerate the property owners' rights with language purporting to denominate the trimming permits as an "accommodation" by the Town:

> The permits allowed in this Ordinance for the trimming and pruning of vegetation upon application of private landowners as set forth herein are not intended by the Town, and the Provisions of this Ordinance shall not be construed as granting to any private landowner the unrestricted right to trim and prune vegetation in the RC-l land. The trimming and pruning allowed in this Ordinance is granted as an accommodation to landowners living immediately adjacent to RC-IA, RC-IC or RC-lE areas, and the Town retains full authority to amend and/or revoke any portion of this Ordinance. [ROA 445; 1995 SI §21-39.1P.]
>
> ***
>
> The permits allowed herein for the trimming and pruning of vegetation upon application of private landowners as set forth herein are not intended by the Town, and the provisions shall not be construed as granting to any private landowner, the unrestricted right to trim and prune vegetation in the RC-l Area District. The trimming and pruning provided herein is granted as an accommodation to landowners living immediately adjacent to RC-IA, RC-IC or RC-lE areas, and the Town retains full authority to amend and/or revoke any portion of these provisions. [ROA 451; 2005 SI §21-71.]

As noted above, the two-step transfer in February 1991 was deemed "necessary to ensure enforceability of the restrictions and prevent a future Town Council with different motivations from changing or weakening the restrictions or doing away with them altogether." [ROA 80; Summary of Deed Restriction.] Unfortunately, as anticipated, a change in leadership of the Town Council with different agendas did come to power. Ironically, however, while the concern in 1991 may have been for changes that would allow development, the new leadership has revised the trimming ordinance to create an overgrown maritime forest previously unknown on Sullivan's Island oceanfront.

Photographic Documentation of the Condition of the Accreted Land in February 1991

A commonly-used adage that seems apropos in this case is that a picture can sometimes be worth a thousand words. In this case, a picture – or more specifically photographs – were expressly required as part of the Deed to document the condition of the accreted land as it existed in February 1991. Those photographs – which constitute a virtual snapshot in time -- are expressly intended to set the standard for the Town's obligations and the rights of the Plaintiffs as third-party beneficiaries of those Deed Restrictions. The Trial Court has acknowledged that: "Photographs exist reflecting the appearance of the AL in 1991. The Trial Court has also found that:

> The condition of the AL today is not in controversy and that the appearance differs from the exact way it looked in 1991; and
>
> Since 1991, nature has caused plants to grow higher on the Accreted Land such that it no longer looks as it did in 1991. [ROA 12; 7/30/15 Order.]

These findings are a vast understatement that reflects the Trial Court's misapprehension of the full extent of the current condition of the accreted land as evidence of the seriousness of the Town's breach of the Deed Restrictions.

The photographs clearly depict that in February 1991, all vegetation on the accreted land was no taller than three feet, and mostly consisted of sea oats and wild flowers. [ROA 116 & 1024; Exhibit 5 to Second Amd. Complt.][7] Those 1991 photos establish – beyond any reasonable argument – that the accreted land was **not** full of unchecked overgrowth. In shocking contrast, a series of photographs taken twenty years later in 2010 sadly show the drastic change that has occurred as the result of the Town's deliberate failure to abide by the Deed

[7] In addition, between 1992 and 1994, many photographs were taken by beachfront property owners which confirm the lack of tall vegetation and trees in the Accreted Land. See ROA 117 & 1025; Exhibit 6 to Second Amd. Complt.]

Restrictions in the 1991 Deed. These photographs depict the shocking and unchecked overgrowth that has completely obstructed, or imminently will obstruct, all views of and from the ocean and shoreline. [ROA 128 & 1036; Exhibit 7 to Second Amd. Complaint]. Every year the unchecked overgrowth on the accreted land becomes more of a problem, growing taller, thicker and more unmanageable.

The Impact of Overgrowth of Vegetation on the Accreted Land

At the time this action was filed, the Plaintiffs Nathan Bluestein and Ettaleah Bluestein resided in a front-row home at 2513 Atlantic Avenue on Sullivan's Island. The Plaintiffs Theodore Albenesius III and Karen Albenesius resided in a front-row home at 2411 Atlantic Avenue on Sullivan's Island. As noted above, in 1991, at the time of the transfer, the accreted land was comprised of sea oats and wildflowers, and the Plaintiffs' homes were oceanfront with scenic views of the shore and ocean breezes; however, over the next two decades, with the new trimming restrictions in place, the vegetation on the accreted land grew into a maritime forest.

In the summer of 2010, both sets of Plaintiffs applied to the Town for a permit to cut, trim and prune, at any time of the year, to a height of no less than three feet, all variety of shrubs and trees located in the portion of the accreted land immediately adjacent to their lot lines. The Town denied their applications despite the restrictions of the 1991 Deed. [ROA 144 & 148; Exhibits 9 & 10 to Second Amd. Complt.]

At the time of the filing of this action in 2010, the unchecked growth on the accreted land has resulted in public and private harms. As found by the Trial Court, the Plaintiffs are "third-party beneficiaries" under the Deed which permit them to seek enforcement of the Deed Restrictions. [ROA 10; 7/30/15 Order.] The overgrowth personally has deprived the Plaintiffs of the ability to reasonable use and enjoyment of their properties for normal and conventional

uses by substantially impairing and/or completely obscuring the view of the ocean from their front-row homes and diminishing the ocean breezes. The overgrowth also is obscuring the public views from the shoreline, and as well, the overgrowth has also created various forms of public and private dangers and nuisances, ranging from fire hazards, mosquitos, and varmints including raccoon, snakes, rats, and coyotes.

Apart from the impairment of the Plaintiffs' personal enjoyment of their home, the overgrowth also has damaged them financially. At times previous, both Plaintiffs' properties were appraised, assessed and classified as "beach front and ocean view" property by the Charleston County offices, and taxes were being paid on those values. However, Thomas F. Hartnett, G.A. A, C.B., a South Carolina Certified General Real Estate Appraiser has expressed the opinion that the unchecked vegetation growth in the accreted land has reduced in fair market value the Plaintiffs' properties by at least one million ($1,000,000.00). [ROA 152; Hartnett letter – Exhibit 14 to Second Amd. Complt..]

ARGUMENT

Summary Judgment Standard

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. Rule 56, SCRCP. In determining whether any true triable issues of fact exist, the court should view the evidence, and all reasonable inferences that may be drawn from the evidence, in the light most favorable to the non-moving party. On appeal from a grant of summary judgment, the appellate court applies the same standard that governs the trial court under Rule 56, SCRCP. Vaughan v. Town of Lyman, 370 S.C. 436, 440, 635 S.E.2d 631, 633-34 (2006).

As a settled proposition of appellate law, no appeal may be taken from the denial of a motion for summary judgment. Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) (the denial of summary judgment is not directly appealable or reviewable on appeal from final judgment). Accordingly, the Plaintiffs would not otherwise be allowed to challenge the denial of their own motion for summary judgment. However, Plaintiffs directly challenge that order and seek review of the Trial Court's findings of fact and conclusions of law made by the Trial Court in its Order Denying Plaintiffs' Summary Judgment Motion Regarding Breach of Contract to the extent that they mirror the findings and conclusions in the Trial Court's other orders granting summary judgment to the Town.

Applicable Law – Interpretation and Enforcement of Deed Restrictions

The Plaintiffs do not assert any common law right to an easement of unobstructed ocean view, breezes, light, or air. *See* Hill v. The Beach Co., 279 S.C. 313, 306 S.E.2d 604 (1983); Bailey v. Gray, 53 S.C. 503, 515-517, 31 S.E. 354, 358-59 (1898); O'Shea v. Lesser, 308 S.C. 10, 18, 416 S.E.2d 629, 633 (1992). However, "right to a view" may be created by contract:

> As a general rule, a landowner has no natural right to air, light or an unobstructed view and the law is reluctant to imply such a right. Such a right may be created by private parties through the granting of an easement or through the adoption of conditions, covenants and restrictions or by the Legislature. Local governments may also protect views and provide for light and air through the adoption of height limits.

