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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

22942

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

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

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SC Court of Appeals

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.

RECORD ON APPEAL
Volume II - pp. 488-883

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K. ALBENESIUS
DEPO

ROA 488

State of South Carolina) In the Court of Common Pleas

County of Charleston) C/A No: 10-CP-10-5449

Nathan Bluestein,)

Ettaleah Bluestein,)

Theodore Albenesius)

and Karen Albenesius,)

Plaintiff(s),)

)

versus) Deposition

) of

Town of Sullivan's) Karen Albenesius

Island and Sullivan's)

Island Town Council,)

)

Defendant(s).)

Deposition of Karen Albenesius, taken before Michelle Dawson Lloyd, Verbatim Court Reporter and Notary Public in and for the State of South Carolina, scheduled for 1:30 p.m. and commencing at the hour of 10:42 a.m., Tuesday, February 15, 2011, at the office of North Charleston City Hall, South Carolina.

Reported by:

Michelle Dawson Lloyd

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17 Derk Van Raalte, Esquire
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19 N. Charleston, SC 29406
20
21 Also Present:
22 Ettaleah Bluestein, M.D
23 Theodore Albenesius
24 Nathan Bluestein
25

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1 STIPULATIONS

2 This deposition is being taken pursuant to South
3 Carolina Rules of Civil Procedure..

4 - - - -

5 The reading and signing of this deposition is
6 reserved by the deponent and counsel for the
7 respective parties.

8 Whereupon,

9 KAREN ALBENESIUS being duly sworn and cautioned to
10 speak the truth, the whole truth, and nothing but
11 the truth, testified and deposed as follows:

12 Court Reporter: State your full name for the
13 record, please.

14 Witness: KAREN KUHLE ALBENESIUS

15 DIRECT EXAMINATION

16 BY MR. VAN RAALTE:

17 Q Good morning, Mrs. Albenenesius, my name is Derk Van
18 Raalte. Like Brady, I'm one of the attorneys for the Town
19 of Sullivan's Island. I appreciate you coming in and
20 telling us a little bit about your position in this
21 lawsuit today. I guess the first thing I need to ask is,
22 whether you're taking any type of medications or have any
23 condition that would impair your ability to answer or
24 understand my questions?

25 A No.

1 MR. HOOD: Both ladies would like to
2 read the transcript.

3 Q Have you ever testified in a case or given a deposition
4 before?

5 A No.

6 Q Well, basically it's an opportunity for the Town to ask
7 some questions and, under oath, for you to go ahead and
8 give answers. If there's anything that confuses you, or
9 if I don't state the question artfully, you could ask me
10 to go ahead and restate it. I'd be happy to work through
11 it until we get it to a point that you're comfortable. If
12 you don't ask me for clarification, I'm going to assume
13 that when you answer that you understood the question the
14 way that I phrased it originally. Is that fair enough?

15 A Yes.

16 Q And you understand that you're under oath today? So
17 you're required to answer everything truthfully?

18 A Yes.

19 Q Are you familiar with the complaint that's been filed on
20 your behalf in this case?

21 A Yes.

22 Q And your complaint isn't saying that the Town had
23 bulldozers or construction crews out altering the dirt in
24 front of your house on the accreted land; is it?

25 A No.

- 1 Q All right. Basically, if I'm correct, you're upset that
2 trees and bushes have grown up to block your view; is that
3 the case?
- 4 A Correct.
- 5 Q All right. And have you sued the Town over the accreted
6 land cutting ordinance?
- 7 A The suit that we're bringing forth is the suit that we're
8 talking about. That's all I know.
- 9 Q All right. Well, why don't you tell me in your own words
10 -- what is it that you're suing to invalidate? What has
11 the Town done that you're suing over?
- 12 A I think that the original deed or ordinance that was
13 there, the cutting to three feet, is what should be in
14 place.
- 15 Q What do you think is in place right now?
- 16 A I think some ordinances have been passed that restrict
17 that.
- 18 Q Okay. And what do they say? What are the current rules?
- 19 A It doesn't allow you to cut certain trees.
- 20 Q Okay. Do you know what the height under the current
21 ordinance is?
- 22 A Five feet.
- 23 Q Okay. Do you know what trees you are allowed to cut or
24 not cut under the current ordinance?
- 25 A Just Waxmyrtles. There are two others, and I can't tell

1 you the names of them. But three species are all you're
2 allowed to cut.

3 Q Am I correct, that this is the first lawsuit that you've
4 ever filed against the Town of Sullivan's Island?

5 A Yes.

6 Q And this is the first one you've ever filed over these
7 cutting rules, right?

8 A Yes.

9 Q Were the trees and bushes in that accreted land living out
10 there at the time when you bought your house?

11 A I'm sure they probably were. I don't know.

12 Q Okay. Well, when you went and looked at the house, before
13 you bought it, did you ever look off the porch or out the
14 windows towards - -

15 A Of course.

16 Q - - the ocean?

17 A Of course.

18 Q Did you see trees and bushes at that time?

19 A There were some trees and bushes. They were not to the
20 extent that they are now.

21 Q Okay. But it was vegetated between --

22 A There was vegetation.

23 Q Okay. And would it be fair to say, that those trees and
24 bushes have naturally grown since you bought it and grown
25 up higher?

1 A Yes.

2 Q You haven't planted any trees out there in the accreted
3 land; have you?

4 A No. Absolutely not.

5 Q All right. And you haven't seen any Town employees out
6 there planting?

7 A No.

8 Q And you haven't I suppose watered, or fertilized, or done
9 anything else?

10 A No.

11 Q And you haven't seen Town employees out there doing that;
12 have you?

13 A No.

14 Q So basically, those trees and bushes are growing without
15 any activity from you or the Town? It's just nature,
16 right?

17 A Correct.

18 Q A moment ago you were saying that what the lawsuit was
19 about to you was the three feet, and cutting the species,
20 and that stuff. Why is it that you think you're entitled
21 to those rules, as opposed to the rules that Town Council
22 has passed right now?

23 A Well, I think in the original agreement, about the land
24 out front, it was agreed that it would be maintained to
25 the degree that it was at that point and time, which was

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1 ability to cut everything to three feet. But to my
2 understanding, there was really nothing out there at that
3 time. So in essence, to me what the original deed said
4 is, that it would be no vegetation out there.

5 Q Okay. So under your interpretation, the original deed --
6 because there wasn't vegetation then, it means no
7 vegetation going forward?

8 A Keep it in the state that it was in.

9 Q Are you familiar with the 2005 cutting ordinance that
10 currently governs?

11 A I've read over it.

12 Q All right. Would you agree that ordinance says that the
13 bushes and trees between your house and the ocean can be
14 cut under certain conditions and terms?

15 A Yes.

16 Q And you like the idea of being able to trim that
17 vegetation, don't you?

18 A I like the idea of being able to trim all vegetation.

19 Q If you were able to just flat top the accreted land to
20 five feet in front of your house, would that be enough to
21 give you an adequate view? All species?

22 A I think three feet would be better, but five would help if
23 we could flat top. If we could cut everything, yes.

24 Q So taking three feet is not on the table for the question.

25 A Okay.

- 1 Q Five feet, could you see it?
- 2 A I think it would help enhance my views, yes.
- 3 Q Would it be enough to satisfy you for the purposes of this
- 4 lawsuit?
- 5 A I would prefer three.
- 6 Q Now, I think a few moments ago you told me that the
- 7 current 2005 rules only let you cut three species,
- 8 correct?
- 9 A Correct.
- 10 Q And those would be Waxmyrtle, Baccharis, and the Popcorn
- 11 trees, I think?
- 12 A Correct.
- 13 Q Now, that means trees like Pines, and Oaks, and Cedar, and
- 14 the like, are protected, right?
- 15 A Yes.
- 16 Q Do you favor cutting of Oak trees, Palmetto trees, and
- 17 those type of things, on the accreted land?
- 18 A Not Oak trees. There are two Pine trees blocking our
- 19 views. And Pines, I don't think, are endangered in any
- 20 way. I see no problem with cutting Pines or Cedars. You
- 21 know, Oak trees and Palmetto trees are probably a little
- 22 more - -
- 23 Q Now, am I correct that this ordinance that you're suing to
- 24 invalidate deals with when you can cut, how much you can
- 25 cut, and what you can cut?

- 1 A I believe that's what the ordinance says, yes. There are
2 dates and restrictions.
- 3 Q But it's certainly -- this ordinance that you're suing
4 over deals with the trimming and cutting of vegetation,
5 right?
- 6 A Yes.
- 7 Q And the 2005 ordinance was passed before you bought your
8 house, right?
- 9 A Obviously.
- 10 Q Okay. When did you buy it?
- 11 A 2009, 2010. I'm sorry. No, '09. I'm sorry.
12 Yes, '09.
- 13 Q Are you familiar with any prior versions of the ordinance?
- 14 A Just what I've read. Only two that I know of.
- 15 Q Are you familiar with the 1995 version that Mrs. Bluestein
16 described earlier, while you were sitting here, that dealt
17 with seven feet?
- 18 A I have read it, yes.
- 19 Q Would you agree that just like the 2005 version that this
20 also allows certain vegetation trimming?
- 21 A Yes.
- 22 Q Okay. The seven foot height, that's not going to satisfy
23 you either; is it?
- 24 A No.
- 25 Q And am I correct that the '95 ordinance has the same

1 species limitations?

2 A Yes, you are.

3 Q And again, just like the more recent one, the '95
4 ordinance deals with trimming of vegetation out in the
5 accreted land?

6 A I mean, it's vegetation and limiting what can be cut.

7 Q Let me talk to you now about the 1981 version of the
8 ordinance. What did that provide?

9 A To the best of my knowledge, and I was not living there,
10 but the way I read it, it provided that the land that was
11 deeded would stay in the state that it was in. Again, that
12 was without vegetation, but that it could be -- cut
13 everything to three feet.

14 Q Now, you mentioned that you weren't living there at the
15 time. When did you first visit Sullivan's Island?

16 A In 1982.

17 Q When did you first move out there?

18 A Moved to Sullivan's?

19 Q Yes, ma'am.

20 A In 2009.

21 Q Now, sounds like the difference between the 1981 rule and
22 the later ones, the ones that you're not as satisfied
23 with, that difference is that you could cut lower under
24 the original one that you like, correct?

25 A More that you could cut everything. It didn't limit what

1 you could cut.

2 Q It's safe to say that you like that 1981 version better

3 than the later ones?

4 A Just to say yes, I mean, I'd have to read both before I

5 definitively - -

6 Q Well, --

7 A I mean, I'd have to study both.

8 Q If the 1981 version allows you to cut everything, all

9 species down to three feet, is the reason you prefer that

10 because it allows more cutting?

11 A Not necessarily more cutting. It mainly allows the views

12 and the breezes. The main reason we moved out there is so

13 we could see, and hear, and smell the ocean. And with the

14 way it is now the trees are blocking all of that.

15 Q Well, is the problem then that the new version is more

16 restrictive than the old one?

17 A Yes.

18 Q Okay. Do you think that scenic enhancement is something

19 that the Town should be concerned with?

20 A Yes. In that, that would effect property values and would

21 effect them, the Town, as a whole.

22 Q Is one view - - that some people find enjoyable a view of

23 the ocean?

24 A I would say that's the majority of the views.

25 Q Okay. Do you think that there are other people on the

1 Island who think that the accreted land, as a forest,
 2 might be an enjoyable view?
 3 A I'm sure there are some.
 4 Q Would you agree that the fact that personal taste might
 5 differ? It doesn't necessarily mean that one person is
 6 right or another one is wrong; it's more a matter of
 7 taste?
 8 A I agree, yeah.
 9 Q Would you also agree that there are sometimes choices,
 10 with view and other things, that you gotta have one or the
 11 other? I mean, you can't have a forest and have a field
 12 at the same time; can you?
 13 A I would agree with that statement, yes.
 14 Q Well, let's talk about your own front yard for a second.
 15 If you decided that you wanted trees there, you could
 16 plant trees in your front yard, right?
 17 A In the property?
 18 Q Right. Just right in your grass.
 19 A Yes.
 20 Q Okay. But if you decided you wanted grass, you could have
 21 grass there too?
 22 A Yes.
 23 Q And you get to decide because you own it, right?
 24 A Right.
 25 Q Now, let's think about your neighbor inland. You know,

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1 right across the street on the inland side. He gets to

2 decide what to do with his own front yard, doesn't he?

3 A Uh-huh.

4 Q What if that across the street neighbor decided that your
5 house and your landscaping were interfering with his view
6 of the accreted land and the ocean. Would he have a right
7 to come and bulldoze your house and landscaping to improve
8 his view?

9 A Of course not.

10 Q Okay. And that's because he doesn't own your land, right?

11 A Well, and he would be destructing property if he bulldozed
12 my house. Yes --

13 Q Because it's your land, not his?

14 A Correct.

15 Q Let's talk for a second now about a similar scenario, but
16 on land that the public owns. Well, that the Town owns.
17 Imagine that one group of people in the Town want one
18 thing, and another group of people in the Town want
19 another. Would you agree that it's Town Councils job to
20 sort of balance those view points and decide what to do on
21 Town land?

22 A I think that the citizens of Sullivan's Island should have
23 that right to re-vote.

24 Q Well, let's talk about that for a second. Town decisions
25 on Sullivan's Island are typically done by a vote of the

1 Mayor and Town Council, right?

2 A I'm not positive. But, yes, I would say that's - -

3 Q Are you a voter on Sullivan's Island?

4 A Yes, I am.

5 Q So theoretically, you, and the Bluestein's, and others,

6 get a chance to go to the ballot box and vote for your

7 councilmen, and mayor, and the like, right?

8 A That is the way it's set up.

9 Q And as voters on Sullivan's Island, you, the Bluestein's,

10 and others, can call, or write, or talk to your elected

11 representatives and share your viewpoints, right?

12 A Correct.

13 Q So if the Town owns the accreted land and sets the rules

14 for it as voters, don't you have the ability to sort of

15 help communicate and shape what your elected

16 representatives do with it?

17 A Well, I think in reference to the accreted land, that

18 original deed should stand. And to me, it reads that the

19 Town is responsible for maintaining it the way it was.

20 Q Well, do you think that the Town Council has made a bad

21 decision as far as how they manage the accreted land?

22 A I can't answer that. But I think that the majority of the

23 citizens were not represented in that decision.

24 Q Well, if Town Council makes decisions that a majority of

25 voters disapprove of, isn't one solution for the majority

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1 to vote them out of office?

2 A Yes.

3 Q If you have a majority, as you stated a moment ago, why
4 should a court get involved to order a result that you can
5 obtain at a ballot box for yourself?

6 A I'm not sure I can answer that question. I think that the
7 decision, the ordinance and all, that have been made have
8 been made by a small group. I'm not sure how they've
9 arrived at those decisions. So I don't -- I mean, I really
10 can't speak to that. I don't think it's ever been put to
11 a vote before the citizens.

12 Q But you don't think your ability to go to the ballot box
13 is an effective way to deal with the fact that your voice
14 is not being heard on Town Council?

15 A Yes. I do believe that. I've only lived on the Island
16 for a year, so I haven't had that ability.

17 Q So you believe, it's not an effective -- the voting booth
18 is not an effective solution?

19 A No. I did not say that.

20 Q I'm just trying to understand.

21 A I don't understand your question, apparently.

22 Q Do you feel like the voting booth is an effective way to
23 solve a problem if Town Council is not hearing the
24 majority's voice?

25 A In our government, as a whole, yes.

1 Q Why would that not be the case here, with the accreted
2 land and then passing ordinances? That you think the
3 majority - -

4 A I think a lot of things have come up since all the
5 original deed and all that have precluded - this all come
6 up in between voting. I don't think that it's been
7 represented as the Town.

8 Q What if it turned out that your wrong about the majority;
9 that a majority really was not as concerned about the view
10 from the front beach as ya'll are and favored the forest?
11 Do you think that a court should set aside the majority on
12 that?

13 A Set aside the majority? I'm not sure I understand your
14 question.

15 Q Well, do you think that if Council is really accurately
16 representing what a majority of people on the Island want,
17 and it just turns out that you don't have enough votes for
18 your viewpoint, and somebody else has more for the forest
19 viewpoint, do you think it would be appropriate to ask a
20 court to step in and essentially make the Town do
21 something against the will of the majority of the people
22 on the Island?

23 A I can't answer that question. I don't really understand
24 it. I mean, I think that ultimately the Town, however
25 it's set up, would have that authority. I guess.

- 1 Q If a majority of people on the Island favor the forest
- 2 instead of the cutting, would you be able to accept that
- 3 result and just live with it?
- 4 A I don't - - I can't answer that. I'd have to see that.
- 5 Q Well, you don't know whether you'd be able to accept it or
- 6 not?
- 7 A No, I think I'd have a hard time accepting that. I don't
- 8 know. I can't answer that question.
- 9 Q Are trees a part of nature?
- 10 A Yes.
- 11 Q How about deer, and birds, and snakes, and racoons, and
- 12 flowers, and mosquitoes?
- 13 A Yes.
- 14 Q All right. And those are all the kind of things you might
- 15 expect to find in a natural undeveloped place, right?
- 16 A Yes.
- 17 Q And you never seen the Town release racoons, and snakes,
- 18 and all that wildlife in the accreted land; have you?
- 19 A No.
- 20 Q So can we agree that the wildlife that's out there, that's
- 21 present, is there naturally?
- 22 A Yes.
- 23 Q And the bushes and trees that are grown out there, they're
- 24 growing naturally too?
- 25 A Yes.

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- 1 Q Now, your lawsuit says that the natural wildlife and plant
2 growth on the accreted land is causing you harm, right?
- 3 A Yes. I guess it says that. I'm not positive.
- 4 Q Is it fair to say that the purpose of the cutting you want
5 to perform would be to undo or counteract the natural
6 growth of the plants? Back, you know, to cut it down to
7 three feet?
- 8 A No.
- 9 Q Okay.
- 10 A I think they're natural and they will grow just like a
11 Pine tree, if you cut it. Not all the way down, it's
12 going to continue to grow.
- 13 Q Okay. So what you're trying - - it's naturally growing, and
14 what you want to do is cut it to take it back down?
- 15 A Right.
- 16 Q Okay. Mechanical saws, and pruning shears, and those kind
17 of - - That equipment, that's not a part of the natural
18 growth process; is it?
- 19 A I think that's a matter of opinion. I mean, we prune our
20 front yard, and we prune our flowers, and they grow back
21 more beautiful than before. So I can't say that, no.
- 22 Q Was that human interaction, or is that nature on it's own
23 undisturbed?
- 24 A Human interaction.
- 25 Q Okay. So it's not natural; it's human intervention?

- 1 A I'm not sure I understand your question.
- 2 Q Well, if you let your bushes or your trees grow naturally - -
- 3 A Correct.
- 4 Q -- they would generally continue to grow?
- 5 A In an unruly manner, yes.
- 6 Q Okay. But you want to restore - you want to intervene to
- 7 basically create a manicured environment in your yard or
- 8 on the accreted land, right?
- 9 A Not a manicured environment on the accreted land, but on
- 10 the property that we maintain, yes.
- 11 Q Well, let's talk about the accreted land, separately, then
- 12 for a second. If you have the unruly natural growth out
- 13 there, and you cut it back every year or every other year
- 14 to three feet, across the board without any regard to
- 15 species, everything is cut flat. So it's a flat top. I
- 16 mean, isn't that a manicured state that you're creating?
- 17 A I guess.
- 18 Q If you had to choose between the natural state of the
- 19 accreted land, which blocks your view, or having human
- 20 intervention to manicure it every year at three feet to
- 21 keep that view, which would you choose?
- 22 A Human intervention.
- 23 Q I want you to assume for the purpose of this question,
- 24 that fewer snakes would live in the accreted land if it
- 25 grew up to a forest than would live there if it were flat

1 topped at three feet. So if you had to choose between
2 having your view at three feet, and more snakes, or having
3 no view, and less snakes, which would you choose?

4 A Well, I wouldn't assume that, because I don't believe that
5 to be the case. I know - -

6 Q I understand that.

7 A -- in our case, we have banana spiders that are prolific,
8 and they preclude my children from even going in the back
9 yard. And when we did trim, according to the guidelines,
10 we didn't have that problem anymore. So I would say, I
11 guess in that case, I would say I disagree with that. I
12 would not assume that would prevent.

13 Q Well, I'm not asking you that you have to agree with the
14 assumption. I'm just saying for purposes of this
15 question, I'd like you to assume that. So you had to make
16 a decision between one state of the world or another state
17 of the world, which would you choose? More snakes or more
18 view?

19 A I would choose more view.

20 Q Same question with mosquitoes. I want you to assume that,
21 just assume for purposes of the question, that fewer
22 mosquitoes would live in a grown up forest than would live
23 there if it was trimmed every year to three feet. So
24 you've got to choose between a better view, and more
25 mosquitoes, or no view, or less view, and, you know,

1 better mosquito situation. Which would you choose?

2 A Well, again I would say that I don't believe in the
3 assumption, but I would agree to trim for more views.

4 Q Okay. I'd like you to assume for a moment that the uncut
5 accreted land, forest if you will, provides some stability
6 to hold sand, and houses, and all that kind of stuff, in
7 place during hurricanes and storms. Such that, cutting
8 down to three feet would actually increase hurricane and
9 storm risk. Now, you have to choose between the view and
10 increasing the storm risk. Which would you choose?

11 A Again, I'm going to say I don't agree in that assumption.
12 I've read many things to the contrary, particularly in
13 that area, that, that would not help in a hurricane case.

14 Q I understand.

15 A So under that assumption, I would say I would cut
16 regardless.

17 Q Are hurricane risk and soil stability things that City
18 Council should consider?

19 A In what?

20 Q In managing the accreted land? I'm not asking if you
21 think they got it right. I'm asking if you think that
22 those are topics that are appropriate for them to be -

23 A Hurricane risks and what?

24 Q Soil stability.

25 A I would say, yes.

- 1 Q Might it be that Council would have to balance those kinds
2 of interest on the one hand against views on another?
- 3 A I'm sure that in an objective observation they would have
4 to balance those, I suppose.
- 5 Q What if trimming your - - the accreted land in front of
6 your house down to three feet, so that you can see out to
7 the ocean. That would make your view more enjoyable?
8 What if it meant that people walking on the beach, looking
9 back inland, had a less enjoyable view?
- 10 A I think that's totally a matter of opinion. I think that's
11 completely a matter of opinion. I use to - when my
12 husband and I started dating in 1982, we would love to
13 walk on the beach and look at the houses. That was why we
14 walked to the beach, so that we could look back and look
15 at the different architecture. So I mean, I totally
16 disagree with what you're saying.
- 17 Q Well, do you think that the experience of people on the
18 beach is something that Council should put into that big
19 hopper of considerations?
- 20 A I think if people are going to the beach, they're going to
21 the beach because they want to see the beach, not because
22 they want to see a forest. If they want to go to a
23 forest, they can go to Francis Beidler.
- 24 Q Okay. So it would inappropriate for Council to consider - -
- 25 A I think Council is considering the beach. And it's the

1 beach, just like you said. I think you go to the beach to
2 see the beach.

3 Q Okay.

4 A I think that they don't need to govern what you're going
5 to see when you go to the beach.

6 Q But you think they should govern and allow you to be able
7 to see what you want to see out of your porch?

8 A I think they need to listen to the citizens of Sullivan's
9 Island. All of their issues, and all of their complaints,
10 and all that they would like to see the Island do.

11 Q Now, you mention that you bought your house in 2009. What
12 did you think the cutting rules were when you bought your
13 house?

14 A I think that I've already stated that it was the ordinance
15 that's in place, the five feet and restricted on the
16 trees.

17 Q Well, when you go there with the real estate agent the
18 first time, and you're looking at it, and you're deciding
19 whether to make an offer on it, had you gone in and read --
20 When's the first time you read the zoning ordinance?

21 A After we moved in and the growth started growing up, and
22 we wanted to trim. I looked at it. At that point,
23 briefly. I asked around and found out what it was.

24 Q Okay. So going back to my question, at the time that you
25 were actually there looking at the house and made the

1 offer on the house, what did you think the cutting rules
2 were at that moment?

3 A I knew that it was five feet and it was restricted on
4 certain trees. I did not know what trees were restricted
5 at the time. I mean, we knew there was a few species that
6 were restricted.

7 Q But you knew that it was five feet, and that there was
8 some that was restricted, and some that you could cut?

9 A Right.

10 Q Okay. Am I correct in that, you feel the value of your
11 home has fallen as a result of the plant growth blocking
12 the view?

13 A Yes.

14 Q Okay. How much did you pay for your house?

15 A We paid 3.1.

16 Q Okay. What do you think it's worth today?

17 A I couldn't answer that without getting an appraisal.

18 Q You don't have any kind of a thought?

19 A No.

20 Q If the Town had a buyer that they could present to you
21 today, that offered you \$2,000,000., would you sell your
22 house for \$2,000,000.?

23 A No.

24 Q Two and a half million?

25 A No.

1 Q Three million?

2 A Not right now. But you have to realize, we've only lived

3 there a year, a little over a year. I mean, I'm not in

4 the market to sell it at this moment.

5 Q If the seller would give you a refund at this very moment,

6 and you move out tomorrow, would you take a refund?

7 A No. I don't know.

8 Q Let me get you to turn to Tab 1-B in the notebook.

9 MR. VAN RAALTE: Yeah, right there.

10 Q Take a look at Section 21-67 for a moment. And I'll give

11 you a chance to read it if you're not familiar with it

12 already.

13 A Okay.

14 Q Would you agree with me that Section A in 21-67 is a set

15 of fact findings dealing with the accreted land?

16 A Well, I'm not sure who found these facts.

17 Q I agree. But I mean, what is that bold A? What does that

18 say?

19 A The Town of Sullivan's Island finds the following.

20 Q Okay. Let's talk about (1) for a second. One says that

21 the RC Areas greatly contribute to the health, safety, and

22 welfare of the Island. And that they provide countless

23 hours of pleasurable activity and relaxation and that

24 stuff, which is important to the goal of public health,

25 safety and welfare. Do you agree with that fact finding?

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1 A RC is the - - What does that refer to?

2 Q That's the conservation, it's essentially the accreted

3 land.

4 A I don't know if I would agree with that or not, no.

5 Q Okay. How about (2), would you agree with (2), that the

6 boundaries of the area are constantly shifting over

7 unpredictable periods of time, and composed of sand dunes

8 and vegetation that ceaselessly change, and can be flooded

9 and not suitable for development. Do you agree with that?

10 A Yes.

11 Q Okay. Let's move to (4) where they find the land left in

12 their natural state, provides protection to adjoining

13 landowners and their property from the hazards of high

14 tides and floods caused by hurricanes, tropical storms and

15 seasonal tides. Do you agree with that?

16 A No, I don't. Because I've read things to the contrary.

17 Q Okay. How about (6), the RC Area is of a particular

18 beauty in its natural state. Do you agree with that?

19 A No. I do not agree with that. And I'll tell you one of

20 the reasons I don't. When my family comes to visit they

21 think it's sort of scary to walk down our paths with all

22 the other overgrowth.

23 Q Back in 1981, do you think the accreted land was comprised

24 of sand and vegetation that changed over time?

25 A I think it was comprised mostly of sand dunes, and a minor

1 amount of vegetation, which was mostly flowers and sea
2 oats.

3 Q But you think it's changed over time?

4 A Since '81?

5 Q Yeah.

6 A Yes.

7 Q So if Council in 1981 said there was sand and vegetation
8 and that, that might change over time, they'd be right in
9 that finding, right? Correct?

10 A Yes.

11 Q And if Council had to revisit that finding today that
12 would probably still be true, right? There's vegetation
13 out there and it might change over time?

14 A Yes.

15 Q If Council in 1981 found that it was possible for the
16 accreted land to flood when there were big storms, would
17 that have been true in 1981 you think?

18 A I assume.

19 Q Okay. How about if they revisited that today, in 2011, you
20 think that would still be true? Possible it might flood
21 in a big storm?

22 A Yes. Possible.

23 Q If the accreted land -- if Council in 1981 found as a fact
24 that it was inappropriate to develop with houses and such
25 on the accreted land, would you agree with that?

1 A I - - No, I can't. I don't know. I can't agree to that,
 2 because I don't know.
 3 Q So you think maybe in 1981, it would've been appropriate
 4 to develop houses on the accreted land?
 5 A No, I do not agree to that. I'm just saying, I don't
 6 know.
 7 Q Well, how about today? I mean, do you think it's still
 8 inappropriate to put a house out there on the accreted
 9 land?
 10 A Yes.
 11 Q All right. If Council thought it was appropriate in 1981
 12 to think about the public safety, health, and welfare,
 13 would that be the same type of thing that they should
 14 consider today?
 15 A Yes.
 16 MR. VAN RAALTE: Turn to Tab 5 for me,
 17 please. I'd like for you to take a
 18 moment and read that letter.
 19 A Uh-huh.
 20 Q Are you familiar with that letter?
 21 A Yes, I am.
 22 Q All right. What is it?
 23 A It's a letter that my husband and I filed to allow us to
 24 cut to three feet, in accordance with the original
 25 ordinance.

1 Q Now at the time you submitted that letter, you knew that,
2 that was not - - that, that 1981 ordinance was not on the
3 books anymore; didn't you?

4 A I knew that it was originally on the books, and I wasn't
5 sure why it had changed.

6 Q Okay. But you knew that it wasn't? Why would you apply
7 under an ordinance that you knew was superseded?

8 A I didn't know exactly what had superseded it, precisely. I
9 hadn't seen it. We wanted to see what would happen if we
10 asked to cut to three feet as the original ordinance did.

11 Q Who drafted the letter?

12 A I'm not sure, maybe my husband. I'm not sure.

13 Q Do you know how that letter was delivered to Town Hall?

14 A I'm not positive, no.

15 Q Is it possible that Mr. Bluestein carried it over?

16 A I guess it's possible. I don't know.

17 MR. VAN RAALTE: Turn to Tab 6 for me
18 for just a second.

19 Q Now, this is a similar cutting letter from the
20 Bluestein's, correct?

21 A Uh-huh.

22 Q Do you have any idea why your letter is so similar to the
23 Bluestein's letter?

24 A I do not.

25 Q Did you ever discuss the accreted land with the

1 Bluestein's before you filed the letter?

2 A I didn't. Not prior to filing this letter, no.

3 Q Okay. Did you ever have any discussions with anyone else
4 before you submitted the letter?

5 A My husband. I can't really remember, I don't really
6 remember. That was shortly after we moved there, and I
7 don't remember all the - -

8 Q Can we agree that, it's the Town that owns the deed, or
9 has the deed to the accreted land?

10 A I'm not positive about that.

11 Q Well, do you own the accreted land?

12 A No.

13 Q Is it correct or true that you have to look across that
14 accreted land - - in other words, over land that you don't
15 own in order to see the ocean?

16 A Yes.

17 MR. VAN RAALTE: I appreciate you coming
18 in this morning and don't have any
19 further questions.

20 MR. HOOD: Thank you.

21 - - - - -

22 (Whereupon, at 11:25, the deposition in the
23 above-entitled matter was concluded.)

24

25

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E. BLUESTEIN
DEPO

ROA 527

State of South Carolina) In the Court of Common Pleas
County of Charleston) C/A No: 10-CP-10-5449

Nathan Bluestein,)
Ettaleah Bluestein,)
Theodore Albenesius)
and Karen Albenesius,)

Plaintiff(s),)

vêrsus) Deposition
) of

Town of Sullivan's) Ettaleah Bluestein, M.D.
Island and Sullivan's)
Island Town Council,)
)

Defendant(s).)

Deposition of Ettaleah Bluestein, taken before Michelle Dawson Lloyd, Verbatim Court Reporter and Notary Public in and for the State of South Carolina, scheduled for 9:30 a.m. and commencing at the hour of 9:40 a.m., Tuesday, February 15, 2011, at the office of North Charleston City Hall, South Carolina.

Reported by:

Michelle Dawson Lloyd

APPEARANCES

1

2

3 For the Plaintiff(s):

4 For Nathan Bluestein:

5 Robert H. Hood, Esquire

6 Hood Law Firm, LLC

7 172 Meeting Street

8 Charleston, SC 29401

9

10 For the Defendant(s):

11 For Town of Sullivan's Island:

12 J. Brady Hair, Esquire

13 2500 City Hall Lane

14 N. Charleston, SC 29406

15

16 Derk Van Raalte, Esquire

17 2500 City Hall Lane

18 N. Charleston, SC 29406

19

20 Also Present:

21 Karen Albenesius

22 Theodore Albenesius

23 Nathan Bluestein

24

25

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1 STIPULATIONS

2 This deposition is being taken pursuant to South
3 Carolina Rules of Civil Procedure.

4 - - - -

5 The reading and signing of this deposition is
6 reserved by the deponent and counsel for the
7 respective parties.

8 Whereupon,

9 Ettaleah Bluestein, M.D. being duly sworn and
10 cautioned to speak the truth, the whole truth, and
11 nothing but the truth, testified and deposed as
12 follows:

13 Court Reporter: State your full name for the
14 record, please.

15 Witness: ETTALEAH COPELAND BLUESTEIN, M.D.

16 DIRECT EXAMINATION

17 BY MR. J. BRADY HAIR:

18 Q Mrs. Bluestein, I'm Brady Hair. I know that you've
19 seen me do these depositions before. The purpose of today
20 is to ask questions, and you'll give me answers under
21 oath. It's in furtherance of our discovery, so that both
22 sides can get to know more about the position of the other
23 side. Before we go any further, you want me to call you
24 Dr. Bluestein, Ettaleah, Mrs. Bluestein? What's your
25 preference?

1 A Either Ettaleah or Dr. Bluestein.

2 Q How about if I say, Dr. Bluestein?

3 A That's fine.

4 Q Because Ettaleah is harder for me.

5 A Okay.

6 Q Dr. Bluestein, have you ever testified before in a

7 lawsuit?

8 A You know, I think, maybe. I'm not positive. As a resident

9 at MUSC, I think there were several times that there were

10 - - or depositions. I'm not sure that they were really

11 depositions, but we were questioned about things that were

12 going on.

13 Q Okay.

14 A I think.

15 Q And you're an ophthalmologist?

16 A I'm an ophthalmologist.

17 Q And how long have you been practicing?

18 A Since '96.

19 Q Okay. Have you ever been sued?

20 A A couple of times. A suit was brought and then dropped.

21 A medical suit was brought and dropped because of no

22 cause, or whatever they say.

23 Q Okay. In those situations, did you have to give a

24 deposition?

25 A No. It never got that far.

1 Q Never got that far. Okay, good. And you've watched me
2 depose Nicky?

3 A Right.

4 Q And you've been here, so you know that when I ask you a
5 question if you don't understand the question, you have to
6 ask me for clarification.

7 A Sure.

8 Q Not Mr. Hood.

9 A No. I understand.

10 Q And everything is under oath. You have to answer
11 truthfully.

12 A Sure.

13 Q Okay. You have a right to read and sign the deposition.
14 Mr. Hood can explain all that stuff to you after.

15 A Okay.

16 Q Tell me a little bit about your educational history?

17 A I graduated from Sophie Newcomb College of Tulane
18 University, with a degree in biology; and then I raised
19 children for twenty years; then I went to medical school;
20 well, then I got a masters degree from the Citadel; and
21 then I went to medical school at MUSC and graduated in
22 1990; I completed an internal medicine internship and
23 finished in '91; and from '91 to '93 I did research at
24 the Storm Eye Institute in ophthalmology; in '93 to '96 I
25 completed the residency in ophthalmology at the Storm Eye

1 Institute at Medical University; and I've been in practice
2 since '96.

3 Q Okay. Tell me about your practice?

4 A I'm an ophthalmologist. I do general ophthalmology. I see
5 all kind of ophthalmology patients, and I have a laser
6 vision correction practice within my office for LASIK.

7 Q Okay. Do you own your own practice, or are you a member
8 of a group?

9 A No. I own my own practice.

10 Q Okay. And you practice by yourself?

11 A I do.

12 Q Tell me, why did you file this lawsuit against the Town of
13 Sullivan's Island?

14 A Because we have lost our view of the water and the breezes
15 that normally came to us, and they're what we enjoy so
16 much about the beach. It's real
17 important to me, the breezes and the view, and that's why
18 we bought the lot. That's what we've lost, and we can't
19 seem to do anything about keeping it.

20 Q Okay. And when did you guys buy the lot?

21 A In the late '70's. I'm not sure exactly the date. I
22 think we built the house in '80, so it was right at about
23 that time.

24 Q Okay. And the house, is it the original that you built on
25 the property in the '80's?

1 A It is. It's the original house. We've added a few
2 additions. As time went on, we added. I'm trying to
3 remember exactly what we've done. We've extended the
4 bedroom forward from where it was originally built, and I
5 just added an art studio recently. That little bit of
6 construction we've done in all those years.

7 Q But the same basic structure that you've added to?

8 A Oh, yeah. We've not changed the house.

9 Q Okay. Have you read the complaint that you filed?

10 A I have.

11 Q Okay. Have you read our answer?

12 A No. I have not.

13 Q Okay. Have you reviewed the Zoning Ordinance, with regard
14 to cutting on the Island?

15 A I have.

16 Q Okay. So you're familiar with those things?

17 A Right.

18 Q And have you read the deed that the Town received from the
19 Lowcountry Open Land Trust in 1991?

20 A I did.

21 Q Okay. Tell me this, Dr. Bluestein, why do you think you
22 have a right to cut the bushes out there to preserve your
23 view?

24 A Well, when we originally bought the lot - - And I need to
25 go back a little ways before that. We have been a lover

1 of Sullivan's Island ever since I moved to Charleston. I
2 moved to Charleston in 1959. My first date with my
3 husband, three months after I came to Charleston, was for
4 his birthday. Our date was to spend the day at the beach.
5 Before that his family had been lovers of Sullivan's
6 Island, three or four generations before. We spent the
7 day at the beach, and from then on we have loved the
8 beach. We've loved the views, the breezes, the water, the
9 whole thing.

10 And I think in 1971, as twenty-six year olds, we
11 bought a lot on Brownell Street. We paid I think \$2500.00.

12 I'm not sure -- from Sullivan's Island. We built a
13 beautiful little house, and we raised three children in
14 the house. We loved the house, but we couldn't see the
15 water. Several times we tried to buy a lot on the water.
16 Finally, we were able to get this lot. At that time, the
17 only reason for moving was to be close to the water. To
18 be close to the beach, to be close to walk out and take
19 the children right out onto the beach. And, as I said, we
20 loved the view. We built the house; the house has nothing
21 but windows across the front. The downstairs of the house
22 is built as a wind tunnel so that the breezes come
23 through. It's just purely an enjoyment of the views that
24 we went after.

25 At that time, when we bought the lot and built the

1 house the law said you could cut the trees. There was no
2 discussion about anything, at that point. We interpreted
3 it to assume that would be forever. I mean, it was never
4 a thought that we wouldn't have it. And when the Land
5 Trust came along, we all agreed, because what it said was
6 that we would be protected, that things would be kept as
7 they were. You know, before that the lots were broken up
8 and sold. As the land accredited, they broke them up and
9 sold them to the people that were adjacent to the land.
10 That's how my lot was sold to me. Because Mr. Krawcheck,
11 who lived behind - - somehow he had the right to get the
12 lot, and he bought the lot. His son owned the lot, and
13 they were able to sell.

14 Well, when we did the Land Trust nobody wanted to
15 have people come in front of them because we wanted to
16 continue the breezes. And they figured, well, if we sell
17 the lots - if we keep and go with the Land Trust, they
18 agree that we will always be protected. The views will be
19 protected; things would maintain as they were and that was
20 it.

21 Q Okay.

22 A So that was how we felt that we were entitled. We
23 could've bought the lots and kept moving forward if we had
24 wanted at that time.

25 Q So remind me again. Now, you completed construction on the

1 house on front beach in 1983?

2 A No. I think it was '80.

3 Q '80, okay.

4 A I'm not positive. I guess I could go back and look at - -

5 Q That's okay. But, generally, around 1980?

6 A I think it was about 1980.

7 Q And so one of the zoning ordinances that you were relying

8 on occurred in 1981, is that correct?

9 A Well, you know what. I don't know, it could've been '81.

10 I haven't really looked it up. At that time, there was no

11 issue of zoning ordinance. Everybody knew that if you

12 owned a front beach lot you had the view of the water; it

13 stayed. If something came up where they thought they

14 wanted to sell lots, you got the right to buy the lot. And

15 if you wanted, you could've moved forward. So I don't

16 know. We never looked into it any further, because at

17 that time there was no issue.

18 Q When you say there was no issue, how far was the beach or

19 the water from your house, back in 1980, '81?

20 A No further than for my son to drag his catamaran from our

21 front yard right down to the sand. So I don't know. I'm

22 not a good judge of distance, but the boat sat in the

23 front yard and he pulled it onto the beach.

24 Q So pretty close?

25 A Pretty close.

1 Q And the land has truly, amazingly, accreted --

2 A Right.

3 Q --over those years?

4 A Right.

5 Q And how far do you think you're from the water now, from

6 the house?

7 A A mile, I guess. You know, I don't have any - I'm not

8 good at distance.

9 Q But a tremendous difference -

10 A A big difference, yeah.

11 Q -- between 1980 and 2011?

12 A Exactly. I don't have any idea how far it is.

13 Q And I think you made reference to it, that the Town has

14 been regulating the cutting of the property out in front

15 of your house for - - well, since you moved there?

16 A As far as I knew. I mean, it really was not an issue

17 right at the beginning. So I don't know what was

18 happening in those days. There was nothing there.

19 Q You and Nicky have applied for various pruning and

20 trimming permits over the years?

21 A Right. When things got to be a problem then we applied,

22 and did whatever we were supposed to do.

23 Q And that's been going on now for ten years or so?

24 A You know, I don't know how long. I have no idea.

25 Q Well, we've got the permits and all that.

- 1 A Yeah. I don't have any idea.
- 2 Q But ya'll been cutting over a period of time?
- 3 A Yeah. I don't have any idea.
- 4 Q Okay. And so, when did the issue of how much you could
- 5 cut, and the fact that you couldn't see, or enjoy the
- 6 breezes really become a problem?
- 7 A I think, approximately, the past five years. I don't know
- 8 if it was even that far back, to be honest with you. It
- 9 hasn't been a real long time.
- 10 Q Okay. So within the last five years, what's changed with
- 11 regard to the accreted land in front of your house - -
- 12 A Trees have grown.
- 13 Q -- to impede the view?
- 14 A Big trees, who's arms go like this (demonstrating). I
- 15 think from hearing somebody else say, they may be Cedar
- 16 trees. Again, I have no actual identity of what the trees
- 17 are. They are growing in different patches. Some are
- 18 growing in a straight row, others are growing so that they
- 19 fill in the gaps between the seemingly straight row. So
- 20 it's really lots and lots of trees that have come up in
- 21 the very past short time.
- 22 Q Okay. And so the ultimate problem is, those trees, those
- 23 bushes, whatever the vegetation is, is impeding your views
- 24 and your breezes?
- 25 A Right, exactly.

1 Q And that's the heart and soul of the lawsuit?

2 A That's the heart and soul. I love the breeze; I love the
3 beach; I love the view; and we don't have it.

4 Q Okay. If you could write the zoning ordinance that
5 regulated the property in front of you, at what height
6 would you allow cutting?

7 A Well, I'd like to go back to the three feet that is in the
8 -- at the time of the deed and allow cutting of everything
9 down. I think they could leave -- if there were Grand Oak
10 trees or something. I think that they could be left.
11 Something of value, Palmetto trees perhaps could be left.
12 But I think the rest should all be down, so that we're not
13 destroying our views.

14 Q Okay. So if it was left up to you, you would cut it to
15 three feet?

16 A Right.

17 Q Which is what the 1981 ordinance allowed? And you would
18 save some species, Oaks, Grand Oaks --

19 A Right.

20 Q Those kinds of things? But you would cut the other
21 species down?

22 A Right.

23 Q If you were allowed to cut to three feet, if that was what
24 the law was, would it make any difference to you what
25 impact cutting it to three feet would have on other

1 aspects of the land?

2 A Yeah. I think that if you could cut it to three feet - -
3 I think you would have to go in - - and there's some talk,
4 but I don't understand the ecology of the whole thing. But
5 there's some talk about that some of those vines and
6 bushes need to be thinned so that it affects the animals -
7 - it affects whatever is there. So I would feel that
8 should be thinned out appropriately, so that it doesn't
9 adversely harbor animals that shouldn't be there, and
10 prevent whatever may be dangerous for any other purposes.

11 Q Okay. And who should make the determination of how best
12 to do those types of things?

13 A I think that we should have trained and educated people
14 that know about the ecology; that knows about the land;
15 that knows about the species. I feel that they should be
16 able to give us an opinion. I don't have any opinion as
17 to what's appropriate.

18 Q Okay. These folks that did the study - - Are you familiar
19 with the study of the accreted land - -

20 A Very.

21 Q -- that we've talked about?

22 A The new study?

23 Q Yes, ma'am. Whatever the latest version is.

24 A I can't tell you about the latest version. I don't know
25 when the latest version came out, but I am very familiar

1 with what I think was the latest version.

2 Q Okay.

3 A So I don't really know if it was the latest version.

4 Q Right. But regardless of the version, do you feel
5 comfortable that those folks are competent to advise the
6 Town on what to do out there?

7 A I do feel very much that they are competent. I feel that
8 they have somewhat been manipulated as to what they were
9 able to say. They came out with many opinions that I
10 thought were very interesting. And they were told,
11 point-blank, you cannot use this plan that you have
12 picked; no phase of this plan that you have picked. Strike
13 it. I think that was wrong. I think that the officials
14 should not have directed them as to what was appropriate.
15 If they were the scientists coming forth with their
16 information, I think we should've listened a little more
17 carefully to what they had to say and not had
18 pre-conceived ideas as to what way it should be. It
19 doesn't make sense to pay people hundreds of thousands of
20 dollars for an opinion and then not even listen to what
21 their opinion is.

22 Q Okay. But from a qualification standpoint --

23 A No question.

24 Q -- you don't have any problem with them?

25 A No. I think they sound very capable.

- 1 Q Okay. And the Town has not adopted any new plan at this
2 point, is that correct?
- 3 A Not that I know of. I don't think so.
- 4 Q So conceivably, the Town could go back and ask these folks
5 to consider whatever they wanted them to consider?
- 6 A Could. That's true.
- 7 Q And they could amend - - I'm sure they'd be happy to do
8 another draft and charge the Town for it.
- 9 A Right.
- 10 Q Let me ask you this: If the cutting to three feet is
11 really the only thing that matters to you -
- 12 A No, that's not the only thing. The other thing is that
13 they've limited the species. They've manipulated what
14 species of trees could be cut.
- 15 Q Okay.
- 16 A I think that's a prime issue.
- 17 Q Okay. I guess my question is: You want to cut three feet,
18 not withstanding the species, with the exclusion of
19 possibly Grand Oaks, if they exist. I don't know whether
20 they do or not.
- 21 A Right. I don't think they exist, or Palmetto trees out
22 there; I haven't seen them. But I would think those would
23 be important to keep.
- 24 Q Okay. Would you agree with me, Dr. Bluestein, that there
25 are pros and cons of the various ideas in the plan? In

1 other words, there's some benefit to some folks of cutting
2 it to three feet; there's some benefit to other folks of
3 just letting it grow into a maritime forest?

4 A That's true. And I think they've addressed that. With
5 their expertise, I think they picked areas that they
6 thought were appropriate for different - you know,
7 different divisions of what could be put in each area. My
8 objection is the small amount that they have given to us
9 in our areas. I mean, when they come in and they say that
10 you can only now cut such a percentage of the shrubs and
11 the trees, it's very small when you come and look out
12 there. It's not enough.

13 Q Okay. But you would agree with me that there are some
14 folks on the Island that would let it grow up into a
15 maritime forest?

16 A No question. And I'll tell you that when we agreed to the
17 Open Land Trust it said that things would remain as they
18 were; things would keep in its state. That isn't what
19 actually was interpreted, and that is not what happened.

20 Q And when you say it was said, who was it said by?

21 A The Trust reads that.

22 Q You think it says that?

23 A I think it says that. Will stay natural or something to
24 that effect, as it is.

25 Q Okay. But you think that's in the document?

1 A I think that's in the document; my interpretation.

2 Q And so you would agree with me that beauty is in the eyes
3 of the beholder?

4 A No question.

5 Q Okay. And you would agree with me that there are some
6 people who would prefer, as they're walking down the
7 beach, to look back toward your house and see a maritime
8 forest?

9 A Oh, there's no question. We've had people that have
10 recently come in and when they walk down the beach they
11 don't want to see a house.

12 Q And, Dr. Bluestein, that difference of opinion among
13 people is not really different from other issues that
14 government deals with all the time?

15 A True.

16 Q So for instance, - - on the Island
17 itself, I'm sure that there is disagreements
18 about how expansive the business district should be.
19 Would you agree with me?

20 A Right. I would.

21 Q There's some folks that would say, 'let's make it bigger;
22 there's some folks that say, let's make it smaller. So
23 people can disagree?

24 A Absolutely.

25 Q When people in a community, such as Sullivan's Island,

1 disagree about issues that effect the whole place who
2 makes the decisions?

3 A Well, I think that's kind of an interesting point, because
4 I think that you are restricted by first, what laws are in
5 effect at the time; and second, things are changed by the
6 Town Council; and third, would be referendums. So I think
7 that if you -- first you have to figure what is the
8 actual law; what does the law say. Then you must stick
9 with the law, unless you then go by the contract of the
10 Open Land Trust that said that in order to change this we
11 must have a 100 percent of Council, or we must have a
12 referendum done; otherwise the law stays that way.
13 Therefore, then we move down to the, I guess, the lower
14 law, which would be Town Councils' responsibility. And
15 then, I guess, -- I mean, I don't know which is higher or
16 which is lower, but I think that if you have a law you
17 have to obey the law first.