Pacifica Homeowners' Assn. v. Wesley Palms Ret. Cmty., 178 Cal. App. 3d 1147, 1152, 224 Cal. Rptr. 380, 382 (Ct. App. 1986) (citations omitted).

The Plaintiffs' claims are based in contract under the 1991 Deed. The central purpose of this action is to force the Town to abide by the Deed Restrictions to preserve the accreted land in the condition that it existed in February 1991, or in the alternative, to compensate the Plaintiffs for their damages from the breach. The Court has long recognized the value of restrictive deed

restrictions and enforced them accordingly to their terms to effectuate a grantor's intent. See e.g. Abbott v. Arthur, 261 S.C. 31, 43, 198 S.E.2d 261, 267 (1973). The focus of the claims turns on the Town's revised trimming ordinances that have resulted in violation of the Deed Restrictions by allowing excessive overgrowth of the vegetation that has drastically changed the condition of the accreted land from how it existed in February 1991.

This is an equitable matter that presents questions of law:

> The interpretation of a deed is an equitable matter. The construction of a clear and unambiguous deed is a question of law for the court. The determination of whether language in a deed is ambiguous is a question of law.

Penza v. Pendleton Station, LLC, 404 S.C. 198, 204-05, 743 S.E.2d 850, 853 (Ct. App. 2013)(citations and quotations omitted). On review of a trial court's ruling in an equitable matter, the standard is de novo and the appellate court may review determine the facts in accordance with its own view of the preponderance of the evidence. K & A Acquisition Grp., LLC v. Island Pointe, LLC, 383 S.C. 563, 682 S.E.2d 252, 256 (2009); Slear v. Hanna, 329 S.C. 407, 410-11, 496 S.E.2d 633, 635 (1998).

There are two well-settled principles applicable to interpretation and enforcement of these Deed Restrictions. Wayburn v. Smith, 270 S.C. 38, 41-42, 239 S.E.2d 890, 892 (1977)("In the construction of this deed, we are guided by two settled rules of law.") "First, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." Id. (citation omitted). This is a corollary to the basic contract rule that when an agreement comes before the court for interpretation, the main concern of the court is to give effect to the intention of the parties. Id. (citation omitted). In this case, by virtue of the two-step transfer, the Town is both the grantor and the grantee, but as the originator of this plan, the Town's intent is key.

The second principle is that the Town's intention must be found within the four corners of the deed. Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 583 (2009). "[T]he intention the deed must be construed as a whole, and effect given to every part thereof, if such can be done consistently with law." Id. (citing Wayburn, supra.) As stated in Arrants v. Rankin, 268 S.C. 567, 570-71, 235 S.E.2d 135, 136 (1977), in construing such covenants/restrictions: "It is proper to consider the overall plan. Such intent should, as nearly as possible, be gleaned from the instrument itself. However, the circumstances surrounding the origin of covenants should also be considered." (Citing Cheves v. City Council of Charleston, 140 S.C. 423, 138 S.E. 867 (1927)).[8] The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation. In such case, the court may take into consideration the circumstances surrounding its execution in determining the intent. Penza, id. (citations omitted).

> [I]f a meaning can be obtained thus giving effect to every word in the paper then that is the legal intention without further ado. If, however, there is ambiguity, then resort may be had to other rules, seeking still the main purpose of ascertaining the intention. But the deed must first be read in the light of all the surrounding circumstances

Wallace v. Quick, 156 S.C. 248, 153 S.E. 168, 174 (1930).

The Plaintiffs maintain that the Town's intent is expressly stated in the Deed, wherein it is stated:

> WHEREAS, the parties desire to place restrictions upon the Property for the purposes of, inter alia, retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants, or wildlife, and

[8] In Arrants, the Supreme Court held that "the lower court erred in determining intent from the instruments alone. It may develop that the instruments are controlling, but the plaintiffs should be allowed to develop their case by presenting additional evidence of the surrounding circumstances, etc." Id. at 137.

> WHEREAS, "the natural, scientific, education, aesthetic, scenic and recreational resource," as used herein shall, without limiting the generality of the terms, mean the condition of the Property at the time of this grant, ...: [ROA 96; Deed.]

The Deed Restrictions, when read consistently with that intent, support the Plaintiffs' claims for enforcement in regards to trimming vegetation on the accreted land to preserve its prior condition because the maritime forest that the Town has allowed to grow up on the accreted land certainly did not exist when the transfers were executed in February 1991. In addition, the overall plan for this two-step transfer orchestrated by the Town with the Land Trust, and the circumstances surrounding the origin of Deed Restrictions, fully support the intent expressed in the Deed, which is to preserve the condition of the accreted land as it existed in February 1991. In particular, as part of the Town's transfer plan, the Town documented its intent in its official Summary of Deed Restrictions, which discusses the importance of preserving the scenic views and also discusses the intent to prevent future changes in Town's political power structure from undoing the transaction.

Unfortunately, the Trial Court has ignored or misapprehended the applicable rules of construction and the clear, express intent of the Town as stated in the Deed and official Town documents accompanying the two-step land transaction. And, sadly, the powers that be, through changes in the Town political structure, have undone what the 1991 Town Government worked so diligently to avoid. The accreted land has been changed from a scenic jewel of sea oats and wildflowers with scenic views and sea breezes to a maritime forest creating nuisances and safety issues and obscuring scenic views -- both the ocean views from the front-rows home and the views from the beach and shoreline. The Trial Court has also misapprehended or overlooked that the right to an ocean view has been legally recognized as a unique component of coastal property rights through the property tax jurisprudence. Properties are identified by the unique

aspects of their ocean frontage and ocean views as specific designations which have identifiable monetary values – values that affect not only the taxable values, but also the overall market value of the properties. The Plaintiffs respectfully submit that the Trial Court's orders should be reversed and this case remanded for further proceedings on the claims to enforce the Deed Restrictions or trial on damages for the breach.

I. THE DEED RESTRICTIONS ARE INTENDED TO PRESERVE THE CONDITIONS OF THE ACCRETED LAND, INCLUDING THE SIGNIFICANT AND VALUABLE SCENIC VIEWS, IN THE SAME CONDITION AS THEY EXISTED IN FEBRUARY 1991.

The Trial Court held that: "The Deed Restrictions Do Not Promise the Plaintiffs a View and Do Not Promise that the Town's Vegetation Trimming Ordinances Will Remain Unchanged." [ROA 38; 7/30/15 Order.] In so holding, the Trial Court has overlooked and misapprehended the facts and misapplied various legal principles. Most significantly, Trial Court fails to comprehend that the Deed Restrictions – at their core – restrict and obligate the Town to preserve the accreted land in the same condition as it existed in February 1991. That "promise" or obligation is intended to provide views of the ocean from inland and views of the accreted land from the beach and shoreline. And, even if there be no explicit promise that the trimming ordinances would remain unchanged, there are restrictions and conditions which do prohibit the Town from taking the actions that have allowed a maritime forest to grow in the accreted land – a drastic difference in condition from February 1991.

A. The Town's right to trim as provided in Paragraph 2 does not foreclose the Plaintiffs' claims for enforcement of the Deed Restrictions to preserve the condition of the accreted land as it existed in February 1991.

Paragraph 2 of the Deed Restrictions reads:

> Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given the unrestricted authority to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean, and

providing views of the ocean and beaches to its citizens.

The Trial Court has held that "Paragraph 2's phrase "unrestricted authority" conclusively settles this dispute in the Town's favor." [ROA 39; 7/30/15 Order.] However, the Trial Court fails to read the "unrestricted" language in context with all the provisions and in light of the overall plan and intended purpose of the Deed.[9] Arrants v. Rankin, supra.

Also, ironically, but unappreciated by the Trial Court, is that the real problem is that the Town is not trimming (or allowing trimming). The Town has offered no proof that the limited trimming policy and the resultant overgrowth is intended, or in fact, serves the purposes of mosquito control, scenic enhancement, beach access, or ocean views To the contrary, the allegations and evidence are that the overgrowth has worsened the mosquito conditions, and marred the scenic enhancement of the ocean views.

The Trial Court has taken an unreasonable myopic view of the "scenic view" provisions in the Deed, noting that:

> The deed summary clearly indicates that "scenic value" refers to the view of the AL from the beach. Further, if "scenic enhancement" meant "ocean view" there would be no purpose in separately describing the two purposes within Paragraph 2 of the deed. Notably, no other paragraph refers to ocean views. Thus, this case revolves around Paragraph 2. [ROA 9; 7/30/15 Order.]

The Plaintiffs maintain that they have a right to view of ocean over and across the accreted land, while the Town has taken the position – accepted by the Trial Court -- that the "view" protected by the Deed Restrictions is the public's view of dunes on the accreted land from the shoreline. Whether viewed from the perspective of either the homeowner sitting on his porch or the citizen walking on the beach, the key component is that the preeminent intent of the Town in the two-step transaction that was formally memorialized in the Deed was to preserve the accreted land in

[9]The "unrestricted" right to trim is also limited by ¶4, which happens not to be applicable in this situation.

the condition as it existed in February 1991. "Scenic Views and Open Spaces" were specifically identified by the Town as a "Very Significant" component they intended to preserve:

> The scenic value of this property is due to its visibility from the Atlantic Ocean and the public beach. Open space values derive from the undeveloped natural character of the entire property. These conservation values are protected by the limitations on subdivision, building and commercial use. [ROA 81; Summary.]

In February 1991, beachgoers strolling along the shoreline had a view of low-growing sea oats and wildflowers, and the property owners, such as these Plaintiffs had a corresponding view of the beach over that accreted land. Neither the homeowners nor the beachgoers had a view of a maritime forest that now exists. By no rational argument can anyone contend that the accreted land is currently in the same -- or any reasonably comparable -- condition as it existed in February 1991. Under the well-settled rules on interpretation of contracts and deeds, the only reasonable interpretation of Paragraph 2 is that the Town may have "unrestricted authority" to trim – to the standards as they existed in 1991 – but not to change the standards to impair the ocean views and allow uncontrolled growth of a maritime forest that not only impairs the view, but creates a nuisance in other serious respects.

B. Paragraph 6 of the Deed does not authorize the 1995 and 2005 Ordinances as "more restrictive" ordinances.

The Trial Court also rests its ruling on Paragraph 6 of the Deed which contains the language: "The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Regulations or which are not inconsistent with these Restrictions." The Trial Court erroneously reasons that the 1995 and 2005 trimming ordinances are authorized as "more restrictive" because they allow less cutting than did the 1981 ordinance. However, in so holding, the Trial Court's perspective is skewed. The language must be construed in the context of the core intent of the Deed Restrictions and "not inconsistent" with all the

Restrictions. *See* Wayburn v. Smith, supra. The Trial Court's construction to allow the Town to limit trimming and allow overgrowth does not serve the intent of the Deed to preserve the accreted land in the condition as it existed in February 1991. In the proper context, the "more restrictive" provision of Paragraph 6 might allow the Town to limit the trimming to shorter – but not taller – heights.

In construing the 1995 and 2005 ordinances as "more restrictive," the Trial Court apparently finds that the Plaintiffs have somehow conceded or stipulated that the 1995 and 2005 Deed Restrictions are "more restrictive." [ROA 36; 7/30/15 Order #11, p. 6.] On this point, the Trial Court states that "the entire basis of the Plaintiffs' complaint is that the current rules are "more restrictive" and cites to Paragraph 36 of the Second Amended Complaint and isolated pages from the Deposition of Plaintiff Nathan Bluestein. [ROA 589; Depo p. 71, lines 14-18.] However, Paragraph 36 of the Second Amended Complaint makes no such concession:

> 36. Acting under the guise of its legislative and executive powers, Defendants enacted, and have since enforced, ordinances in 1995 and 2005 pertaining to the management of the Accreted Land. [ROA 58.]

The cited deposition testimony excerpt reads:

> Q: That is a good solution. So, would you agree with me that with regard to the cutting rules the 1995 ordinance, that makes you cut at seven feet, is more restrictive than the 1981 ordinance that allowed you to cut at three feet?
>
> A: Yeah, definitely. [ROA 589; Dep.]

Mr. Bluestein's isolated answer to a leading question does not amount to a concession that the Town can allow the accreted land grow into a jungle or a conclusive admission negating the Plaintiffs' entire claims, particularly, where Mr. Bluestein's immediate next answer stated: " I can't give you an answer, because I don't know the laws." [ROA 590; Dep. 77/11-12.] The issue is one of perspective, while the Town takes the position that its 1995/2005 trimming ordinances

are allowed as "more restrictive," the Plaintiffs steadfastly maintain that the phrase "more restrictive" cannot – in light of the core purpose of the Deed Restrictions -- be read to restrict trimming to allow growth beyond the three foot limit in place in 1991.

As yet another ground for dismissing the Plaintiffs' claims, the Trial Court held that the 1981 trimming ordinance in effect at the time of the 1991 Deed did not give the Plaintiffs any absolute right to cut vegetation to three feet. In so holding the Trial Court reasoned that the 1981 ordinance was subject to the Zoning Administrator's discretion where the "the cumulative effect of the trimming, cutting or pruning shall not be detrimental to the safety, welfare, and health of the people of the Town." [ROA 17.] However, the Trial Court acknowledged that such permit requests had been granted routinely by the Town, and the Town expressly acknowledged the right to trim under the 1981 Ordinance in its trial memorandum:

> The 1981 zoning ordinance allowed property owners that were adjacent to the Town's land to obtain a permit to trim the vegetation on the Town's land. The 1981 ordinance allowed this cutting to reduce vegetation down to a height of three (3') and allowed all species of plants to be cut. The 1981 ordinance thus allowed the vegetation to be given a "flat top"."

[ROA 743; 2/28/2014 MIS of motion on "right of view", p. 5.] Ultimately, the speculation of whether the Zoning Administrator might deny permit requests under the 1981 ordinance does not justify the Trial Court's dismissal of the claims based on the Deed Restrictions which were part of a plan that the Town not only voluntarily executed, but initiated for the very purpose of preserving the accreted land in the condition it existed in February 1991.

C. The Deed Restrictions do not impair the Town's legislative power.

In dismissing the Plaintiffs' claim, the Trial Court held "reading the contract in the manner advocated by the Plaintiffs would violate South Carolina's case law on impairment of legislative power," relying upon Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 131-32, 459

S.E.2d 876, 880 (Ct. App. 1995), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996). [ROA 16; 7/30/15 Order.] In Piedmont, the Supreme Court affirmed the holding of the Court of Appeals that a municipal entity could not enter a 20-year employment contract because the appointment and removal of public officers is a governmental function and no contract in such regard could extend beyond the term of the governing members of the municipality. In this case, there is no employment contract and the reasoning of that opinion does not support the Trial Court's conclusion that the Town Council had no authority to make binding covenants in the Deed Restrictions.

In contrast to the employment contract case of Piedmont, the Supreme Court has upheld the city was bound to certain real estate covenants to fill certain low land and pave a boulevard, a driveway and sidewalks in the above cited case of Cheves v. City Council of Charleston, supra. Although the decision does not indicate a challenge was made to the city's authority to bind its successors, the Court's language is compelling: "The city council ... is bound by the contracts in these cases and that subsequent acts of the Legislature, or ordinances of the city council of Charleston, cannot operate to permit the defendant to impair the obligations of tits preexisting contracts, regularly made and authorized." 138 S.E.2d at 868.