18 Q Okay.

19 A That's there.

20 Q Fair enough. Let's not talk about the deed, with regard
21 to this. More of a bigger question of where we were
22 headed was about who decides what happens with the laws?
23 And I think you said, first of all you have to look at
24 what the law is, and you either comply with it or you get
25 the law changed, and if Town Council would have the

1 authority to change laws through an ordinance. Is that
 2 correct? In general, I'm not talking about the deed.
 3 A Yes. I would say that's true. But I don't know that's
 4 what the deed says.
 5 Q Right. But I'm not talking about the deed, I'm talking
 6 about - - Let's go back to the business district.
 7 A Sure.
 8 Q Okay. The Town Council would have the authority to zone a
 9 particular area whatever designation, a business,
 10 restaurant use?
 11 A Right.
 12 Q And they could if they wanted to, I suppose, expand that
 13 and rezone, maybe, residential properties adjacent to the
 14 current business?
 15 A Right. They could.
 16 Q And so when they do that, they would be changing a law?
 17 A True.
 18 Q Okay. So Town Council, ultimately, would decide zoning
 19 laws and other laws on the Island, on Sullivan's Island?
 20 A Correct. If they are legally given the right to change
 21 the law within that restriction.
 22 Q Fair enough. And do you understand the process - Let's
 23 forget about the deed. Now, I understand your position.
 24 Let me just state it, that that deed keeps them from
 25 changing - -

1 A That's fine. Okay.

2 Q -- the law? Is that fair?

3 A Yes.

4 Q Okay. So not withstanding that, do you understand the

5 process of how the Town governs and changes laws?

6 A Yes. I do.

7 Q You do. Have you gone to any Town meetings over the

8 years?

9 A I have.

10 Q Okay. Has there every been an issue, other than this one,

11 that really was something that you were very interested

12 in, and there were a lot of folks on both sides, and had

13 Town meetings?

14 A No.

15 Q No. You can't recall?

16 A Not that I can think of. Not anything that was in my

17 heart that I cared about.

18 Q Not as big, nothing like this one?

19 A (Nonverbal response)

20 Q Okay. Have you voted historically in the Town Council and

21 Mayoral elections?

22 A Yes.

23 Q What kind of things do you -

24 A Now, wait a minute. You said in Town Council elections?

25 Q Yes, ma'am. The Town -

1 A Oh, for the Town Council member. Yes, I have.

2 Q Okay. And what kind of issues do you consider when you're
3 voting for Town Council members?

4 A Well, I would consider the character of the person who's
5 running; what I can get to know about who they are and
6 what they are; and if I think they have the capacity to
7 make logical decisions and take into account all sides of
8 what they're looking at and they wouldn't be stuck in one
9 position. I'd want to know who they are and what they
10 are.

11 Q And what they stand for?

12 A Uh-huh.

13 Q Okay. Now, Sullivan's Island has what we would call an
14 at-large system of electing people, is that correct?

15 A I don't know what that is.

16 Q Let me explain it to you. In some cities they have what's
17 called single-member districts. So Councilman Jones
18 represents this particular area; Councilman Williams
19 represents this particular area. And when you go to vote
20 if you live in Councilman Jones area, you only get to vote
21 for him. You don't get to vote for Williams, and Smith,
22 and whoever else.

23 A Sure. Sullivan's Island doesn't do that.

24 Q And on Sullivan's Island, if you have six members of
25 council you get to vote for all six. Except you have

1 staggered terms, so not all of them come up for election
 2 at the same time.
 3 A Right.
 4 Q So the question there - I mean the point of that is, you
 5 get to vote for the entire group of people?
 6 A Right.
 7 Q So theoretically at least, all of them should be
 8 responsive to your needs and concerns?
 9 A Well, I think they should all be responsive to hear all of
 10 the sides to a question and not be limited as to what they
 11 -- have preconceived opinions. I think they should be
 12 listening to everybody's opinion.
 13 Q Sure. All politicians should do that.
 14 A And everybody's needs.
 15 Q Sure. Everybody's needs?
 16 A Right.
 17 Q And that's the point. Whereas in a single-member district
 18 situation where most big cities, North Charleston,
 19 Charleston, the one person elected in that area is
 20 listening to that person?
 21 A A more partisan.
 22 Q Yeah. They don't care much about somebody from twenty
 23 miles up the road?
 24 A Right.
 25 Q So on Sullivan's Island each individual voter and property

1 owner has the opportunity to vote for every one of those
2 people?

3 A Correct.

4 Q Okay. So at least theoretically and from a good government
5 perspective, all of those folks should be responsive to
6 every voting person on Sullivan's Island?

7 A Correct.

8 Q Regardless of where they live on the Island, is that
9 correct?

10 A Should be.

11 Q Should be?

12 A Should be is what I would say.

13 Q And if you don't think they are, what's the solution?

14 A Again, very theoretically, the solution would be don't
15 elect them again. Again, you have one vote.

16 Q Right. But, again theoretically, if you've got other
17 people that were like-minded saying I don't want to vote
18 for that guy or woman again, you could kick them off and
19 vote for somebody else?

20 A True.

21 Q That's the way government is supposed to work?

22 A Right.

23 Q Whether it does or not -- well, it doesn't always work
24 that way?

25 A Right.

1 Q But it's supposed to work that way. Who owns the accreted
2 land?

3 A I don't know who actually owns the accreted land. But I
4 feel we have a big stake in the accreted land because we
5 gave up our right to purchase the lots in front of us as the
6 land accreted. I think that's really a big issue. We always
7 would've had the right to get the lot in front of you. If
8 you choose to build on the lot - - That's how, historically,
9 Sullivan's Island has always developed. We relinquished
10 that, knowingly, when we thought of the good of Sullivan's
11 Island, and our own fact of protecting our views when we
12 agreed to the Open Land Trust. So I don't know actually
13 what else to say.

14 Q Well, let's explore that a bit. When you gave up the
15 right, did you sign any documents giving up a right to
16 that land when they did this Open Land Trust deal?

17 A No. We didn't sign any documents, but we supported the
18 concept. And as you said, when you vote in an election or
19 when you vote - - we were positive to the concept.

20 Q Okay. But you didn't sign a deed transferring your
21 interest in any of this property?

22 A No.

23 Q Okay. And you've bought and sold property before in your
24 life?

25 A Right.

1 Q And every time you did that you had to sign away a deed of
2 interest in land, is that correct?

3 A Right? But the way the Open Land Trust was promoted to
4 all of us, at that time, was that this is a great idea; we
5 are preserving the land as it is now; it will not be
6 changed; it will protect the views and the breezes; and it
7 will be for the good health. All of that is in the Trust.
8 We were very much supportive. Never did we campaign;
9 never did we politically try to negatively influence that
10 concept. Everybody on Sullivan's Island was together
11 pushing forward for that concept. We never opposed the
12 concept. So as you said, couldn't you influence the
13 people? We could've influenced and we didn't.

14 Q And at the time you were supportive of what the Town
15 wanted to do?

16 A That's exactly right, because it suited everyone,
17 supposedly.

18 Q At the time?

19 A At the time.

20 Q We can look at the deed, but let me ask you this question.
21 So what happened was the Town deeded the property to the
22 Land Trust, then the Land Trust deeded it back to the
23 Town?

24 A Right. I think.

25 Q With restrictives, covenants, and deed restrictions?

1 Which we're all familiar with, that is part of the
2 lawsuit. So would you agree with me that the Town owned
3 the land; they deeded it the Land Trust; then the Land
4 Trust deeded it back?

5 A Yes.

6 Q With restrictions on it?

7 A Right.

8 Q Okay. So let me ask you again. Would you agree that the
9 Town now owns that accreted land?

10 A I guess. In what you just said, yes.

11 Q And subject to the deed restrictions?

12 A Right. Subject to the deed restrictions.

13 Q And we both agree that the Town is made up of all the
14 people?

15 A Correct. You know, it's an interesting thing. I don't
16 know if you noticed in the morning paper. But there's a
17 big, big spread in the Post and Courier about the Open
18 Land Trust and how people have reveled in the fact that
19 they have maintained their land that was given to the Open
20 Land Trust, and it has not changed. If you'd like to pick
21 up the Post and Courier and look at this morning's paper.
22 I don't know if you had a chance to see it before you
23 left, but applauding the Open Land Trust actions for
24 twenty-five years. I think that is where we all were at
25 that time.

- 1 Q Right. I saw both of the articles, and I read them with
2 great interest. I'm interested in conservation anyway.
- 3 A And we are too.
- 4 Q Even more so now that we are involved in this case. Let
5 me ask you this then, Dr. Bluestein, since we're on the
6 Open Land Trust. If the folks from the Open Land Trust, I
7 think some of them are still there from the time this deed
8 was done. If they came in and said, you know what, it was
9 never our intention to allow people to cut to three feet
10 and protect their views. Would that influence your
11 position?
- 12 A No, it wouldn't, because I wouldn't have felt that if
13 that was their opinion. They should've made that clear at
14 the time that we all felt we were all together in the same
15 boat and going by what the rules were. No. I wouldn't
16 think or look back to say, we didn't mean it that way.
- 17 Q Okay. So if one of those folks said, that was never our
18 intention. Then you would just disagree that they didn't
19 agree with you at the time?
- 20 A I would've felt that they should've made that clear at the
21 time; before we all supported their project.
- 22 Q Okay. Do you know how many property owners there are on
23 Sullivan's Island?
- 24 A I have no idea.
- 25 Q Do you know how many registered voters there are?

- 1 A No.
- 2 Q But we agree that, at least theoretically, each and every
3 one of them has an equal voice in how government is
4 supposed to run?
- 5 A Yes.
- 6 Q Therefore, really no one person is more important than the
7 other?
- 8 A That's right.
- 9 Q And goes sort of to the one person, one vote deal?
- 10 A That's right.
- 11 Q Should the Town Council and the Mayor listen to everyone
12 equally, or should they put more weight on particular
13 peoples opinions?
- 14 A I think they should listen to everyone equally.
- 15 Q Okay. Should people that don't live on the front beach
16 - - second row, third row, fourth row, whatever row, should
17 they have any impact or influence on this decision?
- 18 A Yeah. I guess they should. I'm not saying they don't. I
19 feel that many people feel that what has happened is
20 unfair to the whole Island. It affects everyone. I'm not
21 big on the concern of the economics even though we're
22 talking about it's an economic downturn. That isn't my
23 passion; I could care less, to be honest with you. But it
24 has impacted the entire Island, the economics of what's
25 happening. Number one, the front beach owners' property

1 has become devalued by almost a million dollars per lot,
2 per house. That causes - - therefore, the next row to - -
3 We've gotten statements from very well known real estate
4 people, and attorneys, and things like that. They have
5 explained that as you move from the ocean front property,
6 beach front views, that as you move away it has negatively
7 impacted all of the property values. I think that's an
8 issue. I think that definitely affects everybody all the
9 way back. I think the fact that the property values
10 dropped effects the collection of taxes. That negatively
11 impacts the treasury. Therefore, that adversely affects
12 everybody on the beach. I think this is an issue that is
13 of prime importance to everybody, no matter where they
14 live.

15 Q So everyone on the Island should weigh in, equally, on
16 whatever decision Council --

17 A That's right.

18 Q -- ultimately makes?

19 A That's right.

20 Q Fair enough. Do you think that front beach residents
21 should have a louder voice on this issue?

22 A No.

23 Q Okay. Now, you would agree with me that since 1981, Town
24 Council has changed the zoning ordinance, which affects
25 the cutting and pruning out there, two or three different

1 times?

2 A I don't really know the number of times. I know that what
3 I've looked at it seems like they've changed it when they
4 - after the Land Trust. I think they changed it twice, as
5 I understand it.

6 Q And you're aware that, at some point - - and I'll just
7 represent to you because I don't really want to go through
8 all these books if we don't have to. I'm enjoying our
9 conversation. In 1995, they changed that ordinance that
10 allowed you to cut to three feet and then raised it to
11 seven feet. Do you recall that?

12 A Yes. I do.

13 Q And that was in effect for ten years or so?

14 A Right.

15 Q And you guys applied for permits and cut under that law?

16 A If you say so. I don't know when we cut.

17 Q And you complied with whatever the law was?

18 A I don't know. You know, I don't know at what time we
19 first had to start cutting.

20 Q Well, whatever the law was, you complied with it?

21 A Sure.

22 Q Okay. Would cutting to seven feet, across the board,
23 would that satisfy your needs for the views and the
24 breezes?

25 A If you could cut everything then I think you're in a

1 different situation than if you could only cut Myrtles.

2 Q Okay.

3 A I don't know. I prefer, of course, three feet.

4 Q Okay. Fair enough.

5 A Could we look at it a different way, I'm not saying I'm

6 pushed up against a wall one way or the other. I think

7 the main issue is that these huge trees are growing; that

8 they were never there before. That is what is adversely

9 affecting the views.

10 Q Okay. How about five feet, which they did in 2005, I

11 guess? Would that help you?

12 A Again, I guess I'd have to give you the same answer. To

13 me, it's mainly the fact that those other species are

14 growing wild, and covering, filling in, and covering up.

15 I don't know what to say about the height. I would prefer

16 three feet.

17 Q Okay. And I think what I'm getting from you is that

18 whether it's three feet, five feet, or seven feet, you

19 need to be able to cut them all?

20 A Right.

21 Q Otherwise --

22 A It's a moot point.

23 Q If there's certain species exempted then you're going to

24 have areas that are cut, and then once these grow up,

25 eventually, they're going to block the view?

- 1 A Exactly. And they're not just patches blocking the view.
2 They are extending in all directions. As I told you
3 before, you may have them in a row at one place and then
4 the thing splits. If there's no tree there, then there's
5 another tree out of that row that's in that same
6 direction.
- 7 Q Because with regard to these species that they don't allow
8 you to cut - - I mean, they sort of grow haphazardly; you
9 don't know where they're going to sprout up?
- 10 A I guess. If that's how they got there. I'm not sure.
- 11 Q Right. But it doesn't appear to be any particular rhyme
12 or reason to where they grow?
- 13 A Other than they're completely growing all the way across
14 the front is what looks like is happening.
- 15 Q Do you think someone planted those trees in front of you?
- 16 A I don't really know.
- 17 Q Okay. Do you have any evidence that they did?
- 18 A No.
- 19 Q Okay. I think that what you've told me is that the rights
20 that you have, that you believe were violated, come from
21 the deed, is that correct?
- 22 A The deed and the law that were in effect at the time the
23 deed - - the law that was on the books at the time the
24 deed was signed.
- 25 Q Okay. And that would be the zoning ordinance?

1 A I don't know if it's a zoning ordinance or not. I would
2 think it was the law about what could be cut, and what
3 height, and what were the restrictions on the cutting.

4 Q Okay. So do you think the deed, anywhere in the deed,
5 it says that you're allowed to cut to three feet?

6 A I don't think the deed specifies. I think the deed
7 implies that it would abide by the law. I'm not an
8 attorney; my feeling would be that if you signed a deed it
9 would - - that what was in restriction at that time with
10 the law would be what was applicable to the deed you
11 signed.

12 Q Okay. So let me make sure I get this straight. Your
13 position then is that when the deed was executed in 1991,
14 whatever law, zoning law, was in effect at that time was
15 forever frozen in time?

16 A No. I wouldn't say that. I would say that whatever deed
17 - - whatever law was in effect at that time applied to the
18 deed.

19 Q Okay.

20 A And then I would say to you, that the deed says, as my
21 opinion, not as an attorney, the deed says we will leave
22 it in this state and we will maintain the views. It
23 doesn't say that, and so it says that everything should
24 stay put as it is at the time we signed it.

25 Q Okay. Do you believe that the deed prevented and prevents

1 the Town from passing any new ordinances that affect the
2 cutting and pruning of the land?

3 A I would think that as long as they maintain the
4 restrictions of the deed - If they could change the law,
5 as long as we keep things as they were at that time they
6 could change the law. But it says that things will stay
7 in this natural state.

8 Q Okay. So again, the crux of it is that you believe that
9 the deed restricts the Town from passing laws that violate
10 the deed?

11 A Yeah.

12 Q Whatever the deed says?

13 A I guess. Again, I'm not a lawyer and I don't even know if
14 that makes sense. I would feel that we should be stuck in
15 time at what was it and as it says remain natural as it is
16 now. That's my interpretation.

17 Q Okay.

18 MR. HOOD: Would you like any water, or
19 like to use the bathroom, or anything?

20 DR. BLUESTEIN: No. I'm fine.

21 MR. HAIR: I don't have anything else.

22 - - - - -

23 (Whereupon, at 10:25, the deposition in the
24 above-entitled matter was concluded.)

25

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N. BLUESTEIN
DEPO

ROA 570

State of South Carolina) In the Court of Common Pleas

)

County of Charleston) C/A No: 10-CP-10-5449

Nathan Bluestein,)

Ettaleah Bluestein,)

Theodore Albenesius,)

and Karen Albenesius,)

)

Plaintiff(s),)

)

Deposition

versus)

)

of

Town of Sullivan's)

Island and Sullivan's)

Nathan Bluestein

Island Town Council,)

)

Defendant(s).)

)

**CONDENSED
COPY**

Page 2

1 Deposition of Nathan Bluestein, taken before Michelle
2 Dawson Lloyd, Verbatim Court Reporter and Notary Public in and
3 for the State of South Carolina, scheduled for 9:30 a.m. and
4 commencing at the hour of 9:42 a.m., Tuesday, January 18, 2011,
5 at the office of North Charleston City Hall, South Carolina.
6
7 Reported by:
8 Michelle Dawson Lloyd
9
10 APPEARANCES
11
12 For the Plaintiff(s):
13 For Nathan Bluestein:
14 Robert H. Hood, Esquire
15 Hood Law Firm, LLC
16 172 Meeting Street
17 Charleston, SC 29401
18
19 For Theodore Albenesius:
20 A. Walker Barnes, Esquire
21 Hood Law Firm
22
23
24 For the Defendant(s):
25 For Town of Sullivan's Island:

Page 3

1 J. Brady Hair, Esquire
2 2500 City Hall Lane
3 N. Charleston, SC 29406
4 For Sullivan's Island Town Council:
5 Derk Van Raalte, Esquire
6 2500 City Hall Lane
7 N. Charleston, SC 29406
8
9 Also Present:
10 Theodore Albenesius
11 Ettaleah Bluestein
12 Francie D. Austin, Esquire
13
14
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23 EXHIBITS
24
25 Exhibit No. 1: Exhibit Book

Page 4

1
2 STIPULATIONS
3 This deposition is being taken pursuant to South
4 Carolina Rules of Civil Procedure.
5
6 The reading and signing of this deposition is
7 reserved by the deponent and counsel for the
8 respective parties.
9 Whereupon,
10 Nathan Bluestein, being duly sworn and cautioned to
11 speak the truth, the whole truth, and nothing but
12 the truth, testified and deposed as follows:
13 Court Reporter: State your full name for the
14 record, please.
15 Witness: Nathan Jerome Bluestein.
16
17 DIRECT EXAMINATION
18
19 BY MR. J. BRADY HAIR:
20
21 Q Mr. Bluestein, I'm Brady Hair. And this is Derk Van
22 Raalte and Francie Austin of our office and, as you know,
23 we represent the Town of Sullivan's Island in this lawsuit
24 that you and your wife and Mr. and Mrs. Albenesius brought
25 against the Town. Now, we've had several conversations,

Page 5

1 you and I, and every time I call you Mr. Bluestein, you
2 want me to call you Nicky. You want me to call you Nicky
3 today, is that more comfortable for you?
4 A That'll be fine, Mr. Hair.
5 Q Okay. That's great. You call me Brady, okay.
6 A Okay.
7 Q Have you ever testified before in a case, a case at a
8 trial?
9 A I don't understand what you mean.
10 Q Okay. You filed a lawsuit, maybe this case goes to trial,
11 have you, previously, ever testified in a trial of any
12 kind? Civil, criminal, domestic, any kind of testimony.
13 A I've never filed a lawsuit before. You're talking about
14 in a courtroom?
15 Q Yeah.
16 A No.
17 Q No. Have you ever had your deposition taken before?
18 A No.
19 Q Okay. The deposition that you attended when Mr. Hood's
20 firm deposed Mr. O'Neil, is that the first deposition you
21 ever attended?
22 A Yes.
23 Q Okay. Good. If you have any questions during the
24 deposition ask me and I'll give you whatever clarification
25 that I need to. You've got to answer truthfully, tell the

2 (Pages 2 to 5)

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Page 6

1 whole truth to my questions. You have to answer out loud
 2 too, Nicky, because she can't take it down unless you
 3 respond to me --
 4 A Okay.
 5 Q -- yes, or no, or whatever you answer, okay. If you
 6 answer a question I'm going to assume that you understood
 7 my question and gave me a correct answer. Fair enough?
 8 A Uh-huh. Yes.
 9 Q Yes, good. All right. If you need a break, let me know.
 10 We've got coffee, and drinks, and whatever right down the
 11 hallway in my office and there's restrooms out there. I
 12 want you to be comfortable. This is just an information
 13 gathering session. So if you need something you let me
 14 know, and we'll take a break.
 15 A Thank you.
 16 Q Fair enough?
 17 A Uh-huh.
 18 Q What's your address?
 19 A 2513 Atlantic Avenue, Sullivan's Island.
 20 Q And that's on the front beach at Sullivan's Island?
 21 A Yes.
 22 Q And when did you buy that house?
 23 A I built -- I bought the lot, I can't remember the date. I
 24 think I built the house around 1980.
 25 Q Okay. How is the house titled, is it in your name, your

Page 7

1 wife's name, jointly?
 2 A My wife's name.
 3 Q Your wife's name, okay. And you say you built the house?
 4 A Uh-huh.
 5 Q How much did you pay for the lot?
 6 A I paid ninety-five thousand.
 7 Q And that was around 1980?
 8 A No. The lot I bought, I really don't remember exactly.
 9 In the 70's, mid to late 70's, I'm not sure exactly when.
 10 Q Okay. And, roughly, how much do you have in the house?
 11 When you built the house what did it cost you?
 12 A When I built the house the first time?
 13 Q Uh-huh.
 14 A The house cost me one hundred twenty thousand plus
 15 ninety-five.
 16 Q Okay. And you said the first time, so have you since then
 17 added onto it or rebuilt it?
 18 A I did some renovation after Hurricane Hugo did some
 19 damage. And I just finished some renovation, not quite
 20 finished, ninety-nine percent finished.
 21 Q Okay. So you would've bought the lot somewhere in the mid
 22 to late 70's or early 70's?
 23 A Somewhere there, I can't remember exactly when.
 24 Q When you bought the lot in the 70's how far was it from
 25 the lot line to the water line, to the ocean, just

Page 8

1 roughly?
 2 A From -- I think it was about, mean high was about 450 feet
 3 from the street. I think that's fairly accurate.
 4 Q So over a period of years the accretion has been fairly
 5 dramatic where you are, it's added a lot of land between
 6 you and the ocean?
 7 A It's added some land, yes.
 8 Q About how far?
 9 A That, I don't know.
 10 Q Don't know?
 11 A I've never measured.
 12 Q Okay.
 13 A It's -- I've just never gone out there and measured it or
 14 walked it.
 15 Q Have you recently had your home appraised?
 16 A I think it was in '09.
 17 Q What did it appraise for, then?
 18 A I really don't know. Walker has the appraisal. I just
 19 don't remember exactly what it was, but he's got it here.
 20 Q Do you maintain insurance on your house?
 21 A Yes.
 22 Q What kinds of insurance?
 23 A I have South Carolina Wind and Hail Storm and I've got
 24 South Carolina Farm Bureau.
 25 Q You have flood insurance?

Page 9

1 A I believe I do, now.
 2 Q Is it with the same company?
 3 A No. I think that's the federal government. I mean it's
 4 through South Carolina Farm Bureau but..
 5 Q But FEMA?
 6 A FEMA.
 7 Q Let me ask you this, Nicky, maybe this will expedite our
 8 process today. Can you tell me in your own words why you
 9 filed this lawsuit? Tell me what it's about.
 10 A I can tell you in two words, view and breeze.
 11 Q Okay.
 12 A I want them back.
 13 Q And when you say you want them back, do you feel like
 14 someone or something has taken them from you?
 15 A Definitely.
 16 Q And who would that be?
 17 A The accreted land.
 18 Q Okay. Now, we talked a lit bit about the accreted land,
 19 and what I was trying to get at was just how much
 20 accretion has occurred in front of your house?
 21 A It's, it's -- I've never really been in the accreted land
 22 and walked it. It's such a mess, it's standing water, and
 23 I just never really walked it. It's mosquitoes, I just
 24 never really walked it. I don't know, I can't give you an
 25 answer.

3 (Pages 6 to 9)

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Page 10

1 Q But the land itself doesn't cause you a problem with your
 2 view and the breezes, is that correct?
 3 A The forest causes the problem.
 4 Q Okay. So it's the vegetation on the land that is causing
 5 you the problem?
 6 A Yes.
 7 Q Okay. So is it fair to say that the lawsuit is about
 8 trees, and bushes, and vegetation blocking your view and
 9 interfering with your breezes?
 10 A I would say I want my views and my breezes back.
 11 Q So, in a nutshell, that's why you brought the lawsuit?
 12 A Uh-huh.
 13 Q Okay. So this really isn't about the Town actually doing
 14 anything to the accreted land. In other words, the Town
 15 hasn't affirmatively gone out there with a bulldozer and
 16 pushed the dirt around, or built a building, or -- They
 17 haven't done anything to you, the Town, is that correct?
 18 A The best way that I can answer it, I don't think they have
 19 managed the accreted land properly.
 20 Q Fair enough. So is it fair to say that it's really about
 21 the way the Town has regulated the accreted land with
 22 regard to how they've allowed you to cut for your view?
 23 A I don't know whether it's regulated or management. They
 24 have not managed the accreted land so I can continue my
 25 view and my breezes. Let me give you a little background

Page 11

1 on my house.
 2 Q Sure.
 3 A I used an architect out of Hilton Head -- And my house
 4 has, and Bobby's been in my house, it's designed as wind
 5 tunnels and the breezes go all the way through my house.
 6 And, also, it's designed by the architect with maximum
 7 views. Well, the views are gone, or almost all gone, and
 8 the breezes are gone. And that's, I guess in a nutshell,
 9 that's why I brought the lawsuit.
 10 Q Fair enough. So what I'm trying to get at, it's not a
 11 trick question, but, simply, that it's not about what the
 12 Town has done to the land, it's about the way the Town, in
 13 your opinion, has kept you from doing something to the
 14 land, i.e., cutting the bushes and the vegetation.
 15 A I don't think the Town has managed the accreted land
 16 properly.
 17 Q Okay. And when you say managed, in what regard?
 18 A By -- This is a legal question for Bobby. It's out of my,
 19 you know, I'm not an attorney. But I don't think that
 20 they have managed the land as the land trust instructs
 21 them to do.
 22 Q Okay, fair enough. But in what regard? Specifically, what
 23 have they failed to do that you would like for them to do?
 24 A I don't have -- I want my views and my breezes back.
 25 Q Okay. And how would you if you were just allowed to do

Page 12

1 whatever you wanted to do get your views and breezes back?
 2 A I haven't even thought of that.
 3 Q You haven't thought of what it would take to accomplish
 4 your objective?
 5 A I can't give you an answer. I haven't thought about it.
 6 Would I, you know, I just haven't thought that ..
 7 Q Okay.
 8 A I guess you'd say the lawsuit is really -- The views and
 9 the breezes, I haven't thought what the Township should
 10 do. I don't know.
 11 Q Okay. So does the concept of whether your allowed to cut
 12 vegetation, or how your allowed to cut it, any of those
 13 things, that doesn't figure into your thought process
 14 about the lawsuit?
 15 A I have not thought about, that much thought about what the
 16 Town should do.
 17 Q Would you agree with me that the land that we're talking
 18 about, the accreted land, belongs to the Town and not to
 19 you?
 20 A I don't know. I think that's more of a legal question. I
 21 can't give you an answer.
 22 Q Well, let me ask you this way. Do you own the accreted
 23 land, do you have a deed to it?
 24 A No.
 25 Q So somebody must own it?

Page 13

1 A That I don't know.
 2 Q You don't know who owns the accreted land, Mr. Bluestein?
 3 A I think you'd have to ask my attorney, Bobby Hood. I just
 4 don't know, legally, who owns what.
 5 Q So you don't know who owns the accreted land, that's your
 6 answer?
 7 A I can not give you an answer to that.
 8 Q Okay. When you say you can't give me an answer, does that
 9 mean you don't know the answer?
 10 A I don't know the answer.
 11 Q Do you think that you have a right to cut the vegetation
 12 on that accreted land?
 13 A I think I have a right to my views and my breezes.
 14 Q Okay. And what gives you that right?
 15 A I always had it, since I built my house in 1980. I just
 16 feel that over the last, I don't know when, but since the
 17 forest has started to grow that I've lost my views and my
 18 breezes.
 19 Q Okay. Well, what right do you feel like you had when you
 20 first bought it that you don't have anymore?
 21 A There's trees, I don't, I don't -- I can't say all right.
 22 I, you know, I just don't know. But there's trees blocking
 23 my view and my breezes.
 24 Q Those trees always been there?
 25 A No, never.

Page 14

1 Q Did trees ever grow up and you cut them before?

2 A I've never cut a tree.

3 Q You never cut a tree?

4 A Never cut a tree in the accreted land.

5 Q Have you ever cut a bush?

6 A No. Me, personally, no.

7 Q No, no. Have you ever applied for a permit, and hired someone to go out, and cut the bushes and vegetation in the accreted land in front of your home?

8

9

10 A I, as the Township allows you to do, you can cut it to five feet, yes. Every year I would hire someone to go out and cut, yes.

11

12

13 Q So you would agree with me that you have caused the bushes to be cut in front of your house over the years?

14

15 A I have caused?

16 Q Caused, you went out --

17 A I can't say that. I was allowed to cut them.

18 Q I understand.

19 A I didn't cause it, I was allowed to do what Sullivan's Island let me do.

20

21 Q Okay. Why don't you tell me how you went about doing that?

22

23 A You go and give them \$250., you get a permit, and you hire someone, and you have to post a \$5,000. bond.

24

25 Q Do you go to the Town yourself and get the permit, or do

Page 15

1 you get someone to go do it for you?

2 A I've always gone and gotten the permit.

3 Q Okay. And have you always followed the rules --

4 A Yes.

5 Q -- in the zoning ordinance --

6 A Yes.

7 Q -- when you got your permit?

8 A Yes. Always have.

9 Q So every time you got a permit, and you got several over the past twenty years --

10

11 A Uh- huh. Correct.

12 Q -- you followed the letter of the law in the zoning ordinance?

13

14 A Whoever cut the accreted -- whoever was allowed to cut it, I personally didn't cut it, someone was hired, and they were allowed to do it. I mean they did it properly.

15

16

17 Q Did you supervise them?

18 A What do you mean -- No, I didn't supervise them.

19 Q How do you know that they did it correctly?

20 A Because you get your deposit back.

21 Q So someone comes out and inspects what they did?

22 A Inspects.

23 Q Does someone have to approve the contractor that you use?

24 A I think it's certain contractors who can do it. That have been approved by the Town, and that's who you have to use,

25

Page 16

1 one of their contractors.

2 Q Okay. Are you allowed to cut at any time of the year?

3 A No.

4 Q Do you know how that's regulated?

5 A No.

6 Q How do you know when you can cut?

7 A The Township tells you, I think, you can cut -- I'm not even sure, I think, through February and you can start in like November or something. I'm not sure.

8

9

10 Q Do you know the reason for that?

11 A No.

12 Q Have you ever asked anyone the reason for that?

13 A No.

14 Q Do you know how that's regulated, where you would find that? If I wanted to go found out what the rules are, where would I go look?

15

16

17 A I would call, probably, someone in Town Hall.

18 Q And who would you call?

19 A Probably, Randy Robinson. I think he runs it.

20 Q Who is he?

21 A He's the building inspector.

22 Q Over the years when you've applied for permits, and you paid your fee, or whatever you have to pay to the Town, and you hired a contractor what is your goal whenever you're hiring them to cut? What are you trying to

23

24

25

Page 17

1 accomplish?

2 A You can cut the trees to five feet and that's it.

3 Q Okay.

4 A There's nothing -- I don't have any goals I can accomplish, it's what the law tells me I can do.

5

6 Q Is your goal not to help preserve your view of the ocean by cutting the vegetation? Is that one of your goals?

7

8 A It gives me a better view, yes.

9 Q And is one of your goals to help preserve the breezes as your house is designed to use them?

10

11 A It helps your breezes, yes.

12 Q You keep mentioning the five feet. Now, you been out there a long time, you've been out on the island thirty years or so. When your first got a permit to cut, and your hired someone to do it, were the rules the same then or have they changed over the years?

13

14

15

16

17 A I'm not sure. I don't know the first time I got permission to cut. I'm not so certain. I don't know when the rules changed.

18

19

20 Q Do you know if the rules changed?

21 A I've heard there's been a change somewhere along the lines. It use to be three feet, but I don't know. I'm not, I don't study the laws and the rules. That I don't do.

22

23

24

25 Q But it's something that you --

5 (Pages 14 to 17)

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Page 18

1 A Let's go back a little bit further, a correction on you.
 2 My family, now, you mentioned thirty years on the island,
 3 my family now is in the fourth generation on Sullivan's
 4 Island. My grandparents, my parents, I'm there, and my
 5 son lives out there now.
 6 Q Okay.
 7 A So we go way back when.
 8 Q So you've seen a lot of changes on the island over the
 9 years?
 10 A Not until recently.
 11 Q How recently?
 12 A With the accreted land.
 13 Q That's the only changes you've seen to the island over
 14 four generations?
 15 A Probably not, there's probably others, I hadn't thought
 16 about it. But that's been the big change.
 17 Q Now, do you recall the first time that you applied for a
 18 permit to cut any of the vegetation in the accreted land?
 19 A I do not.
 20 Q Got any general idea?
 21 A I, I don't even, I really -- My philosophy in life, I
 22 really don't look back, and I just look forward. And I
 23 really -- No, I couldn't give you an answer.
 24 Q Could you give me an answer to this question: When, if you
 25 remember generally, did the vegetation begin to be a

Page 19

1 problem for you?
 2 A I don't know exactly when. I can't give you a year when.
 3 But I know as a kid going to the beach there was no trees.
 4 And the only problem, I had two problems, one was the sand
 5 was hot, and I was stupid, and I didn't wear shoes. And
 6 that's just the way we were on Sullivan's Island. The
 7 other thing is, there was always stickers. And that was
 8 my two problems. There were no trees or anything like
 9 that.
 10 Q So you don't know, specifically, how the zoning ordinance
 11 have changed over the years?
 12 A I'm not privy to that.
 13 Q All right. Well, we're going to look at them in a minute,
 14 but I just wanted to see what your memory was without
 15 looking at them. Over the years, and encompass twenty or
 16 thirty years, have you discussed the zoning ordinances
 17 with regard to how the Town allows you to cut with your
 18 neighbors on the island?
 19 A I don't understand what you mean by that.
 20 Q Okay. There's been an issue with the accreted land and
 21 the vegetation throughout the years blocking your views
 22 and the breezes, is that correct?
 23 A I can speak for myself, yes.
 24 Q Okay. And that's what I'm asking. Do you believe that,
 25 that's been an issue for other folks, other than Mr.

Page 20

1 Albenesius, we know it's an issue for him because he's in
 2 the lawsuit?
 3 A Oh, definitely. All the way up and down the front beach,
 4 there's no questions.
 5 Q Okay. That's what I'm asking.
 6 A I would say, definitely, the majority. It might be close
 7 to a hundred percent.
 8 Q Okay. And that's all I'm asking. So is it fair to say
 9 that this is a topic of discussion among front beach
 10 owners on Sullivan's Island?
 11 A I can't say that. I mean we, you know, it's -- When I see
 12 somebody who lives on the front beach, you know, not the
 13 first thing I say is, we don't talk about the accreted
 14 land. We don't talk about the trees.
 15 Q I understand. But you've been out there, living in that
 16 house for thirty years. So I'm asking you, have you had
 17 discussions with your front beach neighbors about the
 18 accreted land during that period of time?
 19 A Oh, I'm sure that I've talked to some neighbors about the
 20 trees, you know, at different periods, at different times,
 21 yes.
 22 Q And do their concerns seem to be the same as your
 23 concerns?
 24 A Definitely.
 25 Q Okay. And that concern is, the view ..

Page 21

1 A The views and the breezes.
 2 Q And the breezes. And, in your opinion, that's being
 3 blocked or has the potential to be blocked by the
 4 vegetation.
 5 A Right now my house is built up, eight and a half feet and
 6 fourteen, my house is built up about nineteen -- My main
 7 living floor level is about nineteen feet off the ground,
 8 or nineteen feet above sea level. From the right-hand
 9 side fifty percent of my view is gone. The rest of my
 10 view, trees have popped up. I don't know where they came
 11 from, I've never seen them before. They're popping up all
 12 over the place. Within the next year the other fifty
 13 percent of my view will be gone.
 14 Q And you think that's a common problem among other folks on
 15 the front beach?
 16 A I can't say everybody is having that problems but, you
 17 know, the majority of the people who are faced with this
 18 problem. I have seen other lots, yes, that are worse than
 19 mine, and some that are going to be worse than mine, or on
 20 the same level with me.
 21 Q Fair enough. And so the problem, and I'm just trying to
 22 get at the problem, so that we can talk about some
 23 potential solutions. Is that the vegetation, if it's not
 24 cut it grows, is that correct?
 25 A I don't know. I'm not a gardener. I just don't know, I

6 (Pages 18 to 21)

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Page 22

1 can't give you an answer to something I don't know.
 2 Q Let me ask that question again, because I think you can
 3 give me an answer. If there's a bush out there in the
 4 accreted land and it's just left alone, typically it will
 5 grow, is that right?
 6 A I don't -- It depends, I don't know.
 7 Q If you cut it, you've stunted that growth. Would you agree
 8 with that?
 9 A I don't know. I can't give you an answer. I just really
 10 don't know.
 11 Q You don't know if you cut a bush off whether it has
 12 eliminated the height?
 13 A I'm not a gardener, a horticulturist. I just don't know.
 14 I raise Japanese Koi, if you want to ask me a question
 15 about them I can give you an answer. But I just can't give
 16 you answer about a bush. I don't know.
 17 Q So you don't know why you hire people, and pay them money
 18 to go out and cut the vegetation in front of your house?
 19 A Oh yeah, I know why. Because I can cut the Myrtle's to
 20 five feet once a year.
 21 Q And why do you do that?
 22 A To improve my view and breeze.
 23 Q And what would happen if you didn't cut them?
 24 A Oh, they would grow high. I mean -- I did mine recently,
 25 probably by May they'll be up. The five feet will be up

Page 23

1 to ten feet.
 2 Q So back to my question. If these bushes were left uncut,
 3 we would think that they would grow up and block your
 4 view?
 5 A I can't give you -- I can't. I just don't know the life
 6 span of Myrtle's. I just don't know.
 7 Q Okay. Well, when we started out you said that you had two
 8 concerns, your view and the breezes.
 9 A Yes.
 10 Q Okay. And we talked about the fact that over the years
 11 you've gotten permits, and you follow the zoning ordinance
 12 to the letter of the law, and you've cut in order to
 13 preserve the breezes and the views. Is that correct?
 14 A Yes.
 15 Q Okay. So you can't answer my question if the Town decided
 16 no more cutting at all how that would affect you?
 17 A My views and breezes would definitely be gone.
 18 Q Why?
 19 A Because of the trees.
 20 Q Why?
 21 A Because the trees are going to grow up. There are all
 22 kind of trees out there.
 23 Q Okay. That's all I was trying to get to before we got
 24 started down this road.
 25 A But you kept asking me about Myrtles, which I can't give

Page 24

1 you an answer --
 2 Q Well, we will talk about --
 3 A -- to a certain species. But I can tell you which trees,
 4 like I said there's trees growing that I don't know where
 5 they came from.
 6 Q You don't know where they came from?
 7 A Uh-huh.
 8 Q Okay. What kind of trees?
 9 A I don't know. Some green trees, I just don't know.
 10 They're big, and they're full, and they're, I don't know,
 11 bushy.
 12 Q Do you know what the current zoning ordinance says
 13 regarding cutting?
 14 A Yeah. I think I told you that. Five feet from, I don't
 15 know the exact date, from November through February or
 16 something like that.
 17 Q So you think the height restriction is five feet?
 18 A I'm pretty sure. Five feet and I think seven feet on the
 19 pathway, the width of the pathway.
 20 Q Does it regulate the species that you can cut? Can you
 21 cut anything five feet or is it particular things?
 22 A Just Myrtles.
 23 Q Just Myrtles?
 24 A Uh-huh.
 25 Q Okay. So you can't cut oak trees or pine trees?

Page 25

1 A I have not seen an oak tree out there.
 2 Q Okay.
 3 A Pine trees ought to be removed. They're fire hazards.
 4 Q Do you know whether or not under the current ordinance it
 5 allows you to cut pines or oaks?
 6 A You can not.
 7 Q You can not?
 8 A You can only cut Myrtles.
 9 Q Only myrtles. Can you cut Popcorn trees?
 10 A What's a Popcorn tree?
 11 Q I don't know.
 12 A I don't know either.
 13 Q So you think it applies to Myrtles?
 14 A I know it applies only to Myrtles.
 15 Q Okay.
 16 A And, again, I have not seen an oak tree out there.
 17 Q Okay. Do you know when the current zoning ordinance was
 18 passed?
 19 A No.
 20 Q So you don't know whether you've cut under it or not, or
 21 do you know?
 22 A What do mean, cut under it, I don't understand.
 23 Q Applied for a permit under the current zoning ordinance
 24 and cut?
 25 A Oh I cut last year. You know, I applied then and cut what

7 (Pages 22 to 25)

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Page 26

1 I could.

2 Q Okay. So you followed the rules under the zoning

3 ordinance that's in effect now?

4 A Correct.

5 Q And you follow the rules every time?

6 A I have always followed the rules.

7 Q Do you agree with the rules, or you disagree with the

8 rules?

9 A I disagree.

10 Q Okay. How do you disagree, in what regard?

11 A The Chief Forest Commissioner for the State of South

12 Carolina came down. There's a lot of fire hazards out

13 there. You mentioned pine trees, they catch on fire easy

14 and they pop. The Myrtles are problems. So I disagree

15 with it.

16 Q Based on the --

17 A I think there's a lot of trees out there that are possible

18 dangers to the island.

19 Q Okay. Now, can you tell me -- I want you to assume that

20 I'm correct on this answer. That the current zoning

21 ordinance was passed in 2005.

22 A I have no idea.

23 Q Just assume, for the sake of this question, that I'm

24 correct. It's not a trick, you can assume that, okay.

25 A Brady, I might forget your name, but the numbers and all,

Page 27

1 I just can't -- I don't assume anything when it comes to

2 numbers or, I really just don't. I can't assume it,

3 because I really don't know.

4 Q Okay. Do you know if in your lawsuit you're complaining

5 about a particular ordinance?

6 A Are you talking about the land trust?

7 Q No. I'm talking about in your lawsuit, do you know if you

8 are complaining or challenging a particular ordinance?

9 A When it comes to the legal part I leave that with my

10 attorney.

11 Q So the answer is, you don't know.

12 A I leave it with my attorney. I'm not an attorney, and I

13 have one hundred percent confidence in the legal -- We've

14 got a good, you know, a good team of attorney's, and I

15 have a hundred percent confidence in them.

16 Q Me too, you've got a great team of attorney's. My

17 question is: Do you know if you are challenging, in your

18 lawsuit, a particular ordinance?

19 A I just don't -- I can't, I can't be specific on the

20 lawsuit. I can't.

21 Q So your answer is, you don't know.

22 A I just don't know.

23 Q Okay. That's fair.

24 A I mean I know we're challenging the land trust. That's

25 all I can really ..

Page 28

1 Q Do you have any concerns about what the Town may do in the

2 future to the accreted land?

3 A Right now, yes.

4 Q What are those concerns?

5 A I don't know what they'll do.

6 Q You don't know what the Town will do?

7 A I don't know what the Town. I think -- The leadership, I

8 just don't know what they'll do. I have doubt in my mind

9 what they'll do.

10 Q Okay. Nicky, do you know what they're considering? I

11 mean, you're aware, obviously, that they've hired

12 consultants and they're kicking around different ideas

13 about what to do in the accreted land. Is that correct?

14 A I mean, I know what the final report said, yes.

15 Q Okay. Have you read the final report?

16 A Yes.

17 Q Okay. So you know sort of what they may be thinking about

18 doing even though they haven't done it yet?

19 A Yes.

20 Q In that final report, does - (Interruption)

21 MR. HAIR: Let's go off the record for a

22 minute.

23 (OFF THE RECORD)

24 MR. HAIR-Resuming:

25 Q Okay. Nicky, we were talking about this proposed plan

Page 29

1 that the Town is considering about how to manage the

2 accreted land. And you said you've read it, is that

3 correct?

4 A Uh-huh.

5 Q Can you tell me whether or not your happy with what the

6 plan may be or not?

7 A No. I'm not happy with it.

8 Q Okay. What are you not happy with?

9 A It's not -- It does not say, exactly, what it will look

10 like in front of my house. And it doesn't say exactly

11 what it will look like all the way. It says, generally,

12 what's going to be, but it doesn't say it exactly.

13 Q Okay. So you're unhappy because the plan isn't definite,

14 it isn't well defined, is that accurate?

15 A Ask the question again.

16 Q Well, I'm trying -- You say that it doesn't tell you

17 exactly what's going to happen in front of your house. So

18 are you concerned that the plan isn't detailed enough as

19 it applies to you, is that your concern?

20 A I'm concerned about the plan all the way down on the front

21 beach.

22 Q Fair enough. What parts of the plan are you concerned

23 with?

24 A I don't have the plan in front of me, I can't quote. But

25 there's a lot of areas that are left up to discretion.

8 (Pages 26 to 29)

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Page 30

1 Q Do you how the proposed plan would regulate cutting the
2 Myrtles that we talked about?
3 A No.
4 Q Do you know how it would regulate, if at all, cutting pine
5 trees, oak trees, those kind of things?
6 A No. I don't think there's any -- I don't know.
7 Q Do you know any details of how it would treat cutting at
8 all?
9 A No.
10 Q Okay. But you've read it?
11 A I've read it and I know that the views -- That it's going
12 to be select views all the way up and down the front
13 beach.
14 Q And how would --
15 A Nothing's definite. It doesn't say exactly what. For
16 example, you look at of here it doesn't say we're going to
17 leave this tree or that tree, and, you know, it doesn't
18 say that. It leaves it up to discretion of someone.
19 Q Okay. And that's why you don't like it?
20 A I'm very definite. Just as you asked me to assume
21 something that you were saying, I couldn't have said yes
22 to that. I need to know exactly what I'm getting.
23 Q Okay. And in the current plan you don't know exactly what
24 you're getting, is that fair to say?
25 A When you say the current plan, you're talking about --

Page 31

1 Q Well, the one that you read.
2 A Exactly.
3 Q And you don't know, specifically, how it proposes to treat
4 cutting or species?
5 A I don't know. No, it doesn't say. I don't know, I don't
6 think it says that. I'm not sure, but I'm pretty sure it
7 doesn't.
8 Q But you would agree with me that the Town has not adopted
9 that proposed plan yet, is that correct?
10 A I don't think it has been adopted. I'm not -- I'm pretty
11 sure it has not been adopted.
12 Q Okay. Nicky, are you familiar with the deed restrictions
13 that were put on the accreted land in 1991?
14 A Somewhat, yes.
15 Q Have you read them?
16 A Yes.
17 Q Do you recall what the zoning rules were regarding cutting
18 at that time, in 1991?
19 A Not really but I've heard you could cut everything to
20 three feet, or something like that, prior to that.
21 Q Okay. Fair enough.
22 A I'm not sure but..
23 Q And do you know whether those rules were in a zoning
24 ordinance like the present rules are?
25 A I don't know. I can't give you an answer on that.

Page 32

1 Q Do you recall, during that time, cutting to three feet?
2 A I never cut. Because at that time it was never a problem.
3 Q You never cut?
4 A Never cut prior. At three feet, no.
5 Q You never cut at three feet?
6 A Huh-uh.
7 Q And why was that?
8 A It was never a problem. It was never an issue.
9 Q Is that because the vegetation hadn't grown up to block
10 your views and your breezes?
11 A There was no trees, there was no vegetation.
12 Q So you didn't need to cut?
13 A Yeah, that's a better way to answer it.
14 Q Okay. Now, after the deed restrictions were put on in
15 1991, do you recall the Town changing the zoning
16 ordinances with regard to cutting at any particular time?
17 A No.
18 Q You don't recall?
19 A No.
20 Q Okay. Do you ever recall being able to cut to seven feet?
21 A No.
22 Q You don't recall that?
23 A Huh-uh.
24 Q All right.
25 MR. HAIR: I think what we want to do is admit

Page 33

1 this whole book as Exhibit One and then we'll
2 go through various parts of it that are
3 tabbed.
4 (WHEREUPON, EXHIBIT BOOK, CONSISTING OF 296
5 PAGES AND 18 TABS, WAS MARKED AS DEFENDANT'S
6 EXHIBIT NO. 1 FOR IDENTIFICATION)
7 Q And, Nicky, you've got one in front of you. And, so, what
8 I want to start out with looking at is the 2005 Zoning
9 Ordinance and it is under, if you'll look at Tab 1-A,
10 2005. You with me there.
11 A Yeah.
12 Q If you will just read the caption up there to me, Nicky.
13 A You just need the caption, the part that's highlighted in
14 yellow?
15 Q Just the intro. That the Ordinance to Amend.
16 A Ordinance to Amend, Chapter 21 of the Zoning Ordinance for
17 the Town of Sullivan's Island (as read).
18 Q Okay. Now, I want you to turn to Tab 1-C, and I want you
19 to look at Sections 21 through 77 [sic] 71. You see where
20 we've got that highlighted?
21 A Uh-huh.
22 Q Read just that title to me.
23 A Trimming and pruning in the RC-I District.
24 Q Okay. And I want to represent to you, and I'm going to
25 give you a chance to look at it. If you disagree then

9 (Pages 30 to 33)

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1 we'll go over that. That section is contained in this
 2 Zoning Ordinance, which is, that thick (demonstrating).
 3 Fair enough? Does that look correct to you?
 4 A I can't say yes or no.
 5 Q All right.
 6 A Again, I don't assume anything. If you want me to read it
 7 and give you an answer --
 8 Q No, no.
 9 A Is that what you're asking me?
 10 Q No, that's okay. You can trust me, it's part of the
 11 zoning ordinance, okay. So, I want you to look at Section
 12 C and read that to me.
 13 A Nothing in this article shall be construed --
 14 Q No, no, no. Down there, I'm sorry, below Section 21-71C.
 15 A Oh, the part that's yellow. Number three?
 16 Q Yeah, where it says Permit for trimming and pruning of
 17 vegetation.
 18 A Yeah. The only vegetation that may be trimmed and pruned
 19 in the RC-1A, RC-1C or RC-1E Areas is limited to the
 20 following: Southern Waxmyrtle, Eastern, something, and
 21 Popcorn trees. This vegetation may be trimmed and pruned
 22 as to have a maximum height of no less than five feet
 23 above the ground (as read).
 24 Q Okay. And, so, do you believe this is the ordinance that
 25 we're currently operating on?