This is a deed transferring property, and state law, S.C. Code Ann. § 5-7-40, authorizes the Town to own and possess and leave or sell property without limitation as to any time limits. In this case, the term for the Deed Restrictions is for 50 years, and while that might be considered unreasonably long for an employment contract, in the law of real estate, it is not generally considered unreasonable.

In the Piedmont case, the Supreme Court cited to a decision from the North Carolina Supreme Court in Plant Food Co. v. City of Charlotte, 214 N.C. 518, 199 S.E. 712 (1938),

wherein that court upheld and enforced a contract where the city agreed to deliver sludge from a sewage disposal plant for 10 years. The North Carolina court rejected the contention that contract impaired the city's discretionary powers and could not bind a subsequent administration, and held that the contract was valid and binding. There is another decision from the North Carolina Supreme Court that is of interest and supports enforcement of the Deed Restrictions in this case, namely, Dudley v. City of Charlotte, 223 N.C. 638, 27 S.E.2d 732 (1943). There, the city took title to a parcel of land and a right of way from certain organizations, making covenants to build a bridge and limiting the use of the parcel. When citizen/neighboring homeowners sought to enjoin the city, the court upheld the city's promises against a challenge that the prior administration could not bind their successors.

The following language from the court in McDonough v. City of Rosemount, 503 N.W.2d 493, 497 (Minn. Ct. App. 1993), speaks profoundly as to the Town's obligations and the error of the Trial Court's ruling:

> 'A municipality must perform its valid contracts the same as an individual or private corporation.' 10A Eugene McQuillan, The Law of Municipal Corporations § 29.119 (3d ed. rev. vol. 1990); see *Ketterer v. Independent Sch. Dist. No. 1*, 248 Minn. 212, 221, 79 N.W.2d 428, 435 (1956) (where city enters into contract of business nature, common principles of law applicable to private persons apply). If a municipality has revoked its contract, the other party may sue for breach. 10A McQuillan, supra, § 29.120. When a council authorizes the purchase of land, and the purchase is made pursuant to such authority, a subsequent council may not repudiate the contract, regardless of a change of membership. Id. Generally, sovereign immunity does not apply to contractual obligations. Id. § 29.123.

By the same reasoning, these Deed Restrictions should also be held valid and binding. This real estate transaction was thoughtfully considered by the Town Council in 1991 and duly approved and executed under seal. Promises were made and actions taken in reliance on those promises. It is simply untenable that the Town can simply walk away from the Deed

Restrictions because of a change in Council members after an election.

D. The Land Trust Annual Reports do not conclusively establish the Town's compliance with the Deed Restrictions so as to foreclose the Plaintiffs' third-party enforcement rights.

As an additional ground for granting summary judgment, the Trial Court held that the Land Trust – as Grantor – has made annual inspections and issued written reports that the Town is in compliance with the Deed Restrictions. The Trial Court erred in relying on such evidence because the Land Trust is not the only party with interests enforceable under the deed/contracts. Further, the annual reports -- noting in the most general way that the Town is in compliance and failing to take note of the serious problems associated with overgrowth – do not amount to an admission, concession, or stipulation binding upon the Plaintiffs that the Town is not in breach of any aspect of the Deed Restrictions. These Plaintiffs are third-party beneficiaries with separate and independent rights to seek enforcement of the Deed Restrictions, and Trust/Grantor's annual inspections and reports are not binding or conclusive to preclude these Plaintiffs from pursuing the claims of breach/noncompliance in the Court.

There is no privity between the Plaintiffs and the Land Trust that would bind them to the Land Trust's opinion that there was no violation of the Deed Restrictions. *See* Trial Handbook for South Carolina Lawyers § 18:5 ("A judicial admission made by one party is not binding upon coparties unless they consent to it or there is privity between them."); 29A Am. Jur. 2d Evidence § 780 ("There is authority that the admissions of a party are not admissible against his or her co-parties, unless they consent to it, adopt the admission as their own, or there is privity between the parties making the admission and the coparties.") (footnotes omitted).

As express third-party beneficiaries, the Plaintiffs' rights are direct, not merely derivative, and they are not subject to any defense based on the Land Trust's

admissions/concessions/waivers that might arguably be founded on the annual reports. *See* Barringer v. Fid. & Deposit Co. of Maryland, 161 S.C. 4, 159 S.E. 373, 375 (1931) (surety's wavier of notice of default by contractor did not have any bearing on the right of materialman as third-party beneficiary; and release of bond by the contracting parties did not preclude third-party action); *see also* Restatement (Second) of Contracts § 309 (1981)[10]("[T]he beneficiary's right against the promisor is not subject to claims and defenses of the promisee against the beneficiary unless the contract so provides."); Bozzio v. EMI Grp. Ltd., 811 F.3d 1144 (9th Cir. 2016) (third-party beneficiary who had independent cause of action on contract could bring action for breach of contract against promisor even when promisee was suspended corporation without capacity to sue). Here, there is nothing in the 1991 Deed that pertains to the Land Trust making annual inspections or providing that the Land Trust's observations would be conclusively binding on the third-party beneficiaries. At most, the Land Trust annual reports might be some evidence of the Town's compliance, but they do not automatically preclude the Plaintiffs from claiming and proving that the Town is in breach.

E. The existence of the Bayonne Avenue Extension does not relieve the Town from its obligations to comply with the Deed Restrictions on the accreted land.

The Trial Court accepted the Town's argument that the Plaintiffs have no viable claim to a right to a view and cannot enforce the Deed Restrictions on the ground that their views of the ocean will not be completely restored because the Deed Restrictions do not apply to a parcel of

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10 (3) Except as stated in Subsections (1) and (2) and in § 311 or as provided by the contract, the right of any beneficiary against the promisor is not subject to the promisor's claims or defenses against the promisee or to the promisee's claims or defenses against the beneficiary.

(4) A beneficiary's right against the promisor is subject to any claim or defense arising from his own conduct or agreement.

Town-owned between the Plaintiffs' properties and the accreted land – referred to as the Bayonne Avenue Extension. [ROA 741-743; Town's MIS Defendants' Motion for Summary Judgment on All Causes of Action Due to Plaintiff's Lack of Any Right to Control or Look Over Neighboring Parcels, 2/28/14, pp.3-5.] The Trial Court reasoned that the Plaintiffs cannot prove a claim because such right would not include the right to a view across the Bayonne Avenue Extension strip that lies between the Plaintiffs' property and the accreted beachfront property:

> There is nothing that would legally stop the Town from constructing a parking garage, wall, or hedgerow on the Bayonne Avenue Extension property, thus totally cutting off Plaintiffs' ability to even see the deed-restricted portion of the Accreted Land. Since the Plaintiffs' possess no legal right to look across Bayonne Avenue Extension to see the most inland edge of the deed-restricted portion of the AL, they cannot claim any right to look all the way to the far side of the AL to get an ocean view. [ROA 14; 7/30/15 Lack of View Order, p. 8.]

The Trial Court's ruling is incorrect and based on a misapprehension of the facts and illogical faulty reasoning. The Trial Court erred in finding that there is some separate parcel that lies between the Plaintiffs' front-row lots and the accreted beachfront property, and the Trial Court erred in considering the potential for partial obstruction of their scenic views on other properties.

First, irrespective of the existence of the Bayonne Avenue Extension, it does not negate the Plaintiffs' right to enforce the covenant/promise on the accreted land which stands independently of any supposed obstruction of their ocean views that might arise on that strip of property. In particular, the extension would not affect the view of the accreted land from the shore. "A party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or by a third party." Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 593, 493 S.E.2d 875, 879 (Ct. App. 1997). The Town cannot avoid its obligations under the 1991 Deed where no point of fact or law connected with the Bayonne Avenue Extension issue would render its compliance impossible as to the accreted

land subject to the Deed Restrictions. Further, the Deed does not contain any provision that would limit the property-owners rights to enforce the restrictions only if there would be "a materially improved view."

Second, it is unclear on the record as to the official existence of any such Bayonne Avenue Extension. The Town argued that:

> The portion of the Town's parcel 087 lying closest to the Plaintiffs' lots is an unpaved section generally available for the Town (public) to use to extend the length of Bayonne Ave. There are no deed restrictions on this portion of the parcel. See Exhibit 4 to Amended Complaint. The remainder of Parcel 087 is subject to various deed restrictions as well as to Federal, State and Local law. [ROA 743; Town MIS, p. 5.]

However, neither the 1991 Deed nor the incorporated Exhibits A (parcels descriptions) and Exhibit B (plat) evidence that Parcel 9 – TMS 529-1000-087 of the accreted land, which lies in front of the Plaintiffs' properties, has any subdivision or any provision exempting such a portion from the Deed Restrictions. There is a portion of Parcel 9 –locally known as the Bayonne Avenue Extension – which has been left undeveloped and there is no vegetation obstructing the views on in that area. But, the prospect that the Town could build on the strip, and thereby obscure the Plaintiffs' view of the ocean, is rank speculation of the most absurd kind. There are various legal, practical, and political hurdles to stop the Town from constructing a parking garage, wall, or hedgerow on the Bayonne Avenue Extension property that would totally cut off Plaintiffs' view of the ocean. Such speculation also is wholly inconsistent with the Trial Court's finding in a separate order that: "The Plaintiffs occupy 'front row' lots on Sullivan's Island, meaning that no other buildable lots exist between Plaintiffs and the ocean." [ROA 23; 7/30/15 Order Granting Defendants' Motion to Strike Damages Claim Due to Location of OCRM Critical Line, p. 2. *See also* ROA 741; Town's MIS, p. 3.]

II. THE LOCATION OF THE OCRM LINE AND THE NEED FOR AN OCRM PERMIT DOES NOT NEGATE THE PLAINTIFFS' CLAIMS TO ENFORCE THE DEED RESTRICTIONS AGAINST THE TOWN.

OCRM Regulatory Background

As has become routine in our ever increasing bureaucratic world, a Town-trimming permit is not the only permit required for trimming vegetation on the accreted land. There are also State regulations that control trimming in a designated coastal region known as the "Critical Line." Under S.C. Code § 48-39-10 (J), the "critical area" is ... "(4) beach/dune system which is the area from the mean high-water mark to the setback line as determined in Section 48-39-280." In stable or accretional areas, the setback line is located 20 feet landward of the baseline. The critical line is adjusted and moves periodically in ten-year cycles.[11] *See* S.C. Code 48-39-280(C). Regulation of the Critical Area is handled by the S.C. Department of Health and Environmental Control (SCDHEC), through the Coastal Division of the Department of Health and Environmental Control. S.C. Code Ann. § 48-39-35.

The Trial Court's misapplication of the OCRM Regulations to the Plaintiffs' Claims.

By separate order, the Trial Court granted the Town's motion to strike the damages claims due to the location of the Critical Line, because the Plaintiffs have not applied for or obtained a trimming permit from the OCRM:

> Plaintiffs can presently establish no damages against the Town because, regardless of whatever Town ordinance might exist, the vegetation Plaintiffs complain about lies within the OCRM "Critical Zone". Since the Plaintiffs lack a cutting permit from the State Coastal Council, the Plaintiffs cannot legally cut as desired no matter what Town permission might be issued and no matter what Town ordinance might be on the books. The Town's ordinance cannot have "damaged" the Plaintiffs or "taken" anything from them in light of this.
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> ***

[11] Of interest, and not coincidently, is the fact that the critical line was first established in 1991 – the same year that the Town executed the Deed. See S.C. Code Ann. § 48-39-280(C).

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

[ROA 22, 25; OCRM Order 7/30/15, p. 1, 4.] The Trial Court also struck the Plaintiffs' claim for damages on their Contract Clause claims[12] in its Order on the OCRM issue, on the same reasoning stating:

> **Impairment of Contract**
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> The Plaintiffs claim that the Town's ordinance amendments restrict cutting on the Accreted Land in a way that -impairs- the value of pre-existing deed restrictions because the Town's ordinance stops them from certain cutting. See Para. 128 - 133. As with every other cause of action, the problem is that the Plaintiffs lack OCRM permission to cut. Consequently, whatever diminished view they complain about would be basically unchanged even if the Town repealed the ordinance. This makes clear that the Town ordinance cannot have caused damage to the Plaintiffs. Any such claim for damages is stricken. [ROA 27; OCRM Order p. 6.].

In so holding, the Trial Court misapprehends the facts and law regarding the vegetation in question and the OCRM lines.

In striking the Plaintiffs' claims for damages, the Trial Court relied on a letter written by the Chief Counsel for DHEC to Counsel for the Plaintiffs on January 24, 2014, which the Court found "clearly demonstrates that Plaintiffs do not have the required State permissions. [ROA 26; OCRM Order.] However, the Trial Court misapprehends the import of that letter and the Regulations cited therein.

The Chief Counsel, offering comment on the Plaintiffs' Second Amended Complaint, wrote:

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[12]By their Second Amended Complaint, the Plaintiffs asserted a claim for violation of the Contract Clauses of the S.C. and U.S. Constitutions, S.C. Const. art. I, § 4 and U.S. Const. art. I, § 10, cl. 1. [ROA 76-77; Second Amd. Complt. ¶¶127-133.]

> Although I do not know the extent of your clients' desires to cut, trim and prune the shrubs and trees seaward of their homes, I would invite your attention to S.C. Regulations §30-11D(6). This regulations prohibits *"[t]he destructions of beach or dune vegetation seaward of the setback line ... unless there is no feasiable alternative."* Furthermore, S.C. Regulation §30-21F(4) states that *"[a]ny activity that will disturb the beach or dune vegetation within the critical area requires a Coastal Council permit."* I mention these regulations in an effort to help your clients avoid violating them if they prevail in the above-referenced action.

[ROA 359; Churdar/DHEC letter 1/24/14.] DHEC Counsel did not state that there is an absolute prohibition that would prevent the Plaintiffs from obtaining the necessary OCRM permits; rather, he simply invited attention to the state regulatory process – of which the Plaintiffs were already aware.

Further, the Trial Court misapprehends the Regulations cited by the DHEC Chief Counsel in several important aspects. First, under S.C. Regulation § 30-11D(6), trimming of vegetation is not totally prohibited; rather, it addresses destruction – not trimming – and the regulations may even allow "destruction" under the appropriate showing. Additionally, while S.C. Regulation §30-21F(4) provides that a Coastal Council permit must be obtained to allow disturbance of the dunes in the setback zone, such may be allowed with mitigation. Thus, it is a ***discretionary*** decision for OCRM to issue a permit depending on the facts and circumstances shown on an application at the time it is made. The Trial Court has no basis for presuming that the Plaintiffs will not be able to obtain OCRM trimming permits – if they can ever apply for one.

Perhaps most significantly, the Court misapprehends or ignores that these Plaintiffs cannot even apply for a OCRM "cutting permit" without the Town's permission. Under S.C. Regulation 30-2, in order to receive a permit from OCRM for non-exempt activities seaward of the setback line, an application must include: "A certified copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the proposal." The Plaintiffs do not own the accreted land and the

Town, as owner, will not give permission. Notably, even the DHEC Chief Counsel's advice is premised on the Plaintiffs prevailing in this litigation.

In an incredulous argument, the Town contended before the Trial Court that the Plaintiffs should have submitted the Deed to the OCRM as proof of their right to cut, but the law does not require a party to attempt a futile act. Carmichael v. Dan Nance Corp., 274 S.C. 357, 361, 264 S.E.2d 601, 603 (1980)(" Equity will not require the doing of a futile task, nor foreclose the rights of a party from obtaining specific performance for failure to do something which in view of all the facts would have been useless.") The OCRM would not be the proper venue to litigate the rights under the Deed; rather, that is what the Plaintiffs are doing in this very litigation. And, the fact that the Plaintiffs have not applied for or received an OCRM permit to trim on the accreted land in the Critical Line does not defeat their claims.