Page 35

1 A I can't say yes or no, I don't know.
 2 Q All right. But your memory is that your latest permits
 3 allow you to cut to five feet?
 4 A Yes.
 5 Q Okay. And --
 6 A Cut Waxmyrtles.
 7 Q Cut Waxmyrtles. And in paragraph three, which you just
 8 read, it appears that you, in addition, can cut Eastern
 9 Baccharis, whatever that is, and Popcorn trees, whatever
 10 they are. Is that what it appears to say?
 11 A That's what it says. I mean I can't verify that's -- And
 12 I can't also verify the other trees that are out there
 13 that you can't cut.
 14 Q Okay.
 15 A I don't know what they are.
 16 Q Okay. But you hire someone to go out and cut them?
 17 A I hired someone, he went and cut the Myrtles to five feet.
 18 Q Okay. Now, do you tell them to just to cut the myrtles,
 19 or do you tell them to go find out from the Town what they
 20 can cut and follow the law?
 21 A I just told them to go cut the Myrtles to five feet.
 22 Q Okay. So you don't tell them to follow the law?
 23 A Oh, yes, he follows the law. Whatever Sullivan's Island
 24 allows him to do.
 25 Q Okay. So, if this is the law that he can cut Popcorn

Page 36

1 trees and Baccharis, whatever those are, you ask them to
 2 cut those as well?
 3 A If the law allows them to do it, yes, go ahead and do it.
 4 Q Fair enough.
 5 A But I still don't know what the other trees are out there
 6 that you can't cut. I don't know what they are.
 7 Q Okay. Well, how would you interpret this? I mean, I --
 8 It says that the only vegetation that may be trimmed and
 9 pruned is the following: Waxmyrtle, Eastern Baccharis, and
 10 Popcorn trees. Correct?
 11 A That's what this says.
 12 Q So, would you gather from reading that, that you couldn't
 13 cut any other kind of trees?
 14 A Right.
 15 Q Okay. That's what I gather from it too, I just thought
 16 I'd ask you. Now, this ordinance passed in 2005, okay?
 17 A (Non verbal Response)
 18 Q You've got to say yes or no.
 19 A If you tell me. You know, if you say it is. I'm not
 20 familiar with the ordinances. I'm not up to date on it.
 21 Again, that would be legal, and I would leave that with my
 22 lawyer.
 23 Q Well, fair enough.
 24 A I just don't know.
 25 Q I'll tell you, that's the 2005 Ordinance.

Page 37

1 A I just don't know.
 2 Q Okay. Do you know whether or not this is the ordinance
 3 that you've sued the Town over?
 4 A I'm not -- Again, I leave it up to my attorney.
 5 Q All right.
 6 A I just don't know.
 7 Q You don't know?
 8 A I assume, I think it's over the land trust agreement -- is
 9 part of the lawsuit. I can't say this is part of it or
 10 not. I just don't -- I'd have to say, no, I don't know.
 11 Q Okay. Do you agree with this ordinance? The provisions
 12 in this ordinance about how you can cut and what you can
 13 cut.
 14 A Are you asking me off the record, my personal opinion?
 15 Q I'm not asking you off the record, but I'm asking your
 16 personal opinion. Do you agree with it?
 17 A I, personally, I think you ought to be able to cut
 18 everything.
 19 Q Fair enough. So, is that a no, you don't agree with this?
 20
 21 A I'm not saying I agree with it. I don't know what these
 22 are. I don't know what those trees out there are, that
 23 are growing up.
 24
 25 Q Okay.

10 (Pages 34 to 37)

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Page 38

1 A I have no idea what they are. But if you tell me I can
 2 cut everything to five feet that'd be great.
 3 Q It would?
 4 A (Non verbal Response)
 5 Q Is that yes?
 6 A A yes to what?
 7 Q What you just said is --
 8 A The trees --
 9 Q -- if I told you, you could cut everything to five feet
 10 that would great.
 11 A That would be great.
 12 Q That would be great? Okay. And, so, is your concern
 13 about the species restriction in this ordinance that
 14 bothers you?
 15 A It concerns me that I've lost my views and my breezes.
 16 That concerns me.
 17 Q I understand that. Let's just try this again. I want you
 18 to read, and you don't have to read it out loud, Section
 19 C-3, where it starts, the only vegetation that may be
 20 trimmed. And I want you to stop down there where -- Well,
 21 just read that whole third paragraph. That sub-paragraph.
 22 A C-3?
 23 Q Yeah.
 24 A You know, again, I don't know what the other trees out
 25 there are. I have no idea. They could be -- Those trees

Page 39

1 out there that are growing could be Popcorn trees, I just
 2 don't know.
 3 Q Okay. But did you read this paragraph?
 4 A Yes.
 5 Q Okay. Now, you would agree that if they're Popcorn trees
 6 they can be cut?
 7 A Yeah, that's fine with me.
 8 Q Is that what it says?
 9 A That's what this says.
 10 Q Okay. Now, my question is, do you agree with this
 11 provision or not?
 12 A I -- If you let me cut everything to five feet, I'll agree
 13 with it. I don't, I don't -- The reason I'm being vague,
 14 Brady, I don't know what some of those trees out there
 15 are. I have no idea what they're called, what their names
 16 are. If you tell me about a pine tree or an oak tree, I
 17 know what they are. But there's some trees out in front
 18 of my house, blocking my view, I don't know what they are.
 19 Q Okay, so --
 20 A If you say everything, that's fine I'll go along with it.
 21 You say everything except oak trees, I'll go along with
 22 that. But I ain't seen an oak tree on the front beach
 23 yet.
 24 Q Okay. So my question is: All right, you filed a lawsuit,
 25 you sued the town, you're unhappy about something, okay --

Page 40

1 A I'm unhappy because I've lost my views and my breezes.
 2 Q And I think that we agree that the reason you feel like
 3 you've lost it is because of the vegetation that's grown
 4 up to block the breezes and the view.
 5 A Whatever you call those trees, those trees, yeah.
 6 Q Let's call it vegetation, that will cover everything.
 7 A I don't know if a tree is a vegetation. You know, that
 8 tree over there I don't know if you call that vegetation.
 9 To me vegetation is low lying stuff -- I don't know. I
 10 don't know what vegetation is. I'd have to look up and
 11 see what it is.
 12 Q You don't know what vegetation is?
 13 A I mean, I think, to me, it's low lying bushes and things.
 14 Q Okay. All right. Let's try this again. All right, this
 15 paragraph in the current Zoning Ordinance 2005 C-3 says
 16 the only vegetation that may be trimmed and pruned in the
 17 RC-1A, RC-1C, or RC-1E Areas is limited to the following:
 18 Southern Waxmyrtle, Eastern Baccharis, and Popcorn trees
 19 (as read). What does that sentence mean to you?
 20 A It means that you can cut those trees to five feet.
 21 Q And that's it?
 22 A And no other trees.
 23 Q And no other trees?
 24 A Correct.
 25 Q Fair enough. Now, this paragraph -- this sentence that

Page 41

1 says this vegetation may be trimmed and pruned so as to
 2 have a maximum height of no less than five feet above the
 3 ground. What does that mean?
 4 A Where you reading that?
 5 Q In that next sentence, this vegetation may be trimmed and
 6 pruned so as to have a maximum height of no less than five
 7 feet above the ground (as read).
 8 A It says that you can cut it to five feet, I guess.
 9 Q Good. So we agree that under the current Zoning Ordinance
 10 you can cut vegetation, Waxmyrtles, Baccharis, whatever
 11 that is, and Popcorn trees, whatever they are, to five
 12 feet but nothing else?
 13 A Yes. That's what that says to me.
 14 Q And so we understand, we agree that, that's what the
 15 current law is?
 16 A Uh-huh.
 17 Q Okay. And we agree that you have applied for permits
 18 under that law, and you've complied with the law. Is that
 19 correct?
 20 A Definitely.
 21 Q Okay, good. But, let me ask you again, do you -- Let's
 22 just change the wording a little bit. Do you like this
 23 ordinance, do you like this law?
 24 A It's a start, but no.
 25 Q It's a start, but no, okay. And do you know --

11 (Pages 38 to 41)

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Page 42

1 A It's a beginning.
 2 Q What?
 3 A It's a beginning, it's a start.
 4 Q Fair enough. Do you know if this ordinance, this
 5 restriction on your cutting, is part of your lawsuit or
 6 not?
 7 A I can't -- You'd have to refer that to Bobby Hood.
 8 Q Okay. So the answer is, you do not know.
 9 A I do not know.
 10 Q Okay. During the discovery process, the lawyers exchange
 11 different letters and communications, called discovery.
 12 Are you generally familiar with that?
 13 A Not really, but I can understand.
 14 Q Okay. And what they do is sort of like a deposition.
 15 We're asking them to provide information, they ask us to
 16 provide information --
 17 A Got you.
 18 Q -- so that both sides can understand the issues of the
 19 lawsuit.
 20 A Okay.
 21 Q That's what discovery is, okay. Now, we sent to your
 22 lawyer's various questions called Interrogatories, Request
 23 for Admissions, Request to Produce Documents, and things
 24 of that nature, okay?
 25 A (Non verbal Response)

Page 43

1 Q Say yes, I'm telling you that I did that.
 2 A Okay, yeah. I answered some things for them.
 3 Q That's my question, did you meet with them, and I don't
 4 want to know what you talked about. But did you meet with
 5 them and help them prepare answers to Interrogatories,
 6 Request for Admissions, and Request for Production?
 7 A I don't understand, you'd have to define those questions.
 8 Q Okay.
 9 A What do you mean by that? Did I meet with them and --
 10 Q And help them --
 11 A Answer's for what?
 12 Q To the questions that we asked.
 13 A To the questions. I don't think we talked about it.
 14 Q Okay. Did you read the initial complaint that you filed
 15 against the Town in this case?
 16 A I don't understand where you're going with this. Well, I
 17 don't understand the question.
 18 Q Okay. Let me try to make it simple. You and Mr.
 19 Albenesius and your wives filed a lawsuit against the Town
 20 of Sullivan's Island. Is that correct?
 21 A Yes.
 22 Q Did you read that lawsuit before you filed it?
 23 A I read through it, yes.
 24 Q You read through it, okay. Do you know that you filed an
 25 amended lawsuit against the Town?

Page 44

1 A I did.
 2 Q Okay. Do you know what the changes were between the first
 3 one and the second one?
 4 A No.
 5 Q Okay. And do you know, in that lawsuit - Did you read the
 6 second one too?
 7 A I read it, but I can't, legally I can't give you an answer
 8 on anything.
 9 Q I'm not asking for a legal answer, I'm asking you, did you
 10 read it?
 11 A I read it, yes.
 12 Q Okay. And do you know whether or not in that second
 13 amended complaint, the first amended complaint, there was
 14 any complaint, if you will, about that Zoning Ordinance?
 15 A I can't answer that.
 16 Q Is that, you don't know?
 17 A I don't know.
 18 Q Okay. I think I know the answer. But looking at this
 19 2005 Zoning Ordinance again, tell me what it is that you
 20 don't like about it.
 21 A Because it's too many trees that I don't -- I don't know
 22 what they are and they can't be cut.
 23 Q Okay. So, would it be fair to say that the problem you
 24 have with this ordinance is that it limits the type of
 25 trees that you can cut, the type of the species?

Page 45

1 A The problem I have with this is it doesn't go far enough.
 2 Q Fair enough. I think that's the same way, I think we
 3 agree, that it doesn't include other trees that you'd like
 4 to cut.
 5 A And I do not know what the other trees are called.
 6 Q Okay.
 7 A Now, if you tell me a pine tree or an oak tree, I know
 8 what they are but the trees out there I just don't know
 9 what they are.
 10 Q But you're sure that these three, cutting these three,
 11 that doesn't give you the relief that you'd like to have?
 12 A I just cut, and I do not have the relief that I need.
 13 Q Okay. And if in their future ordinances that they pass,
 14 the Zoning Ordinance, if the Town passed an ordinance that
 15 said no cutting, whatsoever, in the accreted land, would
 16 you agree with that?
 17 A No.
 18 Q Why?
 19 A It's not fair.
 20 Q Okay. What would happen, in your opinion, if they did
 21 that?
 22 A I think you would see a sharp decline, a further continued
 23 sharp decline in property values.
 24 Q As a result of what?
 25 A Not allowing to be able to cut and taking away views and

12 (Pages 42 to 45)

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1 breezes.

2 Q Okay. And is that because if they didn't allow any

3 cutting at all the vegetation, whatever that term means,

4 would grow up and block the views and the breezes?

5 A Yes.

6 Q Okay. And, in your opinion, the net result of that would

7 be a sharp decline in property values?

8 A Yes, that's one of them.

9 Q So, you would agree with me that your view is much better

10 allowing the vegetation to be cut than if the Town said

11 you can't cut it?

12 A No. Not a hundred percent. Because I am about to lose my

13 view because of the trees that I cannot cut.

14 Q All right. Follow me with this now.

15 A I've lost fifty percent of my view and I'm going to lose

16 the other fifty percent within the next year or two.

17 Q Okay.

18 A And there's a perfect example. I'll take you out there if

19 you want to go see Dave Fortier's house. He's around,

20 he's a couple of doors down from the Sand Dunes Club. He

21 can't see the ocean, it's gone.

22 Q Okay. But my question was this, you're better off with

23 your views and your breezes if the Town allows you to cut

24 the vegetation to some height than to just let it go. You

25 would agree with that?

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1 A No. I do not agree with that. Because I'm going to lose

2 it, I'm in the process of losing it.

3 Q No. So --

4 A If they continue as it is, I'm going to lose all my view.

5 Q Not my question, okay. Let's go back --

6 A You asked me the same question. Am I better off, no I'm

7 not better off because I'm going to lose my view.

8 Q You're not better off being allowed to cut than to not

9 cut?

10 A It's, it's -- it doesn't mean anything.

11 Q Being allowed to cut doesn't mean anything to you?

12 A Well, it does. But it's not solving the problem.

13 Q The manner in which they're regulating it now isn't

14 solving your problem, is that what you're saying?

15 A As long as you allow the trees out there, which I don't

16 know what they are, to continue to grow in one to two

17 years my view is totally gone.

18 Q Okay. So my question --

19 A There are trees out there, I have no idea, I've never seen

20 them, I have no idea where they've come from. All the

21 sudden they're just popping up all over the place.

22 Q I'm trying to get a concise --

23 A And, also, if you go out there and you turn to the left or

24 the right, and you're looking at these certain trees,

25 they're in a straight line all the way down the front --

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1 the accreted lane.

2 Q Okay. What I'm looking for, Nicky, is, and I think we've

3 talked about it, but is it -- what is it that you're mad

4 about or unhappy about in the present ordinance?

5 A I'm losing my -- I've lost a good bit of my views and

6 breezes, and I'm going to lose it all.

7 Q And is that because it doesn't allow you to cut certain

8 trees and other vegetation that you think you ought to be

9 allowed to cut?

10 A Yes.

11 Q Okay, good. That's all I'm looking for there, okay.

12 A I will answer -- You give me an oak tree, that's fine.

13 But I don't see any oak trees out there.

14 Q Okay. Why do you think the Town needs to have a cutting

15 ordinance at all? What do you think the purpose of the

16 cutting ordinance is?

17 A As it stands?

18 Q Yeah.

19 A I don't know.

20 Q You don't know?

21 A Huh-uh.

22 Q Okay.

23 A Because in the long run it's -- I think it's negative to

24 the Township.

25 Q Do you think that one of the reasons to have a cutting

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1 ordinance is to preserve your views and your breezes?

2 A Repeat the question.

3 Q Do you think that one of the reasons to have a cutting

4 ordinance is to help protect your views and your breezes?

5 A I think, I can't say mine particularly, but I think a

6 better ordinance would protect the front beach property

7 owners. Which there are, I think, about eighty-six of us.

8 Q Okay. So would you agree then that one reason for the

9 Town to have a zoning ordinance that allows cutting is to

10 protect the views and the breezes for those eighty-six, or

11 whatever number it is, front beach owners?

12 A That's part of it.

13 Q Part of it, okay.

14 A The other reason is -- I've got a friend of mine who

15 lives, John lives probably three rows back, not on the

16 front beach, doesn't have a view of the ocean. That's not

17 a question of his. John, twenty-five, thirty years, has

18 two dogs. At the certain appropriate times he walks them

19 on the beach. John said that it is just absolutely

20 horrible, the mosquitoes, the standing water. He said

21 it's just absolutely horrible getting out there. That's

22 why he's a big supporter of let's cut the trees. There's

23 another friend of mine down the street, Sandra and her

24 family. She's got a bunch of grandchildren. She says

25 during the summer when she wants to take her kids, her

13 (Pages 46 to 49)

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1 grandchildren to the beach, she says she's already started
 2 putting, you know, the suntan lotion, the mosquito lotion
 3 on. She says but it doesn't do any good. She says that
 4 her grandchildren are itching when they get to the beach,
 5 they got mosquitoes all over them. There's standing
 6 water, there's snakes, you know. So, I think presently
 7 the law does not solve the problem.
 8 Q Okay.
 9 A There's a lot of problems, and there's something else that
 10 hasn't even been brought up. It's like I'm standing on a
 11 soap box. If the Myrtles ever catch on fire, well they
 12 have caught on fire, at high tide we're going to lose the
 13 whole island. That means the tide is high, the breezes
 14 are blowing in, it's going to be a tremendous problem for
 15 Sullivan's Island.
 16 Q Okay. So let me ask you a couple of questions about your
 17 examples there. Do you believe that cutting the
 18 vegetation lower will help with the mosquito problem?
 19 A Cutting it would be a beginning. And proper maintenance,
 20 such as cleaning out the trash, letting the water flow.
 21 We need to get rid of the snakes, the spiders, the
 22 armadillos and all kind of animals that come out at
 23 night. Raccoons and all live in there. At night time
 24 they're all over the island.
 25 Q Do you think cutting it to a certain height would help

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1 with that problem?
 2 A I think that would be the beginning and cleaning up all
 3 the trash, yes. That could be a solution.
 4 Q Okay. But cutting is part of the solution, in your
 5 opinion?
 6 A I think that would be the beginning of the solution.
 7 I would hire the folks out of, who are doing the survey,
 8 or the accreted land study, and let them-- And don't tie
 9 their hands behind their back, and don't tell them what to
 10 do, and let them come up with a solution.
 11 Q And who would you hire again? I'm sorry.
 12 A The same people that the Township's using. I think
 13 they're honorable people. But don't tie their hands
 14 behind their back.
 15 Q How do you think they've had their hands tied behind their
 16 back?
 17 A They've told them certain things. What to pull out, what
 18 to do, what not to do.
 19 Q Okay. So you think that it hasn't been a fair process?
 20 A No. It has not.
 21 Q It has not been a fair process?
 22 A Correct.
 23 Q And tell me, specifically, why.
 24 A They've changed certain things, they don't want certain
 25 things in there.

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1 Q And who's they?
 2 A The Township, the leadership.
 3 Q Anybody in particular?
 4 A I'm not going to -- I don't know names but whoever driving
 5 it, yeah. Whoever is instructing them.
 6 Q Okay. So when you say, they, I mean I'm asking because as
 7 a Town, they, consist of, you know, it could consist of
 8 anybody.
 9 A I would have to say--
 10 Q You've got several Town Council people, you got an
 11 administrator, you got a zoning guy, I mean there's a lot
 12 of people that could be they.
 13 A Well, the administrator does whatever he's told.
 14 Q Who tells him what to do?
 15 A I guess the Mayor and the Council.
 16 Q Okay. Is there anybody in particular that encompasses
 17 that "they" that you spoke about? That you know has done
 18 something to make the process unfair.
 19 A I'm sure there are people. I'm certain there are people.
 20 Q Who are they?
 21 A I don't know.
 22 Q All right. So you don't know their names?
 23 A All right. I guess I should give you the names then.
 24 Q I think you should.
 25 A I would say the Mayor and Pat O'Neil.

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1 Q Okay. So you think they have caused the process to be
 2 unfair?
 3 A I think they've been a big part of it.
 4 Q Okay. Fair enough. But, again now, we're talking about a
 5 process that involves a plan that has not been adopted
 6 yet, is that correct?
 7 A Correct.
 8 MR. HAIR: All right. Let's look again at this
 9 2005 Zoning Ordinance. Go back, you're on the
 10 right page.
 11 Q And take a minute, Nicky, and read through the whole
 12 Sections, the 21 through 71, and it's continued on that
 13 next page which is, on the bottom of it is page 36.
 14 A Now, let me tell you how I do things, Brady. I can read
 15 through it, but giving an answer, and my wife will tell
 16 you this, when I do something I read through it one day, I
 17 sleep on it, then I read it again the next day before I
 18 give it an answer. So, I'm not going to be able to read
 19 it and give you an answer. I have to think about
 20 everything.
 21 Q All right. I think my questions are going to be pretty
 22 easy, but just so you'll know I sent these documents to
 23 you over a week ago, to your attorneys, to give you an
 24 opportunity to read them and be prepared for today. Okay?
 25 A Okay.

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1 Q So. But, again, just cruise through that, take whatever
2 time you need to read it and, hopefully, my questions are
3 going to be fairly simple.
4 A (Witness complies) Okay.
5 Q The question is, would you agree with me that the 2005
6 cutting ordinance is a fairly detailed ordinance?
7 A Again, like I said to you before, I'll have to read it
8 again tomorrow, and I'll give you a more definite answer.
9 I just don't make decisions that quickly on anything.
10 Q Well, if you want to, we can continue this deposition, and
11 you can go home, and read all this stuff, and we can start
12 again tomorrow. Would you prefer that?
13 A No. Let's start with your questions, let's see if I can
14 answer them without ..
15 Q All right. Do you know what detailed means?
16 A Uh-huh. Yes.
17 Q So my question is, would you agree that this 2005 Zoning
18 Ordinance, these two pages, is fairly detailed?
19 A Yeah. This is fairly detailed, yes.
20 Q Good. And it talks about what height it can be cut to,
21 we've already been through that. Is that yes?
22 A Yes.
23 Q And it talks about --
24 A Certain trees.
25 Q Yeah. It talks about what species can be cut.

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1 A Okay.
2 Q It talks about when you can cut.
3 A Okay.
4 Q Is that a yes?
5 A Yes.
6 Q Okay. It talks about who can cut it.
7 A Yes.
8 Q It talks about the process.
9 A Yes.
10 Q It talks about the permitting.
11 A Yes.
12 Q It talks about the approval.
13 A Yes.
14 Q Okay. And you understand, in that last paragraph there,
15 that if you apply for a permit and you don't do it in
16 accordance with the zoning ordinance then it's a crime?
17 You understand that?
18 A Yes.
19 Q Okay. But you've always complied with it?
20 A Yes.
21 Q Because you hired a contractor?
22 A Yes.
23 Q Who went and got the permit?
24 A Yes.
25 Q Got the zoning ordinance so that he would even know what

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1 he was doing?
2 A Uh-huh.
3 Q And went out and followed the letter of the law?
4 A Yes.
5 Q Okay. Now, if you draft a zoning ordinance, sort of like
6 this one okay, and you knew that the Town would
7 unanimously agree to it, and put it into affect, okay,
8 would you regulate the height that you could cut?
9 A Are you asking me would I add something to this?
10 Q No. Let's start over, okay. You're familiar with the
11 provisions of this ordinance, we've been through them. Is
12 that correct?
13 A Yes.
14 Q And you're familiar with the provisions of some of the
15 previous ordinances that you've cut under. Is that
16 correct?
17 A The five feet, the Myrtles, yes.
18 Q And you sort of know what you like and what you don't like
19 about the various ordinances. Is that correct?
20 A So far, okay. Yes.
21 Q And I'm sure in your mind you have some idea of what you'd
22 like for it to be. Is that correct?
23 A What I would like to see in an ordinance?
24 Q Yes.
25 A Yes.

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1 Q Okay. So that's what I'm asking you. You have the
2 authority, right now in this deposition, to tell me what
3 you want with regard to a zoning ordinance that regulates
4 the cutting in the accreted land. Assume that what you
5 say, the Town would approve. And I want to know what you
6 would include in it?
7 A So you want me to draw up an ordinance?
8 Q I want you to talk to me about what you would want in the
9 ordinance. Number one question is --
10 A First of all, I'd have to think about that. If the Town
11 wants to pay me to do it, I'll come up with an ordinance.
12 Q Well, they might. I mean they may need you to draft one.
13 A I'd do it.
14 Q But let's just talk about answering my questions.
15 A What I would add and make changes, I -- Off the top of my
16 head, just cut everything.
17 Q So you would pass an ordinance that says, cut everything.
18 Would you regulate how high to cut it?
19 A Yeah, probably.
20 Q How high would you let them cut it?
21 A Three feet.
22 Q Three feet. And so your ordinance would start out saying
23 that you cut all vegetation to three feet. Is that
24 correct?
25 A Yes.

15 (Pages 54 to 57)

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1 Q Okay. And it wouldn't - It would be without regard to
 2 the species, the vegetation, the type?
 3 A No. I'd save oak trees. Hard wood trees, yeah, I'd save
 4 those.
 5 Q Okay. So your ordinance would cut everything except hard
 6 wood trees in the accreted land?
 7 A Uh-huh.
 8 Q Okay. And pine trees, we already agree you don't like
 9 pine trees, so you'd cut the pine trees too, right?
 10 A It's not that I don't like them, they're dangerous.
 11 Q Okay. But you wouldn't -- You wouldn't save them, you'd
 12 cut them in your ordinance?
 13 A I think they're dangerous.
 14 Q Would you save the pine trees?
 15 A I'm not going to -- If Sullivan's Island wants to pay me,
 16 I'll give them an ordinance.
 17 Q No. You see, Nicky, you have to answer my questions in
 18 this deposition.
 19 A There would be no pine trees.
 20 Q Good. Fair enough.
 21 A Because they're fire hazards.
 22 Q All right. Now, would you regulate the time that you
 23 could cut under your ordinance?
 24 A I'd have to think about -- I can't give you an answer on
 25 that. I really just don't know.

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1 Q You don't know if you would or not?
 2 A I just don't know. I can't give you a time. I can't give
 3 you a time frame, no.
 4 Q Would you require the people who are going to cut to get a
 5 permit from the Town?
 6 A Definitely.
 7 Q Okay. And why would you do that?
 8 A I think so the Town could control the law.
 9 Q Okay. So you think it's a good idea for the Town to issue
 10 permits so that they can control the law?
 11 A Definitely.
 12 Q Okay. Would you require licensed contractors to come in
 13 and do the cutting?
 14 A Yes.
 15 Q And why?
 16 A I think the Town could control them better. They would
 17 have a knowledge of what to cut and what not to cut.
 18 Q So you think that's a good idea?
 19 A Yeah.
 20 Q Okay. Is there anything else that you would regulate in
 21 your ordinance?
 22 A I don't know, I'd have to really give it some thought.
 23 Q Okay. But --
 24 A They want to pay me, I'll do it.
 25 Q Okay. Well, I don't know whether they will or not.

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1 That's not my job. But, so what we agree on --
 2 A But these things are created and drawn up over months of
 3 study, not just spur of the moment.
 4 Q Okay. So they put some time into drawing up an ordinance?
 5 A No question -- No question it would have to be done right.
 6 Q Okay. And you think they have put the time in and done
 7 the studies to come up with these?
 8 A I don't know.
 9 Q You don't know?
 10 A I don't know what they've done.
 11 Q Okay. But under your ordinance, what we could agree, if
 12 you could pass one today you would cut all vegetation
 13 except oak trees to three feet?
 14 A And hard wood trees.
 15 Q You'd save all hard wood trees or just those?
 16 A Hard woods, oak is a hard wood.
 17 Q Yeah. But any, I don't know --
 18 A That's a tree, a real tree.
 19 Q A real tree. You'd save real trees but you'd cut
 20 everything else to three feet?
 21 A Right. Not a trash tree. You don't need to save those.
 22 Q And you think that it would be important to get licensed
 23 contractors so that they would do it right?
 24 A Yes.
 25 Q And you think it would be important for the Town to issue

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1 permits so that they can regulate and make sure it was
 2 done right?
 3 A Yes.
 4 Q And you think it would be important for this ordinance to
 5 be posted where there's rules, where people would
 6 understand them?
 7 A Yes.
 8 Q Okay. So when we go back and look at the 2005 Ordinance
 9 that you just read, it would be fair that you agree with
 10 parts of it and you disagree with other parts of it?
 11 A What do you mean disagree? You talking about what can be
 12 cut?
 13 Q Yeah. Well, you'd change some of it --
 14 A Yes.
 15 Q Under your ordinance.
 16 A The Myrtles, and the Popcorn trees, and whatever else that
 17 other tree was.
 18 Q Right. But the issuance of permits is covered in there,
 19 and you think that's a good idea?
 20 A I think that's a good idea, yes.
 21 Q And the license contractor thing is in there --
 22 A It's a good idea.
 23 Q -- you think that's a good idea?
 24 A Yes.
 25 Q So my question is, would you agree that some parts of the

16 (Pages 58 to 61)

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1 ordinance are good ideas and some of them are not good
 2 ideas, for you?
 3 A I can tell you what I don't like in this, yeah.
 4 Definitely.
 5 Q But there's some of it that you like?
 6 A I think the permit part. Yeah, that's important.
 7 Q And the contractor part?
 8 A That's important.
 9 Q And the Town regulating part?
 10 A That's important.
 11 Q Fair enough.
 12 MR. HAIR: Okay. I want you to look under Tab
 13 2-A.
 14 MR. BLUESTEIN: Is that the one in the
 15 beginning?
 16 MR. HAIR: 2-A. It should be -
 17 MR. BLUESTEIN: Oh, there it is, yeah.
 18 MR. HAIR: And, this first page, and I'll just
 19 tell you what this is. This is a
 20 Certification that the following pages are
 21 part of the 1981 Code Book, okay. And that
 22 continues on into 2-B, where it's highlighted.
 23 You can stop right there.
 24 MR. BLUESTEIN: 2-B?
 25 MR. HAIR: 2-B. You're on it. You're good,

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1 right there.
 2 MR. BLUESTEIN: Okay.
 3
 4 MR. HAIR: Resuming.
 5 Q So we want to talk about Section 21-38. Wait a minute --
 6 This is of the 1981 Sullivan's Island Zoning Ordinance,
 7 okay?
 8 A (Non-verbal Response)
 9 Q You agree?
 10 MR. VAN RAALTE: Section 38 or 39, the cutting
 11 rules are 39.
 12 MR. HAIR: Yeah. First of all I want to just
 13 establish that it's the Zoning Ordinance.
 14 A So what's your question?
 15 Q Does this appear to be the 1981 Zoning Ordinance?
 16 A If you say it is, I would have to agree with you.
 17 Q Fair enough.
 18 A I don't know.
 19 Q All right. I say it is.
 20 A Okay. I agree with you.
 21 Q Turn the page then.
 22 A To?
 23 Q To the next page. It's labeled 194.
 24 MR. HAIR: I tell you what, Nicky, let's go
 25 back to the page before. I think it's

Page 64

1 important that we read the whole thing.
 2 MR. BLUESTEIN: Okay.
 3 MR. HAIR: Look at Sections 21 through 39
 4 where it says Area RC-1 Restrictions.
 5 MR. BLUESTEIN: Uh-huh.
 6 MR. HAIR: And if you would, just sort of read
 7 through that for me. All the way through the
 8 next page, Sub-section C.
 9 MR. BLUESTEIN: Okay.
 10 MR. HAIR: And again, I've told you this is
 11 the 1981 Zoning Ordinance and what I've had
 12 you read is the part that deals with cutting.
 13 Can you look at that Sub- Section 5 for me?
 14 MR. BLUESTEIN: Okay. Under Zoning?
 15 MR. HAIR: Yeah, the part that's highlighted.
 16 MR. BLUESTEIN: Okay.
 17 MR. HAIR-Resuming.
 18 Q And read that paragraph, which includes the highlighted.
 19 A In those areas where the height of trees or bushes are
 20 deemed objectionable, the trees or bushes may be pruned to
 21 a height of no less than three feet, provided that the
 22 cumulative effect of the trimming, cutting or pruning
 23 shall not be detrimental to the safety, welfare, and
 24 health of the people of the Town (as read).
 25 Q Okay. Do you know anything about this 1981 Zoning

Page 65

1 Ordinance?
 2 A No.
 3 Q Have you ever seen it before?
 4 A No. I mean I've never paid attention to it.
 5 Q Have you heard anything about the 1981 ordinance, about
 6 cutting to three feet?
 7 A No.
 8 Q Nothing?
 9 A Hub-uh.
 10 Q When you were working on your lawsuit, do you know whether
 11 --
 12 A I take it back. The only thing I know about it is, there
 13 was someone who did get a permit before land trust to cut
 14 to three feet. There was someone that they say got a
 15 permit, and they tried to stop them, but he did everything
 16 legally, and he was allowed to go ahead and cut.
 17 Q So, the land trust occurred in 1991?
 18 A I think it was -- It was afterwards, right.
 19 Q So did he get the permit before 1991 or after 1991?
 20 A He must've -- He got it before 1991. Before the land
 21 trust because he was allowed to go ahead and cut to three
 22 feet.
 23 Q Okay. Fair enough. Do you know whether you got any
 24 permits under this 1981 ordinance?
 25 A I don't think so.

17 (Pages 62 to 65)

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Page 66

1 Q Okay.

2 A Not that I know of.

3 Q Right. So we know --

4 A I don't remember cutting anything.

5 Q Back then?

6 A Yeah.

7 Q Because you really didn't have a need to.

8 A It was no problem.

9 Q This ordinance appears to let you cut to three feet.

10 A Uh-huh. That's what it says.

11 Q Okay. And do you see anything in those two pages that has

12 any restrictions with regard to the species you can cut at

13 all?

14 A I don't -- I didn't read it that thoroughly. You know,

15 there was something that concerned me though. On page

16 193, the last thing that's highlighted. Something about

17 the health, safety, and welfare of the island residents

18 and visitors. I think that's something that's, it's sort

19 of been lost. And that's very disturbing to me. I don't

20 know if you're familiar about the girl that got beaten,

21 almost murdered, and raped. Luckily enough, someone came

22 along. That was because of the thick vegetation. Some

23 fellow, and these people, the fellow came along on a

24 bicycle, caught the guy in the act and he ran. And he

25 received a medal from the Council. Commendation.

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1 Q Right.

2 A I think things like that have been lost. And this states,

3 you know, the health, the safety, and the welfare. We

4 talk about safety, we talk about health, we talk about

5 mosquitoes. Mosquitoes sure aren't healthy for anybody,

6 especially, for Sandra's grandchildren. And the welfare,

7 general welfare to the island, I think that's something

8 that's been lost. That's concerning to me.

9 Q Okay. And that's sort of a political issue. I mean,

10 that's something that the Town's supposed to do, right?

11 A I'm not into politics. I don't care about politics, in

12 that respect. I have no political ambitions whatsoever.

13 I just want to maintain the quality of life on Sullivan's

14 Island as it always was.

15 Q Okay. Who's responsible for doing that?

16 A I guess Council.

17 Q That it's a Town responsibility? That's all that I was

18 trying to get.

19 A I'd say it's the Town, yeah.

20 Q I mean that's what they do, they manage the public safety,

21 welfare of the island residents.

22 A Exactly.

23 Q And you would agree with me they're responsible for the

24 health, safety, welfare of all the island's residents?

25 A No question.

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1 Q All right. So, in 1981 you could cut to three feet

2 without regard to the species.

3 A That's what it says, yeah.

4 Q We in agreement on that?

5 A Whatever it says, yeah.

6 MR. HAIR: Now, take a look at Tab 3-C. Now,

7 just to make things simple, Nicky, this is an

8 excerpt from the 1995 Sullivan's Island -

9 MR. BLUESTEIN: Yeah. It's got the same

10 wording as that other -

11 MR. HAIR: --Zoning Ordinance, okay. Now, I

12 will tell you that between 1981 and 1995 this

13 is the first change. '95 changed the '81

14 ordinance, okay?

15 MR. BLUESTEIN: Okay.

16 MR. HAIR: So between '81 and '95 we were

17 dealing with the same ordinance, which cut to

18 three feet without regard to species, okay.

19 Now, look at that Section 21-39 1(e).

20 MR. BLUESTEIN: Uh-huh.

21 MR. HAIR-Resuming.

22 Q Now, does that appear to limit the type of vegetation you

23 can cut?

24 A Yeah. It says you can cut three trees whatever they are.

25 Q Okay. And that --

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1 A I think I know what Popcorn trees are. I know what the

2 Waxmyrtles are. The Eastern Baccharius, whatever that is,

3 I have no idea. I think the Popcorn trees are those

4 things that have like little white flowers on them.

5 Q So, with regard to the species, this looks like the 2005

6 ordinance that we looked at earlier? The one that's

7 current.

8 A I don't know. Whatever - it looks like, similar to what

9 you can cut now.

10 Q On the species aspect of it?

11 A Right, yeah.

12 Q Now, turn that over to the next page.

13 A Okay.

14 Q And you see where it starts up, where that highlighted

15 part is, where it says this vegetation may be trimmed?

16 A To seven feet, yeah.

17 Q Seven feet?

18 A Yeah.

19 Q Okay. So, do you remember this ordinance going into

20 affect where it changed things to where you could not cut

21 certain species?

22 A No.

23 Q And you cut at seven feet?

24 A No.

25 Q Okay. You don't have any recollection of that?

18 (Pages 66 to 69)

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1 A You know, there might've been some talk, but I really
 2 wasn't concerned or really wasn't involved, really more so
 3 until things started getting out of control.
 4 Q Okay. Do you know whether or not you got any permits
 5 under the '95 ordinance where you could cut to seven feet?
 6 A I might have. I don't think so, I'm not sure. I'm really
 7 am not sure. I really don't know.
 8 Q Now, this version, the '95 version, changed the cutting
 9 height from three feet to seven feet. Does that appear
 10 accurate?
 11 A Yeah. I guess so.
 12 Q Okay. Now, is that something that you like or don't like?
 13 A To go to seven feet?
 14 Q Yes.
 15 A No. Don't like that.
 16 Q Don't like that, okay. And why is that?
 17 A It is only certain species you could cut.
 18 Q Okay.
 19 A And it's -- I think seven feet's too high.
 20 Q Okay. Fair enough. If there was a provision that allowed
 21 you just to cut everything at seven feet, would that solve
 22 your problems?
 23 A No.
 24 Q Because it's too high?
 25 A Too high.

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1 Q Okay.
 2 A Too high is one. I think it will not be able to control
 3 the mosquitoes, the snakes, the rats, which are a major
 4 problem on the beach. And not only the front beach, all
 5 over the island. And the rats come out of there. I'm
 6 very fortunate, I don't have a rat problem.
 7 Q Right.
 8 A You know why?
 9 Q Why?
 10 A Because my neighbor across the street has a bunch of cats.
 11 The cats live in my yard. They're the fattiest and the
 12 happiest cats you can imagine. But all my neighbors up
 13 and down the island have rat problems.
 14 Q That's a good solution. So, would you agree with me that
 15 with regard to the cutting rules the 1995 ordinance, that
 16 makes you cut at seven feet, is more restrictive than the
 17 1981 ordinance that allowed you to cut at three feet?
 18 A Yeah, definitely.
 19 Q And it's also more restrictive in that for the first time,
 20 it appears, they limited the type of species that you
 21 could cut?
 22 A Brady, I can't give you an answer, because I don't know
 23 the laws. I don't know what the three foot law was, the
 24 seven foot. I'd have to study it.
 25 Q But, now, we can go back through it. But I mean, you see

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1 in this ordinance that the restriction about the
 2 Waxmyrtles, and the Popcorn, and the other one is in this
 3 one?
 4 A Right.
 5 Q It wasn't in the '81 when we looked at it?
 6 A It was not -- '81 you could cut anything?
 7 Q Yeah.
 8 A All right. Let's go back to that, that's fine.
 9 Q So, this one is more restrictive than the first one?
 10 A I like the '81 better then.
 11 Q Fair enough. Now, let's go back to 1-C, okay. Now, this
 12 is the one we started out talking about, the 2005
 13 Ordinance, which is in affect today.
 14 A Okay.
 15 Q And, so, what we see here is, looks like the same
 16 restrictions on the species that was in '95. Right?
 17 A Okay.
 18 Q The Waxmyrtles, the Popcorn, and the --
 19 A The same three.
 20 Q Same three. Then the difference, it appears, is that this
 21 one allows you to cut to five feet versus seven feet in
 22 1995. Is that correct?
 23 A Yeah.
 24 Q Okay. So, am I correct that, from your perspective,
 25 this is a little bit of an improvement over the 1995

Page 73

1 ordinance?
 2 A No. The height is different.
 3 Q And it's better for you, because you said you didn't like
 4 seven feet. So, it's better at five feet than seven feet?
 5 A You know -- I guess I'm going to be talking too much and
 6 Bobby's probably going to give me hell later. You know
 7 why it was changed to five feet?
 8 Q No. Why?
 9 A Do you have any idea?
 10 Q I have no idea.
 11 A Okay. Because the Mexican's couldn't reach seven feet,
 12 and they were the ones doing the cutting. So they brought
 13 it down to five feet so ... And that was the complaint
 14 from the people, who were the contractors.
 15 Q Okay. But the fact of the matter is you like five feet
 16 cutting better than you do seven feet cutting?
 17 A I like -- It's not acceptable, I like three feet better.
 18 Q You like three feet better than any of them?
 19 A I like no feet better than any of them.
 20 Q All right. I think I understand where you're coming from,
 21 okay. But all I'm trying to talk to you about is, you
 22 like five feet better than seven feet, and you like three
 23 feet better than five feet. And if you had a choice would
 24 you like no feet?
 25 A Let me re-phrase it. I will not accept five feet. I

Page 74

1 don't know about three feet. Definitely accepts zero
 2 feet.
 3 Q Okay. How many years are there between 1995 and 2005?
 4 A Ten years.
 5 Q Ten years, okay. Now, you got permits during that ten
 6 year period to cut. Is that correct?
 7 A I don't know. I'm really not sure. If you tell me I did,
 8 and you got proof of it. But I'm not one hundred percent
 9 positive, Brady.
 10 Q All right. I'm telling you, you did.
 11 A Okay. Then I did.
 12 Q All right. So, you complied with the law during that
 13 period of time?
 14 A Exactly.
 15 Q Okay. Why didn't you sue the Town during that ten years?
 16 A I think the best answer I can give you is these other
 17 species weren't there.
 18 Q Well, let's look at that ordinance again. Let's go back
 19 --
 20 A Yeah. I know what it says. But there weren't these high
 21 trees, whatever they are.
 22 Q In front of your house?
 23 A In front of my house. Or, there was not a problem on the
 24 island, it wasn't a problem.
 25 Q Okay.

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1 A They weren't there. Again, going back to what I said, if
 2 you'll go out on the beach and turn, look at the ocean,
 3 turn to the right, and that's going west, and you'll see
 4 these trees in a straight row. I don't know where they
 5 came from.
 6 Q Have you watched them grow over the years?
 7 A They have just like, bam, the last few years. Just popped
 8 up.
 9 Q You don't think somebody came out there and planted them
 10 do you?
 11 A I don't know. Possibly.
 12 Q Possibly? Have you ever seen anybody out there planting
 13 trees in front of your house?
 14 A No.
 15 Q Okay. So it's more likely than not that they grew there?
 16 A I'm not going to agree with that.
 17 Q You're not?
 18 A I don't know where they came from. All of the sudden they
 19 just came. I don't know where they came from.
 20 Q Okay. Well, you don't know where they came from. But let
 21 me ask you, do you believe anyone planted the trees that
 22 are bothering you in front of your house?
 23 A Possibly.
 24 Q Have you ever seen anybody plant trees in front of your
 25 house?

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1 A No.
 2 Q Do you suspect that somebody did?
 3 A Possibly, yes.
 4 Q Who?
 5 A I don't know. That I have no idea.
 6 Q So, is it possible that the trees just grew there
 7 naturally, through Mother Nature's handiwork?
 8 A After all these years, no. I never saw them as a kid. I
 9 never saw trees out there.
 10 Q And you've been living in that house for thirty years?
 11 A I've been living there for thirty -- Well, I've been
 12 living there full-time six months before Hugo until now.
 13 But we had the house and we would live there part-time
 14 during the summers.
 15 Q Okay. But over the last ten years have you pretty much
 16 lived there year round, or do you go somewhere else?
 17 A No. We live there year round.
 18 Q Live there year round. And during those ten years, let's
 19 say, have you ever seen anybody out there digging a hole
 20 and sticking a tree in it?
 21 A No.
 22 Q Okay. But your position is that these trees that you
 23 complain of -- Do you know what kind they are?
 24 A No.
 25 Q Okay. They just appeared?

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1 A Just grew, just appeared.
 2 Q Out of the blue one day?
 3 A I really can't say one day but they just kept growing and
 4 growing. You know, I guess when they're little, two to
 5 three feet, you don't see them because it's so much trash,
 6 and under brush, and poison ivy. It's another thing out
 7 there too. A lot of poison ivy. So, that's another reason
 8 not to go out into it.
 9 Q So these trees at one time were little?
 10 A I imagine.
 11 Q Well, you just said that.
 12 A I'm saying they could have been. Someone could have
 13 planted a two or three foot tree.
 14 Q And then they've grown?
 15 A It's not an area that you walk into. You just don't walk
 16 into the accreted land. You just don't do it.
 17 Q All right. My question is --
 18 A You couldn't go from one block to the next. You couldn't
 19 go from one block to the next without being confronted
 20 with snakes, rats, spiders, poison ivy. I mean, it's just
 21 not the type of thing you'd want to go strolling in.
 22 Q Sounds like a terrible place to live?
 23 A In the accreted land it would be a terrible place to live
 24 but not Sullivan's Island.
 25 Q All right. These trees that you're complaining about, you

Page 78

1 don't know where they came from?

2 A I don't. I have no idea.

3 Q You don't know whether they grew there naturally, or

4 whether somebody came out of the darkness and planted

5 them?

6 A Have no idea.

7 Q Just don't know?

8 A Have no idea.

9 Q You just know they're there.

10 A They've been growing, and getting bigger, and bigger, and

11 fatter.

12 Q Okay. How long they been growing?

13 A I'd probably say.. Probably it's been the last, maybe,

14 five, six years, seven years.

15 Q Okay.

16 A I'm not sure.

17 Q So, during the ten years between 1995 and 2005 did you

18 ever think about filing a lawsuit against the Town?

19 A Between what year again?

20 Q '95 and 2005, during those ten years where you could only

21 cut at seven feet.

22 A I don't think it was a major problem like it is becoming.

23 Q So, is the answer you didn't consider filing a lawsuit?

24 A I don't think. I never even thought about a lawsuit. I'm

25 not the kind of person that files a lawsuit. This is the

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1 first lawsuit I've ever filed. I'm not that kind of

2 person. I mean, I would sit and try and talk with you

3 two, three, four years and try to work a solution out.

4 That's my forte.

5 Q Fair enough.

6 A I'm not the type of person that would file a lawsuit.

7 Q Okay. I'm just asking. Did you think about filing a

8 lawsuit during that ten year period?

9 A No. I don't know.

10 Q Did you talk to any of your front beach neighbors, did

11 they talk about filing a lawsuit?

12 A Not that I know of.

13 Q Okay. But it was a topic of conversation, the accreted

14 land?

15 A It's become -- It's become a problem in the last, you

16 know, I can say the last five, six, seven, eight years,

17 yes, it's become a problem. But it's not the topic of

18 conversation.

19 Q But ya'll talk about it sometimes?

20 A I can't say what, you know, .. I can't be privy -- I'm

21 not privy to people's conversations and ..

22 Q Well, what if you were in the conversations. That's what I

23 want to know about. I can't ask you about conversations

24 that other people had when you weren't around. But were

25 you in conversations with other people about what to do

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1 with this problem?

2 A Well, we probably talked about the trees. But I can't say

3 it monopolized the conversation and it was the first thing

4 you said. You know, I can't say that.

5 Q Okay.

6 A But it did change the quality of life, no questions.

7 Q When did it become --

8 A If I showed you my tax bills for front beach, back then,

9 you'd be floored.

10 Q Well, let's talk about that. What do you mean?

11 A It was exorbitant.

12 Q What your tax bill, your property tax bill?

13 A Uh-huh.

14 Q And the property tax bill was based on the value of your

15 property?

16 A Uh-huh.

17 Q Pretty much everybody in Charleston County pays the same

18 percentage if they live in a residential house, based on

19 the value of their property?