The Trial Court also overlooks the point that the location of the Critical Line is subject to revision periodically as set forth in §48-39-280(C). The fact is that the line is supposed to be at the primary dune, but it has been more than 10 years since the last statutorily-mandated redrawing, and the line is now over 200 yards from the primary dune. The line is due for redrawing in the near future, which is another reason that the Trial Court should not have dismissed the claim on this point.

In addition, the Trial Court misapplies the fact that not all of the accreted land lies in the OCRM Critical Line (as it currently exists), stating:

- "[W]hatever diminished view they complain about would be basically unchanged even if the Town repealed the ordinance." and
- "The problem is, the OCRM rules mean that the Plaintiffs could not perform meaningful cutting whether the Town ordinance existed or not. Since one could ignore the Town

ordinance entirely and the Plaintiffs would still not have a materially improved view, one cannot say that the Town has damaged the Plaintiffs." [ROA 26; OCRM Order.]

The fact that the Plaintiffs might not be able to obtain an OCRM permits for trimming on all accreted land between their property and the shoreline does not negate their rights to trimming on the accreted land outside of the Critical Line.

As discussed above in relation to the Bayonne Avenue Extension issue, any impediments to the scenic views from other sources does not relieve the Town of its obligations under the Deed Restrictions, and nothing in the Deed contains any provision that would limit the property-owners rights to enforce the restrictions only if there would be "a materially improved view." In the above cited case of Hawkins v. Greenwood Dev. Corp., supra, the defendant developer tried to avoid its contractual obligation with an argument that compliance was impossible because the South Carolina Coastal Council and Army Corps of Engineers denied its application for a wetlands permit. In holding that defendant's performance was not excused as impossible, the Court of Appeals noted evidence that "it would be difficult, but not impossible, to obtain the required permits." 493 S.E.2d at 879. *See also* Carras v. Birge, 211 S.W.2d 998, 1002 (Tex. Civ. App. 1948)("simply relying on what some City official said—that a permit could not be presently issued and that the building could not be erected until the area was zoned—presents no legal ground to hold that the permit could not have been secured, or that the contract was void).

In this case, lack of an OCRM permit cannot justify dismissal of the Plaintiffs' claims where the State permitting process is being road-blocked by the Town's lack of cooperation and blatant refusal to give permission. *See* 17A Am. Jur. 2d *Contracts* § 677 (impossibility excuse is subject to the requirement that the promisor is not at fault); 17A Am. Jur. 2d *Contracts* § 680 (denial of government permit does not excuse performance where party did not show diligence in

trying to obtain the government's consent). Also applicable is the principle that, even where some part of contractual obligations become impossible, such does not excuse performance of the rest of the obligations. *See* Yankton Sioux Tribe of Indians v. United States, 272 U.S. 351, 359, (1926)("where one part of an alternative promise, originally possible, has subsequently become impossible of fulfillment, the other part of the alternative must nevertheless be performed".) Under comparable reasoning, the ***State*** permitting process does not completely foreclose the possibility of trimming, and even it were literally impossible to trim on some of the accreted land, such circumstance does not excuse the ***Town's*** obligations to abide by the Deed Restrictions or negate the legitimacy of any of Plaintiffs' causes of action or requested damages.

III. THE TORT CLAIMS ACT DOES NOT PROVIDE THE TOWN WITH IMMUNITY FOR BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT.

In addition to alleging breach of the 1991 Deed, the Plaintiffs have also asserted that the breach of contract was accompanied by a fraudulent act entitling them to punitive damages. In support of that cause of action, the Plaintiffs have alleged – and produced evidence -- that the Town manipulated the public opinion survey/matrix conducted by a consultant hired by the Town in 2009 to gather citizen input on the accreted land issues and "monkeyed" with the expert's report to edit out information related to the issue. [ROA 70-72, 152-170; Second Amended Complaint, ¶93-107, Exhibits 14-19.] There also is telling testimony from the former Mayor that would support a reasonable inference that someone on Council altered the public survey form prepared by the consultants by deleting and reducing in importance the issues of "Ocean Views" and "Property Values" on the survey form. [ROA 694-695; Exhibit 5: Smith dep., 21:4 – 22:3.].

The Trial Court granted summary judgment on the Plaintiffs' cause of action for breach of contract accompanied by a fraudulent act on the ground that "the Defendants are immune

from suit under the South Carolina Tort Claims Act." In so holding, the Trial Court stated that the Act "bars damages from being awarded for the alleged governmental conduct," citing to S.C. Code Ann. 15-78-60 (1), (2), (4) and (17), which provide:

> The governmental entity is not liable for a loss resulting from:(1) legislative, judicial, or quasi-judicial action or inaction;(2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature; *** (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies; *** (17) employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude;

The Trial Court erred in granting summary judgment on this claim because the cause of action asserted by these Plaintiffs is one in contract, not tort, to which the Tort Claims Act does not apply.

A. The Plaintiffs are asserting a claim for breach of contract accompanied by a fraudulent act, not a claim for fraud.

It appears that the Trial Court misapprehended the nature of the Plaintiffs' cause of action because the Trial Court held:

> The Plaintiffs have sued for both Breach of Contract and Breach of Contract Accompanied by Fraudulent Act. They have specifically sought damages for the allegedly tortious fraud. The distinction between Breach of Contract and Breach of Contract Accompanied by Fraudulent Act is, of course, the presence of "fraud." [ROA 3; 12/4/14 Order.]

First, as a matter of law, a claim for breach of contract accompanied by a fraudulent act is not the same as a claim for fraud. As the Court of Appeals has summarized the basic principles regarding an action for breach of contract accompanied by a fraudulent act as distinguished from a common law fraud claim:

> The action for breach of contract accompanied by a fraudulent act is not based on the same elements as the action in tort for fraud and deceit. In order to state a claim for breach of contract accompanied by a fraudulent act, the plaintiff must plead facts establishing three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and

> (3) a fraudulent act accompanying the breach. It is not necessary to allege the elements of common law fraud and deceit. The fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design. As the Court observed..., "fraud," in this sense, assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.

Harper v. Ethridge, 290 S.C. 112, 118-19, 348 S.E.2d 374, 378 (Ct. App. 1986) (citations omitted); *see also* Ball v. Canadian American Exp. Co., Inc., 442 S.E.2d 620, 622, 314 S.C. 272, 276 (Ct. App. 1994) ("Breach of contract accompanied by a fraudulent act is not simply a combination of a claim for breach of contract and a claim for fraud."). Further, as a matter of record, the Plaintiffs' second amended complaint does not assert a cause of action for fraud. Rather, the Plaintiffs assert that the breach of the 1991 Deed has been accompanied by fraudulent acts.

It also appears that the Trial Court misapprehended the factual allegations as they relate to the fraudulent act element of the Plaintiffs' claim. As noted in the quote above, a fraudulent act is "any act characterized by dishonesty in fact or unfair dealing." Harper v. Etheridge, supra *cited in* Conner v. City of Forest Acres, 348 S.C. 454, 466, 560 S.E.2d 606, 612 (2002). In regards to the timing of fraudulent acts, the Court has stated: "This fraudulent act, although separate and distinct from the act(s) constituting the breach, must accompany the breach and not be too remote in either time or character." Smith v. Canal Ins. Co., 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980).