20 A I don't know. I don't know how it's determined.

21 Q Well, would you agree with me that the reason your

22 property taxes are higher is because your property is

23 worth more?

24 A Probably.

25 Q Fair enough. Okay. So, what is the difference, now, in

Page 81

1 your tax bills as they were previously, is there any

2 difference? They getting bigger, or less, or what?

3 A Lower.

4 Q Lower. Your property is valued less now than it was when?

5 A Three, four, five years ago.

6 Q Okay. And is that value based on what the assessor's

7 office has determined or is some other outside appraiser

8 determined that?

9 A I've appealed and won. And I guess -- I don't know how

10 they determine it.

11 Q When did you appeal your taxes?

12 A I'm not sure when exactly?

13 Q Within the last five years?

14 A I think so.

15 Q Okay. Do you know, ballpark, when you appealed what the

16 value of your property was?

17 A I just don't remember exactly.

18 Q Okay. But somehow you weren't satisfied that it was

19 accurate, is that right?

20 A I felt it was too high.

21 Q Okay. And you went through the normal appeals process?

22 A Correct.

23 Q What did you have to do?

24 A I think you write a letter.

25 Q Do you have to give them any kind of justification, or do

21 (Pages 78 to 81)

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1 you just tell them I think you're wrong?

2 A You have to give them comps.

3 Q You do? Okay, where'd you get those?

4 A Property that's been sold.

5 Q In and around you, similar property?

6 A In the same neighborhood, same blocks, or same street.

7 Q Did you hire an appraiser or anything, or did you just do

8 that work yourself?

9 A I did the work myself.

10 Q Do you have a copy of that appeal anywhere?

11 A Probably not.

12 Q Okay. Since that appeal has your property taxes remained

13 the same, or have they increased, or decreased?

14 A About the same. I can't remember, I'm just not sure.

15 Q Okay. You've gotten permits under the 2005 Ordinance for

16 four or five years now, you've pretty much cut every year.

17 A Uh-huh.

18 Q Why now, why now to file the lawsuit? Why has it become a

19 problem now?

20 A Because of the other trees?

21 Q The species limitation?

22 A The trees out there, that I don't know what they are, that

23 you can't touch. You're welcome to come to my house today,

24 if you want to, and I'll show you. From the right side of

25 my house I can not see the ocean anymore.

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1 Q Okay.

2 A From the left side it's very limited. And you can see it

3 coming down, and in a year or so I'll lose that view also.

4 And breeze.

5 Q And what I'm trying to identify, Nicky, is to make sure I

6 understand why you brought this lawsuit in 2009 and not in

7 the previous fifteen years.

8 A Because the problem has gotten out of hand with the trees

9 that you can't cut.

10 Q But you would agree with me, that with regard to the types

11 of species you could cut, that ordinance really hasn't

12 changed since 1995?

13 A My issue with it is there's trees that have grown up that

14 I don't know where they came from. They were never there.

15 Q And you think it is of a species that is not the three

16 that you're allowed to cut?

17 A I'm pretty sure.

18 Q And that's the problem?

19 A Uh-huh.

20 Q Fair enough. Okay. Now, --

21 A I tell you what, Brady -- You give me, you come to

22 Sullivan's Island, give me thirty minutes. I'm going to

23 take you to two places. I'm going to take you to my house

24 and Dave Fortiere's house. And I promise you, you will

25 change your opinion.

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1 Q I don't have an opinion, okay. But you get your lawyer to

2 invite me out there, and I'll go have a cocktail with him

3 on his porch. And I'll be happy to walk around and talk

4 to you about it. No problem.

5 A I can't talk to my lawyer I was told.

6 Q You can talk to him afterwards. You'll remember that you

7 want me to come out there. Let me ask you this, Nicky,

8 and we talked a little bit about if you do your own zoning

9 ordinance, and we talked about three feet. If the Town

10 decided that you could flat top the accreted land at five

11 feet instead of three feet, without regard to species,

12 would that satisfy your concerns? Would that be a

13 legitimate compromise?

14 A No.

15 Q No. Five feet's too high?

16 A Uh-huh.

17 Q Okay. Does five feet block your views and your breezes?

18 A I'm not sure. There's more to it than just cutting it,

19 Brady.

20 Q Okay.

21 A Again, we have to address the poison ivy, the rats, the

22 snakes, the mosquitoes, the standing water. There's all

23 kind of problems. I mean, there's more than just cutting

24 it.

25 Q Okay.

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1 A I mean, there's a lot more that has to go into it.

2 Q But over the years, over the last twenty years, there's

3 been different ordinances in affect, different height,

4 different vegetation, and none of them really addressed

5 that poison ivy stuff, right?

6 A I don't think so. And I don't think any ordinances,

7 today, address poison ivy.

8 Q Okay. But you think, and I don't want to re-plow all this

9 ground, but you think that cutting it three feet, somehow,

10 helps control those problems?

11 A I don't know. I can't give you an answer. But even

12 cutting to three feet, without doing, I guess you would

13 call it maintenance, on the rest of the land, I don't

14 think that would even be acceptable. I mean there's a lot

15 of maintenance that's got to be .. There's just a lot of

16 maintenance to keep it, I think, to keep the land, so to

17 speak, from a health hazard for the residents of

18 Sullivan's Island. And, yeah, maybe I enjoy the views,

19 and the breezes, and it's easier for me to get to the

20 beach than somebody on the second row. But he's still got

21 the same health hazards that I have, the rats, the poison

22 ivy, the mosquitoes. You know, Sandra has those same

23 problems when she takes her grandchildren. So, there's

24 other issues than just the height that have not been, you

25 know, that have not been maintained.

22 (Pages 82 to 85)

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Page 86

1 Q Okay. So, the problems, and I'm just going to sort of
 2 summarize them, but the rats, and the snakes, and the
 3 mosquitoes, and the critters that hang out, out there, you
 4 don't really know what height restriction best controls
 5 that problem, do you?
 6 A Again, it goes back to lack of maintenance.
 7 Q Okay. My question is --
 8 A That's a problem.
 9 Q My question is, do you know whether it matters with regard
 10 to those health and safety issues?
 11 A No. I can't give you an answer on that.
 12 Q You don't know?
 13 A I don't know.
 14 Q Who would we go to, to find out something like that? Who
 15 would know?
 16 A I'd go to the same people who did the study.
 17 Q The consultant people?
 18 A The consultant's. And don't tie their hands behind their
 19 back.
 20 MR. HAIR: Let's go back and look at the 1981
 21 version, which is under section, it's Tab 2-B,
 22 Nicky.
 23 Q Now, would you agree with me that, that introductory
 24 section there -- I'm sorry you're on the wrong page. 2-B
 25 and it's Section 21-37.

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1 A 2-B?
 2 Q 2-B.
 3 A Okay.
 4 Q All right. We're going to talk a little bit about the
 5 yellow part. Would you agree with me that, that
 6 introductory section includes findings of fact?
 7 A I don't know what you want me to say.
 8 Q Well, read the last highlighted --
 9 A The last one, the third one.
 10 Q Yeah. Where it starts with further. Read it out loud.
 11 A Further, the Town Council finds that this area is of a
 12 particular beauty in its natural state so as to provide
 13 aesthetic value necessary to the public health, safety,
 14 welfare of island residents and visitors, and in keeping
 15 with the historic uses of Sullivan's Island (as read).
 16 Q Right. Would you agree with that?
 17 A I agree it's of particular beauty, yes. But I value
 18 health, safety, and welfare of island residents and
 19 visitors over that.
 20 Q Well, read it again. Doesn't it include public health,
 21 safety, and welfare of the island residents?
 22 A I don't think it does. I don't think it --
 23 Q You don't think it says that?
 24 A I'm not saying what it says. But I think those are things
 25 that are not being considered.

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1 Q All right. Now this is --
 2 A Health, safety. There was a fellow --
 3 Q Wait, wait. I'll listen.
 4 A There was a fellow on Sullivan's Island. And I'm talking
 5 about, the reason -- I'm addressing safety. And he was,
 6 and he's an attorney. And he was involved with this and
 7 was a big supporter. And when the girl was beaten up, and
 8 almost raped and murdered -- And he lived, he has a
 9 sixteen year old daughter, and he lives about a half a
 10 block and that was the same pathway he took to the beach.
 11 He said, when that occurred, then, safety became an issue
 12 with him. And I just think that's something, safety is
 13 just not in -- And the health and the welfare is just not
 14 being, for the citizens of Sullivan's Island and visitors,
 15 is just not being addressed.
 16 Q Okay. You're unhappy that the current Town
 17 administration, the current government, is not doing a
 18 good job with the public health, and safety, and welfare,
 19 right?
 20 A I think as a citizen of Sullivan's Island, I know I have
 21 and a lot of other people have concerns.
 22 Q Fair enough. I mean --
 23 A There's a lot of concerns.
 24 Q It's okay to have concerns. But what my point is, this is
 25 the 1981 Zoning Ordinance of the Town and all I'm asking

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1 you is: Do you agree with the Town Council and their
 2 findings that this area, the accreted land area, is of a
 3 particular beauty in its natural state so as to provide
 4 aesthetic value necessary to the public, health, safety,
 5 and welfare to the island residents and visitors and in
 6 keeping with the historic uses of Sullivan's Island?
 7 A I think the key word in this is natural state.
 8 Q Okay.
 9 A Where did these trees come from that were never there.
 10 They weren't there when my parents lived there, when my
 11 grandparents, when I was a kid. Those trees weren't
 12 there. Where did they come from, all of the sudden they
 13 just popped up?
 14 Q Do you think they're natural?
 15 A No.
 16 Q You don't?
 17 A No.
 18 Q You think someone went out there and planted them?
 19 A I think -- I don't know where they came from. I can't say
 20 I accuse you, Brady Hair, of planting trees. I mean, I
 21 can't say anybody, but they're not natural. They were
 22 never there as a kid. When I was a kid they were never
 23 there. With my kids they were never there. And, again, I
 24 think health, safety, and welfare, I think is a major,
 25 major concern.

23 (Pages 86 to 89)

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Page 90

1 Q Okay. But you think it's a worthy ideal, right? I mean,
 2 you agree that's what they should be doing, through their
 3 laws?
 4 A Let me tell you something, these people that are against
 5 it, there's not one person -- You can take all of them
 6 together, I am, me personally, I am a better - I take
 7 care of the land, the greenery, better than all of the
 8 other people who are running the island put together. I
 9 mean, I raise salt water fish, I raise Japanese Koi. I
 10 got a huge pond outside. I mean, I'm concerned about the
 11 trees and everything in my yard. I take better care of
 12 it. I'm insulted that they have this attitude towards me.
 13 Q Okay. I get that. You're not happy with the current Town
 14 administration?
 15 A And I think there's a lot of people on Sullivan's Island,
 16 the majority of people on the island aren't happy.
 17 Q I get that and that's your right as a taxpayer and a
 18 voter. And I deal with that, you know, all the time. My
 19 question is, remember now, this is 1981. I'm willing to
 20 guess that most of the people on Town Council were not
 21 here on Town Council in 1981. Is that probably accurate?
 22 A I can't say yes or no.
 23 Q You haven't keep up with that over the years. You don't
 24 know if there have been any changes on City Council in
 25 those thirty years?

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1 A Oh, I'm sure there's been plenty of changes. Yeah,
 2 certainly.
 3 Q I mean, you pretty much know that there has. We got a
 4 different Mayor -- You got a different Mayor than you had
 5 in 1981?
 6 A Right.
 7 Q And probably some different Council people?
 8 A Uh-huh.
 9 Q My question to you is, the Town Council, through this
 10 finding, do you think, not that they're doing it correctly
 11 today, but is that what they're supposed to be doing. Is
 12 that a worthy finding? Is that a worthy goal for them to
 13 accomplish?
 14 A I think it's not a well written sentence. I think you
 15 have to define the difference in what's more important. I
 16 think natural state is no questions, that's important.
 17 But I think health, safety, and welfare are very
 18 important. And I think that's being, totally, forgotten
 19 about today.
 20 Q Okay. That's not my question now. I understand you're
 21 not happy with the way it's been done today. My question
 22 is --
 23 A I can't give you an answer on a 1981 ordinance.
 24 Q So you don't know whether these are good ideas or not?
 25 You don't know whether this is something that a Town

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1 Council should strive for?
 2 A If I was writing it, and they paid me to write it as a
 3 consultant, that wouldn't be in there.
 4 Q Okay.
 5 A It's too ambiguous.
 6 Q All right, fair enough. All right. Let's look at the '95
 7 ordinance again. And it's under Tab 3-B. And we want to
 8 look at Section 21-37. Okay. You got that, the
 9 highlighted part?
 10 A Uh-huh.
 11 Q And under this title where it says, Recreation and
 12 Conservation Area, which is what we're talking about. We
 13 agree to that, right? Read me just that first
 14 introductory sentence.
 15 A Start with Town Council?
 16 Q The Town Council, yeah.
 17 A The Town Council of the Town of Sullivan's Island find
 18 that these areas greatly contribute to the health, safety
 19 and welfare of the residents of Sullivan's Island and that
 20 they provide town citizens as well as visitors, with
 21 countless hours of pleasurable activity and rest and
 22 relaxation, which important to the goal of public health,
 23 safety and welfare; further, that the boundaries of these
 24 areas are constantly shifting over unpredictable periods
 25 of time, in that they are composed of sand dunes and

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1 vegetation that ceaselessly change (as read).
 2 Q Keep going.
 3 A Oh, you want me to read the rest of it?
 4 Q Yeah.
 5 A And these areas are prone to flooding, and, therefore, not
 6 suitable to development for any purpose; further, that the
 7 Town of Sullivan's Island originated as a health resort
 8 for all the people of the State of South Carolina, and
 9 that these areas are vital to the purpose, and useful for
 10 that purpose only so long as they remain in a natural,
 11 undeveloped condition subject to the changing tides;
 12 further, that these areas, left in their natural state,
 13 provide protection to adjoining landowners and their
 14 property from the hazards of high tides and floods caused
 15 by hurricanes, tropical storms and seasonal tides;
 16 further, that the construction of the Santec-Cooper
 17 Diversion Canal and subsequent changes in the volume of
 18 water flowing through the Charleston Harbor may cause
 19 further changes of an unknown nature upon the shoreline of
 20 Sullivan's Island, all of which the Town Council find to
 21 be a threat to all of the residents and property owners of
 22 the Town. Further, the Town Council find that this area
 23 is of a particular beauty in its natural state so as to
 24 provide aesthetic value necessary to the public health,
 25 safety and welfare of island residents and visitors, and

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1 in keeping with the historic uses of Sullivan's Island (as
2 read).

3 Q Okay. Now, keep in mind this is 1995, would you agree
4 with me that the Town Council made certain findings about
5 what they thought, at that time, was important in the
6 accreted land area?

7 A This is 1995, I don't know. If you tell me.

8 Q Is that what it says? That they made those certain
9 findings?

10 MR. HOOD: Objection, leading question.

11 Q You can go ahead and answer.

12 A One question -- One thing I like in here, it says sand
13 dunes. As a kid I remember sand dunes.

14 Q My question is this --

15 A I think sand dunes is great. As a kid that's one of the
16 things I remember.

17 Q Okay. Now, this paragraph, admittedly, is a mouth full.
18 Maybe the longest sentence I've ever seen. But, would you
19 agree that some of the items in here are important to you?

20 A Oh, I can tell you what's important to me.

21 Q Okay.

22 A Oh, definitely. Sand dunes is important, the protection
23 of the flooding, the natural state. Yeah, I think the
24 safety, the welfare, the public health, and the safety,
25 and the welfare of the island, definitely.

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1 Q How about the aesthetic value?

2 A I think that's important.

3 Q Okay. So, is it fair to say that the Town Council got
4 some of these concerns right in this ordinance? They're
5 on the right track about what's important?

6 A I think the ordinance was written -- I don't like some of
7 these things. Some of this, this last sentence is
8 ambiguous. I don't like the way that's done. But my
9 issue is that I don't think the present Council is hearing
10 the citizens of Sullivan's Island.

11 Q Fair enough. I understand your position.

12 A They're not hearing the mosquitoes that Sandra has, the
13 problems that John has when he walks his dog, the problems
14 with the rats, the snakes. They're not hearing the
15 concerns of the island residents. A major concern, which
16 very little has been talked about, has been the fire
17 hazard. Ask Norwood Smoke. About several years ago there
18 was a Myrtle fire in front of his house. Luckily enough
19 he was home. There was no way to get onto the island. The
20 fire chief came to him and said, Mr. Smoke can I have the
21 permission to drive over your land to get to the fire. I
22 mean those are definite concerns.

23 Q I get all that. I hear you.

24 A Those are things that the Council is not hearing from the
25 citizens.

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1 Q I understand exactly what your position is with regard to
2 this --

3 A They either need to get hearing aides or turn their
4 hearing aides up.

5 Q Remember now. Let me ask you what -- Again, my question
6 has got nothing to do, nothing to do, with the present
7 Council or how they're not doing what you think they ought
8 to be doing. I hear that loud and clear. My question is,
9 this Council in 1995 made certain findings of fact about
10 what's important in the accreted land, and do you agree
11 with some of these findings?

12 A Yeah. I agree definitely with sand dunes ..

13 Q Fair enough.

14 A And public safety. Certainly.

15 Q As least conceptually?

16 A I want the present Council to address and listen to what
17 the law said.

18 Q Fair enough, fair enough. Now, you think that aesthetic
19 values with regard to maintaining the accreted land is
20 important as well?

21 A Very important, in it's natural state, without anybody
22 tampering with it. I love to see wild flowers. I think
23 that's the way it always was.

24 Q But you don't really want it to stay in it's natural state
25 without anybody tampering with it, do you?

Page 97

1 A I don't understand what you're getting at.

2 Q All right. What you just said is that you want it to stay
3 in it's natural state with wild flowers without anybody
4 tampering with it --

5 A Yeah. That's the way the island always was. When I was a
6 kid that's the way it was. My kids, that's the way they
7 grew up with the island. That's the way it looked.

8 Q Do you think going out and clear cutting at three feet or
9 five feet is tampering with it?

10 A I can't give you an answer on how to bring it back. I'm
11 not educated enough in horticulture to give you an answer
12 on that, Brady.

13 Q Okay.

14 A But, I do know I don't like what's there, I don't like
15 where it's going. And I do know that they're being
16 neglectful in the way -- If this was 1981, the way that it
17 was written, that their forefathers, so to speak, said
18 that's the way it should, they're neglectful. They're not
19 following and listening to what their forefather's said.

20 Q But what their forefather's said makes some sense?

21 A I like that, sand dunes, public health, safety, no
22 questions. I don't want girls getting raped or afraid to
23 walk to the beach. We don't need the mosquitoes, we don't
24 need the snakes.

25 Q So, and this one as in the other one that you said, it

25 (Pages 94 to 97)

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Page 98	Page 100
1 looks like whoever was the Council people then sat down, 2 thought about this, went through a process, and committed 3 it to paper? 4 A Yeah. 5 Q Now, with regard to the aesthetics have you ever heard the 6 phrase that "beauty is in the eyes of the beholder?" 7 A Yeah. 8 Q You agree with that? 9 A I never thought of it. Are you talking about a tree? 10 Q Well, no, about anything? 11 A Or about a pretty girl? 12 Q I mean, I mean -- 13 A What are you talking about, I don't know what you're 14 talking about. 15 Q But beauty's in the eyes of the beholder, right? I mean, 16 in general. What I think is pretty you might not think is 17 pretty, what you think is pretty I might not think is 18 pretty. You would agree with that? 19 A I never even thought about it, Brady. I heard the 20 statement, I can say that. 21 Q Do you think that there are people out there -- Have you 22 heard from any people out there that think that letting 23 the accreted land just grow up into a maritime forest, 24 like it is sort of down by the lighthouse, is pretty? 25 A You've got to define maritime forest for me.	1 Q All right. 2 A Now, what's in front of Dave Fortiere's house, you want to 3 see a maritime forest, I'll take you out there. 4 Q My question has got nothing to do with -- 5 A When you come to Bobby Hood's, I'm going to be there, and 6 we're going to take you up to Dave Fortiere's. 7 And I'm going to show you a maritime forest. 8 Q Fair enough. But my question really has got nothing to do 9 with defining a maritime forest, or a jungle, or anything 10 else. My question is, would you agree with me that there 11 are people who look at that vegetation around the 12 lighthouse area, we agree we know what we're talking 13 about, -- 14 A Give me a percentage. 15 Q Of what? 16 A Do you think ten percent, five percent, fifty percent? 17 Q Of people or the -- 18 A People. You're asking me a question, do people think 19 that's nice? I'll give you a percentage of how many 20 people, I think, might think it's nice. 21 Q Why don't you give me a percentage. But you would agree 22 that there is, probably, at least one person out there 23 that thinks that's nice? 24 A Yeah, there's one person. 25 Q Okay. Any more that one person? What's your percentage.
Page 99	Page 101
1 Q Okay. You know the area down by the lighthouse, that 2 looks like a jungle if you walk through and it's a big 3 canopy, I mean it just looks like a jungle to me. 4 A I'm familiar with that. 5 Q Okay. So let's call it either a maritime forest or the 6 jungle. But you know what area I'm talking about? 7 A Okay. If you're going to do a comparison, then tell these 8 people to get their act together. They bring in some 9 speakers from Spring Island. Are you familiar with Spring 10 Island? 11 Q No. 12 A Okay. That's a controlled, gated community done by some 13 Harvard graduates, and he only let his friends in there 14 now. Now he's letting other people in there. And they 15 showed you a maritime forest in Spring Island -- This was 16 that same group of people, brought them over. And they 17 talked about Spring Island is wonderful, they showed them 18 the beautiful maritime forest, and the cleared grounds, 19 and everything like that. There was no poison ivy, there 20 was no standing water, and there was no mosquitoes. But 21 they also didn't tell you that they charge you one and a 22 half percent for every transaction on Spring Island. You 23 build a house for \$100,000. you put \$1,500. into the pot. 24 So, define maritime forest to me? I've heard all kind of 25 different definitions of it.	1 what do you think? 2 A I don't know. 3 Q But the point is, there is -- 4 A You give me a percentage and I'll give you a percentage. 5 Q -- there's at least one person or some people who would 6 look at that and say, that's nice. 7 A There is one person and a few people. Let's put it that 8 way. 9 Q Okay. And you would look at it and say, you don't like 10 it? 11 A I have a vision that's different than probably everybody 12 in this room. When I look at something I look at the whole 13 picture. What it's going to be today, what it's going to 14 be like tomorrow, what it's going to be like five, ten 15 years down the road, I look beyond. And that's what 16 troubles me when I see that area out there. 17 Q And so my question, again, is, different people see 18 different things when they look at the same thing? 19 A You give me a percentage. You give me your percentage, 20 and I'll tell you what percent -- There's only a few 21 people that like that. 22 Q You know, you are what I would consider a visionary type 23 person. 24 A No question. 25 Q Okay. And I'm a lot like that. When I look at a piece of

26 (Pages 98 to 101)

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1 land I look at what it could become, not necessarily what
 2 it is. And that's sort of what you're saying. You look
 3 at it in the future, how it's going to develop, what could
 4 be better, those kind of things. My only question is,
 5 different people look at things differently. You would
 6 agree with that?
 7 A Yeah, they could look at it differently. Not necessarily
 8 good, not necessarily, you know, or bad, I don't know.
 9 Q Right. And different people look at things, see different
 10 things, have different opinions about them. It doesn't
 11 necessarily mean they're wrong, it just means we disagree
 12 with them sometimes?
 13 A I would say, you said there's one person. I'd say, yes,
 14 there's one person and a few people.
 15 Q Okay.
 16 A But not the majority.
 17 Q But reasonable, rational, people can disagree about
 18 things?
 19 A Yeah. That's a fair statement.
 20 Q It's sort of our nature, we do that, right?
 21 A Okay.
 22 Q Okay. You disagree with the Town over the management of
 23 the accreted land right now?
 24 A I'm not getting into the legal aspect. Again, I'm going
 25 to have to leave that to Bobby.

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1 Q Do you disagree with the way that they're managing the
 2 accreted land right now?
 3 A All I know is, I want my views and my breezes back.
 4 Q Okay. Do you disagree with the way they're doing it?
 5 A I want my views and my breezes back.
 6 Q Okay. Now, you filed a lawsuit and in the lawsuit -- Now,
 7 we can go through and read it line by line if you want to?
 8 A That's -- if you and Bobby want to do it, that's fine with
 9 me.
 10 Q Bobby and I don't want to do it. Bobby and I know what it
 11 says, okay.
 12 A I'll refer anything in the lawsuit to my attorney's.
 13 Q You have to answer this question, okay. You filed a
 14 lawsuit against the Town of Sullivan's Island?
 15 A Right.
 16 Q Okay. And it takes exception with certain things. And all
 17 I'm asking you is, you disagree with the way the Town
 18 currently manages the accreted land?
 19 A I agree with you that the Town has taken my views and my
 20 breezes.
 21 Q So you disagree with what they've done?
 22 A I disagree with them in the way they've managed my views
 23 and my breezes, yes.
 24 Q Fine. Would you agree with me that there are probably
 25 some people on the island that agree with what they've

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1 done?
 2 A Give me a percentage?
 3 Q I'm not going to give you a percentage. My question is --
 4 A I'd say, like you just said to me before, there is one
 5 person and a few.
 6 Q That agree with the way the Town has managed it?
 7 A Yeah, but not the majority. Not even close to the
 8 majority.
 9 Q You think the majority agree with you?
 10 A No questions.
 11 Q No question about it?
 12 A No questions.
 13 Q Okay. We've gone through the idea that over the years
 14 that you've acquired certain permits through the Town,
 15 under whatever zoning ordinances were in affect at the
 16 time, and you complied with the zoning ordinances, you did
 17 it according to the rules and the regulations, and all
 18 that. So, I'm not going to go through and pull each and
 19 every one of these permits. I think that's be a
 20 monumental waste of time. But in 2009 you applied for a
 21 permit to cut, as you had in other years, do you remember
 22 that?
 23 A Okay. I know I did, the last few years I've done it.
 24 Q And then you sent a letter asking to be allowed to cut
 25 under the 1981 version of the zoning ordinance.

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1 A Oh, the three feet.
 2 Q Do you remember that?
 3 A Yes.
 4 Q Well, why did you do that?
 5 A I wanted to cut it to three feet.
 6 Q Well, when we read the 1981 ordinance and all that, how
 7 did you figure out that in 1981 you were allowed to cut to
 8 three feet?
 9 A I think you'd have to ask Bobby Hood.
 10 Q No. I've got to ask you. I really can't ask Bobby.
 11 A He told me to do it, so I did it.
 12 Q Okay. Fair enough. So, you consulted with your lawyer,
 13 and he told you to do it?
 14 A He advised me.
 15 Q Okay. And, so, it really wasn't your idea to apply under
 16 the 1981 ordinance?
 17 A I never even thought of it. He asked me to do it, and I
 18 did it.
 19 Q Okay.
 20 A I agreed with him, and I did it.
 21 Q Okay. Fair enough. And we talked about why you choose to
 22 sue now versus any time over the last fifteen years. And
 23 to expedite things, your position was that it's just now
 24 become a real problem because of these other undetermined
 25 species of trees that are somehow blocking your view --

27 (Pages 102 to 105)

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Page 106	Page 108
1 A Just as you said you're more of a visionary, such as I am, 2 I see the problem getting worse, and worse, and worse. I 3 know my wife's going to kill me, the grammar is terrible. 4 Q That's okay. 5 A The situation is going to get worse through the years. 6 And I see it, each year it gets worse and worse. 7 Q Okay. And, so, you're unhappy with the 2005 ordinance 8 that's in affect now? 9 A What is that? I don't know what the ordinance is. 10 Q That's the one that says five feet and only three species. 11 A Yes, definitely. 12 Q And you're concerned about what might come in the future? 13 A Definitely. 14 Q But we are in agreement that nothing has come from the 15 future yet? It's not passed, the study. No change. 16 We're still under 2005. 17 A Yeah. Until-- yeah, right. 18 Q Until they do something. If they choose to do something. 19 A Exactly. 20 Q And they could choose to do nothing? 21 A I don't know. 22 Q But they haven't passed anything yet that you're aware of? 23 A Right. As far as I know they haven't done anything. 24 Q And we agree that you don't own the accreted land that 25 we're talking about?	1 really don't know. 2 Q But you don't own it? We know that. 3 A I don't own it. 4 Q So somebody else must own it? 5 A I don't know. I don't know if the State owns it, the 6 federal government owns it, Russia owns it, China owns it. 7 Q That's fine. But somebody or some entity owns it? 8 A Probably China owns it. 9 Q Yeah, they might own it. But you don't own it? 10 A I don't know who owns it. I can't give you an answer. I 11 don't know. 12 Q All right. So you've got to look across somebody else's 13 or some entities land in order to see the ocean? Is that 14 a yes? 15 A All I know is that my views and my breezes are taken away 16 from me, are being taken away. 17 Q Okay. Let me try this one more time and we'll quite, I 18 promise. 19 A I'll give you the same answer. 20 Q In order to see the ocean from your property you've got to 21 look across some other property? 22 A Give me back my views and my breezes. 23 Q Answer my question now. In order to see the ocean from 24 your property you have to look across someone or some 25 entities property to see the ocean?
Page 107	Page 109
1 A I definitely don't own it. 2 Q And you agree that the Town owns it? 3 A I can't say the Town owns it, I don't know who owns it. 4 Q Somebody owns it other than you? 5 A Again, I'd have to refer that to Bobby Hood. I don't know 6 who owns it. 7 Q So in order to see the ocean you've got to look across -- 8 A All I know is I've always had views and breezes and 9 they're gone. They're not, I'm sorry I take that back. . 10 I've always had views and breezes, seventy percent of them 11 are gone and I can see in the next year or two I'm going 12 to lose one hundred percent. 13 Q Okay. But you would agree with me that whoever owns that 14 land, the accreted land that we're talking about, you have 15 to look across it in order to see the ocean? 16 A The views and the breezes -- To get to the ocean, right. 17 Q You've got to look across that dirt, that sand, whatever 18 it is in order to see it? 19 A (Non-verbal Response) 20 Q Agreed? 21 A Well, yeah. I mean, that's where your views and your 22 breezes are. 23 Q Right. Somebody else owns the land between you and the 24 ocean. You would agree with that? 25 A I don't know who owns it. I can't give you an answer. I	1 A Let it stay in it's natural state -- which you -- in this 2 book here that you had. That you highlighted. Let it 3 stay in it's natural state and I'll have my views and my 4 breezes. 5 Q Let me ask this question again now, okay. From your 6 property, you can see the ocean, is that correct? 7 A Barely. 8 Q All right. But you can see it? 9 A Barely can see, half is gone, the other half is, thirty 10 percent's gone of the other half. 11 Q And at some times in the past you could see it better than 12 you see it now? 13 A Oh, ten, twenty years ago I could see the whole thing. 14 Q And you've always had -- 15 A You know, I also vaguely remember the wild flowers out 16 there, and the sand dunes, and the stickers. I vaguely 17 remember that. 18 Q But, despite all that, all the time you were able to look 19 at that ocean, you were looking across someone else's land 20 to see it? 21 A All I know, there was always views and breezes. I bought 22 it like that, the land. It was the way it was. 23 Q Okay. So you don't know the answer to my question? You 24 don't know if you were looking across somebody else's 25 land?

28 (Pages 106 to 109)

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1 A I don't know. If you want to know the truth --
 2 Q I didn't ask you who owned it.
 3 A I could tell you who I bought my lot from. And for years
 4 he use to cut my land. He use to cut the grass in the
 5 accreted land.
 6 Q I didn't ask you any of that. All I'm asking you is a
 7 simple question. We've established --
 8 A I never even thought who owned it, it never entered my
 9 mind. All I know is --
 10 Q You don't own it?
 11 A I know I don't own it. But I know I had views and I had
 12 breezes.
 13 Q You were able to look across it?
 14 A And Mr. Krawcheck use to cut the grass once a month.
 15 Q You could look across it?
 16 A He use to cut your grass too, Bobby. Did you know that?
 17 He use to come out there, he was the nicest old man. He
 18 would just come out there and take care, even though it
 19 was mine.
 20 Q Let me ask you this, what's the guy's name that lives
 21 across the street from you?
 22 A You talking about straight across?
 23 Q Yeah, whatever. Right across --
 24 A Roy Williams.
 25 Q What's his name?

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1 A Roy Williams.
 2 Q Can Roy see the beach from his house?
 3 A No.
 4 Q If Roy -- If you bulldozed your house down, could Roy see
 5 the beach from his house?
 6 A Probably. He might. His house is built low, he's got an
 7 old house.
 8 Q What if he built his house up higher?
 9 A If he built it up higher and I bulldozed, yeah.
 10 Q He could see it?
 11 A Uh-huh.
 12 Q But right now your house is in the way of him seeing the
 13 ocean?
 14 A Uh-huh.
 15 Q And, so, you own the property between him and the ocean?
 16 A Uh-huh.
 17 Q Is that a yes?
 18 A Yes, I own it. No, I don't own it, my wife owns it.
 19 Q Your wife owns it. So you're blocking his view?
 20 A Yes.
 21 Q Okay. All right. Let me talk to --
 22 A Now, can I add to my answer. Can I just make one
 23 statement?
 24 Q Sure.
 25 A Okay. Again, as a visionary, and this is what I do. The

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1 front beach is worth say \$100., the second row, where Roy
 2 Williams is at, is worth fifty, the third row is worth
 3 twenty-five. So, I have -- my value, and my taxes, and so
 4 forth are tremendously much higher than his.
 5 Q Okay. But you're blocking his view?
 6 A But -- He had the right to, he could have bought my lot.
 7 He could have bought it. It was on the market. And when
 8 I bought it, and my wife will tell you this, people
 9 thought I was an idiot. But he could have bought it, it
 10 was for sale.
 11 Q Sure.
 12 A But I guess he elected he didn't want to be on the front
 13 beach.
 14 MR. HAIR: Okay. Let me -- ya'll stay
 15 still, we might be done. One second.
 16 (Break)
 17 MR. HAIR: Okay. Here we go.
 18
 19 Q I should've done this at the beginning, okay, but I
 20 didn't. Tell me about your educational background.
 21 A River's High School. Went to the University of Georgia,
 22 graduated in business school.
 23 Q When did you graduate from Georgia?
 24 A Oh God, don't embarrass me. I think it was 1965 or 1966.
 25 It was '65.

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1 Q Okay. And so you got a business degree --
 2 A Business Administration. I've also done adjunct professor
 3 in the business school at the College of Charleston.
 4 Q Okay. Any other academic type education at all?
 5 A Not academic, no. Not academic. A lot of people use me
 6 to come on Boards to help them with financial crisis and
 7 so forth.
 8 Q That was your -- Was that your business? What business
 9 were you in?
 10 A No. I don't know what I do. I buy investment real
 11 estate. Not residential, just investment real estate, and
 12 I have a men's clothing store.
 13 Q Okay. When you got out of college --
 14 A I happen to have the oldest men's clothing store in the
 15 state of South Carolina.
 16 Q When you got out of college did you come right back to
 17 Charleston?
 18 A Yes.
 19 Q Okay. And what did you first do when you got out of
 20 college for a living?
 21 A Worked at a men's clothing store.
 22 Q And that was your father's?
 23 A It was my father's at that time.
 24 Q Did you continue on. Just give me sort of a history up
 25 till now of what your employment has been.

29 (Pages 110 to 113)

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1 A Bluestein's Mens Wear. We're 126 years old, the dates a
 2 little cloudy, 1883, '84, '85, '86 when we opened up. My
 3 great grandmother -- I've been there ever since then. I
 4 buy investment real estate. And then I got married and we
 5 -- I graduated from college. She's an ophthalmologist. We
 6 have three boys.
 7 Q How old are the boys?
 8 A Oh God, you're going to embarrass me again. Thirty-six,
 9 it's his birthday. Thirty-seven. And I think you know a
 10 couple of them. Because I checked up on you before this.
 11 They say you're good. They said you're very good.
 12 Q I don't know about that.
 13 A Scott is a maritime attorney, Scott's forty-three.
 14 Q Okay. Good.
 15 MR. BLUESTEIN: Everybody's more
 16 educated than me in my family.
 17 MR. HAIR: You sound like you're pretty
 18 well educated. I don't know about the
 19 University of Georgia but I mean.
 20 MR. BLUESTEIN: I take that as an insult.
 21 We just need a new football coach.
 22 MR. HAIR: That's good. That's all I
 23 have. If Bobby has anything to follow
 24 up.
 25 MR. BLUESTEIN: We beat Kentucky the

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1 other night in basketball.
 2 MR. HAIR: That's true.
 3
 4 CROSS EXAMINATION
 5
 6 BY MR. HOOD:
 7 Q Mr. Bluestein, I've got one question.
 8 A Sure.
 9 Q One month after the deed was signed with the open land
 10 trust by the Town of Sullivan's Island the Mayor of
 11 Sullivan's Island was asked by the Post and Courier what
 12 scenic enhancement meant and he is quoted as saying, "to
 13 Mayor Melvin Anderegg, however, scenic enhancement means
 14 getting a better view of the ocean. He said people owning
 15 front beach property pay high price for property and
 16 should be allowed to cut back growth. The whole purpose
 17 of having front beach property is to have the view of the
 18 ocean." Do you agree with Mayor Anderegg?
 19 A One hundred percent.
 20 Q Is that why we're having this lawsuit?
 21 A I would say I think that has been an instigator in the
 22 lawsuit.
 23 MR. HOOD: Thank you.
 24 MR. BLUESTEIN: What year was that, you
 25 said

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1 MR. HOOD: It was a month after, it was
 2 in '91. One month after you signed the
 3 deed.
 4 MR. BLUESTEIN: Yes. I knew Anderegg
 5 well. Matter of fact I played tennis
 6 with his son.
 7 MR. HOOD: Thank you, thank you.
 8
 9 -----
 10 (Whereupon, at 11:55, the deposition in the
 11 above-entitled matter was concluded.)
 12
 13
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 3
 4 ERRATA SHEET
 5 In re: Nathan Bluestein, Ercalash Bluestein, Theodore
 6 Albenesius and Karen Albenesius vs. Town of Sullivan's Island
 7 and Sullivan's Island Town Council.
 8 Depoent: Nathan J. Bluestein.
 9 Date of Deposition: January 18, 2011.
 10 Court Reporter: Michelle Dawson Lloyd.
 11 : Said testimony is correct as is and requires no
 12 changes.
 13 : I desire the following corrections to be made.
 14 CORRECTIONS:
 15 I WISH TO MAKE THE FOLLOWING CHANGES FOR THE FOLLOWING REASONS:
 16 PAGE LINE (use additional sheets, if
 17 necessary)
 18 CHANGE:
 19 REASON:
 20 CHANGE:
 21 REASON:
 22 CHANGE:
 23 REASON:
 24 CHANGE:
 25 REASON:

30 (Pages 114 to 117)

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1 CHANGE:
2 REASON:
3 I CERTIFY UNDER PENALTY OF PERJURY THAT THE FOREGOING TESTIMONY
4 IS TRUE AND ACCURATE.
5 SWORN TO BY ME THIS DAY OF , 2011.
6 (Signed)
7
8 State of South Carolina)
9) Certificate.
10 County of Charleston)
11
12
13 Be it known that I took the foregoing deposition of
14 Nathan Bluestein;
15
16 That I was then and there a notary public in and for
17 the State of South Carolina at-Large;
18
19 That by virtue thereof I was duly authorized to
20 administer an oath;
21
22 That the witness was by me first duly sworn to
23 testify the truth, the whole truth, and nothing but the truth,
24 concerning the matter in controversy aforesaid;
25

Page 119

1 That the Deponent reserved the right to read and sign
2 the deposition and has been provided a copy of same. However,
3 said matter having been scheduled for hearing within the
4 allotted time for the deponent to review the transcript and
5 submit any changes deemed necessary, the original transcript is
6 being submitted without the signature and/or Errata page
7 attached;
8 The foregoing transcript represents a true, accurate
9 and complete transcription of the testimony so given at the time
10 and place aforesaid to the best of my skill and ability;
11
12 That I am not related to nor an employee of any of
13 the parties hereto, nor a relative or employee of any attorney
14 or counsel employed by the parties hereto, nor interested in the
15 outcome of this action.
16
17 Witness my hand and seal this 7th day of February,
18 2011.
19
20
21
22 Michelle Dawson Lloyd
23
24 Notary Public for South Carolina
25 My Commission Expires: 8/30/2020

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2 * This transcript may contain quoted material. Such
3 material is reproduced as read or quoted by the speaker.
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31 (Pages 118 to 121)

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A				
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STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON

)

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

) C/A No. 10-CP-10-5449

)

)

Plaintiffs,)

) **PLAINTIFFS' RESPONSES TO THE**

Versus)

) **DEFENDANT TOWN OF**

) **SULLIVAN'S ISLAND'S FIRST**

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

) **REQUESTS TO ADMIT**

)

)

Defendants.)

TO: J. BRADY HAIR, ATTORNEY FOR THE DEFENDANTS:

The Plaintiffs, Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius (hereinafter "the Plaintiffs"), respond to the Defendant Town of Sullivan's Island's (hereinafter "this Defendant") First Requests to Admit, as follows:

1) Please admit that the 2005 Ordinance regarding trimming / cutting on the accreted land is more restrictive with respect to vegetation cutting and other activity on the accreted land than was the Sullivan's Island policy / ordinance in place when Sullivan's Island received its deed to the accreted property from the Low Country Open Land Trust.

RESPONSE: Denied.

2) Please admit that the 2005 Ordinance is more restrictive than the deed restrictions exceptions contained within the deed to Sullivan's Island from the Low Country Open Land Trust regarding the accreted land.

RESPONSE: Denied.

3) Please admit that the Plaintiffs have not during the period they have owned their relevant property illegally cut vegetation on the accreted land or otherwise interfered with the Sullivan's Island's ownership rights to the accreted property.

RESPONSE: Admitted.

4) Please admit that the 2005 ordinance regarding the cutting / trimming of vegetation on the accreted land was enacted prior to the time the Albenesius plaintiffs purchased 2411 Atlantic Avenue.

RESPONSE: Admitted.

5) Please admit that the prior owner(s) of 2411 Atlantic Avenue made full disclosure to the Plaintiffs Albenesius regarding the 2005 Ordinance and its impact on the right to cut / trim vegetation on the accreted land.

RESPONSE: Denied.

6) Please admit that "second row" property owners have no right to cut down, or force the Plaintiffs to cut down, structures and / or vegetation existing on the Plaintiffs' properties that block or interfere with the view of the ocean (or accreted land) that would otherwise be enjoyed by the "second row" property owners.

RESPONSE: Denied.

7) Please admit that, in the absence of the deed restrictions present in the deed to the accreted land provided by the Low Country Open Land Trust to the Town of Sullivan's Island, Plaintiffs would possess no legal right to a view across a parcel which the Plaintiffs do not own.

RESPONSE: Denied.

8) You will please admit that it is not possible for the Plaintiffs, the Town of Sullivan's Island, the Low Country Open Land Trust, or anyone else to maintain the accreted property in the exact condition shown in the 1991 photos of the property.

RESPONSE: Denied.

9) You will please admit that the Town of Sullivan's Island has not affirmatively planted any of the vegetation that the Plaintiffs contend blocks / diminishes the Plaintiffs' view of the ocean.

RESPONSE: Denied.

10) You will please admit that the Plaintiffs are challenging the validity of the 2005 Ordinance on the basis that they contend it conflicts with the terms of the deed (including restrictions and exceptions) transferring the accreted land from the Low Country Open Land Trust to the Town of Sullivan's Island.

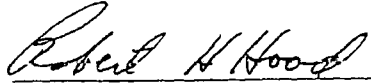
RESPONSE: Denied as written. Further responding, the Plaintiffs are asking the Court to enforce restrictive covenants in the 1991 deed and/or contract, not challenge an isolated zoning ordinance.

11) You will please admit that the 2005 Ordinance at issue in this action is a Zoning Ordinance of the Town of Sullivan's Island.

RESPONSE: Denied as written. Further responding, the Plaintiffs are asking the Court to enforce restrictive covenants in the 1991 deed and/or contract, not challenge an isolated zoning ordinance.

12) You will please admit that in year 2005 no Plaintiff undertook legal challenge to the enactment of the 2005 Ordinance at issue in this action.

RESPONSE: Denied as written. Further responding, the Plaintiffs are asking the Court to enforce restrictive covenants in the 1991 deed and/or contract, not challenge an isolated zoning ordinance.



Robert H. Hood, Sr. (SC# 2599)
S. Scott Bluestein (SC# 65103)
Michael J. Brickman (SC# 874)
Molly H. Craig (SC# 6960)
Robert H. Hood, Jr. (SC# 13491)
James B. Hood (SC# 70212)
Barry Krell (SC# 3573)
Jonathan F. Krell (SC# 16691)
Robert T. Lyles, Jr. (SC# 10299)
Thomas E. McCutchen (SC# 3756)
Alice F. Paylor (SC# 4380)
Stephen A. Spitz (SC # 5287)

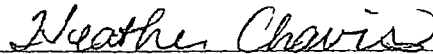
Attorneys for the Plaintiffs, Nathan
Bluestein, Ettaleah Bluestein, M.D.,
Theodore Albenesius, III, and Karen
Albenesius

September 29, 2010
Charleston, South Carolina
J:\docs\625.002\Res-RTA.doc

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 29 day of September, 2010.



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
Nathan Bluestein, Ettaleah Bluestein,) C/A No. 10-CP-10-5449
M.D., Theodore Albenesius, III, and)
Karen Albenesius,)
Plaintiffs,)
Versus)
Town of Sullivan's Island and Sullivan's)
Island Town Council,)
Defendants.)

FILED
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CHARLESTON, SC

**PLAINTIFFS' MEMORANDUM OF
LAW AND EQUITY IN OPPOSITION
TO DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT AND
MOTION TO STRIKE**

The Defendants in the above-referenced matter have filed seven (7) Motions for Summary Judgment and one (1) Motion to Strike. Although the Plaintiffs have pled nine (9) separate and distinct causes of actions, Plaintiffs elected to file only a single motion for partial summary judgment on a single one of their claims, addressing solely the question of whether the Defendants have breached the restrictive covenants of a 1991 deed and/or contract. As for all of Plaintiffs' other causes of actions, Plaintiffs assert in this memorandum that:

- (1) Disputed questions of contested fact exist;
- (2) Sufficient ambiguity in various documents preclude summary judgment;
- (3) Contested disputes exist as to the conclusions or inferences to be drawn from evidentiary facts, even though there may be no dispute as to evidentiary facts themselves (particularly applicable to breach of contract accompanied with fraudulent act); and
- (4) Plaintiffs have asserted novel questions of law and/or equity.¹

¹ In the impairment of contract claims, under both state and federal law, Plaintiffs submit that summary judgment is not appropriate because further inquiry into the facts of the case are needed to clarify the application of the law to certain aspects of those claims and therefore summary judgment is inadvisable on this ground (as well as others). See Simmons v. Berkeley Elec. Co-op. Inc., 404 S.C. 172, 178, 744 S.E.2d 580, 584 (Ct. App. 2013).

SUMMARY OF PLAINTIFFS' POSITIONS

A. Restrictive Covenants

Central to this litigation are certain recorded Restrictive Covenants and Restrictions that the Lowcountry Open Land and Trust (hereinafter "LOLT") entered into with the Defendants in 1991. The covenants are recorded. Of central importance to the deed itself is a document contemporaneously created entitled a "Summary of Deed Restrictions" (Exhibit 2 of 2nd Amd. Complaint). The Summary of Deed Restrictions explains the thinking behind the transaction as well as containing a "ranking" of the importance of various matters found within the Covenants themselves. Id.

With regard to the Covenants, Plaintiffs have already filed one previous Memorandum arguing these Covenants have been broken by the Town and will not repeat those arguments here. In response, Defendants argue that Plaintiffs have misread the documents and that under the Defendants' own analysis of the Covenants, the Plaintiffs, despite being named as third-party beneficiaries, do not have any rights. In making this argument, Defendants barely address the Summary of Deed Restrictions and further emphatically disagree with Plaintiffs' interpretation of the Covenants themselves. The Defendants also argue that the common law governs this situation and not the actual recorded agreement. Finally, the Defendants insist that they have yearly reports from the LOLT which prove the land has remained in virtually the same condition that it was once in 1991, when the Covenants and Restrictions were first put in place.

B. Constitutional Violations of Impairment of Contract

One of Plaintiffs' central themes is that constitutional safeguards have been violated in this case, specifically the Constitutional Safeguards found in the Contracts and Due Process clauses of both the Federal and State Constitutions. This question is briefed subsequently in this Memorandum. For purposes of this summary, it is enough to note here that Plaintiffs believe the Defendants' actions (and inaction) call for "heightened scrutiny." See Chemerinsky, Constitutional Law: Principles & Policies (4th Ed., 2011), at p. 655 (Exhibit 1).

C. Nuisance

Plaintiffs assert that the Defendants' actions and inaction have created a nuisance affecting Plaintiffs' properties. Plaintiffs further argue that this on-going nuisance, repeated year after year, in no insubstantial part directly due to the Defendants' 1995 and 2005 zoning ordinances which limit all trimming and pruning to a mere three months in the winter (December through February when nothing is growing) but forbids trimming or pruning of any kind during the spring, summer and fall seasons (when vegetation does grow).

In response, Defendants point to the South Carolina Torts Claim Act ("TCA") which purportedly exempts "nuisance" as a cause of action against a TCA defendant. Plaintiffs assert that Defendants' TCA defense is incorrect because (1) the nuisance only exists because the Defendants have breached their responsibilities under the Covenants and Restrictions which are contract responsibilities and thus outside the scope of the Torts Claims Act; and (2) a specific exception exists under the TCA for actions brought in equity.

One of Plaintiffs' principal goals is asking this Court to require the Defendants to live up to their contractual commitments, recorded in 1991, and to enjoin the 1995 and 2005 unlawful zoning ordinances that prevent the recorded, contracted promises from being properly performed. A second goal is to enjoin the Defendants from continuing their unlawful actions under both the Due Process and Contract provisions of the Federal and State Constitutions. In short, under the equity and contract exclusions of the Torts Claims Act, and under the Federal and State Constitutions, it is within this Court's powers, if it sees fit to do so, to abate this ongoing breach of contract by appropriate equitable Order to make the Defendants conform to the state and federal Constitutions. Moreover, Plaintiffs also point out that three affidavits filed by the Plaintiffs support the Plaintiffs' factual contentions that this is indeed a nuisance.² Indeed, at least one of the cases that is cited by Plaintiff in the Zoning Section of this Memorandum suggests that the United States Supreme Court would be very surprised if this case was decided on summary judgment, without holding a hearing under the mandates of the Due Process Clause.

D. Due Process of Law

Even if one puts to the side the constitutional problems with impairment of contract and ignores the exceptions of equity and contract which are outside the scope of the TCA, there also exists in this case a highly troublesome constitutional issue on the very face of the 1995 and 2005 zoning law that, Plaintiffs submit, calls for a trial on the merits. It has long been settled that under the Fourteenth Amendment Section

² Defendants also argue that there may be some land between the unaccreted area and some of Plaintiffs' properties. The mere fact that in some areas there may be some other properties between the unaccreted lands and the Plaintiffs' does not preclude this Court from finding that this is a nuisance that has substantially impacted Plaintiffs' enjoyment and use of their property. It would also drastically rewrite nuisance law, both in this State and elsewhere, to require the "nuisance" always be immediately adjacent to a plaintiff's property.

1, it is constitutionally guaranteed that "nor shall any State deprive any person of life, liberty, or property without due process of law." As subsequently briefed, there are two distinct components of due process:

Procedural Due Process: requires the government to follow certain procedures when it deprives someone of life, liberty or property.

Substantive Due Process: Which deals with fundamental fairness and governmental interests "strong enough" to change prior property rights.

Both forms of due process are fully implicated in this case as subsequently argued in this Memorandum. In response, the Defendants argue that the Defendants only "slightly revised" their zoning ordinances in 1995 and 2005. ~~See Defendants' Motion for Summary Judgment on All Causes of Action due to Plaintiffs' alleged lack of any right to control or look over neighboring parcels, p. 7. Defendants arrive at this conclusions by ignoring the 1991 Covenants and Restrictions as if they did not exist. If a fair comparison is made between the binding promises and restrictions of the 1991 deed, which the Defendants fully agreed to, it is clear that the 1995 and 2005 changes were anything but "slight."~~

Most of this is briefed subsequently. To merely mention a single, significant change (and there are many) from the many 1991 promises that were supposed to be followed for fifty (50) years³ and what happened in 1995, the Court need only focus on what happened to the quasi-unlimited right (at a cost to the property owners, not the Defendants) throughout the year to cut and trim, to make the land remain the way it looked in 1991 (which was the sole reason for attaching photographs of the land to the Covenant and Restriction documents) and 1995, when the Town

³ To be automatically renewed for subsequent fifty (50) year installments.

unilaterally, in and direct contravention to the Covenants and prior South Carolina case law,⁴ unilaterally declared that it was now a crime to do what was a promised right, from 1981 to 1995:

What was once an unlimited right to trim and cut trees was now declared by the Town, unilaterally and without reason or justification, as an actual crime. See Town's Zoning Law, Sec. 21-39-1L enacted in 1995, which reads, as follows: "The violation of the terms of this Ordinance shall constitute a criminal offense and shall be punishable by the Municipal Court of the Town of Sullivan's Island or other Court of competent jurisdiction. Each tree or shrub which is trimmed or pruned in violation hereof, or poisoned or destroyed in any manner, shall subject the person so violating this Ordinance to a fine of \$100.00 and / or thirty (30) days in jail."

(Exhibit 2) (emphasis added).

Most people would not find thirty (30) days in jail to be a "slight change." Due Process requires government to advance real reasons for a change, especially when there was once a vested right to do certain things. Here, what was carefully explained and described in the 1991 deed and Summary of Deed Restrictions was radically changed by a new law, without rhyme or reason. As the United States Supreme Court held in Nectow v. Cambridge, 277 U.S. 183 (1928), this by itself would seem to require a trial on the merits.

E. Breach of Contract with Fraudulent Intent

In one of their numerous memoranda, counsel for the Defendants basically makes fun of this cause of action. With respect, this is not a laughing matter. Without discussing all of the Defendants' positions, three of the Defendants' claims about this cause of action warrant a brief initial discussion.

⁴ See Stokes v. Myrtle Beach, 72 S.E.2d 66 (1952): "A zoning law, cannot constitutionally relieve land . . . from lawful restrictions, affecting its use, imposed by covenants." (citing 58 Am. Jur. 942 Zoning Sec. 4).

First, ignoring that this is fundamentally a breach of contract claim accompanied by fraudulent act(s) (which is not the same at all as a pure legal fraud cause of action), the Defendants argue that it should be dismissed summarily, without any chance to ever develop a complete record for meaningful appellate review, as being totally exempt under the TCA.

In response, the Plaintiffs respectfully suggest to the Court that a breach of contract claim accompanied by act(s) of equitable fraud are squarely within the Court's jurisdiction, both because the cause of action deals with questions of contract and because equitable fraud – dealing with wrongful governmental action – is not ~~only not exempt under the TCA but is itself a well-recognized exception to the “legal~~ fraud” exemption for monetary damages under the TCA. See S.C. Code Ann. §15-78-50(c).

Second, the Defendants fail to cite even a single case, either inside or outside South Carolina, in support of their legal position to grant summary judgment on a contract claim accompanied with equitable fraudulent act where the remedy sought is to enjoin the wrongful act itself and not monetary damages. It would seem at least a little odd to grant summary judgment to the Defendants “as a matter of law” when the Defendants fail to cite any actual law in support of this defense.

Third, even as far back as 1995, the Defendants included the right to “through the Tree Commission, to seek the advice of the consultant retained by the Town.” Exhibit 2, at Sections 21-39, 1F and 1G. Furthermore, in 2005, an additional amendment to the zoning ordinances again discussed the role of consultants. Exhibit 3, at Sec. 21-71. In short, official consultants and public surveys have been on-going officially-sanctioned acts by the Defendants for a long time (expressly used

to justify the wisdom of these highly questionable Zoning Laws). Indeed, it is only after filing this lawsuit that Plaintiffs uncovered proof that specific recommendations hired by the Defendants themselves were ignored, without any public knowledge that this was taking place, and in their place, a highly different survey was employed in a further attempt to violate the 1991 deed and/or contract.

An agent of the Defendants⁵ deliberately ignored the consultants and altered the consultant's own recommendations for what should be in a public survey. In short, this was no mere mistake. Indeed, since we know that this happened, but have no agent or employee of the Defendants who will admit to making these changes, the ~~inference particularly on summary judgment is that this act, when it was done, was~~ known to be inappropriate and wrongful.

In all events, with respect to this deliberate change, which Plaintiffs assert was deceptive, wrongful and deliberately hidden from the public (and which the Defendants argue is utterly irrelevant and immaterial), Plaintiffs respectfully suggest that this difference alone supports the argument that it might be highly material. Regardless, for the reasons discussed below and in Plaintiffs' prior briefs, Plaintiffs have cited more than enough legal and factual arguments to preclude summary judgment on this claim.

⁵ As the evidence can be interpreted, especially in a summary judgment setting, where all reasonable inferences are to be construed in favor of Plaintiffs.

Argument

I. PLAINTIFFS HAVE PROFFERED SUFFICIENT EVIDENCE THAT THE DEFENDANTS HAVE BREACHED THE PROMISES IN THE 1991 RESTRICTIVE COVENANTS.

Initially, the Plaintiffs would respectfully urge this Court to exercise its inherent authority under South Carolina law to physically inspect the Accreted Land, viewing its current condition, accompanied by attorneys for Plaintiffs and Defendants, as this would aid the Court to truly compare the existing property's current condition to the 1991 photographs.⁶

Turning to the Defendants' other arguments, the Defendants spend several pages arguing that Plaintiffs have never allegedly been deprived of anything at all because the common law itself recognizes absolutely no right to an unrestricted view. Respectfully, that is not even a material issue because this case is based upon the covenants, not the common law.

The question is what rights, if any, do the Plaintiffs have as a third-party beneficiaries under the 1991 Sealed Deed. The Defendants urge the Court to conclude that the Plaintiffs have no right to any sort of view at all. In response, the Plaintiffs respectfully request the Court to carefully review Exhibit 2 of the Second Amended Complaint, which was contemporarily drafted with the 1991 Sealed Deed, and actually states at one point that "Scenic Views" and "Open Spaces" are labeled "Very Significant" in the Summary of Deed Restrictions. Exhibit 2 of 2nd Amd. Complaint (near the bottom of the page). Since "Scenic Views" are labeled as "Very Significant,"

⁶ There is ample authority for the Court to view the property with counsel, if the Court should elect to do so. See, merely as one of several examples in prior South Carolina law Turner v. Carey, 223 S.C. 477, 76 S.E.2d 671 (1953) (Where the Supreme Court noted with approval that the presiding Judge, after hearing oral argument, viewed the premises with consent of counsel for both sides).

this fact – along with the traditional rule of that all evidence and reasonable inferences are construed in a light most favorable to the party opposing the motion⁷ requires the Defendants' Motion be denied.

II. PLAINTIFFS HAVE PROFFERED SUFFICIENT EVIDENCE THAT THE DEFENDANTS HAVE BREACHED ARTICLE 1 SECTION 10 OF THE FEDERAL CONSTITUTION (CONTRACTS CLAUSE) AND ARTICLE 1 SECTION 4 (IMPAIRING THE OBLIGATION OF CONTRACTS) OF THE SOUTH CAROLINA CONSTITUTION BECAUSE:

- (1) There Are Contested Facts;
- (2) Further Inquiry Into Application of the Law Is Particularly Called For as This Appears To Be a Novel Question of Law⁸;
- (3) The Defendants Have Failed to Address or Discuss The Heightened Judicial Scrutiny Required When Local Government Enacts A Subsequent Law That Substantially Interferes With Its Very Own Prior Contract Promises; and
- (4) The Defendants Have Also Failed to Address The Requirements Found in Harleysville Mut. Ins. Co. v. State, 736 S.E.2d 651 (S.C. 2012) To Justify Interference With an Existing Contractual Obligation.

The United States Constitution, Article I, Section 10 provides that "No State shall pass any . . . law impairing the Obligation of Contracts." Similarly, the South Carolina Constitution, Article I, Section 4 reads as follows:

No bill of attainder, ex post facto law, law impairing the obligation of contracts, nor law granting any title of nobility or hereditary emolument, shall be passed, and no conviction shall work corruption of blood or forfeiture of estate. (emphasis added).

Under federal law, "it is firmly established that the provision applies only if a state or local law interferes with existing contracts." Erwin Chemerinsky, Constitutional Law: Principles & Policies, p. 645 (4th Ed., 2011).

⁷ See Stovall Bldg. Supplies, Inc. v. Mottet, 406 S.E.2d 176, 179 (Ct.App. 1990).

⁸ See Schmidt v. Courtney, 592 S.E.2d 326 (S.C. App. 2003) (We find it extremely troubling this case was resolved on a summary judgment basis especially since the novel issue involved . . . in this case)

Simply stated, under federal law⁹, Plaintiffs' position is that the Defendants entered into a contract with various restrictions, promises and covenants by accepting the 1991 deed from LOLT, and then just a few years later, enacted zoning laws deliberately designed to substantially interfere with the Defendants' own prior obligations under the 1991 contract. Moreover, since this memorandum is merely in opposition to the Defendants' Motion For Summary Judgment, and since the law is very settled that the Plaintiffs are entitled to every reasonable inference, and that the evidence in the case is to be viewed and interpreted in a light most favorable to the Plaintiffs, at least at this stage of the proceedings, Plaintiffs respectfully suggest that there can be very little doubt (if any) that:

- (1) The Defendants entered into a contract in 1991 with the Plaintiffs as named third-party beneficiaries;
- (2) Four years later, the Defendants enacted a subsequent zoning law that deliberately turned the Defendants' own prior contractual obligations upside down and inside out, including, to mention merely a few items:
 - (a) What was arguably an established legitimate property right (cutting to continue to have the view that existed in 1991) became an actual crime;
 - (b) What was arguably a year-long continuous right to trim and cut became a severely restricted right to only do very limited cutting during the "winter-only" season when plants do not grow;
 - (c) What was arguably an unlimited right to trim in 1991 became a highly selective right to merely trim some vegetation and only to a height of 7 feet.

Any and all of these new restrictions, and prohibitions, can be viewed and construed as a substantial interference with an existing contract, and thus a direct constitutional violation of the Federal Constitution.

⁹ Concerning State law, that is discussed subsequently.

Moreover, to the extent that the question of whether a Contract embodied within Recorded Covenants, Restrictions and its legal relationship with subsequent Zoning laws is perhaps a novel question, on this ground as well, summary judgment is inappropriate.

Even more fundamentally, summary judgment on the federal claim should be denied because the Defendants themselves deliberately elected to enact a subsequent zoning law to legally prevent / bar / substantially change their own contractual promises. Where, as here, we are not dealing with a private contract, but instead with an actual governmental contract, this is tantamount to the Defendants' direct ~~interference with their very own prior contract, and particularly on summary~~ judgment, quoting directly from Chemerinsky, Constitutional Law: Principles & Policies, p. 655, (4th Ed. 2011):

Thus, although the Court did not articulate a level of scrutiny, its use of least restrictive alternative analysis and the word "necessary" seems indicative of strict scrutiny. Because there has not been another Supreme Court case since United States Trust Co. v. New Jersey concerning interference with Government contracts, the precise test remains uncertain. Nonetheless, it is clear that laws impairing the government's obligations under its own contracts will be subjected to much more careful review than laws interfering with private contracts. Id. (emphasis added) (Exhibit 1).

Similarly, governmental interference with governmental contracts is also in violation of the South Carolina Constitution. Unlike a private citizen, local and state government have great powers to enact laws, and rightfully so. However, what is not allowed is for a government to enact subsequent zoning restrictions (among other actions and inaction) which prescribe criminal wrongdoing and thus using these immense powers and making a prior contract entered into not worth the paper it is written on.

The founders of this country and this state were genuinely fearful of government doing just this, and created the contract clause in both the State and Federal Constitutions to bar government from enacting its own subsequent laws putting its own existing contracts into oblivion. Indeed, the reason the courts have insisted on "heightened or strict scrutiny" of such laws is to bar precisely what has happened on Sullivan's Island, i.e. new and unanticipated legal consequences designed to deprive "citizens of legitimate expectations and upset settled transactions." See Ward v. Dixie Nat'l Life Ins. Co., 595 F.3d 164, 176 (4th Cir. 2010). This scenario is exactly what has happened here – under the 1991 contract and deed, ~~the Accreted Land was to remain in the same or similar condition as it was at that~~ time, wherein there was a right to clear-cutting the vegetation in the Accreted Land adjacent to the lots of property owners such as the Plaintiffs – but all that was changed, according to the Defendants, solely because the Defendants enacted subsequent laws criminalizing these very same rights.

For purposes of summary judgment, and applying heightened scrutiny, one only need to ask the question of whether the 1995 and 2005 zoning ordinances were absolutely necessary, and whether there was no possible alternative other than to gut the prior covenants and restrictions unilaterally. In Harleysville Mutual Insurance Company v. State, 736 S.E.2d 651 (2012), a divided South Carolina Supreme Court had the occasion to discuss the meaning of the prohibition of impairment of obligations under our State Constitution and its application to an insurance contract. Applying a somewhat similar standard as found under federal law, the Court first noted: "To establish a Contract Clause violation, the Court must examine whether (1) there is a contractual relationship; (2) the change in the law impairs the contractual

relationship; and (3) the impairment is substantial.

Applying under State law, less than strict scrutiny, the Court nonetheless still concluded in Harleysville Mutual Ins. Co. case that the State Contract Clause had been violated, and declared part of the new law in that case unconstitutional. Specifically, the South Carolina Supreme Court suggested that there were a number of interrelated questions that had to be addressed whether:

- (1) an emergency exists justifying the impairment;
 - (2) the law was enacted to protect a basic societal interest, rather than a favored group;
 - (3) the law is narrowly tailored to the emergency at hand;
 - (4) the imposed conditions are reasonable;
 - (5) the law is limited to the duration of the emergency.
-

The Court found the law was neither necessary nor reasonable, and therefore was unconstitutional even under far less than a strict scrutiny standard. It bears noting early in this Memorandum that some of these very issues were discussed and the Defendants have totally failed to articulate any explanation of why they suddenly changed the law inside out and upside down, with no reasons given for many of the dramatic changes from the 1991 Covenants and Restrictions. That alone, or so Plaintiffs respectfully submit, is enough by itself to bar summary judgment being granted in favor of the Defendants.

The Defendants has a substantial burden here: (1) to prove an actual emergency exists; (2) to prove that the law was narrowly tailored; (3) to prove everything in the law is "reasonable"; (4) why the law is not limited to the duration of the "emergency." Any or all of these matters appear to be issues of contested fact, and each calls out for an avoidance of a premature Summary Judgment Order.

Plaintiffs respectfully submit under both the Federal Law, and under the State Law, it would be a clear error of law to grant summary judgment without a full trial on the merits concerning Plaintiffs' claims that a substantial impairment of contract obligation took place in this case.

III. PLAINTIFFS HAVE PROFFERED SUFFICIENT EVIDENCE TO SUPPORT THEIR NUISANCE CLAIM.

Defendants argue that Plaintiffs' nuisance claim is barred by the TCA. Plaintiffs emphatically disagree. Plaintiffs seek an equitable remedy from the Court, and the TCA specifically permits equitable remedies, without regard to any question at all about immunity. Section 15-78-50 provides:

Nothing herein [referring obviously to the entire Torts Claim Act] shall affect the power of a court of equity at a suit of a party complainant to enjoin unlawful acts committed by governmental entities or mandate lawful acts by governmental entities. [Emphasis Added.]

Plaintiffs assert that each and every year, the Defendants have deliberately created a nuisance. They have done so intentionally and deliberately by arbitrarily limiting all cutting of any kind, save and except a winter "dead-season" cutting period, where nothing grows to begin with, and refuses to allow any cutting or trimming of any kind during the spring, summer or fall, when plants and other vegetation actually grow.

Moreover, totally independent of the contract and other constitutional claims, Plaintiffs further assert that the Court can find from a review of all the evidence in this case, that summary judgment is inappropriate, as Plaintiffs' various affidavits set forth sufficient contested facts that this might be a nuisance so as to bar summary judgment and permit a trial, on the merits, as to whether the current vegetation that

exists is not a possible nuisance and that certain activities should not be prohibited because this governmental policy has caused a genuine problem.

Indeed, there is some evidence in front of the Court right now that the failure to trim and prune is harmful to the health, welfare and even safety of some of the Plaintiffs' own children and grandchildren, and clearly the Court has the inherent power under the common law to abate unreasonable and unsafe activities with an equitable Order.¹⁰

No less an authority than Justice Souter, prior to becoming a justice on the United States Supreme Court, in Tenn. v. 899 Associates, Ltd. 500 A.2d 366 (N.H. 1985), after very carefully surveying the common law, held that the principles of nuisance law should be applied to issues of light and air. In part, he stated that "there is no reason in principle why the law of nuisance should not be applied to claims of a protection of a property owner's interest in light and air and for reasons already given we believe that considerations of policy support just such an application of nuisance concepts."¹¹ Id., 500 A.2d at 370.

Here, Plaintiffs' claims go to actual safety issues and not merely "scenic views" and would warrant, by itself, a trial on the merits. In short, even in those States, such as South Carolina, where there may be no existing common law right to a view, Plaintiffs' respectfully submit that the question of nuisance is a different issue, that it does not prevent Plaintiffs from validly arguing that conduct of the Town is truly harmful under several distinct theories, and should the Court agree, the nuisance can be lawfully enjoined. In light of the affidavits in this record and which are not

¹⁰ As the Court is surely aware, the definition of a nuisance is extremely broad, and includes anything which works hurt, inconvenience, or damage.

¹¹ Applying nuisance principles to the facts of the actual case before him, he found that on the merits that in that specific case no nuisance existed.

contradicted by the Defendants, summary judgment should be denied when the facts are "subject to conflicting inferences." See Lyles v. BMI, 355 S.E.2d 282, 285 (Ct.App. 1987).

IV. PLAINTIFFS HAVE PROFFERED SUFFICIENT EVIDENCE TO SUPPORT THEIR DUE PROCESS OF LAW CLAIMS.

Zoning, to be valid, must be enacted with due process of law. From the earliest zoning cases of record, to the present, it has long been settled that to be constitutional, zoning must be based upon, at the very least, a careful study and reasoned support, for the restrictions that are created and the zones that relate to different rules in different parts of a government's influence.

For example, in the leading zoning case in the country, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the United States Supreme Court found the zoning in that case to be constitutional, in part, because of fair, impartial, valid, study prior to the enactment of the zoning in question. The Supreme Court expressly noted that the matter of zoning has received much attention at the hands of "experts" and the results of the investigations have been set forth in "comprehensive reports."

In this case, where are the Defendants' fair, unbiased comprehensive report(s) that justify, if at all, that permitting cutting only during three months in the winter, when it is totally unnecessary to cut anything as virtually nothing is growing, but banning (and criminalizing) all cutting and trimming during the period each year when vegetation actually grows? Where is there any explanation or true justification for these seemingly arbitrary decisions in 1995 and 2005?

In fact, this case looks much more like another very early United States Supreme Court case, Nectow v. Cambridge, 277 U.S. 183 (1928), which was decided only two years after Euclid, and where the United States Supreme Court found that

due process had been violated, and pointedly noted that "governmental power to interfere by zoning restrictions was not unlimited." Nectow, 277 U.S. at 188.

What is particularly significant in Nectow was the case was a challenge, precisely like the kind being made by Plaintiffs in this case, not merely to the Ordinance as a whole, but to the Ordinance as applied, dealing not with abstractions but with regard to the specific properties in question.

Moreover, since this is a summary judgment motion, it is extremely relevant, that in Nectow, the United States Supreme Court expressly noted the direct relevance of the actual trial findings of the Master who first heard the matter. Earlier in this Memorandum, Plaintiffs urged the Court to exercise its inherent authority and actually go to the beach itself, with counsel for Plaintiffs and Defendants, to walk and examine the actual area. It is noteworthy that is precisely what the Master at the trial in Nectow did, and the United States Supreme Court explicitly endorsed that action, stating:

The findings of the Master, after a hearing and inspection of the entire area, supported, as we think it is, by other findings of fact is determinative of the case. Id. (emphasis added).

Highly serious due process concerns are also raised in light of the language of the South Carolina Supreme Court in Talbot v. Myrtle Beach Bd. Of Adjustment, 72 S.E.2d 66 (1952), where the South Carolina Supreme Court noted:

It is worthy of notice that a zoning law cannot constitutionally relieve land within the district covered by it for lawful restrictions, affecting its use, imposed by covenants. Id. (citing 58 Am. Jur. 942 Zoning Sec. 4).

Merely to give the Court a few of the factual questions that should be directly answered in a full hearing: in 1995 and again in 2005, the rights found in the

Covenants, Restrictions and Promises, were turned inside out and upside down by the Town:

1. **What was once an unlimited right is now declared, unilaterally and without reason or justification, an actual crime.**
2. **A Second Seemingly Denied of Due Process: Utterly Irrational time restrictions on trimming and cutting that effectively destroy these prior rights.**

With absolutely no reason given in the Statute, nor any study made (to Plaintiffs' knowledge), nor any stated justification or any other even purported reason ever given – all of a sudden an utterly arbitrary and extraordinarily limited time period was set in the 1995 and 2005 laws for any trimming or pruning of any kind at all.

As discussed subsequently in some detail, zoning requires a careful review and study, as the United States Supreme Court long ago carefully articulated as a significant justification for permitting zoning to be found to be constitutional. By utter and distinct contrast, the Defendants, without rhyme or reason or justification or explanation, or any study, simply enacted by a stroke of a pen:

3. **Section 21-39.1D. The trimming and pruning allowed herein shall only be permitted between November 1 and the following February 28.**

What was once a promise about leaving the land the way it was in 1991 was turned so inside out and upside down it is now a crime. In any event, it was further limited with a new permit and new conditions (one of which will be discussed momentarily) that it can only be done, if at all, between November 1 and the following February 28.

Of course, the Town is totally aware that many of the homeowners actually use their homes in the summertime to go to the beach, and that this so-called right to cut,

if limited to a mere three winter months (the Court can take judicial notice that virtually nothing grows in this dormant season), makes the right to trim and cut virtually an utter nullity. If that is valid due process of law, and if this is lawful zoning restrictions, it sure would be interesting to see what the Defendants would call inappropriate and unlawful activity.

4. Changing the height of what can be trimmed and cut.

Finally, just to make absolutely certain that no part of any of Defendants' promises, so formerly deemed valuable in 1991, was actually worth the paper they were written on, the Defendants added the following new Section in 1995: the Town limited the type of pruning that can be done (See Sec. 21-39.1E) and the length of the pruning (See Sec. 21-39.1E "no less than 7 feet").

Plaintiffs' submit that this case calls out for a full trial on the merits. In fact, Plaintiffs respectfully submit that one of the core policy questions in this case, is whether a Town in South Carolina can totally, unilaterally and arbitrarily tear up its own contracts? Moreover, due process concerns are explicitly raised by the inexplicable mystery surrounding the "consultant's" recommended public survey, that someone on Town Council deliberately tampered with, that not only raises further serious questions about the "transparency" of the Town, and its motives, it also directly related to a breach of contract accompanied with a fraudulent act discussed in the next section of this Memorandum.

V. PLAINTIFFS HAVE PROFFERED SUFFICIENT EVIDENCE TO SUPPORT THEIR BREACH OF CONTRACT WITH FRAUDULENT ACT CLAIM.

Nothing about Plaintiffs' contract claim accompanied with equitable fraud is contrary to the TCA or forbidden by either State or Federal law. From the earliest of days, South Carolina has recognized that "fraud is peculiarly a matter of equitable

cognizance." See Dubose v. Kell, 56 S.E.968, 969 (1907). Similarly, a lawsuit against a Town in South Carolina that acts beyond its powers is well established. See Southern Fruit Co. v Porter, 199 S.E. 537 (1938) (any reasonable doubt concerning the existence of a power of a municipal corporation to enact a certain ordinance is resolved against the municipality).

Now, as to what the Defendants did that constitutes a fraudulent act – there is a great deal of conflicting testimony. Council Member Pat O'Neil testified that there was a decision made by Town Council to change the survey matrix/questionnaire that was prepared by the consultants hire by Town Council before it was submitted to the Town residents:

Plaintiffs' attorney: Was there a motion made in session with regards to what information should be contained on the questionnaire that Tim Kana had presented?

Pat O'Neil: There was a discussion in open session about that. . . [T]he decision of Council was that the survey that was to be used for people to evaluate the different options would include only the elements that he was going to include in his presentation. Therefore, if he was not going to include property values, the questionnaire would not - or the survey form, whatever you want to call it, would not include property values.

O'Neil dep., 104:12 – 105:6. Exhibit 4 (emphasis added).

No other current or former Town Council member agrees with Mr. O'Neil's assertion that Town Council actually made a decision to remove property values from the consideration of Town residents as to how best to manage the Accreted Land. To the contrary, Mr. O'Neil's testimony was directly contradicted by Carl Smith who was Town Mayor at the time of the Defendants' submission of the questionnaire. Specifically, then-Mayor Smith testified that he delegated to Pat O'Neil the task of finalizing the survey matrix:

Plaintiffs' attorney: Do you agree with me that Pat O'Neil was responsible for the final format?

Mayor Smith: I would agree to that, but I can't tell you specifically why something would have been added or deleted.

Smith dep., 21:4 – 22:3. **Exhibit 5** (emphasis added).

Therefore, Plaintiffs have proffered evidence that someone on Council (likely Pat O'Neil) went behind the rest of Town Council and the public and – without telling anyone – altered the public survey form that was paid for by the Defendants' consultants and recommended to be circulating to the entire Town of Sullivan's Island, for the sole purpose of completely deleting and categorically reducing in importance the issues of "Ocean Views" and "Property Values" on the survey form.

For purposes of summary judgment consideration, Plaintiffs' breach of contract with a fraudulent act should not be dismissed because the Defendants have elicited some evidence that would support their breach of contract with a fraudulent act claim.

VI. PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF SAME AS TO ALL CAUSES OF ACTION DUE TO ALLEGED EXPIRATION OF STATUTE OF LIMITATIONS OR UNREASONABLE DELAY.

In their Memorandum in Support of their Motion for Summary Judgment as to all of Plaintiffs' causes of action premised upon the theory of an alleged expiration of the statute of limitations or unreasonable delay ("Defendants' MIS-MSJ Statute of Limitations"), the Defendants repeatedly misinterpret, mischaracterize and oversimplify Plaintiffs' allegations and requested relief. For instance, the Defendants state over and over again that Plaintiffs merely seek to overturn zoning ordinances enacted by the Defendants in 1995 and 2005. In fact, Plaintiffs are complaining not only of the Defendants' actions (including zoning ordinances and other conduct), but also of the Defendants' *inaction* with regard to their management (or lack thereof) of

the Accreted Land through the Defendants' failure to abide by the 1991 contract and/or deed restrictions and/or the Plaintiffs' prior vested property rights.

Among other exaggerations and distortions, the Defendants assert that Plaintiffs are (a) "unhappy with a law governing plant height," (b) attempting to "impose their will on the majority of islanders" and (c) "challeng[ing] the fundamental rights of the citizens and responsibilities of [Defendants] to govern and operate as a democracy." Defendants' MIS-MSJ Statute of Limitations, p. 1, ¶1. The Defendants claim that this Court should "protect the integrity of the Governmental process and the right of it's [sic] citizens to participate in the political process by exercising their right to vote and act via elective representatives" and "require the plaintiffs to operate under our system of democracy. *Id.* p. 2, ¶ 1. The Defendants further assert that "[i]f people are unhappy with a law, their remedy is to elect legislators that will change the law." *Id.*

The Defendants further misconstrue Plaintiffs' theory of the case by stating that the Plaintiffs "now argue that the Town has an obligation to keep the [Accreted Land] in the *exact* condition it existed on the day the [Sealed Deed] was delivered in 1991." *Id.*, at p. 8 (emphasis in original). The Defendants again misstate Plaintiffs' theory of the case at footnote 6 of their Defendants' MIS-MSJ Statute of Limitations: "The Plaintiffs basically argue that 'natural state' must mean the precise and exact condition of the property on the day the deed restrictions were signed in 1991." *Id.*, at footnote 6, p. 8.

The Plaintiffs clearly do not believe (nor have they argued) that the Accreted Land be kept in the exact same condition as it was in 1991. That being said, the Plaintiffs do argue that the 1991 Sealed Deed required (and requires) the Defendants

to maintain the Accreted Land such that its basic character remain similar in nature to what the Accreted Land was in 1991. In other words, the Plaintiffs argue that the Defendants were not permitted to allow the Accreted Land to transform from (a) its natural state in 1991, consisting primarily of sea oats and wildflowers without tall trees or shrubs, to become (b) a jungle of uncontrolled overgrowth and maritime forest.

The Defendants also assert that the parties agree that the Town "slightly revised its zoning ordinance governing cutting on the [Accreted Land] in 1995." *Id.*, p. 7, ¶ 2 (emphasis added). The assertion of a "slight" modification to the Defendants' ~~management of the vegetation in the Accreted Land could not be further from the~~ truth. Instead of a slight revision, the Defendants' deliberate actions and inaction, beginning in 1995, drastically altered the management of the Accreted Land to the point that the very nature and character of the Accreted Land has been completely altered in direct contravention to the promises and obligations under the 1991 deed and/or contract.

From 1981 to 1995, the Defendants permitted citizens residing where Plaintiffs currently reside to prune, cut and trim, at any time or times, all varieties of trees and bushes "to a height of no less than three [3] feet, provided that 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." §21-39(A)(5), Sullivan's Island Town Code and Ordinances (ratified 1981). (See Exhibit 9 of 2nd Amd. Complaint). Beginning in 1995 and until the present, the Defendants have disallowed all cutting, trimming and pruning of all vegetation in the Accreted Land from March 1 until November 1 of every year.

Furthermore, the only cutting allowed between November 1 and February 28 is restricted to three types of vegetation: Southern Waxmyrtle (*Myrica Cerifera*), Eastern Baccharis (*Baccharis Halimifolia*) and Popcorn trees (*Tallaowtree*, *Sapium Sebiferum*). See Section 21-31, 1E (enacted in 1995) and 21-71 (enacted in 2005) of the Town's Zoning Ordinances attached as Exhibits 2 and 3. The drastic limitations on cutting in the Accreted Land (along with other conduct enunciated in the Second Amended Complaint), beginning in 1995 and to present, have fundamentally altered the very fabric of what the Accreted Land was in 1991, all in direct violation of the promises and covenants of the 1991 deed and/or contract.

~~In 1991, the Accreted Land was primarily comprised of sea oats and~~
wildflowers, all three (3) feet or lower, with no trees or tall shrubs. For the past several years, the Accreted Land has been dramatically transformed into a maritime forest of unchecked overgrowth of vegetation and trees that, in addition to eliminating Plaintiffs' views of the beach and Atlantic Ocean, diminishing Plaintiffs' property values and breezes onto Plaintiffs' properties, has increased (a) the potential of a fire hazard; (b) security concerns on Plaintiffs' properties due to the taller trees and shrubs in the Accreted Land which provide increased cover for criminals and dangerous animals/varmints to hide; (c) the bug, raccoon, snake, rat, spider, coyote, and varmint populations; (d) the quantity of poison ivy in the Accreted Land and on Plaintiffs' properties; and (e) the mosquito population on Plaintiffs' properties.

This Court should deny Defendants' attempts to misconstrue (a) what Plaintiffs have alleged (as to Defendants' actions and inaction) and (b) what Plaintiffs are requesting in relief (that Defendants be forced to abide by the deed and/or contract they agreed to in 1991 which specifically granted Plaintiffs third-party beneficiary

rights in the management of the Accreted Land) and deny the Defendants' MIS-MSJ Statute of Limitations in its entirety.

As previously argued in Plaintiffs' Memorandum of Law and Equity in Opposition to Defendants' Motion for Summary Judgment filed February 28, 2014 ("Plaintiffs' MIO-MSJ"), the deed and/or contract (Exhibit 4 of the 2nd Amd. Complaint) executed on February 12, 1991 by the Lowcountry Open Land Trust ("LOLT") conveying the Accreted Land¹² to the Town of Sullivan's Island ("Town"), is a sealed document. Because Exhibit 4 of the 2nd Amd. Complaint is a sealed document between LOLT (Grantor) and the Town (Grantee), as a matter of law, the ~~twenty (20) year statute of limitations for sealed documents is applicable.~~ Accordingly, this lawsuit was timely filed in July of 2010.

In Defendants' MIS-MSJ Statute of Limitations, they fail to acknowledge that the Town, as Grantee of this deed, fully accepted and agreed to in Exhibit 4 of the 2nd Amd. Complaint an express term granting the Plaintiffs standing,¹³ as intended and named third-party beneficiaries, to enforce the agreements and restrictions that run with the land found in that document.

Exhibit 4 of the 2nd Amd. Complaint (hereinafter "Sealed Deed") contains significant restrictions, promises and affirmative obligations on the part of the Defendants. The Defendants' clear, unequivocal written intent is that the Accreted Land's condition "at the time of this grant" was to remain in the same condition for a

¹² As defined in the Second Amended Complaint.

¹³ See ¶5 of Exhibit 4 of Second Amended Complaint (BK K 200 Pg. 498) which expressly reads, in part: "These Restrictions may be enforced by the Town, any property owner within the Town, or by any voter 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 a prohibited activity. . . ." Exhibit 4. (emphasis added)

period of fifty (50) years¹⁴, subject to various exceptions that are irrelevant to the current suit.

The Defendants have purposefully, knowingly and deliberately violated the restrictions and promises made in the 1991 Sealed Deed – in part through the deliberative conduct of enacting zoning laws expressly designed to deliberately thwart the Sealed Deed's restrictions and promises (in violation of the Constitution of the United States of America and the Constitution of the State of South Carolina, as well as in violation of the Unfair Trade Practices Act of South Carolina) – and in part through the Defendants' inaction to appropriately manage the Accreted Land as Defendants promised to do in 1991.

The Defendants argue that, even if this is all true, the statute of limitations has run on all of Plaintiffs' claims. The Defendants again oversimplify Plaintiffs' allegations and requested relief when stating that "[t]here is no factual dispute that the plaintiffs are challenging the application and enforcement of a zoning ordinance that regulates and manages cutting of vegetation on the Town-owned Accreted Lands." Defendants' MIS-MSJ Statute of Limitations, p. 2, ¶2(1). Once again, while Plaintiffs are certainly seeking to overturn zoning ordinances passed in 1995 and 2005, that is not the only action or inaction of the Defendants for which Plaintiffs are seeking appropriate remedies in this case.

The Defendants further argue that (a) a sixty (60) day statute of limitations exists to challenge the Defendants' zoning ordinances; (b) a three (3) year statute of limitations applies to Plaintiffs' breach of contract causes of action; (c) some of

¹⁴ To be "automatically renewed and continued in effect for additional periods of 50 years each until such time as these Restrictions are repealed..." Exhibit 4 of Second Amended Complaint, ¶9.

Plaintiffs' claims are barred by the South Carolina Tort Claims Act; (d) Plaintiffs claim to have a "right to a view" which does not allegedly exist under South Carolina law¹⁵; and (e) the deed and/or contract at issue in this case gives the Defendants "unrestricted authority" to trim vegetation" in the Accreted Land and that Plaintiffs' interpretation of the deed and/or contract is "absurd on its [sic] face," further claiming that Plaintiffs "basically contend that the accreted lands must remain 'exactly the same as in 1991.'" *Id.*, at p. 2-3.

For the following reasons, Plaintiffs deny all of Defendants' statute of limitations (and other) theories and request that the Court deny the Defendants' ~~Motion for Summary Judgment as to all of Plaintiffs' causes of action premised upon~~ a theory of the alleged expiration of the statute of limitations or unreasonable delay.

A. A Question of Fact Exists as to Whether the Statute of Limitations Bars Plaintiffs' Theories that (a) the Defendants Have Breached the 1991 Sealed Deed by Enacting the 1995 and 2005 Zoning Ordinances and for Various Other Actions and Inaction and (b) the Defendants Are Currently Breaching the 1991 Sealed Deed.

The Defendants mistakenly argue that Plaintiffs' claims are statutorily time-barred based upon South Carolina Code 6-29-760(d) (and its alleged sixty (60)-day statute of limitations) or alternatively the general three-year statute of limitations. *Id.*, at p. 10. What the Defendants fail to acknowledge is that Plaintiffs' theories in this case are not solely dependent upon the invalidity of the 1995 and 2005 ordinances.

The Defendants' reliance on Quail Hill, LLC v. Cnty. of Richland, 379 S.C. 314, 665 S.E.2d 194 (Ct. App. 2008) aff'd in part, rev'd in part, 387 S.C. 223, 692 S.E.2d

¹⁵ In their MIO-MSJ filed on February 28, 2014, Plaintiffs previously explained (at Section IV(A), p. 13-14) why the Bloom v. Town of Sullivan's Island Board of Zoning Appeals is highly distinguishable from the present litigation, as almost all of Plaintiffs' causes of action are different than the zoning variance claim asserted in Bloom.

499 (2010) is misplaced because the Plaintiffs, unlike the plaintiff in Quail Hill, are not asserting a theory of negligent conduct on the part of the Defendants. The Quail Hill plaintiff argued that the government was negligent or made negligent misrepresentations to the plaintiff and that the plaintiff purchased property "in reliance upon representations by County officers and staff regarding its zoning." Quail Hill, 379 S.C. at 317. In this case, Plaintiffs' primary theory is that the Defendants have breached, are currently breaching and will continue to breach the terms, promises, conditions and agreement the Defendants made in the 1991 Sealed Deed. Quail Hill is inapposite to the facts of this case because, while the Plaintiffs ~~certainly argue that the 1995 and 2005 zoning ordinances should be repealed, the~~ basis for repeal are the 1991 Sealed Deed itself, which the Defendants specifically drafted and agreed to, with regard to the management of the Accreted Land. There was no contract, deed or agreement and Quail Hill, as the plaintiff in that case merely argued that government officials negligently informed the plaintiff of information pertinent to the purchase of real property as a part of the government's basic functioning duties.

Here, Plaintiffs' theory is that the Defendants' actions and inaction allowed the very character of the Accreted Land to be significantly altered from its natural condition in 1991, and that the Defendants breached, are currently breaching and will continue to breach the terms and conditions of the 1991 Sealed Deed. As such, while the 1995 and 2005 zoning ordinances are a part of the conduct complained of in this lawsuit, the Plaintiffs' theories of recovery are not analogous to the Quail Hill facts in which it was alleged that the government negligently confirmed information which impacted a property owner's investment. Rather, Plaintiffs argue that the

Defendants created a contractual agreement to which Plaintiffs have third-party beneficiary rights and then violated the terms and conditions of that agreement.

As an alternative to their statute of limitations argument, the Defendants assert, at footnote 12 of Defendants' MIS-MSJ Statute of Limitations, that Plaintiffs' claims are barred by the equitable doctrine of laches. The Defendants refer the Court to Robinson v. Estate of Eloise Pinkney Harris, 698 S.E.2d 229 (2010) and Graham v. Town of Loris, 248 S.E.2d 594 (1978) in support of their laches argument.

Robinson involved an heirs' property dispute, and its holding should have no bearing whatsoever on this case. The only quote cited by Defendants from Robinson does not even support Defendants' laches argument: "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or detrimentally change his position, then equity will ordinarily refuse to enforce those rights." Robinson, 698 S.E.2d at 236. First, there was no unreasonable delay on the part of Plaintiffs, and even if there were, such a determination would be a question of fact. Second, the Defendants cannot point to any expenses or detrimental change in position. If this Court grants Plaintiffs' Motion for Partial Summary Judgment or if Plaintiffs prevail at trial, the Defendants would not have to expend any money to allow Plaintiffs the relief they seek. Likewise, the Plaintiffs are not even aware of a possible theory of detrimental reliance the Defendants could make that would be applicable to the facts of this case.

Furthermore, the Defendants' reliance upon Graham is even more misplaced. After all, the primary issue in Graham was whether one circuit judge properly set aside a summary judgment previously granted to property owners by another circuit judge. Graham, 248 S.E.2d at 595. The Court specifically stated that the facts of

that case were unusual and "rare" and the issue of zoning ordinances and the application of laches was only considered by the Court with regard to a "meritorious defense" for purposes of setting aside summary judgment granted in favor of the property owner and against the Town:

From the record before us, it is clear that [the Town's] attorney's action in withdrawing from this case at a crucial stage without reasonable notice to his client is one of wilful abandonment. An attorney who undertakes the conduct of an action impliedly stipulates to carry it to its termination and is not at liberty to abandon it without reasonable cause and reasonable notice. . . . [The Town's attorney's] resignation without prior notice and thereafter secreting himself beyond the ability of the sheriff to find him, was a circumstance beyond the control of the [the Town], and the record reflects that the Town officials acted diligently after being apprised of the fact. ~~The hearing in question was to be held on April 28th, the day following receipt by [the Town] of the resignation of its counsel. While the hearing was postponed until April 29th, the record affirmatively shows that the [the Town] was not aware that a hearing would be held on either date. We feel that, under the rare circumstances of this case, [the Town] should not be charged with the abandonment of the case by its counsel. Conscience requires this Court to charge the attorney alone with his gross dereliction of duty and not to visit its consequences upon an innocent client. The finding of excusable neglect by the trial court was not an abuse of discretion. Id., at 599.~~

The Supreme Court specifically stated in Graham that:

The finding of [the trial judge] that a meritorious defense existed does not constitute an abuse of discretion. A meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to essential facts arising from conflicting or doubtful evidence." Id. (emphasis added).

Importantly, the Graham decision specifically did not rule that the Town's laches equitable defense was valid as against the property owner's theories of recovery based upon the Town's enactment of zoning ordinances; the Court merely

ruled that its presentation by the Town was sufficient to overturn an Order of summary judgment that had been granted against the Town. Such a ruling hardly provides a basis to grant summary judgment in this case. The damages sought by Plaintiffs are the result of a gradual change in the nature of the Accreted Land. There simply was no delay on the part of Plaintiffs to act. The detrimental effect of the Defendants' actions and inaction occurred over a number of years, and Plaintiffs sought recourse at an appropriate time.

Without citing a single case from any jurisdiction in the country, the Defendants assert that the three (3) year statute of limitations of S.C. Code Ann. 15-3-530 disposes of Plaintiffs' Breach of Contract and Breach of Contract with Fraudulent Act causes of action. The Defendants assert that "[t]he Complaint is clear that the Plaintiff feels an alleged 1991 'contract' was violated in 1995 and 2005 when the Town passed a zoning ordinance . . . [and that] [t]his means that the statute of limitations expired in 1998 or 2008..." Defendants' MIS-MSJ Statute of Limitations, p. 14, ¶1.

Defendants' argument is without merit for at least two reasons. First, summary judgment is not limited to the allegations contained in the Complaint. Only after filing a Complaint and obtaining discovery were the Plaintiffs able to obtain some of the evidence supporting Plaintiffs' theories of recovery. For instance, the specifics of the fraudulent conduct was not learned until after the Defendants conducted discovery in this case. Second, Defendants' argument once again ignores a most basic understanding of Plaintiffs' theories in this case: that the Defendants have breached, are breaching and will continue to breach the 1991 Sealed Deed. That includes, but is not limited to, the 1995 and 2005 zoning ordinances. Defendants'

deliberate actions *and inaction*, beginning in 1995, drastically altered the management of the Accreted Land to the point that the very nature and character of the Accreted Land has been completely altered, all in direct contravention to the promises and obligations made by the Defendants under the 1991 Sealed Deed.

B. A Question of Fact Exists as to Whether the Statute of Limitations Bars Plaintiffs' remaining causes of action.¹⁶

Assuming that a legal statute of limitations should even be applied to Plaintiffs' theories of recovery¹⁷, the only applicable legal statute of limitations is the twenty (20) year statute for a sealed document

The Plaintiffs concede that South Carolina has yet to recognize a general property rule that permits a party to complain, as a part of property law, about another person obstructing his view. However, this rule has significant exceptions, particularly when there was a deliberate recorded promise and restriction that the current 1991 view would remain "open" (the very word used in the Sealed Deed) "in the same condition as it existed in 1991" for 50 years. See Sealed Deed.

As previously argued in Plaintiffs' MIO-MSJ, Sea Pines Plantation v. Wells, 363 S.E.2d 891 (S.C. 1987) provides that a cause of action exists in South Carolina when restrictive covenants are involved where the right of a homeowner **on the second row** complained that their view had been obscured and obstructed by trees

¹⁶ Plaintiffs' (1) Declaratory judgment; (2) injunctive relief; (3) writ of mandamus; (4) nuisance; (5) inverse condemnation; (6) impairment of contract; and (7) Unfair Trade Practices Act causes of action.

¹⁷ Some of Plaintiffs' claims are legal in nature and some are equitable in nature. For example, fraud is a legal claim whereas breach of a restrictive covenant are equitable claims. With regard to all the legal claims, Plaintiffs argue that the twenty (20) year statute of limitations for a sealed document is the only applicable statute of limitations. With regard to the equitable claims, Plaintiffs assert that no statute of limitations applies and that the doctrine of laches, equitable tolling and unclean hands are all relevant (as discussed below).

and shrubbery that had grown up over the years in violation of the restrictive covenants and affirmative obligations found in the Sea Pines covenants.

Thus, for purposes of summary judgment consideration, the question is merely whether Plaintiffs are time-barred to even raise this equitable argument. As previously argued, it would be odd that an affirmative obligation to keep the property in the same condition as it existed in 1991, and which obligation was intended to run for fifty years (and thereafter to be automatically renewed) was subject to mere contract rules concerning statutes of limitation. This is especially true in a Sealed Deed. S.C. Code Section 15-3-520 reads as follows:

~~Within Twenty Years states:~~

- (b) an action upon a sealed instrument, other than a sealed note and personal bond for the payment of money only whereon the period of limitation is the same as prescribed in Section 15-3-520, except that a sealed contract for sale or an offer to buy or sell good whereon the period of limitation is the same as prescribed in Section 36-2-725. S.C. Code Ann. § 15-3-520 (emphasis added).

The Sealed Deed falls squarely within S.C. Code Section 15-3-520. The plain language of the Sealed Deed demonstrates that the parties' intentions were to create a Sealed Document. In fact, on the key page of the Sealed Deed where the signatures are found, the word "sealed" is found three different times.

- 1) The very final Clause, in the body of the document itself, and significantly on the same exact page as the parties signature line (prior to the exhibits) expressly references "Witness its hand and seal" This alone, Plaintiffs submit, makes this a sealed document. However, if there were any possible doubt, the Court should also consider the second time the word "Sealed" is found on this page and this time it is expressed in all caps.
- 2) Just above the witnesses and side by side with the Grantor's own Signature, in all caps, SIGNED, SEALED, AND DELIVERED IN THE PRESENCE OF It is impossible to ignore these words.

- 3) Finally, in the first part of the Attestation Clause, one finds the statement (made under oath, by the way) that the Witness actually "saw the [Grantor] by its authorized officers sign, seal, and witness and by its act and deed . . ." See Sealed Deed (emphasis added).