In granting summary judgment on the cause of action for breach of contract accompanied by a fraudulent act, the Trial Court stated in a footnote that: "As an additional sustaining ground the Court notes that none of the alleged fraudulent acts, which occurred in or around 2009, appear to relate to either of the two ordinances being challenged." [ROA 6; 12/4/14 Order.] As

first referenced in the Introduction, this is not a challenge to the zoning ordinances. This is a breach of contract action based on the Town's refusal to honor the terms of the 1991 Deed to preserve the accreted land in the condition it existed in February 1991. The breach is not a single act, but an ongoing, breach up to and including the denial of the trimming permits in 2010. Thus, the fact that the dishonesty and unfair dealing of monkeying with the opinion matrix and manipulating the consultant's work occurred in 2009 is not a proper ground for granting judgment to the Town and dismissing the Plaintiffs' claim for breach of contract accompanied by a fraudulent act.

B. A claim for breach of contract accompanied by a fraudulent act is not a tort claim under the Tort Claims Act.

A claim for breach of contract accompanied by a fraudulent act is not a tort claim. Cox v. Am. Oil Co., 183 S.C. 519, 191 S.E. 704, 710 (1937). It is a breach of contract claim in which punitive damages may be recovered upon proof of a fraudulent act. Ateyeh v. Volkswagen of Florence, Inc., 288 S.C. 101, 103, 341 S.E.2d 378, 379-80 (1986) (citing Peeples v. Orkin Exterminating Company, Inc., 244 S.C. 173, 135 S.E.2d 845 (1964)). *See also* Stevenson v. B. B. Kirkland Seed Co., 176 S.C. 345, 180 S.E. 197, 200 (1935) ("where the breach of the contract is accompanied by a fraudulent act, then punitive as well as actual damages may be recovered"). "There is no cause of action distinct from breach of contract for breach of contract accompanied by a fraudulent act." Smith v. Canal Insurance Company, 269 S.E.2d at 350.

The South Carolina Tort Claims Act only applies to tort actions. This proposition is clear from various provisions of the Act. First, the Act declares the Legislative intent in this regard: "(b) The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for ***any tort*** except as waived by this chapter." S.C. Code Ann. § 15-78-20 (emphasis added).

Further, as expressly provided in S.C. Code Ann. §15-78-20, the South Carolina ***Tort*** Claims Act does not limit liability on contract claims: "(d) Nothing in this chapter affects liability based on contract nor does it affect the power of the State or its political subdivisions to contract." In addition, S.C. Code Ann. § 15-78-30 expressly defines "claim" as a ***tort*** claim: "(b) "Claim" means any written demand against the State of South Carolina or a political subdivision for money only, on account of loss, caused by the tort of any employee of the State or a political subdivision while acting within the scope of his official duty." Similarly, § 15-78-30(f) defines "loss" in terms of "damages recoverable in actions for negligence," and "occurrence" also is defined in §30(g) in terms of acts of negligence. *See also* Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013) (common law breach of contract claim not precluded by TCA). And, while the Tort Claims Act prohibits an award of punitive damages, that prohibition, by its terms, only applies to tort claims under the Act: "(b) No award for damages ***under this chapter*** shall include punitive or exemplary damages or interest prior to judgment." S.C. Code Ann. § 15-78-120 (b) (emphasis added).

In its application of the Tort Claims Act, the Trial Court stated that the alleged fraudulent acts were immune because they related to the Town Council's legislative fact-finding process in connection with a proposed revision of the ordinance in 2009. However, as discussed above, the Trial Court misapprehends the nature of the Plaintiffs' claims which are based ***in contract*** – not in legislation. Plaintiffs' loss results from the Town's continual refusal to comply with its contractual obligations to trim (or allow others to trim) the vegetation in the accreted land. Therefore, § 15-78-60 does not bar Plaintiffs' claim.

****

The Tort Claims Acts does not immunize the Town of Sullivan's Island from liability arising from its contracts. The Town of Sullivan's Island is bound to its contractual obligations under the 1991 Deed just as any private individual. *See* U. S. Fid. & Guar. Co. v. City of Asheville, 85 F.2d 966 (4th Cir. 1936) ("Municipalities and other public bodies are held to same standard of accountability for their contracts as individuals."). As such, the Town should be required to honor its contractual obligations or be held liable for its breach of the 1991 Deed including liability for punitive damages for its fraudulent acts in connection with the breach. Accordingly, the Trial Court's grant of summary judgment to the Town on the claim for breach of contract accompanied by a fraudulent act should be reversed.

IV. THE TOWN'S VIOLATION OF THE DEED RESTRICTIONS THROUGH ITS NEW TRIMMING POLICIES HAVE CREATED A NUISANCE BY ALLOWING OVERGROWTH THAT HARBORS A VARIETY OF PESTS, VARMINTS AND POSES DANGERS TO THE PLAINTIFFS PERSONALLY AND THE OTHER CITIZENS GENERALLY.

"A nuisance is anything which works hurt, inconvenience, or damages; anything which essentially interferes with the enjoyment of life or property." Strong v. Winn-Dixie Stores, Inc., 240 S.C. 244, 253, 125 S.E.2d 628, 632 (1962)(internal quotations omitted). In addition to the contract claims, the Plaintiffs also assert a nuisance cause of action, alleging that the overgrowth has led to serious public and private concerns of safety, because the resulting maritime forest has become a breeding ground for an enormous and highly undesirable increase in the populations of bugs, raccoons, snakes, rats, spiders and other unwanted varmints and dangerous animals. [ROA 1079, 1081; Affidavit of Warren Tawes, Affidavit of Nathan Bluestein.]

The overgrowth also poses dangers from fires and criminal activity, as evidenced by the fact that in March 2011, a fire ignited in the accreted land just down the block from the Plaintiffs' properties. [ROA 1076; Affidavit of Thomas McCutchen.] While the Town's fire services dealt with the fire before it spread to the Plaintiffs' properties, there was damage to the

grass and vegetation in the accreted land and property of owned by McCutchen-Perry, LLC. [See ROA 219, 1052; Exhibit 12 to the Second Amd. Complt.] There is even evidence that criminal acts have occurred on the accreted land in the overgrown vegetation. [ROA 588, 593; N. Bluestein Dep., p.66, 88.]

In its Order Granting Defendants'' Motion for Summary Judgment on Plaintiffs' Nuisance, Breach of Contract and Mandamus Claims, filed November 10, 2015, the Trial Court erroneously disposed of the nuisance claim on several grounds. On one ground, the Trial Court held that the South Carolina Tort Claims Act bars nuisance damages from being awarded against the Town. S.C. Code Ann. § 15-78-60(7). However, the Plaintiffs did not seek damages for nuisance, they sought an order from the Court directing the Town to abate the nuisance which is an equitable matter not subject to the Tort Claims Act: "(c) Nothing herein shall affect the power of a court of equity at the suit of a party complainant to enjoin unlawful acts committed by governmental entities or mandate lawful action by governmental entities." S.C. Code Ann. § 15-78-50(c); LeFurgy v. Long Cove Club Owners Ass'n, Inc., 313 S.C. 555, 557, 443 S.E.2d 577, 578 (Ct. App. 1994) (action to abate/enjoin a nuisance is equitable).

The Trial Court also recited various principles of nuisance law regarding nuisance per se and nuisance per accidens, and regarding public and private nuisances, relying predominantly on Home Sales, Inc. v. City of N. Myrtle Beach, 299 S.C. 70, 80, 382 S.E.2d 463, 469 (Ct. App. 1989). But ultimately, in rejecting the nuisance claim, the Court relied upon its holdings that the 1995/2005 trimming ordinances were lawful and the Deed Restrictions did not, and could not, impede the Town's authority to make the changes to the trimming ordinance. On those points, the Plaintiffs reassert each and every argument made above. By breaching the Deed Restrictions, the Town has allowed the overgrowth of the vegetation on the accreted land into a

maritime forest that serves as breeding grown for pests and varmint, poses a fire hazard, and provides cover for criminal behavior. Equity demands that the Town Government abate these dangers and honor its contractual obligations to the citizens of Sullivan's Island.