On the most critical document page, where parties have to sign, the deliberate use of the word "seal" is found on three different occasions. Under S.C. Code Ann. Section 19-1-160 (1976) the General Assembly has made it extremely clear:

Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto. S.C. Code Ann. § 19-1-160. (emphasis added)

Where the parties to the deed, on three separate occasions, used the word "seal" and, in particular, proclaimed "signed, sealed, and delivered" in all caps right above the signatures, it would be illogical to even suggest that this was not intended to be a "sealed" document. Why else would the language appear in all caps, appear in the body of the document itself and finally appear in the attestation clause of the Deed itself? This document was drafted by lawyers for the LOLT and/or the Defendants and formally accepted by the Defendants.

Justice Kittredge confronted a deed somewhat similar (but not as compelling) as the Sealed Deed in this case in Treadaway v. Smith, 325 S.C. 367, 479 S.E.2d 849 (S.C. App. 1996) overruled on other grounds. In Treadaway, Justice Kittredge held that the use of all caps in that deed (in identical language as found in the Sealed Deed "SIGNED, SEALED, AND DELIVERED IN THE PRESENCE OF... [signature of parties and witnesses]" manifested the parties intent to create a sealed instrument. Id., 325 S.C. at 378.

Similarly, in an action in which the attestation clauses stated that "the parties hereto have set their hands and seals" and the notation "L.S." followed the signatures of the agents for both Plaintiff and the Defendant, the South Carolina Court of Appeals ruled that the two contracts at issue in the case were sealed instruments. S. Carolina Dep't of Soc. Servs. v. Winayah Nursing Homes, Inc., 282 S.C. 556, 561, 320 S.E.2d 464, 467 (Ct. App. 1984) (citing S.C. Code Ann. Section 19-1-160; Wallingford v. Western Union Telegraph Co., 60 S.C. 201, 38 S.E. 443 (1901); Cook v. Cooper, 59 S.C. 560, 38 S.E. 218 (1901)).

Based directly upon the Treadaway and Winayah cases, if a legal statute is applicable at all, it is the twenty-year statute of S.C. Code Ann. § 19-1-160. Reaching this conclusion not only conforms to the document to the actual intentions found in the Sealed Deed itself, it follows the general law of many other states. In C.J.S. Limitations on Actions, Section 102, the general property rule is squarely noted that:

"A covenant in a deed imposing an obligation on the grantee accepting such deed is based on a specialty and governed by the statute applicable to sealed instruments. The statute of limitations governing instruments under seal applies to such a covenant in a deed even where the grantee does not sign the deed." C.J.S. Section 102.

Under both the general rule of property law and the specific property statutes of South Carolina law, the long term promise that so many homeowners have relied upon, and had a right to rely upon, that the Defendants would keep their word and formal legal obligations in a sealed document, calls out for the use of the twenty (20) year statute of limitations. Because the Sealed Deed is dated, February 19, 1991, and this case was filed on July 7, 2010, this lawsuit was timely filed as a matter of law¹⁸, even assuming one uses the earliest possible date of 1991.

¹⁸ It goes without saying that if a statute's language is plain, unambiguous and conveys a

1. Because Plaintiffs' Nuisance Claim Starts Anew Each Year, the Defendants' Actions and Inaction are Abatable Nuisance, and the Statute of Limitations Starts Over Periodically.

Although Plaintiffs believes that the Sealed Deed ends the argument as to Defendants' statute of limitations theory, Plaintiffs also submit the following additional backup arguments. It has long been the settled law in this State that nuisances, for purposes of statute of limitations, can conveniently be divided into periodic reoccurring nuisances and permanent nuisances that never change over time. For example, in the recent case of In Re Estate of Ann Burns Livingston v. Livingston, 744 S.E.2d 203 (Ct. App. 2013), our Court of Appeals accurately summarized existing South Carolina law as follows:

The Supreme Court [referring to the S.C. Supreme Court] has held that when a nuisance is continuing and the injury is abatable, the statute of limitations does not run merely from the time of original intrusion on the property and cannot be a complete bar. Silvester v. Spring Valley Country Club, 344 S.C. 280, 543 S.E.2d 563, 567 (Ct. App. 2001). Rather a new statute of limitations begins to run after each separate invasion of the property. Id. See Cutuchin v. S.C. Dep't of Highways & Pub. Transp. 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990) (stating if the injury is permanent, the plaintiff has a single cause of action that cannot be split, however if the cause of injury is abatable, each injury gives rise to a new cause of action. (citing Webb v. Greenwood Cnty., 229 S.C. 267, 277, 92 S.E.2d 688, 692 (1956)).

Applying this test to the facts of this case, it is clear that a new limitations time period runs, or might run, each and every year Plaintiffs are not permitted to abate the growth of vegetation and thus this is a periodic nuisance¹⁹ which would

clear meaning, the rules of statutory interpretation are unnecessary and the court has neither right nor reason to impose another meaning. A&I, Inc., v. Gore, 621 S.E.2d 383 (S.C. App. 2005). (See Headnotes 3 & 4)

¹⁹ Although this is not the place to argue this case on the merits, it is very clear that the nuisance claim is quite real and is so substantially interconnected with contested and disputed facts that there is no place at all for summary judgment. A private nuisance exists where the defendant's conduct on his own land results in "an unreasonable interference with the Plaintiffs' use and enjoyment of land, which interference is continuous or at least potentially recurring." Hubbard and Felix, South Carolina Law of Torts, at Pg. 211 (2d Ed.

have to be abated from time to time.

2. Plaintiffs' Fraud Claim Was Only Discovered After this Lawsuit Was Actually Filed and Clearly Is Timely as a Matter of Law Under Section 15-3-530.

Plaintiffs assert that only after they actually filed this lawsuit in 2010, and had engaged in depositions and asked for production of documents did they uncover the highly unusual fact that while the Town specifically hired a team of expert consultants²⁰ to draft an opinion matrix or survey to submit to Town residents for their consideration with regard to the Town's management of the Accreted Land did the Plaintiffs learn that the Town secretly changed the actual survey that the hired consultants recommended, and sent out an altered survey, ignoring their own consultants, but at the very same time suggesting to the Town's citizens that they were merely following his program and suggestions.

They did this without telling anyone.

They did this without revealing the altered survey.

They did this deliberately in secret and contrary to their own consultant's recommendation.

1997). Specifically, these two Professors note that under South Carolina law, any or all of the following factors are relevant to the determination as to whether or not an "unreasonable interference":

- (1) An interference is "substantial"
- (2) Whether an "ordinary" person would be upset by the interference
- (3) The nature and social value of the activity
- (4) The manner of conducting the activity
- (5) The appropriateness of the activity to the location involved
- (6) The "intent" of the defendant

Id. at Pg. 213.

As the filed affidavits attest (Exhibits A, B and C), almost all of these activities are potentially at issue in this case. It is claimed in these affidavits that the interference is very much substantial and that conduct of the Defendants has not been truly response to this legitimate concern. Plaintiffs submit that these affidavits taken together raise factual issues of nuisance that is not barred by any statute of limitations and which certainly cannot be decided as a matter of summary judgment.

²⁰ At a cost of \$100,000-150,000 to the taxpayers according to recent testimony given by the Town's Administrator Andrew Benke.

This actual (or perhaps constructive or equitable fraud) was unknown and would have forever stayed unknown without the filing of this lawsuit.

It has been the rule in South Carolina for several centuries that the "statute of limitations begins to run [only] against a fraud from the time it is discovered. See Parham v. McCravy, 6 Rich. Eq. 140 (1853). See also Burgess v. American Cancer Society: "In South Carolina, the statute of limitations for causes of action for fraud is governed by the 'discovery rule,' and does not begin to run until discovery of the fraud itself or of 'such facts as would have led to the knowledge thereof, if pursued with reasonable diligence.' " Burgess v. Am. Cancer Soc., S. Carolina Div., Inc., 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct. App. 1989) (internal citations omitted).

Whatever else the Court decides, Plaintiffs very respectfully request that this particular claim calls out for a fair and full trial on the merits and full public airing of exactly what the Town did and who undertook this action. It is not subject to any applicable statute of limitations as it was only found in discovery itself after 2010, and just as clearly, it is not the basis of a summary judgment at all as it is full of disputed, contested, secret acts, that no one within the Town government²¹ claims to have even done!

3. The Applicable Statute of Limitations for Plaintiffs' Unfair Trade Practices Act Claim Is Similar to Plaintiffs' Fraud Claim - Upon Discovery of Defendants' Deceptive Trade Practices.

Most of the time, a Town or City would never even be considered as a potential defendant in an unfair trade practices claim. For example, in Calcaterra v. City of

²¹ Despite eight depositions of current and former Town officials, at which this issue was thoroughly discussed and addressed. Without exception, all eight Town officials denied knowing about this issue or taking part in the intentional conduct of removing "property values" for the consideration of Town residents despite the recommendation for inclusion of the same by the experts hired by the Town.

Columbia, 315 S.C. 196, 432 S.E.2d 498 (S.C. App. 1993) (no violation of the UTPA for a city to charge higher water rates to non-residents than to residents). However, that assumes that the Town is playing "fairly" and is doing what is actually authorized by proper rules, customs and law.

It is an altogether different story when a Town deliberately sets out to hide what it is doing from the public, and secretly changes its consultant's report, when, without this lawsuit and its related discovery process, no one would ever know about the Town's unauthorized, inappropriate conduct, and when confronted with the truth – no one on Town Council will admit to anything about what happened. That is a different scenario. Unauthorized conduct falls into a special category. See Dema v.

Tenet Physician Services, 383 S.C. 115, 678 S.E.2d 430 (2009)²²

The Plaintiffs claim that the Town engaged in deceptive conduct that was unauthorized. It is not proper for any public entity to mislead the public, to claim its experts suggested one thing but actually suggested something else. To affect commerce (and the economic value of real properties on Sullivan's Island) not by any authorized zoning law or proper use of the Town's powers, but to secretly change its consultant's own expert report, involves trade and detrimentally affects Plaintiffs' economic endeavors.

²² "We hold that the trial court erred in ruling it did not have subject matter jurisdiction over this case. Appellants did not file suit seeking a determination from the trial court that HHRMC was acting in violation of the CON Act. Rather, Appellants' suit involved civil claims arising out HHRMC's violations of the CON Act, which DHEC had already determined HHRMC had committed. While DHEC has exclusive subject matter jurisdiction to determine whether a violation has occurred, it does not have subject matter jurisdiction to hear civil claims for damages resulting from those violations. Therefore, we hold that the trial court's ruling was erroneous." Dema v. Tenet Physician Servs.-Hilton Head, Inc., 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009)

Admittedly, this may be a novel claim (on that ground alone, summary judgment is almost certainly inadvisable as there is clear case law that novel claims should not be decided on summary judgment grounds). Furthermore, merely because a claim is novel hardly bars its consideration. Long ago, it was wisely stated by a common law court in Keeble v. Hickeringill, 103 Eng. Rep. 1127 [report date 1809] 11 East 574 (Queen's Bench 1707) "every man that hath a property may employ it for his pleasure and profit and when a violent or malicious act is done to a man's occupation, profession, or way of making a living, [or property] then an action lies in all cases." Id. The Plaintiffs' property has unlawfully been tampered with and illegally harmed. That was enough for a trial in 1707 and, Plaintiffs submit, in 2014.

4. With Regard to Plaintiffs' Equitable Claims Premised Upon Violation of Restrictive Covenants, No Legal Statute of Limitations Applies at All.

It is far from clear that *any* statute of limitations is even implicated on many of the claims pled by the Plaintiffs.²³ Justice Toal noted in Buffington v. T.O.E. Enterprises, 680 S.E.2d 289 (S.C. 2009) that an action to enforce restrictive covenants by injunction is an action in equity. If this is so, as it certainly appears from the central holding in Buffington, then the equitable claim of breach of the Restrictive Covenants and Promises found in the Sealed Deed is clearly not barred by being untimely. In fact, since the Town itself has engaged in acts that have to be labeled "unclean hands," due to the secret changing of its own purported survey – they are barred as a matter of equity from even raising various equitable defenses to begin with.

²³ The Plaintiffs have pled: (1) Declaratory Relief; (2) Temporary & Permanent Injunctive Relief; (3) Writ of Mandamus; (4) Breach of Contract; (5) Breach of Contract with Fraudulent Act; (6) Unfair Trade Practices; (7) Public and Private Nuisance; (8) Inverse Condemnation; (9) Violation of the Contract Clauses in both State and Federal Constitutions

Plaintiffs have produced a written report from their retained expert Tommy Harnett that the landowners, including the Plaintiffs, have suffered real harm, damages and prejudice by not having the view of the beach and Atlantic Ocean that they relied upon, were promised and which is part of their environment that existed in 1991. Because the Town has grievously hurt the Plaintiffs, and because it is highly doubtful that many of the Plaintiffs' claims are even subject to any statute of limitations defense at all, the Town's theory of a statute of limitations defense is misplaced. On this alternative ground as well, Plaintiffs respectfully move the Court to deny Defendants' statute of limitations defense.

VII. PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' DAMAGES RELIEF DUE TO ALLEGED LACK OF RIPENESS IN LIGHT OF OCRM "CRITICAL LINE" AND MEMORANDUM IN SUPPORT.

In their Memorandum in Support of their Motion to Strike Damages Relief due to alleged lack of ripeness in light of the South Carolina Office of Coastal Resource Management ("OCRM") "critical line" ("Defendants' MIS-MSJ OCRM"), the Defendants argue that Plaintiffs' prayer for damages must be stricken because of a letter written by Bradley D. Churdar, Chief Counsel for OCRM, dated January 24, 2014, in which Mr. Churdar refers Plaintiffs to S.C. Regulations §§ 30-11D(6) and 30-21F(4). Mr. Churdar states that "[a]lthough I do not know the extent of your clients' desires to cut, trim and prune the shrubs and trees seaward of their home . . . I mention these regulations in an effort to help your clients avoid violating them if they prevail [in this lawsuit]." See Exhibit A, Defendants' MIS-MSJ OCRM.

The Defendants' theory of ripeness is without merit because (a) a DHEC permit does not affect the Town's zoning ordinances and the other actions and inaction about which Plaintiffs complain in this lawsuit and (b) the Defendants mistakenly argue

that Plaintiffs' loss of views is the only requested relief. The Plaintiffs are seeking to overturn zoning ordinances and otherwise compel the Defendants to comply with the 1991 Sealed Deed. If the Plaintiffs have to obtain additional permits to obtain the full extent of their desired remedies, that does not affect the legitimacy of any of Plaintiffs' causes of action or requested damages. The Plaintiffs would merely have to comply with state regulations and regulatory bodies *after* this Court addresses the Defendants' conduct (and inaction) at issue in this case.

In addition to repeating the tired, misleading argument that Plaintiffs' theory in this case is that "the Town has an obligation to keep the [Accreted Land] in the ~~exact condition it existed in 1991,~~" the Defendants' theory of a lack of ripeness can be summarily dismissed through the Defendants' own admission that "the OCRM Critical Line has moved over the years." Defendants' MIS-MSJ OCRM, p. 4 (emphasis in original). Since the Defendants admit that the OCRM Critical Line can and has moved over the years, there is little doubt that Plaintiffs' requested remedies cannot be unripe for two reasons: (1) Plaintiffs can apply for permits after this Court adjudicates this lawsuit by following the terms and conditions of S.C. Regulations §§ 30-11D(6) and 30-21F(4); and (2) the OCRM itself may move the Critical Line on its own in the future such that all or portions of the Accreted Land would not be affected by S.C. Regulations §§ 30-11D(6) and 30-21F(4) at all. Furthermore, by the Defendants' own admission, portions of the Accreted Land do not lie seaward of the Critical Line, and therefore those portions would not be affected whatsoever by S.C. Regulations §§ 30-11D(6) and 30-21F(4).

A. Nothing About the OCRM Critical Line or Any State Regulatory Powers Affects the Validity of Plaintiffs' Breach of Contract, Breach of Contract with Fraudulent Act and Unfair Trade Practices Act Cause of Action.

The Defendants argue that the monetary damages sought by Plaintiffs with regard to their breach of contract, breach of contract with fraudulent act and unfair trade practices causes of action should be stricken by this Court because "the OCRM rules mean that the Plaintiffs could not perform the cutting whether the Town ordinance existed or not." Defendants' MIS-MSJ OCRM, p. 4. The Defendants' argument is without merit.

First, the clear terms of the Sealed Deed itself support Plaintiffs' request for monetary damages with regard to their breach of contract and breach of contract with fraudulent act causes of action. Specifically, the Defendants agreed in the Sealed Deed that: "these Restrictions may be enforced by the Town, any property owner within the Town, or by any voter 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 [a] prohibited activity."²⁴ Common sense suggests that "any appropriate remedy" would include monetary damages if the Plaintiffs can prove that the Defendants' conduct, inaction and/or violation of the terms of the 1991 Sealed Deed has proximately caused financial hardship in the form of diminished property values and/or decreased enjoyment of Plaintiffs' property. The Plaintiffs have submitted an expert opinion that Plaintiffs' property values have decreased by \$1,000,000.00 due to the Defendant's actions and inaction. See Exhibit 14 of 2nd Amd. Complaint.

²⁴Paragraph 5 of the Sealed Deed (emphasis added).

Second, the Defendants mistakenly assume that Plaintiffs' only requested relief is to recover all of their loss of views of the ocean and beach. While the loss of views is indeed of central importance to the Plaintiffs, it is not the only requested relief. Plaintiffs can obtain relief short of regaining the full extent of a recovery of their lost views of the ocean and beach in the form of increased vegetation management that would improve or alleviate the following concerns specifically cited in the 2nd Amd. Complaint: (a) increased ocean breezes onto Plaintiffs' properties; (b) decreased fire hazard; (c) decreased mosquito population; (d) decreased bug, raccoon, snake, rat, spider, coyote, and varmint populations; (e) decreased quantity of poison ivy in the Accreted Land and on Plaintiffs' properties; and (f) decreased security concerns on Plaintiffs' properties due to the taller trees and shrubs in the Accreted Land which provide increased cover for criminals and dangerous animals/varmints to hide. Thus, it is a logical fallacy for the Defendants to assert that, absent this Court's ability to provide an immediate recovery of the full gamut of Plaintiffs' requested relief, Plaintiffs' damages should be stricken.

Finally, even if Plaintiffs cannot obtain *the full extent* of their requested relief *immediately* upon a declaration by this Court that the Defendants have breached and are breaching the 1991 Sealed Deed, that would not preclude this Court from a finding of monetary damages based on Plaintiffs' unfair trade practices theories in this case. The Defendants apparently are arguing that if the Plaintiffs cannot instantaneously acquire 100% of the desired vegetation management relief upon a finding of liability of the Defendants, Plaintiffs cannot obtain monetary damages. Even if this Court finds that the Defendants are in partial breach of the 1991 Sealed Deed, the Defendants could be entitled to significant monetary damages in the form

of attorneys' fees and costs. For instance, the South Carolina Unfair Trade Practices Act specifically provides for attorneys' fees. Section 39-5-140(a) states that:

Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by Section 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages. If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs. S.C. Code Ann. § 39-5-20(a) (emphasis added).

Therefore, even if the Court does not accept Plaintiffs' argument above that just because Plaintiffs might have to obtain additional permits to obtain the full extent of their desired relief does not affect the legitimacy of any of Plaintiffs' causes of action or requested damages, Plaintiffs could still obtain monetary damages in the form of attorney's fees and costs.

VIII. PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFFS' UNFAIR TRADE PRACTICES CAUSE OF ACTION.

Similarly as they argued in their other six (6) motions for summary judgment and single motion to strike Plaintiffs' damages relief, the Defendants repeatedly misinterpret, mischaracterize and oversimplify Plaintiffs' allegations and requested relief in their Memorandum in Support of their Motion for Partial Summary Judgment as to Plaintiffs' Unfair Trade Practices Act cause of action ("Defendants' MIS-MSJ Unfair Trade Practices"). For instance, the Defendants state over and over again that Plaintiffs merely seek to overturn zoning ordinances enacted by the Defendants in 1995 and 2005: "Without question, Plaintiffs [sic] claim is based on

dissatisfaction with laws passed by the Town and the Town's consideration of possible amendments to those laws." Defendants' MIS-MSJ Unfair Trade Practices, p. 4.

A. A Question of Fact Exists as to Whether the Defendants' Actions and Inaction Constitute a Violation of the South Carolina Unfair Trade Practices Act.

The Plaintiffs are complaining not only of the Defendants' actions (including zoning ordinances and other conduct), but also of the Defendants' *inaction* with regard to their management (or lack thereof) of the Accreted Land through the Defendants' failure to abide by the 1991 Sealed Deed.

This Court should deny Defendants' attempts to misconstrue (a) what Plaintiffs have alleged (as to Defendants' actions and inaction) and (b) what Plaintiffs are requesting in relief (that Defendants be forced to abide by the deed and/or contract they agreed to in 1991 which specifically granted Plaintiffs third-party beneficiary rights in the management of the Accreted Land) and deny Defendants' MIS-MSJ Unfair Trade Practices. The Plaintiffs assert that the Defendants have purposefully, knowingly and deliberately violated the restrictions and promises made in the 1991 Sealed Deed – in part through the deliberative conduct of enacting zoning laws expressly designed to deliberately thwart the Sealed Deed's restrictions and promises (in violation of the Unfair Trade Practices Act) – and in part through the Defendants' inaction to appropriately manage the Accreted Land as Defendants promised to do in 1991.

The Defendants' complained-of actions and inaction clearly affect the real estate market on Sullivan's Island. For purposes of summary judgment consideration, this Court must accept as true the submitted opinion of Plaintiffs' expert witness Tommy Hartnett that Plaintiffs' property values have decreased by \$1,000,000 due to the loss of ocean and beach views. The Plaintiffs further assert

that the loss of ocean and beach views was proximately caused by the Defendants' violation of the 1991 Sealed Deed through their actions and inaction pertaining to the management of the Accreted Land. The Defendants' actions and inaction have been unfair, deceptive, offensive to the public policy, immoral, unethical and/or oppressive.

One example of the actions and inaction which demonstrates the Defendants' unfair, deceptive, offensive to public policy, immoral, unethical and/or oppressive conduct occurred in 2009 and 2010. On February 3, 2009, consultants hired by the Defendants (at a cost of more than \$100,000 to taxpayers) to implement an Accreted Land Management Plan ("ALMP") submitted a proposed questionnaire or "opinion matrix" for the Town Council to initiate a series of community forums to discuss the various advantages and disadvantages of various alternatives for the ALMP. The consultants' own draft questionnaire/opinion matrix included "Ocean Views" and "Property Values" as distinct issues of importance to be considered in any alternative ALMP. (See Exhibit 15 of 2nd Amd. Complaint). An earlier proposed questionnaire/opinion matrix, which was never submitted to the residents of Sullivan's Island, listed "View of the Ocean" as the first issue to consider when determining how to manage the Accreted Land. (See Exhibit 16 of 2nd Amd. Complaint).

However, in secret, even from all of Town Council members themselves, one or more agents of the Defendants submitted the final draft of its questionnaire/opinion matrix to Town residents in 2009 which completely deleted and categorically reduced in importance the issues of "Ocean Views" and "Property Values." (See Exhibit 17 of 2nd Amd. Complaint). Further, on January 20, 2010, Defendants, through Town Administrator Andy Benke, then-Mayor Carl Smith, then-Mayor *Pro Tem* Mike

Perkis and Town Council member Patrick M. O'Neil, Ph.D., specifically instructed Timothy W. Kana, Ph.D., President of Coastal Science & Engineering and the consultant hired by the Town to prepare the ALMP, to refrain from considering any correspondence or opinions expressed by any Sullivan's Island residents, property owners and registered voters with regard to the management of the Accreted Land. (See Exhibit 18 of 2nd Amd. Complaint)

As a part of their Unfair Trade Practices Act claim, Plaintiffs assert that the above-enunciated conduct constituted the Defendants' knowing and deliberate interference with the real estate market on Sullivan's Island. The Plaintiffs further ~~assert that the Defendants lack the power to enact ordinances (and otherwise~~ interfere with the real estate business and market on Sullivan's Island) which affect the Accreted Land in ways other than those allowed by the 1991 Sealed Deed which deprive Plaintiffs of what they had and/or acquired as owners of so-called "beach front and ocean view" properties.

Defendants' actions and inaction (and deliberate breach of the 1991 Sealed Deed) have substantially interfered with the real estate trade or industry by significantly diminishing the property values of homeowners who have lost their classification of "beach-front" property because of Defendants' bad faith refusal to trim or let Plaintiffs trim sections of the Accreted Land adjacent to their properties. Defendants have directly harmed not only Plaintiffs, but also Charleston County, by failing to maintain, and prohibiting Plaintiffs from maintaining, their ocean views due to the diminution in property values and the resulting decrease in taxes collected as a direct result of the diminution of properties assessed and classified as "ocean front." Defendants' unfair and deceptive trade practices have damaged Plaintiffs and

those similarly situated. Defendants' unfair and deceptive trade practices are having an adverse impact on the public interest, in the use and enjoyment of not only Plaintiffs, but also all residents of Sullivan's Island. As a result, Plaintiffs are entitled to actual damages, treble damages and attorneys' fees.

B. The Defendants' Reliance on the *Health Promotion Specialists* Decision and the TCA is Misplaced Because the Defendants Specifically Agreed to Manage the Accreted Land Pursuant to the Terms, Conditions and Promises of the 1991 Sealed Deed, and the Town Therefore Lacks the Power to Regulate the Real Estate Market in Contravention to the 1991 Sealed Deed.

In their MIS-MSJ Unfair Trade Practices, the Defendants assert that Plaintiffs "cannot collect damages under the South Carolina Unfair Trade Practices Act because it does not apply to alleged Town conduct." Defendants' MIS-MSJ Unfair Trade Practices, p. 2. The Defendants claim that the South Carolina Supreme Court confronted this very issue in *Health Promotion Specialists, LLC v. South Carolina Board of Dentistry*, 743 S.E.2d 808 (2013). Id. The Defendants further assert that the South Carolina Tort Claims Act bars Plaintiffs' Unfair Trade Practices Act cause of action. For the reasons discussed below, the Defendants are incorrect.

- 1. Unlike the South Carolina Board of Dentistry in *Health Promotion*, the Defendants here lack the authority to regulate the Accreted Land in contravention to the 1991 Sealed Deed.**

The South Carolina Supreme Court confronted an entirely different scenario in *Health Promotion* than the issues in this case. In *Health Promotion*, the Supreme Court confronted the issue of whether the Board of Dentistry – which the South Carolina legislature specifically granted the power to promulgate regulations, such as the Emergency Regulation at issue in that case – was immune from suit under the Tort Claims Act. The Court ruled that Board of Dentistry's enactment of an Emergency Regulation constituted a legislative or quasi-legislative act that was

protected from liability under provisions of the Tort Claims Act. The situation before this Court is primarily whether the Defendants have breached and are currently breaching the 1991 Sealed Deed, a contract and/or deed. No legislature granted the Defendants the power to violate the 1991 Sealed Deed. To the contrary, the Defendants themselves drafted and agree to the 1991 Sealed Deed and are obligated to abide by its terms, conditions and promises.

2. A question of fact exists as to whether the Defendants' action and inaction constitutes "trade or commerce" under the Unfair Trade Practices Act.

The Defendants also cite Health Promotion for the proposition that the ~~Defendants' complained-of conduct (and inaction) does not fall within the definition~~ of "trade or commerce" under the South Carolina Unfair Trade Practices Act. The Defendants' reliance is misplaced because the 1991 Sealed Deed was a business and/or consumer transaction and the Defendants' deliberate breach of the 1991 Sealed Deed is an unfair and/or deceptive act affecting the public interest and the Plaintiffs have suffered monetary and/or property as a proximate result of the breach.

"To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." Wright v. Craft, 640 S.E.2d 486, 498 (Ct.App. 2006). As defined by the SCUTPA, "trade or commerce" includes "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39-5-10(b) (1985).

Unlike the government defendant in Health Promotion, which merely issued a regulation which the legislature specifically gave it the power to regulate, the Defendants in this case engaged in a consumer and/or business transaction by selling the Accreted Land to the LOLT and then buying it back from LOLT, and through that transaction, regulating their own future conduct by agreeing to the terms, conditions and promises of the 1991 Sealed Deed. It would be absurd to suggest that a real estate transaction such as the 1991 Sealed Deed does not constitute trade or commerce. It would be equally absurd to suggest that the 1991 Sealed Deed would not affect current and future real property sales on Sullivan's Island. At this summary judgment stage, this Court must accept the evidence presented by the Plaintiffs that the loss of ocean and beach views that has resulted due to the Defendants' actions and inaction has caused Plaintiffs' property values to decrease by \$1,000,000.00. As such, the Plaintiffs have articulated sufficient showing of an Unfair Trade Practices Act violation to allow a factfinder to determine whether the Defendants' alleged conduct and inaction warrants a finding of monetary damages under the Unfair Trade Practices Act and if so, the amount of damages associated with the same.

C. PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF SAME AS TO PLAINTIFFS' INJUNCTIVE RELIEF.

The Defendants cite Riverwoods LLC v. County of Charleston, 563 S.E.2d 651 (2002) and Brackenbrook v. County of Charleston, 602 S.E.2d 39 (2004) for the proposition that Plaintiffs' request for an injunction – against the Defendants' acceptance of tax receipts from properties that have a so-called “beach front and ocean view” location so long as the Defendants continue to frustrate, block, reduce and/or eliminate the beach front and ocean views of Plaintiffs (and others similarly situated) – is improper.

The Defendants' reliance on these two cases is misplaced for at least two reasons: (1) the plaintiffs in Riverwoods and Brackenbrook were specifically challenging tax ordinances, whereas the Plaintiffs in this case are challenging the Defendants' deliberate breach of a contract (which breaches thereby resulted in the Defendants' wrongful acceptance of excessive tax receipts); and (2) the Defendants in this case specifically agreed (in the 1991 Sealed Deed) that persons such as the Plaintiffs are entitled to "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 [a] prohibited activity."²⁵

At the very least, a question of fact exists as to whether the prohibition of accepting tax receipts could be considered "any appropriate remedy" under Plaintiffs' theory of the Defendants' breach of the 1991 Sealed Deed. What is clear, at this stage of summary judgment consideration, is that Plaintiffs have submitted evidence that the Defendants' management (or lack thereof) of the vegetation in the Accreted Land has proximately caused financial hardship in the form of diminished property values and/or decreased enjoyment of Plaintiffs' property. The Plaintiffs have submitted an expert opinion that Plaintiffs' property values have decreased by \$1,000,000.00 due to the Defendant's actions and inaction. See Exhibit 14 of 2nd Amd. Complaint.

Furthermore, the holdings of Riverwoods and Brackenbrook stand primarily for the proposition that the plaintiffs in those cases either (a) had an adequate remedy at law (paying taxes under protest) or (b) failed to exhaust their administrative remedies. Neither of these issues are before this Court. Plaintiffs have timely paid all of their property taxes. At least one of the Plaintiffs has even contested their taxes

²⁵Paragraph 5 of the Sealed Deed (emphasis added).

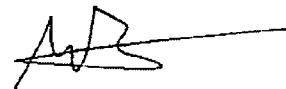
with various Charleston County officials. Simply put, none of the issues in this case are analogous to the issues before the Court in Riverwoods and Brackenbrook.

D. CONCLUSION

For all the above reasons, Plaintiffs respectfully move that the Defendants' seven (7) motions for summary judgment and one (1) motion to strike be denied on the basis that it would be obvious error of law to deny Plaintiffs' arguments above that (1) disputed questions of contested fact exist; (2) there is sufficient ambiguity in various documents to preclude summary judgment; (3) contested disputes exist as to the conclusions or inferences to be drawn from evidentiary facts, even though there ~~may be no dispute as to evidentiary facts themselves; and (4) Plaintiffs have asserted~~ novel questions of law and/or equity. For the foregoing reasons, the Plaintiffs respectfully request that the Court deny Defendants' Motion for Summary Judgment.

Respectfully submitted,

For



Robert H. Hood, Sr. (SC# 2599)
S. Scott Bluestein (SC# 65103)
Michael J. Brickman (SC# 874)
Molly H. Craig (SC# 6960)
Robert H. Hood, Jr. (SC# 13491)
James B. Hood (SC# 70212)
Barry Krell (SC# 3573)
Jonathan F. Krell (SC# 16691)
Robert T. Lyles, Jr. (SC# 10299)
Alice F. Paylor (SC# 4380)
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A. Walker Barnes (SC #78485)

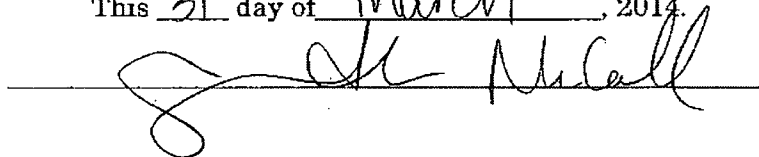
*Attorneys for the Plaintiffs, Nathan
Bluestein, Ettaleah Bluestein, M.D.,
Theodore Albenesius, III, and Karen
Albenesius*

March 31, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 31 day of March, 2014.



§8.3 The Contracts Clause

Crown, Exxon, and Keystone Bituminous Coal — have distinguished *Albed Structural Steel* and have refused to find a violation of the contracts clause.⁵⁵

Government Interference with Government Contracts

In *United States Trust Co. v. New Jersey*, the Supreme Court indicated that government interference with government contracts will be subjected to heightened scrutiny.⁵⁶ In 1962, New Jersey and New York adopted laws prohibiting the use of toll revenues from the Port Authority of New Jersey and New York to subsidize railroad passenger service. The laws were meant to assure those holding Port Authority bonds that the toll funds would remain available to pay that debt. A decade later, during the energy crisis of the 1970s, the states adopted laws to repeal the earlier prohibition and to permit the use of toll funds to improve rail transit.

The Supreme Court declared that the states had violated the contracts clause. The Court emphasized its distrust of the government when it is abrogating its own contracts. Justice Blackmun, writing for the Court, stated: "[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate when the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligation whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all."⁵⁷

The Court recognized that conserving energy and protecting the environment are important public purposes, but the Court said that infringing the contract rights was "neither necessary to achievement of the plan nor reasonable in light of the circumstances."⁵⁸ The Court emphasized that the government could have achieved its goals through other means and also that the government knew of the need for railroad service to protect the environment and conserve energy when it adopted the initial law in 1962.

Thus, although the Court did not articulate a level of scrutiny, its use of least restrictive alternative analysis and the word "necessary" seems indicative of strict scrutiny. Because there has not been another Supreme Court case since *United States Trust Co. v. New Jersey* concerning government interference with government contracts, the precise test remains uncertain. Nonetheless, it is clear that laws impairing the government's obligations under its own contracts will be subjected to much more careful review than will laws interfering with private contracts.

⁵⁵ Cf. *Pension Benefit Guaranty Corp. v. R.A. Gray Co.*, 467 U.S. 717 (1984) (upholding the retroactive application of liability for pensions pursuant to federal law).

⁵⁶ 431 U.S. 1 (1977).

⁵⁷ *Id.* at 25.

⁵⁸ *Id.* at 29.



Sec. 21-35. General Requirements.

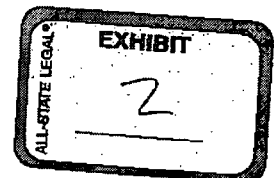
Maximum Building Height: No building or structure shall be erected, altered or moved so as to exceed 38 feet in height. Height shall be measured vertically from the highest point of the structure, excepting any chimney on a building, to the ground level of the grade where the walls or other structural elements intersect with the ground. The height limitations of the Code shall not apply to the church spires, or other similar church features such as belfries, cupolas or domes. In such cases where a lot is below the grade of the nearest street, the lot shall be filled so as to comply with Section 5-16 and Section 7-2 of this Code. In such cases where a lot elevation is two feet or greater above the grade of the nearest street, the total of the grade above and of the height of the structure shall not exceed 40 feet. (1-17-89, 11-20-90)

Sec. 21-36. Double frontage lots.

Subject to the setback requirements of this Ordinance, lots in the GC-OC Zoning District which have commercial frontage on Middle Street and residential frontage on Pon Avenue or Jasper Boulevard may have commercial usage on the half of the lot nearest Middle Street which is zoned commercial on the official Zoning Map, and residential building on the half of the lot fronting on Pon Avenue or on Jasper Boulevard zoned single family residential on the official Zoning Map, as long as the lots continue to be held in one ownership. There shall be no subdivision of these lots. (1-18-82)

Sec. 21-37. Recreation and conservation (RC) area; findings of fact and purposes.

The Town Council of the Town of Sullivan's Island finds that these areas greatly contribute to the health, safety and welfare of the residents of Sullivan's Island and that they provide town citizens as well as visitors, with countless hours of pleasurable activity and rest and relaxation, which is important to the goal of public health, safety and welfare; further, that the boundaries of these areas are constantly shifting over unpredictable periods of time, in that they are composed of sand dunes and vegetation that ceaselessly change, and that these areas are prone to flooding, and, therefore, not suitable to development for any purpose; further, that the Town of Sullivan's Island originated as a health resort for all the people of the State of South Carolina, and that these areas are vital to the purpose, and useful for that purpose only so long as they remain in a natural, undeveloped condition subject to the changing tides; further, that these areas, left in their natural state, provide protection to adjoining landowners and their property from the hazards of high tides and floods caused by hurricanes, tropical storms and seasonal tides; further, that the construction of the Santee-Cooper Diversion Canal and subsequent changes in the volume of water flowing through Charleston Harbor may cause further changes of an unknown nature upon the shoreline of Sullivan's Island, all of which the Town Council find to be a threat to all of the residents and property owners of the Town. Further, the Town Council find that this area is of a particular beauty in its natural state so as to provide aesthetic value necessary to the public health, safety and welfare of island residents and visitors, and in keeping with the historic uses of Sullivan's Island. (8-1-77 and 8-21-78, S675)



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Sec. 21-38. Uses in RC districts.

These areas shall be preserved in their natural state, except for the trimming, pruning and cutting of bushes and trees as provided in Section 21-39 below, as an area of recreation and conservation for the purpose of protecting the ecology, the adjoining property, and the environment, and enhancing and protecting the safety and welfare of the Town and its residents. Further, any activity shall be prohibited in these areas which would detract from their natural state, including, but not limited to, the activities stated in Section 21-39, so as to maintain this natural state for the public enjoyment and as protection for the Town and all of its citizens against the dangers and erosion as delineated in Section 21-37, et. seq. (8-1-77 and 8-22-78, S676; 10-20-80, S1)

Sec. 21-39. Area RC-1 restrictions.

Sec. 21-39.1A The RC-1 area as depicted upon the official Zoning Map for the Town of Sullivan's Island is hereby subdivided into areas RC-1A, RC-1B, RC-1C, RC-1D and RC-1E. Subsection RC-1A shall be that area from the Thompson Memorial Bridge south to the intersection of the north lot line of the property owned by School District No. 2 located in the block of Station 20' on the front beach. The RC-1B area shall run from the north lot line of the aforesaid School District No. 2 property south to the intersection of the south lot line of School District No. 2 property on the front beach located in the block of Station 19. the RC-1C area shall run from the aforesaid south lot line of the School District No. 2 property in the block of Station 19 south to the intersection of Station 16 Street south and the front beach. Section RC-1D shall run from Station 16 Street south to Station 12 Street and the front beach. Section RC-1E shall run from Station 12 Street south to the intracoastal waterway.

Sec. 21-39.1B There shall be no construction of any type, no destruction or removal of vegetation by any means except trimming and pruning of shrubs and trees as provided in this ordinance, and no manmade changes to topography in and 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.

Sec. 21-39.1C Any landowner living immediately adjacent to the RC-1A, RC-1C or RC-1E area shall upon application to the Zoning Administrator be issued a permit, subject to the other terms and conditions of this Ordinance, to prune and trim the shrubs and trees enumerated herein in an area from the applicant's lot line towards the ocean within the extension of the landowner's side lot lines projected towards the ocean.

Sec. 21-39.1D The trimming and pruning allowed herein shall only be permitted between November 1st and the following February 28th; provided, that in 1995 only, trimming and pruning shall be permitted through March 25, 1995.

Sec. 21-39.1E There shall be no trimming, cutting or pruning of any vegetation of any sort in the RC-1B and RC-1D areas. In the RC-1A, RC-1C or RC-1E areas, the only vegetation that may be trimmed and pruned is limited to the following: Southern Waxmyrtle (Myrica Cerifera), Eastern Baccharis (Baccharis Halimifolia), and Popcorn trees (Tillandsia usneoides). In the case of Popcorn-trees, cutting can extend

below 7 feet if recommended by the consultant hired under this ordinance and approved by the Tree Commission). This vegetation may be trimmed and pruned so as to have a maximum height of no less than seven feet (7') above the ground and shall be trimmed and pruned in accordance with the highest professional standards and in accordance with the guidelines promulgated by the Town of Sullivan's Island.

Sec. 21-39.1F All trimming and pruning shall be accomplished only by a commercial contractor licensed by the Town of Sullivan's Island specifically for such purpose. The application for the permit must be made by the landowner and the qualified contractor hired or retained by the landowner. To qualify, the contractor must demonstrate to the Town that he/she has the experience to perform the trimming and pruning in accordance with the highest professional standards, that he/she is capable of identifying the vegetation that may be trimmed and that he/she has read the Ordinance and is familiar with its conditions, regulations and penalties. Additionally, the contractor must file a certificate of insurance with the Town evidencing workers' compensation coverage, public liability coverage of at least \$1,000,000 Dollars and a performance bond as set forth herein. Additionally, the principal of each contractor shall agree to be personally liable for compliance with the terms of this Ordinance. The Town shall make a list of qualified licensed commercial contractors available to those who apply for a permit pursuant to the terms of this ordinance. The Town shall engage a qualified consultant to monitor said work. The consultant must agree to visit each site during the trimming and pruning permitted hereunder to ensure that work is being done according to the highest professional standards and the requirements of this ordinance. The cost of the consultant's visits shall be included in the permit fee which shall be paid by each applicant for a permit upon its issuance.

Sec. 21-39.1G The trimming and pruning allowed and all work performed shall be accomplished without the use of any heavy machinery, vehicles or other such machinery being brought into the RC-1 area or onto the beach front. All cuttings must be removed from the RC-1 area by said commercial contractor upon the completion of said work and hauled off of the island to an appropriate recycling dump by said contractor or used on the island in such use as specifically approved by the Tree Commission.

Sec. 21-39.1H All work performed pursuant to this permit, and all methods of trimming and pruning shall be performed in accordance with the highest professional standards and shall be monitored by and subject to the approval of the Town of Sullivan's Island and its consultant. The Town and its consultant shall have the right to immediately stop any work being performed in a manner not allowed, permitted or approved by removing and revoking the permit posted pursuant to Paragraph 21-39.1K hereinafter. At the conclusion of the trimming and pruning permitted herein the consultant shall visit each site and issue a certificate to the Town and to the landowner certifying that the trimming and pruning has been performed in accordance with the terms and provisions of this Ordinance and highest professional standard. The cost of the consultant's site visits shall be included in the permit fee which shall be paid by each applicant for a permit upon its issuance.

Sec. 21-39.1I Each commercial contractor licensed by the Town of Sullivan's Island to perform the work allowed by this Ordinance shall prior to the issuance of a permit be required to sign an agreement to perform all work in a manner consistent with the

provisions and restrictions of the ordinance and guidelines set forth by the Town and the consultant. Before issuance of a permit, each commercial contractor shall be required to post a performance bond in the amount of \$5,000 Dollars wherein he guarantees faithful performance of his duties and obligations hereunder in a manner consistent with this Ordinance and instruction by the Town's consultant. Any person not complying with the terms of this Ordinance shall immediately forfeit said bond and shall be subject to all other terms and provisions of this Ordinance relating to fines and penalties in addition to the forfeiting of said bond.

Sec. 21-39.1I Landowners living immediately adjacent to the RC-1 area may maintain existing paths through the RC-1 area to the beach, provided those paths are no wider than six and one-half (6.5') feet through the vegetation and follow the natural contours of the land and dunes. No fill may be brought in for said paths, nor any manmade or artificial (non-wood) material.

Sec. 21-39.1K A fee of Two Hundred Fifty and 00/100 (\$250.00) Dollars shall be paid by the applicant to the Town of Sullivan's Island for the granting of a permit to perform the work allowed hereunder. Additionally, the applicant must pay the costs charged by the licensed contractor for the actual cutting done pursuant to the application. The permit shall be posted on the property facing the street in plain view of the street at all times that any work is undertaken pursuant to said permit. Said permit shall be valid for the time specified in the permit with only one permit per property allowed for each cutting season.

Sec. 21-39.1L The violation of the terms of this Ordinance shall constitute a criminal offense and shall be punishable by the Municipal Court of the Town of Sullivan's Island or other Court of competent jurisdiction. Each tree or shrub which is trimmed or pruned in violation hereof, or poisoned or destroyed in any manner, shall subject the person so violating this Ordinance to a fine of One Hundred and 00/100 (\$100.00) Dollars and/or thirty (30) days in jail. Each other violation of this Ordinance shall subject the person so violating to a fine of One Hundred and 00/100 (\$100.00) Dollars and/or thirty (30) days in jail. Penalties prescribed herein shall be in addition to the forfeiture of the bond specified above. In addition, the violator must pay for the replacement of vegetation in like species and volume as determined to be appropriate by the Town upon the professional recommendation of its consultant.

Sec. 21-39.1M If any violation of the provisions and restrictions of the ordinance and the guidelines for trimming and cutting occurs, wherein the perpetrator is not known, the Town shall undertake mitigation to replace the vegetation with like species and volume upon the recommendation of the consultant, from funds available from fines and fees generated pursuant to this ordinance as established below at Section 21-39.1N. Provided further, that if the perpetrator is known, then in addition to fines levied by the Town pursuant to this ordinance, the Town shall institute civil proceedings to require said perpetrator to pay the cost of mitigation and to collect such other damages as are allowed by law. Fines and fees generated shall be used by the town to replant vegetation in the specific area where any such loss occurred. It is the intent of this ordinance to replace any vegetation so damaged or destroyed with like kind and volume.

Sec. 21-39.1N The fees generated by the permit application and fines from any violations of this Ordinance, as well as forfeiture of any bonds for violations hereof shall be set aside by the Town in a dedicated fund and used to pay its consultant and for such matters as appropriate studies and surveys of the land, its vegetation, wildlife and natural processes, mapping and photographing, also information and education programs and materials, as well as mitigation described in Paragraph 21-39.1M.

Sec. 21-39.1O The Town may seek the assistance of the Sullivan's Island Tree Commission to support the activities of this ordinance as they pertain to the gathering, organizing and dissemination of information about the RC-1 area, and to the replacement of vegetation under mitigation. The Tree Commission is hereby given the following responsibilities in addition to those it already has:

- a. to study and monitor the impact of the pruning and trimming allowed under Section 21-39 with regard to the flora and fauna located within the RC-1 area;
- b. to study and monitor the impact of the pruning and trimming allowed under Section 21-39 as to the integrity of the RC-1 public land as it related to erosion control and beach renourishment, drainage, mosquito control, and the public welfare, safety, and health of the town; and
- c. to study and make recommendations to the Town as to the management of all RC-1 public land so as to preserve and maintain RC-1 public land in accordance with the public land in accordance with the public welfare, safety, and health of the Town and the covenants and restrictions set forth in the Title to Real Estate dated February 12, 1991, conveying said land to the Town of Sullivan's Island.

The Committee in the discharge of its duties may seek the advise of the consultant retained by the Town as set forth in this Ordinance.

Sec. 21-39.1P 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 over 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. 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-1 land. The trimming and pruning allowed in this Ordinance is granted as an accommodation to landowners living immediately adjacent to RC-1A, RC-1C or RC-1E areas, and the Town retains full authority to amend and/or revoke any portion of this Ordinance.

Sec. 21-39.1Q The permits allowed under this Ordinance do not obviate the need or requirement of any landowner obtaining a permit under this Ordinance from any other required permit or authorization from any governmental or regulatory body that may have jurisdiction over the RC-1 public land. Any landowner obtaining a permit shall agree to indemnify the Town for any action taken pursuant to said permit in derogation of any State, Federal or County law or regulation, including costs, fines and attorney's fees.

Sec. 21-39.1R Any part or parts of this Ordinance which shall be held to be unconstitutional shall not affect in any way the validity of the remaining parts of this Ordinance. (2-21-95)

Sec. 21-39.2 Erosion control structures.

No fill material, seawalls, jetties, bulkheads, revetments, groins, breakwaters, boardwalks, fences, or other erosion control structures shall be constructed, erected, or placed within the RC-1 Zoning District or the RC-2 Zoning District, except as provided in Section 21-54(F) and Section 21-54(G) of this Ordinance. There shall be no excavation of sand and/or disturbance of vegetation in the RC-1 Zoning District or the RC-2 Zoning District, without Town permission and permission of other agencies as appropriate. (7-15-86, 1-21-92)

Nothing in this section shall be construed to prevent the Town or other property owners from repairing groins, seawalls, bulkheads, revetments or other erosion control structures, provided permission for such repairs is obtained from the SCCC and the Town, where applicable. It shall be the responsibility of property owners, within 90 days following the effective date of this ordinance, to furnish the Town with plans or other information pertaining to erosion control structure location, elevation, construction materials, etc.

For the purpose of this chapter, repair of erosion control structures shall not be allowed when such structures are determined by the Town to be damaged fifty (50%) percent or more. The Town shall make the damage determination using procedures developed and adopted by SCCC.

Erosion control structures damaged less than fifty (50%) percent may be repaired in place, provided such repairs comply with all Town and SCCC repair regulations. In the event that Town and SCCC repair regulations are in conflict, the more restrictive shall apply.

Damaged erosion control structures must not be enlarged, strengthened beyond pre-damage condition or rebuilt during permitted repairs; repairs must be made with materials similar to those of the existing erosion control structure. However, in the event that an adjacent erosion control structure is destroyed and is not permitted to be repaired, a property owner shall be allowed to construct a wing wall, provided permission is obtained from the SCCC and Town.