V. THE PLAINTIFFS' CONTRACT CLAUSE CLAIMS WERE WRONGFULLY STRICKEN BECAUSE THERE IS NO JUSTIFICATION FOR THE TOWN TO PURPOSEFULLY AND VOLUNTARILY ENTER A CONTRACT AND THEN REVISE THEIR ORDINANCES TO DEFIANTLY BREACH THE CORE PURPOSE OF THE 1991 DEED RESTRICTIONS.

In its Order of November 10, 2015, granting summary judgment on the nuisance claim, the Trial Court also stated:

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

[ROA 49; Order, p. 4.]. The Trial Court's errors in holding that there is no breach of contract and that the 1991 Town Council did not have the power to bind subsequent Council actions have been discussed above in Section I. As to the citation to I'On, the Trial Court misapprehends and misapplies the holding of that case.

As the Supreme Court explained in Greenville Cty. v. Kenwood Enterprises, Inc., 353 S.C. 157, 167, 577 S.E.2d 428, 433 (2003), the I'On decision simply holds that land use regulation cannot be effected by referendum:[13]

> The *I'On* Court was faced with the issue of whether zoning by initiative and referendum is allowed in South Carolina. The Court concluded that the detailed nature of zoning acts like the Comprehensive Planning Act "indicates a legislative intent that zoning matters must be decided only in the manner specified in those acts." *Id.* at 415, 526 S.E.2d at 721. *I'On* held that by passing the Comprehensive Planning Act, the Legislature did not intend to allow voters to enact more complex zoning measures by initiative and referendum.

[13] *Overruled on other grounds by* Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005).

> *I'On* does not stand for the proposition that **any** ordinance affecting land use must be part of the comprehensive plan and enacted pursuant to the Comprehensive Planning Act. Instead, *I'On* simply held that land use regulation cannot be effected via the referendum and initiative process. Thus, *I'On* is not dispositive. To accept Platinum Plus and Heartbreakers' expansive reading of *I'On* would necessarily eviscerate a County's ability to exercise its police power if that exercise in any way impacted land use. Moreover, we note that in the instant case, the Ordinance was passed "by a cross-section of unbiased officials after careful deliberation," with the involvement of the County Planning Commission, and therefore does not run afoul of the dangers with which *I'On* was concerned. *See id.* at 416-17, 526 S.E.2d at 721 (indicating that an initiative and referendum process could result "in arbitrary decisions and patchwork zoning with little rhyme or reason").

This case does not involve zoning by referendum. This is a contract case, and to paraphrase the language of the Court in Greenville County, the two-step transaction was proposed by the Town officials, given due consideration, and duly approved by the Town Council.

In contrast to the misapplication of I'On, the viability of the Plaintiffs' Constitutional Contract Clause claims is supported by the more comparable case of Columbia Water Power Co. v. Campbell, 75 S.C. 34, 54 S.E. 833, 838 (1906). That case involved a contract for sale of the Columbia Canal by the State to the Columbia Water Power Company. The sale, which was accomplished by legislative act, included a condition of that the State, as vendor, would warrant it to it free of taxes, except for state purposes; however, after the transfer, the State Comptroller General directed Richland County to assess and collect taxes from the new Canal owner. In affirming judgment for the Canal owner, the Supreme Court refused to allow the State to ignore its contract, stating declaratively:

> For the state to ignore this contract and direct the levy, assessment and collection of taxes other than for state purposes is a substantial impairment of the contract which it has made with the plaintiff and is in violation of article 1, § 10, of the Constitution of the United States, and of article 1, § 21, of the Constitution of the State of South Carolina, 1868.

By the same token, for the Town to ignore the 1991 Deed and change the trimming policies to allow the overgrowth of vegetation creating a maritime forest is a fundamental breach of the Deed Restrictions in violation of the Contract Clauses.

CONCLUSION

WHEREFORE, based on the foregoing, Appellants submit that the Trial Court erred in granting summary judgment to the Defendant Town of Sullivan's Island on the Plaintiffs' breach of contract claims because the 1991 Deed Restrictions obligate the Town to allow front-row homeowners the right to cut vegetation on the accreted land seaward of their homes to preserve the accreted land in the condition as it existed at the time the Deed was executed in February 1991. The Trial Court further erred in granting summary judgment to the Defendant Town on the Plaintiffs' claim for breach of contract accompanied by a fraudulent act because the Tort Claims Act does not provide immunity from contract claims. The Trial Court also erred in striking the Plaintiffs' claims based on its misapprehension of facts and law regarding the State OCRM permitting process for cutting vegetation located inside the designated Critical Line.

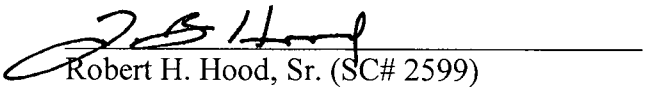
In addition, the Trial Court erred in striking the Contract Clause claims based on its misinterpretation of the OCRM permit process and the absence of any justification for the Town to purposefully and voluntarily enter a contract and then revise their Ordinances to defiantly breach the core purpose of the 1991 Deed Restrictions. Finally, the Trial Court erred in granting judgment on the nuisance cause of action because the new trimming policies have allowed overgrowth that harbors a variety of pests, varmints and poses dangers to the Plaintiffs personally and the other citizens generally.

The Appellants respectfully ask the Court to reverse each and all of the Trial Court's orders of granting summary judgment and/or striking the claims seeking declaratory and

injunctive relief, or in the alternative, monetary damages, for breach of contract, breach of contract accompanied by a fraudulent act, violation of the Constitutional Contract Clauses, and nuisance. The Appellants request that the Court remand the case for full consideration on the merits of their claims seeking to compel the Town to honor and abide by the Deed Restrictions to preserve the accreted land on Sullivan's Island in the condition as it existed in February 1991.

Respectfully submitted,

Hood Law Firm, LLC



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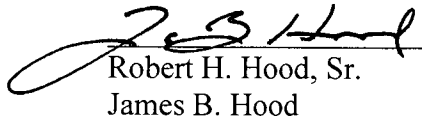
Karen Albenesius

October 26, 2016

Certification of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

October 26, 2016



Robert H. Hood, Sr.
James B. Hood

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas
Mikell Scarborough, Master-in-Equity

Case No. 2010-CP-10-5449
App. No. 2015-002550

Nathan Bluestein, Ettaleah Bluestein, M.D.,
Theodore Albenesius, III, and Karen Albenesius,

Appellants,

v.

Town of Sullivan's Island and Sullivan's Island Town Council,

Respondents.

CERTIFICATE OF SERVICE

The undersigned certifies that on this 26th day of October, 2016, a copy of the Final Brief and Final Reply Brief on behalf of Appellants Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius, were served by depositing said copy of each in the U.S. Mail, with sufficient first class postage, on the following counsel at the addresses listed below:

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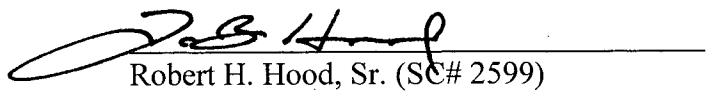

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October 26, 2016

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius v. Town of Sullivan's Island and Sullivan's Island Town Council
C/A No. 2010-CP-10-5449
Appeal No. 2015-002550
HLF File No. 625.002

Dear Ms. Kitchings:

Enclosed please find the original and fifteen copies of the Record on Appeal, Final Brief, and Final Reply Brief on behalf of the Appellants Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius in the above-referenced matter. Also enclosed is the original and one copy of the Certificate of Service for the Record on Appeal and Final Briefs. Please return a clocked-in copy of each in the enclosed envelope. By copy of this letter we are serving counsel for the Respondents with a hard copy of each brief and the Record on Appeal.

Kind regards,

Yours truly,

James B. Hood

JBH/jad
Enclosures
cc: J. Brady Hair, Esquire (w/ enclosures)
Derk Van Raalte, IV, Esquire [***Via E-Mail***]