The Town may require as a condition of erosion control structure repair that the property owner renourish the beach seaward of the erosion control structure on an annual basis with two (2) cubic yards of sand per foot of structure length as measured along the shoreline. This condition shall remain in effect as long as the erosion control structure remains in place and exposed, in whole or in part. Renourishment sand must come from an upland source and must be approved by the SCCC as beach-compatible. The timing and location of renourishment sand placement shall be governed by Town and SCCC regulations. (1-21-92)

Sec. 21-39.3 Regulatory and instructional signs.

Nothing in this section 21-39 shall be construed to prevent the Town of Sullivan's Island from erecting or having erected signs in the RC-1 area for regulatory or instructional purposes. (2-17-87)

Sec. 21-40 Area RC-2 restrictions.

In an RC-2 area there shall be no construction of any type, no destruction of vegetation, except trimming, cutting and pruning of back beach bushes and trees as provided in Section 21-39, non-manmade changes of topography and the construction of private docks by owners of lots adjoining this area may be permitted, provided approval of the U.S. Corps of Engineers, the Department of Health and Environmental Control/Office of Ocean and Coastal Resource Management (DHEC/OCRM) and any other governmental or regulatory agency with jurisdiction provided the dock meets the following restrictions and is permitted by the Town of Sullivan's Island:

- a) No dock shall be permitted to be constructed where the length of the dock shall exceed three hundred (300) feet in total length;
- b) No dock shall be permitted to be constructed which extends into the channel or extends so far as to interfere with navigation;
- c) The head of the permanent dock/"pier head" structure shall be no greater in size than fifteen (15) feet by fifteen (15) feet. In addition to the permanent pier head of the dock there may be a floating dock no greater than eight (8) feet by twenty (20) feet. An attached structure may be placed on a dock or floating dock provided it is included in the above two hundred twenty-five (225 sq. ft.) square feet of the "head" or one hundred sixty (160 sq. ft.) square feet of the floating dock and provided it does not exceed three (3) feet in height and does not exceed thirty-two (32 sq. ft.) square feet in floor area;
- d) The dock, pier, boat lift, the floating dock, walkway and any appendages thereto allowed under this ordinance shall be constructed within the projected property lines of the owner's lot and shall further adhere to the set-back requirements of the Town's zoning ordinances, more specifically be no closer than ten (10) feet from either projected property line;
- e) The maximum width of the walkway or pier between the highland and the pier head shall be four (4) feet. The walkway may have a railing but shall have no walls which impede the flow of air through the walkway;
- f) A single roof may be placed either over the dock or the boat lift and shall be limited to the area lying immediately above the pier head or the boat lift with no more than two (2') foot overhang over any portion of the pier head or boat lift; provided, however, in no event shall the overall size of the roof exceed three hundred sixty-one (361 sq. ft.) square feet. No roof shall extend above fifteen (15) feet of the mean high water

ARTICLE V. RC-1 & RC-2 Recreation and Conservation Area Districts.

Sec. 21-67. Findings and intent of RC Area Districts.

A. RC Area Districts' Findings of Fact

The Town Council of the Town of Sullivan's Island finds the following:

- (1) The RC Areas greatly contribute to the health, safety and welfare of the residents of Sullivan's Island and that they provide island residents as well as visitors, with countless hours of pleasurable activity and rest and relaxation, which is important to the goal of public health, safety and welfare;
- (2) The boundaries of the RC Areas are constantly shifting over unpredictable periods of time, in that they are composed of sand dunes and vegetation that constantly change, and that these areas are prone to flooding, and, therefore, not suitable to development for any purpose;
- (3) The Town of Sullivan's Island originated as a health resort for all the people of the State of South Carolina, and that the RC Areas are vital in the purpose, and useful for that purpose only so long as they remain in a natural, undeveloped condition subject to the changing tides;
- (4) The RC Areas, left in their natural state, provide protection to adjoining landowners and their property from the hazards of high tides and floods caused by hurricanes, tropical storms and seasonal tides;
- (5) The construction of the Santee-Cooper Diversion Canal and subsequent changes in the volume of water flowing through Charleston Harbor may cause further changes of an unknown nature upon the shoreline of Sullivan's Island, all of which the Town Council find to be a threat to all of the residents and property owners of the Town; and,
- (6) The RC Areas are of a particular beauty in its natural state so as to provide aesthetic value necessary to the public health, safety and welfare of Island residents and visitors, and in keeping with the historic uses of Sullivan's Island.

B. Intent and uses in RC Area Districts.

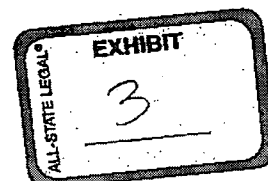
The RC Areas shall be preserved in their natural state, except for the mowing, pruning and cutting of bushes and trees as provided in herein, as areas of recreation and conservation for the purpose of protecting the ecology, the adjoining property, and the environment, and enhancing and protecting the safety and welfare of the Town and its residents. Further, any activity shall be prohibited in these areas that would detract from their natural state, including, but not limited to, the activities stated herein, so as to maintain this natural state for the public enjoyment and as protection for the Town and all of its citizens against the dangers and erosion as delineated in the above Findings of Fact.

Sec. 21-68. General description of RC Area Districts.

A. RC-1 Area Districts (ocean side).

(1) General Description of RC-1 Area District.

The RC-1 Area District shall be defined as follows: all that area within the corporate limits of the Town of Sullivan's Island between, on the one hand, a line commencing at a point being the center line of Breach Inlet between Sullivan's Island and the Isle of Palms on the north side of the bridge across Breach Inlet serving as South Carolina Highway 703 and running southerly along the center line of Breach Inlet to a point opposite the low water mark of the Atlantic Ocean on the southeastern most part of the front beach of Sullivan's Island; thence running with the curve of Sullivan's Island in a direction that is first generally southwesterly, then generally westerly, and then generally northerly along the low water mark of the Atlantic Ocean on the front beach of Sullivan's Island to a point in the center line of Cove Inlet and the Intracoastal Waterway opposite the low water mark of the Atlantic Ocean on the northernmost part of the front beach of Sullivan's Island and, on the other hand, (1) the property platted on Sullivan's Island or (2) the primary oceanfront sand dune as marked in the field by OCRM staff or (3) the seaward face of a functional erosion control device, whichever line includes more area within the RC-1 Area, including but not limited to, those areas owned by the Town of Sullivan's Island, by the State of South Carolina, by the United States Government, or by persons, and also including that area between the aforesaid low water mark of the Atlantic Ocean and a line beginning at the southeast corner of the lot on Sullivan's Island bordered by Pettigrew Street on the north and Station 22nd Street on the east and running in a generally easterly direction to the southwest corner of the lot bordered on the west by Station 22 1/2 Street and on the north by Atlantic Avenue.



(2) Sub-Areas of RC-1 Area District.

The RC-1 Area District, as depicted upon the official Zoning Map for the Town of Sullivan's Island, is hereby subdivided into areas RC-1A, RC-1B, RC-1C, RC-1D and RC-1E. The RC-1A Area shall be that area from the Thompson Memorial Bridge south to the intersection of the north lot line of the property owned by School District No. 2 located in the block of Station 20 on the front beach. The RC-1B Area shall run from the north lot line of the aforesaid School District No. 2 property south to the intersection of the south lot line of School District No. 2 property on the front beach located in the block of Station 19. The RC-1C Area shall run from the aforesaid south lot line of the School District No. 2 property in the block of Station 19 south to the intersection of Station 16 Street south and the front beach. The RC-1D Area shall run from Station 16 Street south to Station 12 Street and the front beach. The RC-1E Area shall run from Station 12 Street south to the Intracoastal Waterway.

B. RC-2 Area District (marsh side).

The RC-2 Area District shall be defined as follows: all that area within the corporate limits of the Town of Sullivan's Island between, on one hand, beginning at a point at the center line of Cove Inlet and the Intracoastal Waterway opposite the low water mark of the Atlantic Ocean on the northernmost part of the front beach of Sullivan's Island, thence running in a generally easterly direction along the center line of Cove Inlet and the Intracoastal Waterway to a point marked "L" on a certain plat entitled "Plat of Area, proposed for annexation to Mt. Pleasant", by E. M. Seabrook, Jr., - C.E., dated February 12, 1963, and recorded in the RMC Office for Charleston County on February 15, 1963, in Plat Book M at Page 127 and on microfilm in Book R-78 at Page 219; thence running in a generally easterly direction along the line "L-K-J" on such plat (which line is a present boundary of the Town of Mt. Pleasant and Sullivan's Island) and in a generally easterly direction along the center line of the Intracoastal Waterway until it intersects the center line of Swinton Creek; thence running southwesterly and southerly along the center line of Swinton Creek and Breach Inlet to a point being the center line of Breach Inlet between Sullivan's Island and Isle of Palms on the north side of the bridge across Breach Inlet serving as South Carolina Highway 703, and, on the other hand, (1) the property now platted on Sullivan's Island, or (2) the South Carolina Department of Health and Environmental Control Bureau of Ocean and Coastal Resource Management (OCRM) formerly known as the South Carolina Coastal Council "Critical Area Line" along Sullivan's Island, whichever line includes more area within the RC-2 Area District.

Sec. 21-69. Erosion control structures in RC Area Districts.

- A. No fill material, seawalls, jetties, bulkheads, revetments, groins, breakwaters, boardwalks, fences, or other erosion control structures shall be constructed, erected, or placed within the RC-1 Area District or the RC-2 Area District, except as provided in herein, without Town permission and permission of other agencies as appropriate.
- B. Nothing in this section shall be construed to prevent the Town or other property owners from repairing groins, seawalls, bulkheads, revetments or other erosion control structures, provided permission for such repairs is obtained from the OCRM and the Town, where applicable.
- C. It shall be the responsibility of property owners to furnish by August 1, 1999, the Town with plans of other information pertaining to erosion control structure location, elevation, and construction materials.
- D. For the purpose of this Zoning Ordinance, repair of erosion control structures shall not be allowed when such structures are determined by the Town to be damaged fifty (50%) percent or more. The Town shall make the damage determination using procedures developed and adopted by OCRM.
- E. Erosion control structures damaged less than fifty (50%) percent may be repaired in place, provided such repairs comply with all Town and OCRM repair regulations. The Town shall make the damage determination using procedures developed and adopted by OCRM. In the event that Town and OCRM repair regulations are in conflict, the more restrictive shall apply.
- F. Damaged erosion control structures shall not be enlarged, strengthened beyond pre-damage condition or rebuilt during permitted repairs. Repairs shall be made with materials similar to those of the existing erosion control structure. However, in the event that an adjacent erosion control structure is destroyed and is not permitted to be repaired, a property owner shall be allowed to construct a wing wall, provided permission is obtained from the OCRM and Town.
- G. The Town may require as a condition of erosion control structure repair that the property owner replenish the beach seaward of the erosion control structure on an annual basis with two (2) cubic yards of sand per foot of structure length as measured along the shoreline. This condition shall remain in effect as long as the erosion control structure remains in place and exposed, in whole or in part. Replenishment sand shall come from an

upland source and shall be approved by the OCRM as beach-compatible. The timing and location of nourishment sand placement shall be governed by Town and OCRM regulations.

Sec. 21-70. General provisions for RC-1 Area District.

- A. The provisions of this Article are applicable to the RC-1 Area District land area of the Town. The Town of Sullivan's Island retains full authority over RC-1 Area District 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. 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-1 Area District. The trimming and pruning provided herein is granted as an accommodation to landowners living immediately adjacent to RC-1A, RC-1C or RC-1E areas, and the Town retains full authority to amend and/or revoke any portion of these provisions.
- B. The permits allowed herein do not obviate the need or requirement of any landowner obtaining a permit under this Article from any other required permit or authorization from any governmental or regulatory body that may have jurisdiction over the RC-1 Area District. Any landowner obtaining a permit shall agree to indemnify the Town for any action taken pursuant to said permit in derogation of any County, State, or Federal law or regulation, including costs, fines and attorney's fees.
- C. Nothing in this Article shall be construed to prevent the Town of Sullivan's Island from erecting or having erected signs in the RC-1 Area District for regulatory or instructional purposes.

Sec. 21-71. Trimming and pruning in the RC-1 District.

A. No construction or removal of vegetation.

There shall be no construction of any type, no destruction or removal of vegetation by any means except trimming and pruning of shrubs and trees as provided in this Ordinance, and no manmade changes to topography in an RC-1 Area District, except as provided herein and in the Title to Real Estate dated February 12, 1991, conveying said land to the Town of Sullivan's Island.

B. Retaining of a town vegetation consultant.

The Town shall engage a qualified consultant to monitor trimming and pruning of shrubs and trees in the RC-1 Area District. The consultant shall agree to visit each site during the trimming and pruning permitted hereunder to ensure that work is being done according to the highest professional standards and the requirements of this Ordinance. The cost of the consultant's visits shall be included in the permit fee that shall be paid by each applicant.

C. Permit for trimming and pruning of vegetation.

- (1) Any landowner living immediately adjacent to the RC-1A, RC-1C or RC-1E Area shall upon application to the Zoning Administrator be issued a permit, subject to the other terms and conditions of this Ordinance, to trim and prune the shrubs and trees enumerated herein in an area from the applicant's lot line towards the ocean within the extension of the landowner's side lot lines projected towards the ocean.
- (2) The trimming and pruning allowed herein shall only be permitted between November 1st and the following February 28th.
- (3) The only vegetation that may be trimmed and pruned in the RC-1A, RC-1C or RC-1E Areas is limited to the following: Southern Waxmyrtle (*Myrica Cerifera*), Eastern Baccharis (*Baccharis Halimifolia*), and Papyrus trees (*Tallgrass, Sagum Schizum*). This vegetation may be trimmed and pruned so as to have a maximum height of no less than five (5) feet above the ground and shall be trimmed and pruned in accordance with the highest professional standards and in accordance with the guidelines promulgated by the Town of Sullivan's Island. In the case of Papyrus trees, cutting can extend below five (5) feet if recommended by the consultant hired under this Ordinance and approved by the Tree Commission.
- (4) The trimming and pruning allowed and all work performed shall be accomplished without the use of any heavy machinery, vehicles or other such machinery being brought into the RC-1 Area District or onto the beach front.
- (5) There shall be no trimming, cutting or pruning of any vegetation of any sort in the RC-1B and RC-1D Areas.

D. Trimming and pruning by a licensed commercial contractor.

- (1) Only a commercial contractor licensed by the Town of Sullivan's Island specifically for such purpose shall accomplish all trimming and pruning.
- (2) The Town shall make a list of qualified licensed commercial contractors available to those who apply for a permit pursuant to the terms of this Ordinance.
- (3) Both the landowner and the qualified contractor hired or retained by the landowner shall make the permit application.
- (4) To qualify, the contractor shall demonstrate to the Town that he/she has the experience to perform the trimming and pruning in accordance with the highest professional standards that he/she is capable of identifying the vegetation that may be trimmed and that he/she has read the Ordinance and is familiar with its conditions, regulations and penalties.
- (5) Each commercial contractor licensed by the Town of Sullivan's Island to perform the work allowed by this Ordinance shall, prior to the issuance of a permit, be required to sign an agreement to perform all work in a manner consistent with the provisions and restrictions of the Ordinance and guidelines set forth by the Town and the consultant as identified below.
- (6) The contractor shall file a certificate of insurance with the Town evidencing workers' compensation coverage and public liability coverage of at least One Million Dollars (\$1,000,000). The contractor shall also post a performance bond in the amount of Five Thousand Dollars (\$5,000) wherein he/she guarantees faithful performance of his/her duties and obligations hereunder in a manner consistent with this Ordinance and instruction by the Town's consultant. Additionally, the principal of each contractor shall agree to be personally liable for compliance with the terms of this Ordinance.

E. Fees and posting of permit.

- (1) A fee of Two Hundred Fifty Dollars (\$250) shall be paid by the applicant to the Town of Sullivan's Island for the granting of a permit to perform the work allowed hereunder.
- (2) The applicant shall also pay the costs charged by the licensed contractor for the actual cutting done pursuant to the application.
- (3) The permit shall be posted on the lot facing the street in plain view of the street at all times that any work is undertaken pursuant to said permit. Said permit shall be valid for the time specified in the permit with only one permit per lot allowed for each cutting season.

F. Performance.

- (1) All work performed pursuant to this permit, and all methods of trimming and pruning shall be performed in accordance with the highest professional standards and shall be monitored by and subject to the approval of the Town of Sullivan's Island and its consultant.
- (2) The Town and its consultant shall have the right to immediately stop any work being performed in a manner not allowed, permitted or approved by removing and revoking the permit posted pursuant to E.
- (3) At the conclusion of the trimming and pruning permitted herein, the consultant shall visit each site and issue a certificate to the Town and to the landowner certifying that the trimming and pruning has been performed in accordance with the terms and provisions of this Ordinance and highest professional standard. The cost of the consultant's site visits shall be included in the permit fee that shall be paid by each applicant.
- (4) All cuttings shall be removed from the RC-1 Area District by said commercial contractor upon the completion of said work and hauled off of the Island to an appropriate recycling dump by said contractor or used on the Island in such use as specifically approved by the Tree Commission.
- (5) Any person not complying with the terms of this Ordinance shall immediately forfeit said bond and shall be subject to all other terms and provisions of this Ordinance relating to fines and penalties in addition to the forfeiting of said bond.

G. Fines for violations.

- (1) The violation of the terms of this Ordinance shall constitute a criminal offense and shall be punishable by the Municipal Court of the Town of Sullivan's Island or other Court of competent jurisdiction.

- (2) Each tree or shrub which is trimmed or pruned in violation hereof, or poisoned or destroyed in any manner, shall subject the person so violating this Ordinance to a fine of Five Hundred Dollars (\$500) and/or thirty (30) days in jail.
- (3) Each other violation of this Ordinance shall subject the person so violating to a fine of Five Hundred Dollars (\$500) and/or thirty (30) days in jail.
- (4) Penalties prescribed herein shall be in addition to the forfeiture of the bond specified above. In addition, the violator shall pay for the replacement of vegetation in like species and volume as determined to be appropriate by the Town upon the professional recommendation of its consultant.
- (5) The fees generated by the permit application and fines from any violations of this Ordinance, as well as forfeiture of any bonds for violations thereof shall be set aside by the Town in a dedicated fund and used to pay its consultant and for such matters as appropriate studies and surveys of the land, its vegetation, wildlife and natural processes, mapping and photographing, also information and education programs and materials, as well as mitigation described in H.

H. Mitigation.

- (1) If any violation of the provisions and restrictions of this Ordinance and the guidelines for trimming and cutting occurs, wherein the perpetrator is not known, the Town shall undertake mitigation to replace the vegetation with like species and volume, upon the recommendation of the consultant, from funds available from fines and fees generated pursuant to this Ordinance as established in G(5).
- (2) If the perpetrator is known, then in addition to fines levied by the Town pursuant to this Ordinance, the Town shall institute civil proceedings to require said perpetrator to pay the cost of mitigation and to collect such other damages as are allowed by law. Fines and fees generated shall be used by the Town to replant vegetation in the specific area where any such loss occurred. It is the intent of this Ordinance to replace any vegetation so damaged or destroyed with like kind and volume.

Sec. 21-72. Maintenance of footpaths in the RC-1 Area District.

- A. Landowners living immediately adjacent to the RC-1 Area District may maintain existing dirt footpaths through the RC-1 Area District to the beach.
- B. Existing dirt footpaths shall not exceed six and one-half (6 1/2) feet in width; new paths shall not be created.
- C. Footpaths shall follow the natural contours of the land and dunes.
- D. No trees or branches one and one-half (1 1/2) inches in diameter or larger shall be cut or destroyed without first receiving permission from the Town of Sullivan's Island Zoning Administrator or Building Official.
- E. No fill or any other material whatsoever shall be brought in for said paths.
- F. Nothing contained in this section shall restrict the Town from maintenance of public constructed walkovers and emergency access through the RC-1 Area District.

Sec. 21-73. Tree Commission assistance with RC-1 Area District.

- A. The Town may seek the assistance of the Sullivan's Island Tree Commission to support the activities of this Ordinance as they pertain to the gathering, organizing and dissemination of information about the RC-1 Area District, and to the replacement of vegetation under mitigation.
- B. The Tree Commission is hereby given the following responsibilities in addition to those it already has:
 - (1) Provide guidance with the management of tree pruning and trimming within the RC-1 District;
 - (2) To study and monitor the impact of the pruning and trimming allowed under Sec. 21-71 with regard to the flora and fauna located within the RC-1 Area District;
 - (3) To study and monitor the impact of the pruning and trimming allowed under Sec. 21-71 as to the integrity of the RC-1 Area District as it relates to erosion control and beach stability, drainage, mosquito control, and the public welfare, safety, and health of the Town; and
 - (4) To study and make recommendations to the Town as to the management of all RC-1 Area District so as to preserve and maintain RC-1 Area District in accordance with the public welfare, safety, and health of the Town and the covenants and restrictions set forth in the Title to Real Estate dated February 12, 1991, conveying said land to the Town of Sullivan's Island.

- C. The Commission in the discharge of its duties may seek the advice of the consultant retained by the Town as set forth in this Ordinance.

Sec. 21-74. General uses in the RC-2 Area District.

- A. In the RC-2 Area District there shall be no construction of any type, no destruction of vegetation, except trimming, cutting and pruning of back beach bushes and trees as provided in Sec. 21-71, non-manmade changes of topography, however, the construction of private docks by owners of lots adjoining this area may be permitted subject to the restrictions of Sec. 21-75.

Sec. 21-75. Construction of private docks in RC-2 Area District.

- A. In the RC-2 Area District the construction of private docks by owners of lots adjoining this area may be permitted, provided approval of the Town of Sullivan's Island, U.S. Corps of Engineers, the Department of Health and Environmental Control/Office of Ocean and Coastal Resource Management (DHEC/OCRM) and any other governmental or regulatory agency with jurisdiction.
- B. The following restrictions govern the construction of docks in the RC-2 Area District:

- (1) No dock shall be permitted to be constructed which extends into the channel or extends so far as to interfere with navigation;
- (2) No dock shall be permitted to be constructed across marshland in the RC-2 Area District from the centerline extension of Station 18 to the centerline extension of Station 27 and no dock shall be permitted to be constructed in the marsh lands of the RC-2 Area District in the area located between the intersection of the eastern point of the Sullivan's Island Fire Rescue Squad Boat Landing lot located at the end of Point Street, TMS#523-05-00-070, and the Osceola Avenue right-of-way and the intersections of the western point of the lot located at 1010 Osceola Avenue, TMS# 523-06-00-003, and the Osceola Street right-of-way. In all other areas of the RC-2 Area District, no dock shall be permitted to be constructed where the length of the dock shall exceed three hundred (300) feet in total length; (4-18-06)
 - (a) Exception: a dock may extend up eight hundred (800) feet to reach a creek that is two hundred (200) feet or more in width (width of creek measured from land or marsh grass to land or marsh grass); however, said dock shall not be permitted to cross a creek that is greater than eight (8) feet in width to reach the two hundred (200) foot width creek.
- (3) Pier head, floating dock and boatlift.
 - (a) The head of the permanent dock/"pier head" structure shall be no greater in size than two hundred twenty-five (225) square feet and may include a bench not exceeding more than thirty (30) linear feet and twenty-four (24) inches in width. (4-18-06)
 - (b) In addition to the permanent pier head of the dock, there may be a floating dock no greater than eight (8) feet by twenty (20) feet or one hundred sixty (160) square feet. An attached structure for storage ("dock box") may be placed on a dock or floating dock provided it is included in the above two hundred twenty-five (225) square feet of the "head" or one hundred sixty (160) square feet of the floating dock and provided it does not exceed three (3) feet in height and does not exceed thirty-two (32) square feet in floor area;
 - (c) In addition to the permanent pier head of the dock there may be one boatlift, not to exceed four (4) vertical support pilings with a maximum lift capacity of thirteen thousand (13,000) pounds or one floating boat storage device with the capacity not exceeding that of the permitted boat lift. (4-18-06)
 - (d) The boat lift and primary access ramp or ladder to the floating dock shall only be accessed directly from the pier head; no additional walkways or catwalks shall be allowed to provide access to the boat lift or floating dock, nor shall access to these components be allowed from the walkway leading to the pier head.
- (4) No docks or pier heads or other associated structures shall be permitted closer than ten (10) feet from Extended Lot Lines with the exception of common docks shared by two adjoining property owners.
 - (a) Exception. A dock shall be permitted to cross over Extended Lot Lines in areas where angled docks currently exist and where these docks cross over Extended Lot Lines, provided the angled placement would result in the dock being shorter than if built within the Extended Lot Line setbacks and meets the criteria of Sec. 21-76 B (2) above.

1 Q. Was there ever a motion made by the
2 Town Council related to what to instruct them, Tim
3 Kana and his group?

4 A. Well, that was the decision that I just
5 described, which was that the Town administrator
6 would contact Kana and tell him that we didn't
7 think -- that there was a disagreement as to
8 whether that should be part of the presentation.
9 And if he were not willing and able to document

10 whatever he said that, you know, he should probably
11 not include it.

12 Q. Was there a motion made in session with
13 regards to what information should be contained on
14 the questionnaire that Tim Kana had presented?

15 A. There was a discussion in open session
16 about that. The decision -- and I don't know that
17 a vote was taken, because I'm not sure that it
18 required one -- this was just simply an informal
19 way -- or not an informal way, but one means of
20 facilitating public input, one of a number of means
21 of getting public input and reactions to their
22 presentation.

23 And as I recall, the decision of
24 Council was that the survey that was to be used for
25 people to evaluate the different options would

1 include only the elements that he was going to
2 include in his presentation. Therefore, if he was
3 not going to include property values, the
4 questionnaire would not -- or the survey form,
5 whatever you want to call it, would not include
6 property values.

7 Q. So was there a motion, or not?

8 A. I don't recall.

9 Q. Did you specifically tell Mr. Kana not
10 to consider property value?

11 A. Did I personally tell him? No.

12 Q. Did you somehow non-personally tell
13 him?

14 A. No. The communication -- the only
15 communication with him that I'm aware of was what I
16 just described from the -- by the Town
17 administrator, based on Council's direction to him.

18 Q. Explain to me again, if you would, why
19 the opinions of the voters about property values
20 would not be significant for purposes of taking
21 this opinion poll?

22 A. It was not an opinion poll. And if I
23 indicated that, I apologize.

24 Q. Or a decision matrix. Is that what you
25 said?

1 values listed on that opinion form?

2 A. No, I don't.

3 Q. Let me show you this letter from Tim
4 Kana and see if you recognize that.

5 A. I mean, I recognize the particulars,
6 but not specifically.

7 Q. If you look at the back, the second
8 page of Exhibit 2, does that format kind of look
9 similar to the final format? It is similar? If

10 you look at the form drafted by Tim Kana's group
11 as consultants for the Town of Sullivan's Island,
12 its property value is included as an issue of
13 consideration?

14 A. It's there, yes.

15 Q. Do you have any knowledge as to why
16 property values was excluded from the final form?

17 A. I do not.

18 Q. Based upon your response then, it was
19 likely Pat O'Neil, who would have been responsible
20 or you would have delegated this to Pat O'Neil, do
21 you think Pat O'Neil was responsible for moving
22 property values?

23 A. I couldn't answer that question.

24 Q. Do you agree with me that Pat O'Neil
25 was responsible for the final format?

1 A. I would agree to that, but I can't
2 tell you specifically why something would have
3 been added or deleted.

4 Q. Would there have been anybody else
5 other than town council members that would have
6 been responsible for finalizing that?

7 A. That would be me I think.

8 Q. You mentioned that you were on town
9 council when Mayor Anderegg was mayor?

10 A. Uh-huh.

11 Q. What was Mayor Anderegg's involvement
12 in the land transfer of the accreted lands to the
13 open land trust and back to the town?

14 A. Before I was on council, Mayor
15 Anderegg asked me and Charlie Swet, who is
16 deceased, and Bobby Thompson to seek out ways to
17 preserve that land. We were concerned about it.
18 Frankly, my main concern was that it be turned
19 into a county park.

20 Q. You wanted it to be a county park?

21 A. No.

22 Q. No, you did not want it to be a county
23 park?

24 A. Not at all. No, we didn't want that.
25 All of us went through investigation and major

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Nathan Bluestein, Ettaleah Bluestein,	)	Case No. 10-CP-10-5449
Theodor Albenesius and Karen	)	
Albenesius,	)	
	)	Town's Memorandum in Reply to Plaintiffs'
	)	Memorandum in Opposition to Town Motion for
Plaintiffs,	)	Summary Judgment On Grounds of Statute of
	)	Limitations and Untimeliness ¹
Versus	)	
	)	
Town of Sullivan's Island and	)	
Sullivan's Island Town Council,	)	
	)	
Defendants.	)	

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 JULIE J. ARMSTRONG
 CLERK OF COURT

The Plaintiffs arguments offering the general “sealed documents” statute of limitations do not overrule the sixty (60) day filing requirement of S.C. Code 6-29-760(d) that dooms most of the Complaint.² There are a number of reasons for this.

A Statute of Limitations is, by its nature, a “door shutting” device. The fact that Section 15-3-520 (sealed documents) does not itself close a door for years does not mean that some other law might not close it earlier. For instance, in Quail Hill³, the Plaintiff sued Richland County with claims including negligence and inverse condemnation relating to a challenged zoning ordinance. In contexts other than a zoning ordinance challenge, such claims would normally be

¹ The Town also wishes to incorporate by reference as if set forth fully herein all arguments and exhibits included in the Town's similar Memorandums in Support of Summary Judgment previously filed.

² S.C. Code 6-29-760(d) provides: “No challenge to the adequacy of notice or challenge to the validity of a [zoning] regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made sixty days after the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission.” (emphasis added.)

³ Quail Hill, LLC v. County of Richland, 665 S.E.2d 194, (SC App. 2009); overruled in part on other grounds, Quail Hill, LLC v. County of Richland, 692 S.E.2d 499 (SC 2010)

analyzed under a general, multi-year statute of limitations such as S.C. Code Ann. 15-3-530. However, the existence of a longer general statute of limitations in Title 15 did not prevent the Quail Hill court from applying the sixty (60) day rule of S.C. Code 6-29-760(d) since the claims were based on a zoning ordinance dispute. Thus, the existence of Section 15-3-520 does not bar application of the sixty (60) day rule of 6-29-760 in this case.⁴

Even if one imagined a conflict between Sections 15-3-520 and 6-29-760, the sixty (60) day rule of 6-29-760 should apply since that statute was enacted after Section 15-3-520 and is more specific to this situation. Though done without express discussion, Quail Hill is a clear example of this with Section 6-29-760. There, a longer generic statute of limitations under Title 15 was obviously found subordinate to the more specific sixty (60) day limit on zoning challenges. Another example is Rainey v. State, 414 S.E.2d 131, 132 (SC 1992) in which the court concluded “[b]ecause there is a conflict between 44-53-375(B) and the general second offense statute, the later, more specific crack cocaine statute must prevail.” See also, Stone v. State, 443 S.E.2d 544 (SC 1994)(more recently enacted and specific statute prevails to the extent of conflict.) Here dealing with the Accreted Land claims, Section 15-3-520 is a general statute of limitations. In contrast, Section 6-29-760 deals with a very specific, focused situation – attacks on the validity of zoning ordinances. Further, Section 15-3-520 was last amended in 1988, whereas Section 6-29-760 was enacted more recently in 1994. The sixty (60) day rule of S.C. Code 6-29-760(d) is thus unaffected by the Plaintiff’s proffered Section 15-3-520.

The following claims and/or relief should be barred by S.C. Code 6-29-760(d) because they directly, or by implication, rely on the invalidation of the challenged Zoning Ordinance.

⁴ The same is seen in other settings as well. For instance, torts are typically subject to a three year statute of limitations under S.C. Code Ann. 15-3-530. But even if the door under 15-3-530 remains open generally, a shorter time limit might still bar a tort claim. See S.C. Code Ann. 15-78-110 (two year statute of limitations for tort claims against the Government in certain instances.)

- Plaintiffs' First Cause of Action is for Declaratory Judgment requesting an order "invalidating all ordinances relating to the Accreted Land passed since February 12, 1991." Second Amended Complaint, Para. 73. This Cause of Action is clearly time barred by the words of Section 6-29-760(d).
- Plaintiffs' Second Cause of Action is for injunctive relief, basically barring the Town from enforcing the ordinances they believe to be contrary to the deed restrictions. See Para 77-82, Second Amended Complaint. But since Section 6-29-760(d) means that the zoning ordinances remain valid, injunctive relief cannot be appropriate.
- Plaintiffs' Third Cause of Action is for a Writ of Mandamus seeking a court order allowing them to perform certain cutting notwithstanding the Zoning Ordinances. See Para 84 - 87, Second Amended Complaint. Again, since Section 6-29-760(d) means that the zoning ordinances remain valid, it would be impossible to issue such a writ allowing Plaintiffs to ignore those ordinances without also invalidating them.
- Plaintiffs' Seventh Cause of Action seeks a ruling that the conditions that have occurred on the AL as a result of the Zoning Ordinances constitute a nuisance. See Para 116 - 122, Second Amended Complaint. However, since Section 6-29-760(d) means that the Zoning Ordinances are valid the trees protected by the ordinance cannot legally constitute a "nuisance"⁵ unless the zoning ordinance is invalidated.
- Plaintiff's Eighth Cause of Action seeks a ruling that the Town, by allegedly unlawful enforcement of invalid Zoning Ordinances, engaged in an inverse condemnation. See Para 124 - 126, Second Amended Complaint. Again, however, since Section 6-29-760(d) means that the Zoning Ordinances *are* valid the Town has not done anything that would constitute inverse condemnation.
- Prayer for Relief (b) – The Plaintiffs ask "[t]hat the Town ... be enjoined and restrained from interfering with the rights of the citizens of Sullivan's Island who own property immediately adjacent to the Accreted Land ... to cut, trim and prune, at any time or times, all variety of shrubs and trees in the Accreted Land to a height of no less than three feet above the ground;" This relief clearly seeks invalidation of the zoning ordinance. This is barred by Section 6-29-760.
- Prayer for Relief (c) – The Plaintiffs ask "[t]hat this Court invalidate the 1995 and 2005 Town Ordinances which limit what can be cut, trimmed or pruned...." Again, this is barred by Section 6-29-760.

⁵ "Nothing is a nuisance which the law itself authorizes." Home Sales, Inc. v. City of North Myrtle Beach, 382 S.E.2d 463, 469 (SC App. 1989).

Even if Section 15-3-520 did give the Plaintiffs a right to file a Cause of Action, that Section would not allow for much of the Plaintiffs' requested relief.

Even if Section 15-3-520 did apply, that Section would at most save only a sliver of the Plaintiffs' complaint. Even if one read 15-3-520 to allow various Causes of Action to be *filed*, nothing in 15-3-520 promises the existence of a particular *remedy*. Section 6-29-760(d) clearly bars a "challenge to the validity of a zoning ordinance." So regardless of whether 15-3-520 allows a particular claim to be filed, Section 6-29-760(d) prevents any remedy that would disturb the validity of the zoning ordinance. In most instances, this bar on "remedy" invalidates a cause of action entirely. In other instances, it might be arguable that within a particular Cause of Action certain requested remedies are barred by 6-29-760(d), while other requested remedies may go forward. For instance, with the Second Cause of Action seeking Injunctive Relief, the Plaintiffs seek as remedies (a) an order enjoining the Town from collecting certain taxes⁶ and⁷ (b) an order prohibiting the Town from enforcing the cutting ordinance.⁸ *Arguably*, the first of these requested remedies might not seek to invalidate the Town's zoning ordinance and thus might be governed by Section 15-3-520 rather than S.C. Code 6-29-760. However, even if Section 15-3-520 allowed for some of the requested remedies, Section 6-29-760(d) clearly prohibits any portion of relief that would invalidate the zoning ordinance.

⁶ Note that other areas of substantive law bar injunctions prohibiting taxation. These are addressed in the Town's separate Motion for Summary Judgment.

⁷ See Para. 81, Second Amended Complaint.

⁸ See Para. 82, Second Amended Complaint.

Plaintiffs' Are Wrong In Claiming That The Statute of Limitations for Breach of Contract Accompanied by Fraudulent Act Is Clearly Based On Discovery Of The Alleged Fraud

The Plaintiffs argue that the statute of limitations on their "fraud" claim started running only after they received certain documents through the civil discovery process in 2010. Plaintiffs cite several cases regarding the statute of limitations for fraud actions and the fact that such limitations periods commence on the date of discovery of the fraud. But this Court must remember that "fraud" is a different cause of action than "breach of contract by fraudulent act" and the Plaintiffs only pled the latter. The United States District Court for the District of South Carolina in The Wilson Group, Inc. v. Quorum Health Resources, Inc., 880 F.Supp. 416, 424 (D.S.C. 1995), reviewed South Carolina law and determined that "[a]lthough a cause of action for breach of contract accompanied by fraudulent act has elements of contract and tort, it is considered contractual in nature. Therefore, Wilson Group's cause of action for breach of contract accompanied by fraudulent act is governed by the limitations period for contract actions." The Court went on to focus on evidence about when the Plaintiffs learned of *the breach*, ultimately finding no statute of limitations bar. The Town believes that a similar focus on the alleged breach, not the alleged manner of breach, is appropriate here.

In any event, the conduct claimed as "fraud" in the Plaintiffs' Memorandum is not legally an "act" by the Defendant and thus can't logically be the Statute of Limitations trigger. South Carolina has defined by statute that there are two ways that a municipality may formally take action. See S.C. Code Ann. 5-7-260(listing certain act of Council which must be done by ordinance and providing that in all other matters Council may act by passage of a resolution.) Indeed, the 1995 and 2005 cutting rules the Plaintiffs challenge were adopted by Ordinance and were "acts". The 2009 Questionnaire drafting process was certainly not an official "act" of the Town. Even the Plaintiffs evidently acknowledge this. Plaintiffs' counsel actually told the

Town Administrator before a court reporter: "I'm not aware of any formal action that's been taken with regard to the accreted land management plan – with regard to management of the accreted land since the last ordinance in 2005" and later asked the Town Administrator to confirm for Plaintiffs that "none of the accreted land plan has been formally adopted". See Deposition of Benke, p. 48 – 49 (copy attached)

Even if the "questionnaire" were somehow an "act" of the Town, there is no logical or legal relationship between the questionnaire and the "breach" claimed by the Plaintiffs. There is no dispute that Accreted Land cutting permits are governed by the Town's 2005 zoning ordinance and before that, the even more restrictive 1995 Ordinance. See Second Amended Complaint, Prayer for Relief "c" (asking that "this Court invalidate the 1995 and 2005 Town ordinances which limit what can be cut....") There is also no dispute that the questionnaire didn't exist before 2009. See Exhibit 15 to Second Amended Complaint. No matter what one thinks of the questionnaire drafting process, it is impossible to call a 2009 event fraud "accompanying a breach"⁹ that occurred in 1995 when the Town's ordinance was adopted. Even the Plaintiffs have said that the last formal act by the Town relating to the Accreted Land happened in 2005. See Benke Deposition, at p. 48 – 49.

Section 15-3-520 By Its Own Terms Does Not Appear To Apply To Certain Claims.

Sixth Cause of Action – Unfair Trade Practices Act

The Plaintiffs' Unfair Trade Practices Act claim should not be evaluated under the general Statute of Limitations set forth in Section 15-3-520 because the Unfair Trade Practices Act itself provides a specific limitations period of three years. See S.C. Code Ann. 39-5-150

⁹ alleged

("No action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit.")

For the same reasons stated in the "fraud" discussion above, the limitations period should not run from the 2009 questionnaire date. The questionnaire was not an official "act" of the Town. Further, it clearly did not impact the passage of the 1995 or 2005 ordinances about which the Plaintiffs complain. The only thing it could arguably relate to is a policy which has never been adopted and which does not apply. Since the Questionnaire has no relation to any "act" in this case, it cannot serve as the trigger point for the statute of limitations.

Seventh Cause of Action - Nuisance

The "sealed document" statute of limitations is applicable to Causes of Action "upon a sealed instrument." S.C. Code 15-3-520. "Nuisance" is not, at its heart, a claim based on an "instrument", contract or other writing. The Plaintiffs claim is that they must suffer mosquitos, pests and ugly views of nature and that it is unreasonable for one neighbor (the Town) to put this burden on another. That claim, if it is valid at all, exists whether there is a contract in place or not. Consequently, the nuisance claim should not properly be viewed as a claim "upon a sealed instrument" and the twenty (20) year statute of limitations has no application.

Perhaps recognizing this, the Plaintiffs advance a "periodic recurring nuisance" theory under which they claim the statute of limitations resets every year. The Town does not quarrel with the idea that "permanent nuisances" that never change over time have a single statute of limitations period commencing with the injury (no matter how long that injury continues) and that "periodic recurring nuisances" may have a new statute of limitations commence with the

occurrence each separate injury event. The Town does disagree with the Plaintiffs as to which category the current dispute falls into.

As explained in the Plaintiffs' cited cases, the test is whether the nuisance is abatable and that there are separate injuries which occur repeatedly over time. "A new statute of limitations begins to run after each separate invasion of the property." In re Estate of Ann Burns Livingston v. Livingston, 744 S.E.2d 203 (Ct. App. 2013). With the Accreted Land, it cannot be said that there have been separate injury events or "separate invasions of the property." *First*, the Town hasn't invaded anything. The complaint here is about an Act of God – plant and animal growth. *Second*, the Plaintiffs' desired cutting has been barred in a basically unchanged way since 1995 by ordinance.¹⁰ The plants blocking the Plaintiffs' view were protected from cutting by a single "act" in 1995 and have been growing as an Act of God constantly since. Thus, this is unlike a situation in which a neighbor's pond might overflow once every couple of years, thus creating a separate injury with its own statute of limitations. Here, any claimed "injury" occurred in 1995 and has simply continued to blossom ever since.¹¹

The Plaintiffs' Argument to Equitably Exempt Certain Relief Claims From Applicable Time Limits Ignores S.C. Code Ann. 6-29-760(d)

The Plaintiffs incorrectly believe that general equitable principles should exempt their injunctive relief claims from having to be timely filed. The Plaintiffs cite Buffington v. T.O.E.

¹⁰ The ordinance was amended in 2005, but Plaintiffs find both versions unacceptable because they similarly deviate from the ordinance in place in 1991 that is preferred by the Plaintiffs.

¹¹ Any argument that a separate injury or legal "event" happens each day a plant grows is absurd. For instance, if a ball were dropped off a roof, the fact that its speed of descent is faster after ten seconds of freefall than the speed after five seconds does not mean that there was a separate "event" every second the ball is in flight. Conceptually there is a single "event" (the ball being dropped) regardless of the resulting speed. The same is true here. The Plaintiffs desired cutting became barred by zoning ordinance in 1995 and has not been lawful since. That fact doesn't change based on how much the plants have grown over the years.

Enterprises, 680 S.E.2d 289 (SC 2009) for the proposition that equitable actions to enforce restrictive covenants are not subject to a statute of limitations since they sound in the Court's equity powers. However, regardless of whether Buffington's rule may apply generally, in this case there is a specific statute. The South Carolina Legislature has decreed that actions challenging the validity of zoning ordinances are barred unless filed within sixty (60) days. There is no way to view the Plaintiffs' requested non-monetary remedies as anything but a challenge to the validity of the zoning ordinances. The Plaintiffs expressly ask this Court to enjoin the Town from enforcing, and to "invalidate", the 1995 and 2005 zoning ordinances. See Second Amended Complaint, Para. 82, 86, Prayer for Relief "c", and Prayer for Relief "c", among others. Since they seek to invalidate the zoning ordinance, they must abide by the challenge requirements of S.C. Code Ann. 6-29-760(d). They have not.

The Plaintiffs' other equitable argument, an allegation that the Town has unclean hands, is not well placed. The Plaintiffs point to the process by which the Town sent out a questionnaire in 2009 to ask about the Accreted Land. As discussed above, the challenged ordinance was passed in 1995 (and amended in 2005). There is no way that a 2009 questionnaire could logically have any bearing on the ordinances that are the heart of the breach Plaintiffs claim.

Finally, to the extent the Plaintiffs direct this court to Buffington, equitable maxims and public policy arguments, they should also direct the Court to Buffington's expressly stated hesitation to enforce restrictive covenants on title. "A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Buffington, 680 S.E.2d at 291.

Bloom v. Town of Sullivan's Island Board of Zoning Appeals

This Court, in Bloom, applied the sixty (60) day time limit to a dispute over the same Sullivan's Island cutting ordinance governing the Accreted Land. The Plaintiffs here waited years longer than Mr. Bloom. Just as Mr. Bloom was time-barred, so are the Plaintiffs here.

The Plaintiffs attempt to distinguish their claim from Bloom in multiple ways. There certainly are factual differences – that is true every time a court evaluates precedent. But none of the distinctions drawn by the Plaintiffs undermine the basic logic of Bloom. The Plaintiffs here, just as in Bloom, abut the Accreted Land and are upset that vegetation on the Accreted Land blocked a view of the ocean. The Plaintiffs here, just as in Bloom, are asking this Court to invalidate the Town's ordinance. The Plaintiffs here, just as in Bloom, waited more than sixty days after adoption of the ordinance to challenge it. While there were multiple grounds listed by the Bloom Court to support its decision, this Court clearly commented "the Blooms failed to challenge the legality or constitutionality of the ordinance within 60 days of its adoption; as such any challenge is barred by law." The Plaintiffs distinctions are without significance.

Section 15-3-530

The Town's initial brief argued that, in instances in which Section 6-29-760(d) (or some other statute) did not apply, a fallback three (3) year statute of limitations would apply under S.C. Code Section 15-3-530. With respect to causes of actions / remedies that are outside of 6-29-760(d) and all other statutes and which specifically are predicated on the covenant documents, the Town withdraws that assertion. The Town believes only the damages portions of the Inverse Condemnation, Breach of Contract and Breach of Contract Accompanied by Fraudulent Act claims might fall into this category. (These claims are, of course, barred by other grounds in any event).

This 24th day of March, 2014


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Attorneys for the Defendants

Exhibit A – Benke Deposition Excerpt

Andrew Benke February 19, 2014

Page 1

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT
NATHAN BLUESTEIN, ETTALEAH BLUESTEIN,
M.D., THEODORE ALBENESIUS, III,
AND KAREN ALBENESIUS,
Plaintiffs,

vs. CASE NO. 2010-CP-10-5449

TOWN OF SULLIVAN'S ISLAND and
SULLIVAN'S ISLAND TOWN COUNCIL,

Defendants.

DEPOSITION OF: ANDREW BENKE
DATE: February 19, 2014
TIME: 10:35 AM
LOCATION: 2050 Middle Street
Sullivan's Island, SC
TAKEN BY: Counsel for the Plaintiffs
REPORTED BY: Roxanne M. Easterwood,
Registered Professional Reporter

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1 that's been taken with regard to the accreted land
2 management plan -- with regard to management of
3 the accreted land since the last ordinance in
4 2005.

5 A. Correct.

6 Q. That's the last formal action that's
7 been taken?

8 A. Yes.

9 Q. Pat O'Neil in his deposition said that
10 there was a decision of council to instruct the
11 town administrator to communicate with a
12 consultant that if he couldn't support the
13 property value analysis that it should not be
14 included. Do you have a recollection of that?

15 A. Of the council?

16 Q. Yes.

17 A. Not specifically.

18 Q. You're not saying it didn't happen,
19 you just don't recall?

20 A. Right. I don't recall if it was at a
21 specific meeting or an executive session. I do
22 not recall.

23 Q. Who is Jeff Jackson?

24 A. Jeff Jackson is a contract worker for
25 the Town of Sullivan's Island. He is employed

Page 49

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Theodor Albenesius and Karen	)	
Albenesius,	)	Reply to Plaintiffs' Memorandum of Law
	)	and Equity Regarding Town Motions
Plaintiffs,	)	For Summary Judgment / Motion to Strike ¹
	)	
Versus	)	
	)	
Town of Sullivan's Island and	)	
Sullivan's Island Town Council,	)	
	)	
Defendants.	)	

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2014 APR 11 PM 3:23
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CLERK OF COURT
BY 

Arguments for Which Plaintiff Offers no Meaningful Response

"If you don't have something good to say, don't say anything at all." That appears to be the approach of the Plaintiffs' Response memo to some of the hardest hitting Summary Judgment arguments raised by the Town.

Deed Restrictions

The Plaintiffs acknowledge that, lacking a common law right to a view, any right they might have here must flow from the Deed Restrictions. The Plaintiffs' then accuse the Town of breaking promises made in the Deed Restrictions. In a nutshell, the Plaintiffs claim that the Deed Restrictions contain a promise that vegetation on the Accreted Land would, for at least fifty years, be cut in exactly the same manner as it was the day the deed was signed in 1991. The

¹ The Town wishes to incorporate by reference all arguments contained in its prior briefs.

problem for the Plaintiffs is, the Deed Restrictions never promised that the cutting rules or the view would remain unchanged.

Rather than promising perpetually unchanged cutting rules, the Deed Restrictions specifically state that "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." Deed Restrictions, Para. 6. There is no question that the 1995 and 2005 amendments allow less cutting (i.e. are "more restrictive") than the ordinance in place on the day the Deed Restrictions were signed. In light of Paragraph 6 of the Deed Restrictions, it is clear that the Plaintiffs claimed "breach" is based on a misstatement of the "promise." When the actual Deed Restriction language is used instead of Plaintiffs' misstatement, it is clear that the Town has scrupulously honored the "promise" by assuring that the AL cutting ordinance on the books today is the same or "more restrictive" than the one in place in 1991. The Plaintiffs have no meaningful response.

The Plaintiffs also offer no meaningful response to the fact that the Deed Restrictions give the Town the "unrestricted authority to trim and control vegetation growth." See Deed Restriction, Para. 2. "Authority" means that the Town (not the Plaintiffs) has the power to decide whether to cut. "Unrestricted" means that the Town (not the Plaintiffs) gets to decide when to cut, how much to cut, and even whether to cut. "Unrestricted authority" means that there is no requirement that the Town cut at all. This is fatal because the Plaintiffs' arguments are all based on the idea that the Deed Restrictions gave the Town an "obligation" to cut. That premise does not exist in the Deed Restrictions. The Plaintiffs have no meaningful response.

Yearly Lowcountry Open Land Trust Inspections

The Plaintiffs claim a breach of contract, but they ignore the fact that the Lowcountry Open Land Trust (LOLT) says there is no breach. The LOLT annually inspected the property and has reported in writing that the Town's management of the Accreted Land is compliant with the Deed Restrictions. This is extremely significant for several reasons. *First*, the LOLT is a nature conservation organization with an objective, detached frame of reference. The Plaintiffs, on the other hand, are property owners reading the Deed Restrictions through the lens of their own self-interest. *Second*, the LOLT as grantor of the Deed is better positioned to read and accurately enforce its own "contract" than the Plaintiffs who are merely third-party beneficiaries. *Third*, the difference of opinion between the Plaintiffs and the LOLT highlights why it would be unworkable to allow the Plaintiffs' reading of the Deed Restrictions to prevail over that of the primary parties to the deed. For while *these* property owning Plaintiffs might read the Deed Restrictions one way, there is nothing to say that hundreds of other property owners on the island (all of whom are third party beneficiaries just like the Plaintiffs) might not read it differently. The fact that the challenged Accreted Land ordinances were adopted by the political process suggests that a majority of islanders actually disagree with the Plaintiffs. Suffice it to say, the Deed itself can't simultaneously be subject to the conflicting interpretations of hundreds of landowners. Instead, such choices between competing visions of policy and opinion are for the ballot box, not a courtroom. The Plaintiffs cannot offer any meaningful response to this.

Sixty Day Challenge Window of S.C. Code 6-29-760

The Plaintiffs fail to adequately explain why the centerpiece of the relief they demand (invalidation of the 1995 / 2005 cutting ordinance) is not time-barred by the sixty (60) day rule of S.C. Code Ann. 6-29-760(D). The statute is clear:

“No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made sixty days after the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission.”

Even the Plaintiffs admit that this case is a challenge to the validity of the Town's 1995 and 2005 zoning ordinances.² Trying to avoid the sixty (60) day rule, the Plaintiffs offer various theories, such as longer statutes of limitations because the 1991 Deed Restrictions were a “sealed document.” What Plaintiffs are unable to do, however, is explain why the principal relief they request (invalidation of the zoning ordinance) is not barred. Even if other types of relief might be theoretically possible³, and even if other Statutes of Limitation periods might apply to other types of relief, the Plaintiffs cannot get away from the fact that the Zoning Ordinance they attack cannot be invalidated since they did not challenge it within sixty (60) days of its enactment. They also cannot answer how it could make sense to give them other relief while the ordinance itself is legally unassailable.

Impairment of Legislative Power

The Plaintiffs have failed to offer any meaningful explanation for why their interpretation of the Deed Restrictions is not barred by South Carolina's law against impairment of legislative power. The Plaintiffs are quite clear that they view the Deed Restrictions as a fifty (50) year

² See Plaintiffs' Memorandum of Law and Equity at p. 27 (“... Plaintiffs are certainly seeking to overturn zoning ordinances passed in 1995 and 2005....”), and p. 29 (“...while the Plaintiffs certainly argue that the 1995 and 2005 zoning ordinances should be repealed....”). See also, *Id.* at 17 (Plaintiffs apparently challenging zoning ordinance by questioning existence of a rational basis.)

³ Here, for other reasons such as the Tort Claims Act and other bodies of law, most if not all of the Plaintiffs other forms of requested relief are also barred for other reasons.

promise and contract that the cutting ordinances would remain unchanged.⁴ The law of South Carolina is equally clear that a court will generally not enforce a contract which restricts the authority of the legislature beyond the term of the legislators that signed the agreement. See Piedmont Public Service District v. Cowart, 459 S.E.2d 876 (SC App. 1996). See also, Cunningham v. Anderson County, 741 S.E.2d 545 (SC App. 2013) In other words, the Council leaving office must pass on to the successor Council the full (unimpaired) government powers of the office and cannot, by contract, give away the powers that successor councils should enjoy. See Id. at 880-882. See also, Newman v. McCullough, 46 S.E.2d 252, 255-256 (SC 1948). The Plaintiffs offer no meaningful explanation for how their interpretation of the contract could be enforced in light of such authority.

Points On Which The Plaintiffs Contradict Themselves

Contradiction I: The “Exact” 1991 Condition of the Accreted Land

The Plaintiffs contradict themselves about whether the Deed Restrictions require the Town to maintain the Accreted Land exactly as it was in 1991. In their most recent brief the Plaintiffs write: “The Plaintiffs clearly do not believe (nor have they argued) that the Accreted Land be kept in the exact same condition as it was in 1991.” But only a month ago the Plaintiffs claimed that under the deed restrictions “the predominant plan and use of the property was to preserve this land precisely the way it physically looked in 1991....” Plaintiffs’ Memorandum in Support of Summary Judgment, pg. 13 (emphasis added.)

Given that the Plaintiffs now admit that the Deed Restrictions do not require the Accreted Land to remain precisely the same, the questions then become what change to the Accreted Land

⁴ See Plaintiffs’ Memorandum of Law and Equity, p. 5 (“To merely mention a single, significant change ... from the many 1991 promises that were supposed to be followed for fifty (50) years....”)

is acceptable and who decides. In this instance, the Deed Restrictions themselves provide an answer. Paragraph 2 of the Deed Restrictions leaves the Town with the unrestricted authority to control vegetation trimming. Further, the Deed Restrictions specifically leave the Town with the unrestricted authority to pass ordinances that are more restrictive than existed in 1991. See Deed Restrictions at Para 6. There can be no dispute that the 2005 ordinance challenged here is more restrictive in terms of what may be cut on the Accreted Land – that is the Plaintiffs’ whole grievance. The Plaintiffs now admit that the condition of the Accreted Land may change and the Deed Restriction tells us that the vegetation trimming changes that occurred here were specifically allowed.

Contradiction 2: Is This Case About the View, or About Public Safety

The Plaintiffs ignore their own testimony arguing that their “claims go to actual safety issues and not merely ‘scenic views’” and that the failure to trim is “harmful to the health, welfare, and even safety of some of the Plaintiffs’ own children and grandchildren.....” See Plaintiffs’ Memorandum of Law and Equity at p. 16. While the Plaintiffs try to paint a safety-based argument to avoid summary judgment, at least two of the Plaintiffs were candid at deposition that they did not care about safety and nuisance concerns. Consider the testimony of Plaintiff Karen Albenesius:

- 13 *Well, I'm not asking you that you have to agree with the*
14 *assumption. I'm just saying for purposes of this*
15 *question, I'd like you to assume that. So you had to make*
16 *a decision between one state of the world or another state*
17 *of the world, which would you choose? More snakes or more*

18 view?

19 A I would choose more view.

20 Q Same question with mosquitoes. I want you to assume that,

21 just assume for purposes of the question, that fewer

22 mosquitoes would live in a grown up forest than would live

23 there if it was trimmed every year to three feet. So

24 you've got to choose between a better view, and more

25 mosquitoes, or no view, or less view, and, you know,

23

1 better mosquito situation. Which would you choose?

2 A Well, again I would say that I don't believe in the

3 assumption, but I would agree to trim for more views.

4 Q Okay. I'd like you to assume for a moment that the uncut

5 accreted land, forest if you will, provides some stability

6 to hold sand, and houses, and all that kind of stuff, in

7 place during hurricanes and storms. Such that, cutting

8 down to three feet would actually increase hurricane and

9 storm risk. Now, you have to choose between the view and

10 increasing the storm risk. Which would you choose?

11 A Again, I'm going to say I don't agree in that assumption.

12 I've read many things to the contrary, particularly in

13 that area, that, that would not help in a hurricane case.

14 Q I understand.

15 A So under that assumption, I would say I would cut

16 regardless.

Deposition of Karen Albenesius, pg. 22 -23

See Also, Deposition of Theodore Albenesius, Pgs. 27 - 30.

Page 29

- 1 Q How about the - Up there at the top the Council finds that
2 the accreted land area is constantly shifting in
3 unpredictable periods of time, and sand dunes, and
4 vegetation that ceaselessly change, and all that stuff.
5 You read that to us a second ago.
6 A Uh-huh.
7 Q If cutting down to three feet would be less beneficial, in
8 terms of holding the soil in place, than the current rule,
9 would you still be in favor of moving it down to three
10 feet?
11 A Could you repeat that, please?
12 Q Okay. If you found out that the current rule of five feet
13 did a better job of holding the dunes, and the soil, and
14 the sand in place than would be done if the rule changed
15 down to three feet, would you favor keeping it at five, or
16 would you still want to go to three so your views improve?
17 A Three.
18 Q Okay. Now, in this section that the Council also found
19 that these, this area, the accreted land, left in natural
20 state provides protection to adjoining land owners and
21 their properties from the hazards of high tides and floods
22 caused by hurricane's, tropical storms, and seasonal
23 tides. If you learned that cutting down to three feet
24 would decrease the protection that, that was giving you,
25 would you still want to reduce the cutting height so that

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- 1 you had a better view?
2 A No. Cut it to three.
3 Q Okay. So even - If cutting down to three feet, changing
4 that rule from five foot down to three foot, increased the
5 number of rodents that were out there, would you still
6 want to move it down to three feet to improve your view?
7 A Yes. I paid for a view. And I paid millions of dollars
8 to have a view, and I don't have one now.
9 Q Okay. So it's all about the view?
10 A Yes.
11 Q Natural, un-natural, you want your view?
12 A Correct.
13 Q Okay.
14 A That's the way it was in '81.
15 Q More rodents, less rodents, you want the view?
16 A I want the view.

This case isn't about public safety. Theodore Albenesius spoke the truth – "A: I paid for a view. And I paid millions of dollars to have a view, and I don't have one now. Q: Okay, so it's all about the view? A: Yes."

Contradiction 3: Equitable Relief versus Dollar Damages

In arguing that the Tort Claims Act (TCA) should not bar the Breach of Contract by Fraudulent Act claim, the Plaintiffs in part argue that the TCA does not apply because they seek injunctive relief. See Plaintiffs Memorandum of Law and Equity at p. 7.

The problem with this argument is the Plaintiffs' Second Amended Complaint. Under Breach of Contract Accompanied by Fraudulent Act the Plaintiffs specifically seek "consequential, actual and/or punitive damages as the Court may see fit for the independent tortious wrong associated with the breach of the contract." See Second Amended Complaint, Para. 107. The Plaintiffs do not request mere injunctive relief in that cause of action. Thus, the Plaintiffs' argument doesn't work to avoid the TCA bar.

Unfair Trade Practices Act

The Plaintiffs cannot avoid the case of Health Promotion Specialists, 743 S.E.2d 808 (2013) by arguing that the unfair "act" was something other than the enactment of the challenged zoning ordinances. See Plaintiffs' Memorandum of Law and Equity at p. 47-50. The South Carolina Supreme Court in Health Promotion Specialists made clear that legislative enactments (here, the zoning ordinance) cannot constitute the "act" for an Unfair Trade Practices Act claim.

The Plaintiffs try to avoid that by calling the execution of the Deed (their “contract”) the “act” in question. See Plaintiffs’ Memorandum of Law and Equity at p. 52. The problem with that logic is that there is nothing the Plaintiffs claim was unfair or improper about the *execution* of the deed in 1991. The entire premise of the Plaintiffs’ claim is the Town acted improperly by amending the Accreted Land ordinances in 1995 and 2005. That claim is barred.

Questionnaire

The Plaintiffs devote extensive discussion to a red herring - the public opinion questionnaire. They attach various labels such as “fraud” or “unfair trade practices” to the drafting of the questionnaire. But beneath the bluster, the Plaintiffs are unable to answer the most basic question – relevance. It is undisputed that the 2009 questionnaire was drafted years after the Town passed the 1995 and 2005 amendments that the Plaintiffs complain about. Moreover, it is undisputed that the questionnaire related to a proposed ordinance change that was never adopted. Whether the questionnaire was drafted well or poorly, it is impossible to demonstrate its relevance to any claim in this case.

Injunctions Barring Taxation

The Plaintiffs attempts to distinguish themselves from Brackenbrook and Riverwoods cause them more problems than they solve. Plaintiffs argue that those cases “stand primarily for the proposition that the plaintiffs in those cases either (a) had an adequate remedy at law (paying taxes under protest) or (b) failed to exhaust their administrative remedies.” Plaintiffs Memorandum of Law and Equity at p. 53. Plaintiffs then assert that “Plaintiffs have timely paid all of their property taxes. At least one of the Plaintiffs has even contested their taxes with

various Charleston County officials.” Id. In other words, the Plaintiffs brief says that the Plaintiffs have an adequate remedy at law (property tax appeal process) and that they have used it. Far from distinguishing themselves from Brackenbrook, the Plaintiffs have admitted that the case bars their claim. They have admitted that they possess, and utilized, a remedy at law. No injunction may issue to bar taxation.

Plaintiffs’ Description of the 1981 Ordinance Is Inaccurate

The Plaintiffs inaccurately portray the contents of the 1981 zoning ordinance in several regards, apparently to try to magnify the significance of the Town’s 1995 and 2005 amendments. Consider the following:

- *Plaintiffs’ Claim:* The 1995 amendment for the first time made it a “crime” to violate the Accreted Land ordinance. See Plaintiff’s Memorandum of Law and Equity at pp. 5-6, and p. 19.

- Inconvenient Truth: Violation of nearly every municipal ordinance is a misdemeanor punishable by up to thirty days in jail. See S.C. Code Ann. 5-7-30 (“The municipal governing body may fix fines and penalties for the violation of municipal ordinances ... not exceeding five hundred dollars or imprisonment for not exceeding thirty days.”)
- Inconvenient Truth: The 1981 Town Ordinance contained the following:

Sec. 21-57. Penalties for violation.

Any person violating any provision of this chapter shall be guilty of a misdemeanor and, upon conviction, shall be fined, as determined by the Municipal Court for each offense. Each day such violation continues shall constitute a separate offense.

Nothing herein contained shall prevent the Town from taking such other lawful action as is necessary to prevent or remedy any violation. (8-1-77 and 8-21-78, 8808)

- Inconvenient Truth: The Deed Restrictions themselves actually require the Town to make violation of the Accreted Land rules a crime:

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.

- *Plaintiffs' Claim:* The Plaintiffs describe the 1981 Ordinance as allowing residents a virtually "unlimited right to trim and cut trees." See Plaintiffs' Memorandum of Law and Equity. P. 6

- Inconvenient Truth: Residents did not have an unlimited right to trim and cut at the time the Deed Restrictions were signed. The 1981 ordinance specifically required residents to obtain permits from the Town and gave the Town Administrator discretion to give "due regard for existing climatic conditions, the season of the year and the effect of the cumulative trimming,....." See Section 21-39 of 1981 Ordinances.

Changes to the Town's Zoning Ordinance Were Completely Rational and Reasonable.

The Plaintiffs try to second guess the legislative wisdom of the winter cutting season rules installed in the 1995 amendment. They do this by suggesting it was adopted without adequate factual study and argue that it is useless to allow the Plaintiffs cut during the dormant winter season. See Plaintiffs' Memorandum of Law and Equity at p. 19 - 20. This argument simply doesn't work.

First, such challenges are time barred by S.C. Code 6-29-760(D).

Second, the Town need only demonstrate some hypothetical justification.⁵ No empirical support is required under Rational Basis Review. Here, it is easy to see justifications. Plants are typically pruned during the dormant season for plant health. See University of Minnesota Extension Service “Pruning Trees and Shrubs” (“The late dormant season is best for most pruning. Pruning in late winter, just before spring growth starts leaves fresh wounds exposed for only a short length of time....”)⁶ Further, dormant season pruning assures that the fewest number of birds will be disturbed. See Sea and Sage Audubon Society “Seasonal Tree Trimming or When to Trim Your Trees So That The Birds Are Not Harmed” (advocating winter pruning.⁷)

Third, the Plaintiffs’ argument that winter pruning is so useless as to be “virtually an utter nullity” is ridiculous. See Plaintiffs’ Memorandum of Law and Equity at p. 20. Saying that yearly pruning is useless because it isn’t during growth season is like saying a monthly haircut is useless because your hair grows on the days in between.

OCRM Critical Line / Ripeness

The Plaintiffs cannot avoid the impact of OCRM’s notification that even a victory in this lawsuit would not be sufficient to let them cut as desired. The Plaintiffs argue that OCRM’s letter does not pose a problem because the Deed Restrictions allow for remedies, such as dollar damages, in addition to injunctive relief (cutting). But whether monetary damages are an allowable remedy under the deed misses the point. In order to recover damages a Plaintiff must show that a Defendant’s conduct caused the Plaintiff harm. Here, the claimed “harm” is high

⁵ See McKnight v. State, 661 S.E.2d 354, 364 (SC 2008) (“Next, even if this Court were to consider child abusers similarly situated to illegal abortion seekers, the determination of whether a classification is reasonable is initially one for the legislative body and will be sustained if it is not plainly arbitrary and there is a reasonable hypothesis to support it.”)

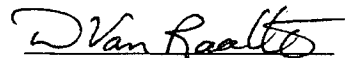
⁶ <http://www.extension.umn.edu/garden/yard-garden/trees-shrubs/pruning-trees-shrubs/>

⁷ <http://www.seaandsageaudubon.org/Conservation/conservationtree.htm>

vegetation. OCRM's letter makes clear that the Plaintiffs would experience that condition whether the Town ordinance existed or not because the Plaintiffs lack State permission to cut.⁸

The Plaintiffs also miss the point of "Ripeness" when they argue that they should be awarded damages / relief now with the idea that they can get permission from OCRM after this court rules. That argument completely ignores the whole concept of Ripeness. At the time of this suit the Plaintiffs lack required state permissions. While it might be that they could present a ripe claim later if they filed after obtaining OCRM permits, the fact remains that they do not have State permission now. The Plaintiffs have a ripeness problem.

This 10th day of April, 2014



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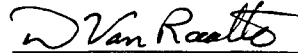
⁸ While the Plaintiffs point to a letter from Tommy Hartnett as a basis for damages, it is clear from the face of that letter that it deals with the presence / absence of vegetation and does not even purport to apportion or differentiate between the impact of OCRM and Town rules.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Nathan Bluestein, Ettaleah Bluestein,	)	Case No. 10-CP-10-5449
Theodor Albenesius and Karen	)	
Albenesius,	)	
	)	Defendants' Motion for Partial Summary Judgment
Plaintiffs,	)	regarding Breach of Contract Accompanied by
	)	Fraudulent Act Claim
Versus	)	
	)	
Town of Sullivan's Island and	)	
Sullivan's Island Town Council,	)	
	)	
<u>Defendants.</u>	)	

FILED
 2014 FEB 28 AM 11:30
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

PLEASE TAKE NOTICE that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, the Defendants, by and through their undersigned counsel, will move before the Hon. Judge Scarborough in Charleston County, South Carolina, for an Order granting Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. This motion is based, in part, on the inability of the Plaintiffs to demonstrate fraud or legally collect from a governmental entity based on fraud. This motion is further supported by statutory law, caselaw and by the Defendants' Supporting Memorandum.

This 26 day of Feb, 2014


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COUNTY OF CHARLESTON)
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Theodor Albenesius and Karen)
Albenesius,)
)
Plaintiffs,)
)
Versus)
)
Town of Sullivan's Island and)
Sullivan's Island Town Council,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Case No. 10-CP-10-5449

Memorandum in Support of
Defendants' Motion for Partial Summary Judgment
regarding Breach of Contract Accompanied by
Fraudulent Act Claim

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FACTS

The Plaintiffs filed suit against the Town claiming that the Town's adoption and enforcement of certain zoning ordinances constitutes a breach of contract based on (1991 deed restrictions) placed on the so-called Accreted Land. Under the current zoning ordinance plants on Town-owned front-beach parcel have grown such that the view of the ocean is lessened from the adjacent parcels owned by the Plaintiffs. Among other things, Plaintiffs contend that the Town engaged in a Breach of Contract Accompanied by Fraudulent Act in conjunction with the consideration of a zoning ordinance. The Plaintiffs are wrong.

The two Plaintiff families own homes on the front row of Sullivan's Island that are closest to the beach. See Para. 50, Second Amended Complaint. Plaintiffs' lots do not abut the beach because a town-owned parcel (Accreted Land) separates the two. See diagram within Exhibit 4 to Second Amended Complaint. The deed restrictions are associated with the town-owned Accreted Land. See Exhibit 4 to Second Amended Complaint. The deed restrictions deal with, among other things, the trimming of vegetation on the Accreted Land. Id. When the deed

restrictions were enacted in 1991 trimming on this land was governed by a 1981 zoning ordinance. See Exhibit 9 to Second Amended Complaint. In 1995, and again in 2005, Town Council passed zoning ordinances that altered the plant cutting rules on the Accreted Land and were more restrictive in terms of what cutting could take place. See Para. 36, Second Amended Complaint. In years since 2005 there has been additional discussion about the possibility of amending the ordinance further, but Council has taken no action to amend.

The Plaintiffs allege that the Town Council's passage of the 1995 and 2005 zoning ordinances breached a contract (1991 deed restrictions) and that the Town's discussion about the possibility of additional amendment constitutes a "fraudulent act". Nothing could be further from the truth. By separate motion the Town demonstrates that it is in compliance with the 1991 Deed Restrictions and has not engaged in any breach. Those arguments are incorporated by reference as if set forth fully herein. This motion is intended to raise additional arguments unique to the "Fraudulent Act" element because, even if a technical breach could have occurred, Summary Judgment would still be appropriate.

ARGUMENT

One obvious bar to the fraud aspect of Plaintiffs' claim is the South Carolina Tort Claims Act. Plaintiffs agree that the Town is a governmental entity. See Second Amended Complaint at Para. 2. As a governmental entity, the "fraud" aspect in this cause of action is one to which the Town is immune. The General Assembly specifically provided that "[t]he governmental entity is not liable for loss resulting from: (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." S.C. Code Ann. 15-78-60 (emphasis added). The distinction between "Breach of

Contract” and “Breach of Contract Accompanied by Fraudulent Act” is unquestionably the “fraudulent act”. The Tort Claims Act bars the Town from being liable for such acts.

The Court should also take note of the fact that none of the fraudulent conduct alleged by Plaintiffs as fraudulent constitutes an official “act” of the town. The Town certainly passed ordinances in 1995 and 2005 that deal with the Accreted Land. These were open, publicly known, legislative acts. The Plaintiffs, perhaps recognizing this, try to argue that the “fraudulent act” is communication between Town officials and a contractor working for the Town to study the Accreted Land and gather community input. See Second Amended Complaint at Para 100 – 102. Basically Plaintiffs claim that the Town told the consultant to ask some questions, but not others, and to communicate with the Town (consultant’s client) rather than directly with citizens. Id. But there is no legal or governmental requirement that the Town send out any questionnaire or engage in any particular method of fact finding. The Town’s elected Council may consider whatever information it desires in making its decision – and that may include information that Plaintiffs believe inaccurate or even biased. At the end of the day, Plaintiffs’ recourse is at the ballot box if Plaintiffs believe that Council is making bad decisions based on inaccurate data.

Plaintiffs’ alleged “fraudulent acts” are even more baffling here in light of the fact that the allegedly biased data gathering is related to potential future legislation that has never been finalized or passed as a law. The alleged fraudulent acts have nothing to do with the 1995 or 2005 ordinances that the Plaintiffs erroneously claim violate the deed – they could not have because those ordinances had already been on the books for years. The alleged fraudulent acts reflect to the fact that the Town has from time to time given thought to amending the 2005 ordinance. Not only has this amendment never occurred, no final decision has ever been reached as to what the amended rules would even be. Thus, what Plaintiffs are complaining of is core

political debate that might or might not ever result in legislation being passed. The claim is unripe.

Such political debate and information gathering of the Town as described above is also immune from suit based on multiple other provisions of the Tort Claims Act. See S.C. Code 15-78-60 (1) (“legislative ... action or inaction”); (2) “administrative action or inaction of a legislative ... 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.”)

Finally, even if one considered the Town to have “acted”, there is nothing remotely fraudulent about the alleged conduct. The questionnaire about which the Plaintiffs complain is clear on its face. It might have been phrased differently – some ways the Plaintiffs would have liked more and some they might have liked less. But the version that was sent out was not deceptive. If it failed to give some fact the weight Plaintiffs desired then that was self-evident and not hidden. It was hardly fraud.

This 26 day of Feb., 2014



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Albenesius,)
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Plaintiffs,)
)
Versus)
)
Town of Sullivan's Island and)
Sullivan's Island Town Council,)
Defendants.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Case No. 10-CP-10-5449

Defendants' Motion to Strike Damages Relief
Due to Lack of Ripeness In Light of OCRM
"Critical Line"

FILED
2014 FEB 28 AM 11:33
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PLEASE TAKE NOTICE that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, the Defendants, by and through their undersigned counsel, will move before the Hon. Judge Scarborough in Charleston County, South Carolina, for an Order granting Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. This motion is based, in part, on the fact that under a ripeness type theory the location of the OCRM critical line essentially vacates any damage or impact that the Plaintiffs might otherwise claim to result from the challenged Town ordinance(s). This motion is further supported by statutory law, caselaw and by the Defendants' Supporting Memorandum.

This 26 day of Feb, 2014

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
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COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
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Albenesius,	)	Memorandum in Support of
	)	Defendants' Motion to Strike Damages Relief
Plaintiffs,	)	Due to Lack of Ripeness In Light of OCRM
	)	"Critical Line"
Versus	)	
	)	
Town of Sullivan's Island and	)	
Sullivan's Island Town Council,	)	
	)	
Defendants.	)	

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 JULIE J. ARMSTRONG
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SUMMARY OF ARGUMENT

The Plaintiffs' prayer for damages in this case must be stricken because any such claim is "unripe" against the Town. The Plaintiffs' seek damages against the Town claiming that, but for a Town Zoning Ordinance, they would be able to cut vegetation blocking their view of the ocean. But even if the Town's Zoning Ordinance disappeared tomorrow the Plaintiffs still would not be able to cut the vegetation and still would not be able see the beach. That is because the South Carolina Office of Coastal Resource Management (OCRM) expressly notified the Plaintiffs that, regardless of the validity of the Town's zoning ordinance, the vegetation cannot be cut without State permission. It is undisputed that the Plaintiffs do not hold any State permits. Unless and until the Plaintiffs have State permission to cut, there is simply no way that the Town's ordinance can cause them harm. The Plaintiffs' claim for damages is unripe.

FACTS

Plaintiffs sued the Town of Sullivan's Island complaining over the Town's management of Town-owned land. Naturally occurring plants located on the Town's land ("Accreted Land") have grown to a height that partially obscures the Plaintiffs' view of the beach. Plaintiffs contend that the Town violated various rights and duties by failing to cut (or allow others to cut) trees and shrubbery growing on town-owned land that lies between Plaintiffs' houses and the ocean. Specifically, the Plaintiffs complain that the Town's current zoning ordinance does not allow them to cut certain vegetation on the Accreted Land. As will be shown, however, Plaintiffs can have no ripe damages claim against the Town in this instance because the majority of the vegetation Plaintiffs complain about lies within the OCRM "Critical Zone". Since Plaintiffs lack a cutting permit from the State OCRM, the Plaintiffs cannot legally cut as desired. The vegetation complained of by plaintiffs is protected by State regulations. The Town's ordinance cannot have even theoretically "damaged" the Plaintiffs or "taken" anything from them until the Plaintiffs first hold State permission to cut.

The Plaintiffs occupy "front row" lots on Sullivan's Island, meaning that no other *buildable lots* exist between Plaintiffs and the ocean. (Plaintiffs' parcels are 529-10-00-064 and 070). See Para. 50, Second Amended Complaint. That is not to say, however, that the Plaintiffs actually abut the beach. To the contrary, as shown in the following diagram at least one platted parcel (Parcel 529-10-00-087) owned by the Town exists between the Plaintiffs and the water. See diagram within Exhibit 4 to Second Amended Complaint.



Diagram taken from: <http://ccgisweb.charlestoncounty.org/website/Charleston/viewer.htm>¹

Over the years the Town's parcel 087 (hereinafter known as the "accreted land" or "AL") has grown in size due to sand accretion. See Para. 19, Second Amended Complaint. Plants growing on the AL have also matured. See Footnote 8, Second Amended Complaint. The Town has permitted nearby residents, such as the Plaintiffs, to enter the Town-owned AL to trim vegetation under certain terms and conditions specified by a zoning ordinance. See Para. 42 and 43, Second Amended Complaint. In 1991 when certain deed restrictions were put into place trimming was permitted to a height of three (3') feet. In 1995 the height limit changed to seven

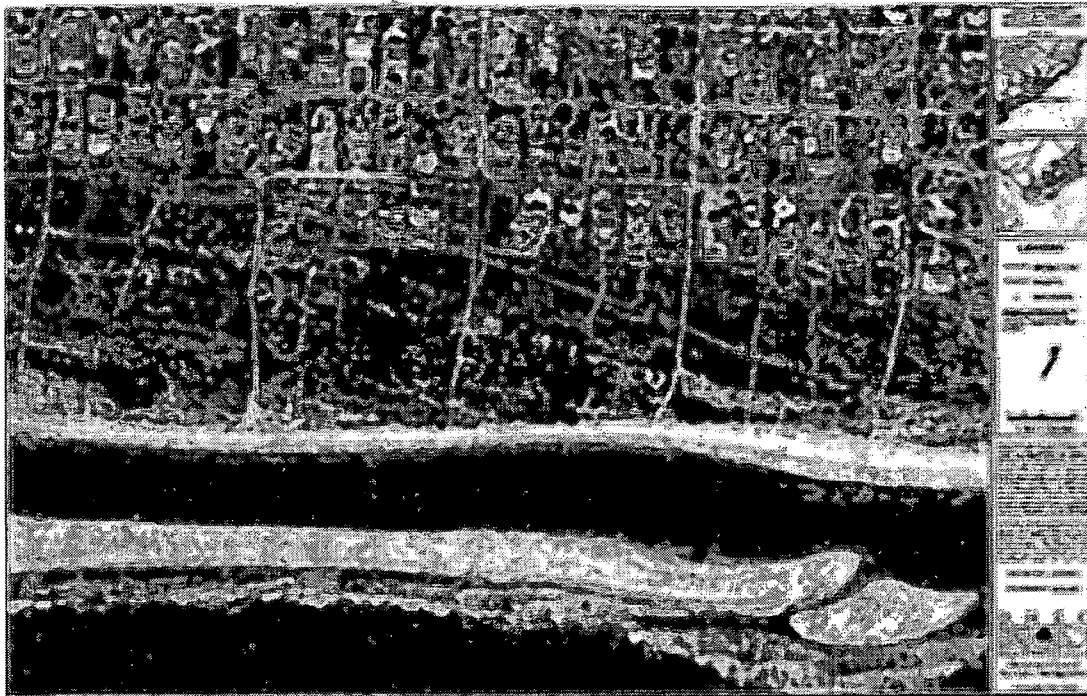
¹ A very similar map was provided by Plaintiffs as Exhibit 3 and 4 to the Second Amended Complaint. For reading ease the official Charleston County electronic image is used herein.

(7') for a few selected species and most species were no longer permitted to be trimmed at all.² In 2005 the height limit again changed, this time to five (5') feet, and the species restrictions were unchanged.

The Plaintiffs now argue that the Town has an obligation to keep the AL property in the *exact* condition it existed on the day the deed was delivered in 1991.³ Plaintiffs claim that by enforcing the 1995 and 2005 zoning ordinances, and thus restricting their ability to cut, the Town has "taken" value or otherwise damaged them because they can no longer see the ocean as well as they once did. Plaintiffs ignore, however, the fact that the OCRM Critical Line has moved over the years. At this point the Critical Line is such that it covers the overwhelming majority of the land which Plaintiffs wish to cut. This is documented by the following OCRM image:

² The "only vegetation that may be trimmed and pruned is limited to the following: Southern Waxmyrtle..., Eastern Baccharis ..., and Popcorn trees...." (See 1995 Ord, Sec 21-39.1E). Thus, live oak trees, pine trees, and other species could no longer be cut.

³ The Plaintiffs argue that "natural state" must mean the precise and exact condition of the property on the day that the deed restrictions were signed in 1991. The Town maintains that such an interpretation of the term "natural state" is not only at odds with the deed as a whole, but a physical impossibility given the changing tides, winds and other forces of nature that impact the property.



Plaintiffs have received no permits from the State to allow cutting. Consequently, they may not legally cut (as requested in this 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. Plaintiffs' damages claims are unripe.

ARGUMENT

The Town cannot have damaged the Plaintiffs in this action because the Plaintiffs lack State permission to perform their desired cutting. Until the Plaintiffs hold State permission to cut, the Plaintiffs will have no improved view whether this Court rules in their favor or not regarding the Town ordinance. This reality conclusively demonstrates that the Town's

ordinances cannot be damaging the Plaintiffs at present. The Plaintiffs damages claims are simply not ripe.

The Plaintiffs may not cut the vast majority of the vegetation that blocks their view. South Carolina's Regulation 30-11(D)(6) prohibits "[t]he destruction of beach or dune vegetation seaward of the setback line ... unless there is no feasible alternative." Regulation 30-21(F)(4) goes on to state that "[a]ny activity that will disturb the beach or dune vegetation within the critical area requires a Coastal Council permit." The OCRM map makes absolutely clear that the overwhelming majority of the vegetation between the Plaintiffs and the ocean falls within the critical area and thus may not be disturbed within State approval.

It is also abundantly clear that the Plaintiffs lack State permission to perform the cutting they ask this Court to force upon Sullivan's Island. No less than the Chief Counsel for OCRM wrote to Counsel for the Plaintiffs on January 24, 2014, quoted the Plaintiff's own Complaint regarding the desired cutting, and put the Plaintiffs on notice that they must comply with Section 30-11 and 30-21. Copy attached. This letter clearly demonstrates that Plaintiffs do not have the required State permissions. Plaintiffs' claims for relief are therefore not ripe.

Breach of Contract, Breach of Contract with Fraudulent Act, Unfair Trade Practices

The Plaintiffs seek monetary damages from the Town claiming that their houses are worth less because a Town ordinance has stopped them from being able to cut vegetation which lies between Plaintiffs and the ocean. See Para. 89 – 114. The problem is, the OCRM rules mean that the Plaintiffs could not perform the 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 (even in theory) say that the Town has damaged the Plaintiffs until such time as the Plaintiffs possess a State permit. No permit exists at present. Consequently, any claim for damages *based on the Town's ordinance* is unripe.

Inverse Condemnation

The Plaintiffs claim that the Town has essentially “taken” the value of their homes because, *but for* the Town ordinance, they could cut vegetation on the Accreted Land as desired. See Para. 124 – 126. The link between the Town’s ordinance and Plaintiffs’ view does not exist at this time, however, since the OCRM Critical Line means that the Plaintiffs could not cut enough to obtain a view even if the Town repealed its ordinance tomorrow. The Town’s ordinance cannot (even theoretically) be said to have “taken” anything from the Plaintiffs unless and until they hold a State permit. Until such time, Plaintiffs’ claims are unripe.

Impairment of Contract

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 and until they hold such permission any damages claims against the Town are unripe.

CONCLUSION

The Town is entitled to have Plaintiffs' damages claims stricken because State regulations mean that the Plaintiffs, who currently hold no state permit, (a) cannot cut as requested even if the Town ordinance was stricken and (b) have suffered no damages as a direct result of the Town's ordinances. The vegetation the Plaintiffs desire to cut lies within the Critical Zone. OCRM has informed the Plaintiffs that they do not possess State permission to perform the requested cutting. Damages claims against the Town are thus unripe.

This 26 day of Feb., 2014


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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	) =	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Nathan Bluestein, Ettaleah Bluestein,	)	Case No. 10-CP-10-5449
Theodor Albenesius and Karen	)	
Albenesius,	)	
	)	Defendants' Motion for Summary Judgment
Plaintiffs,	)	on All Causes of Action Due to Plaintiff's Lack
	)	of Any Right to Control or Look Over
Versus	)	Neighboring Parcels
	)	
Town of Sullivan's Island and	)	
Sullivan's Island Town Council,	)	
	)	
Defendants.	)	

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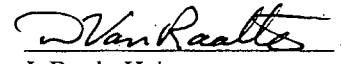
JULIE J. ARMSTRONG
CLERK OF COURT

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PLEASE TAKE NOTICE that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, the Defendants, by and through their undersigned counsel, will move before the Hon. Judge Scarborough in Charleston County, South Carolina, for an Order granting Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. This motion is based, in part, on the the lack of any relevant right possessed by the Plaintiffs to look over or control vegetation on neighboring lands, and the lack of and relevant duties on the Defendants. This motion is also supported by statute, caselaw and Supporting Memorandum.

This 26 day of Feb, 2014


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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
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Nathan Bluestein, Ettaleah Bluestein,	)	Case No. 10-CP-10-5449
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Albenesius,	)	Memorandum in Support of
	)	Defendants' Motion for Summary Judgment
Plaintiffs,	)	on All Causes of Action Due to Plaintiff's Lack
	)	of Any Right to Control or Look Over
Versus	)	Neighboring Parcels
	)	
Town of Sullivan's Island and	)	
Sullivan's Island Town Council,	)	
	)	
Defendants.	)	

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I. INTRODUCTION

This matter comes before the Court pursuant to the Defendants' Motion for Summary Judgment. There is no common law or statutory "right to a view" in South Carolina. The deed restrictions on the Accreted Land did not change the law. All of the Plaintiffs' causes of action rely on their belief, clearly contrary to established law, that they have a legal "right to a view" across town-owned land.

Four clearly established legal principles, discussed in detail in this memorandum, eliminate all of the Plaintiffs' causes of action:

1. The Plaintiffs have been deprived of no common law or statutory right to a view because no such right exists here.
2. The Deed Restrictions on the Accreted Land create no "right to a view" for Plaintiffs.
3. The Plaintiffs' desired reading of the Deed Restrictions would constituted an unlawful impairment of legislative power.
4. The Plaintiffs' interpretation of the Deed Restrictions is ridiculous on its face. The Land Trust that actually imposed the Deed Restrictions finds Town is fully compliant. See Affidavit of Elizabeth Hagood, Exec Director of Land Trust (attached).

Rarely is the law more clear than in this case. Summary judgment should be granted in favor of the Town.

Plaintiffs sued the Town of Sullivan's Island complaining over the Town's management of Town-owned land. Naturally occurring plants located on the Town's land have grown to a height that partially obscures the Plaintiffs' view of the beach.¹ Plaintiffs contend that the Town has deprived them of an alleged right to a view by failing to cut (or allow others to cut) trees and shrubbery growing on town-owned land that lies between Plaintiffs' houses and the ocean. The Complaint trots out this basic grievance in many different wrappers: (1) Declaratory Judgment; (2) Injunctive Relief; (3) Writ of Mandamus; (4) Breach of Contract; (5) Breach of Contract with Fraudulent Act; (6) Unfair Trade Practices Act; (7) Nuisance; (8) Inverse Condemnation; (9) Constitutional Impairment of Contract. At the heart of every one of these causes of action, however, is the common pillar that Plaintiffs believe the Town has taken from them an ocean view to which they are legally entitled. As a matter of law the Plaintiffs simply do not possess the claimed right or any right to control vegetation on the Accreted Land as requested in the Complaint. This very Court already decided this in a 2005 Sullivan's Island case involving the same type of tree growth on the very same Accreted Land and very similar issues. See Order in Bloom v. Town of Sullivan's Island Board of Zoning Appeals, 2005-CP-10-1014. This legal reality invalidates every cause of action in the Complaint and makes summary judgment appropriate here.²

¹ Plaintiffs describe their right with various labels (right to have vegetation pruned, condemnation of their view or beachfront status, etc.), but in essence the dispute in this case revolves around whether the Plaintiffs can force the Town to engage in the vegetation cutting necessary to allow Plaintiffs to see the ocean. For ease of reference in this brief, regardless of Plaintiffs label, this will generally be termed "right to a view".

² Typical summary judgment motions recite every legal element of every cause of action and then discuss each in turn. This motion takes a different approach. Here, regardless of what elements might differ between various claims, all claims are predicated on the common assumption that Plaintiffs possess a view right or right to trim

The Plaintiffs occupy "front row" lots on Sullivan's Island, meaning that no other *buildable lots* exist between Plaintiffs and the ocean. (Plaintiffs' parcels are 529-10-00-064 and 070). See Para. 50, Second Amended Complaint. That is not to say, however, that the Plaintiffs actually abut the beach. To the contrary, as shown in the following diagram at least one plated parcel (Parcel 529-10-00-087) owned by the Town exists between the Plaintiffs and the water.

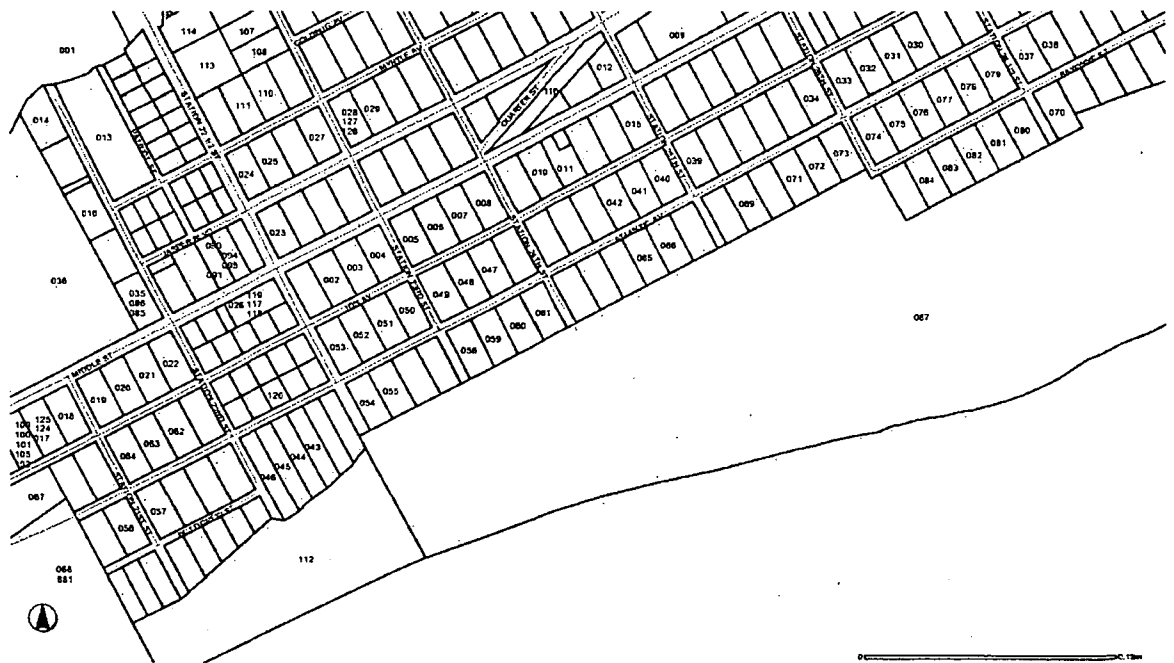


Diagram taken from: <http://ccgisweb.charlestoncounty.org/website/Charleston/viewer.htm>³

vegetation on Town land. This particular motion seeks to demonstrate that no such right exists and, in the course of so doing, demonstrate why summary judgment is appropriate. It is not necessary to review herein other statutory elements that are irrelevant to the Town's limited argument in this motion. Other technical defects with various claims may be addressed in separate motions.

³ A very similar map was provided by Plaintiffs as Exhibit 3 to the Second Amended Complaint (attached hereto.) For reading ease the official Charleston County electronic image is used herein.

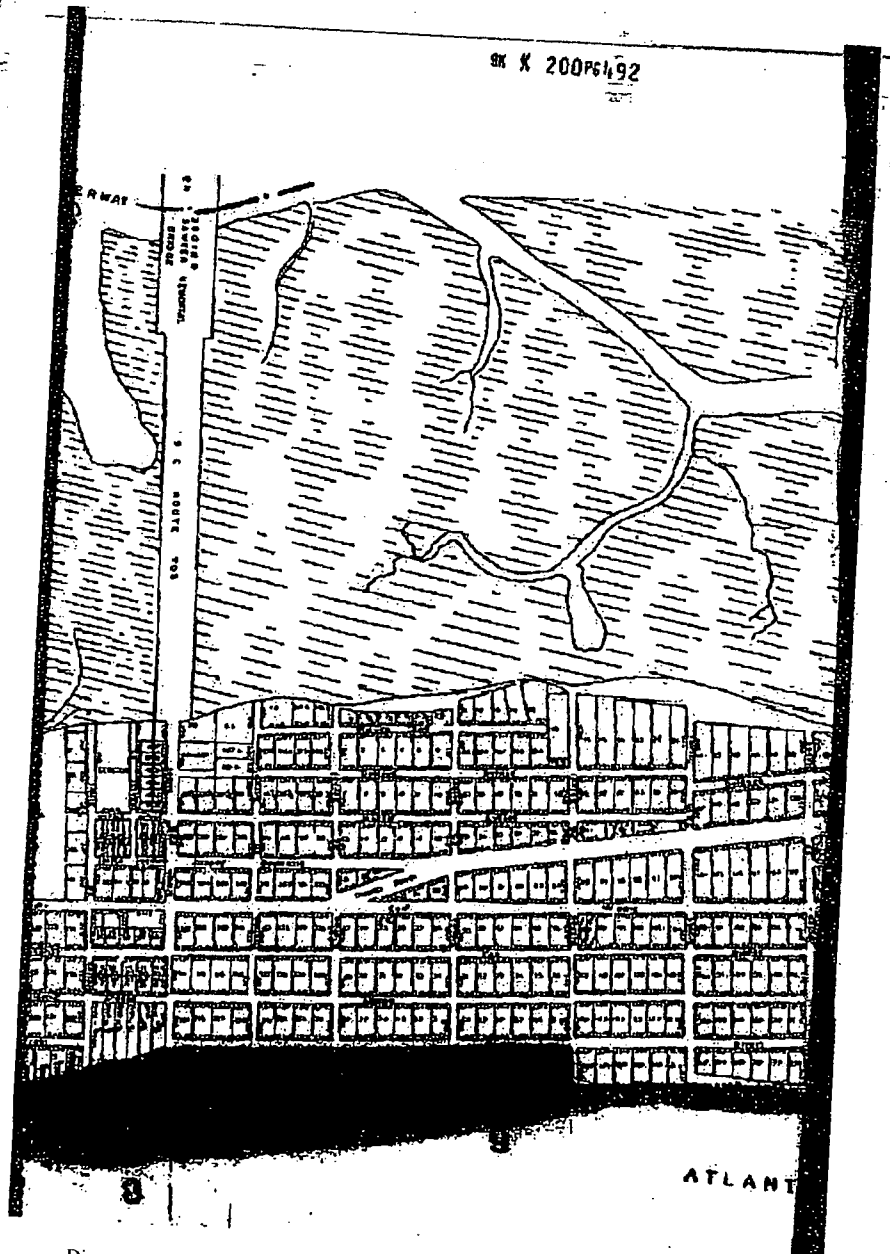


Diagram taken from Exh 3 to Second Amended Complaint⁴

⁴ An identical diagram is contained within Exh 4 to the Second Amended Complaint (deed from LOLT to Town), recorded Bk K 200 PG507. The version from Exh. 3 is reproduced herein as it has a higher photocopy quality.

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.

Over the years the Town's parcel 087 (hereinafter known as the "accreted land" or "AL") has grown in size due to sand accretion. See Para.19, Second Amended Complaint. Plants growing on the AL have also matured. See Footnote 8, Second Amended Complaint. The Town has permitted nearby residents, such as the Plaintiffs, to enter the Town-owned AL to trim vegetation under certain terms and conditions specified by a zoning ordinance. See Para. 42 – 43, Second Amended Complaint. Some, but not all, island residents have trimmed pursuant to the zoning ordinance over the years. Presumably those that undertook trimming did so to preserve or enhance the view of the ocean enjoyed from their residences since they must gaze across the Town-owned land if they are to see the water. The Plaintiffs, now dissatisfied with the Town's longstanding vegetation trimming rules, have sued to invalidate them. The Complaint basically asks that the Court roll back the clock, invalidate more than 15 years' worth of intervening zoning regulations passed by the legislature of the Town, and restore to the books a 1981 version of the Town's zoning ordinance. See Para. 73, Second Amended Complaint.

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') feet and allowed all species of plants to be cut. The 1981 ordinance thus allowed the vegetation to be given a "flat top". Copy of 1981 Ordinance attached hereto.

Additional development restrictions were put into place on the AL in 1991. See Exhibit 4 to Second Amended Complaint. Residents of Sullivan's Island had noticed that the AL had been growing in size through the accretion of sand. See Exhibit 2 to Second Amended Complaint. 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 AL for the public and to assure that no similar construction of a "new front row" of houses would ever happen. See Exhibit 2 and 4 to Second Amended Complaint. The Town did this by arranging a pair of property transactions with the Low Country Open Land Trust ("LOLT"). See Para. 26 – 27, Second Amended Complaint. First the Town sold the AL property to LOLT. Id. Then LOLT sold the same property back to the Town. Id. However, the deed transferring the property from LOLT back to the Town was different than the prior deed because LOLT added a set of deed restrictions. (Compare Exhibits 3 and 4 to Second Amended Complaint).

There were several main components of the deed restrictions. Copy of Deed Restrictions Attached. The deed restrictions were primarily designed to retain the AL property in a natural state and prohibit development. The deed took different approaches depending on whether an issue involved changes to the property itself (i.e. "land") or simply managing the vegetation on the land. Not surprisingly, the deed restrictions limited the ability of anyone to ever build structures on the AL. The deed restrictions did permit the Town to alter the "Property", provided that (a) the alteration was intended to achieve one of the purposes expressly listed in the deed

restrictions⁵, and (b) the Town made certain written fact findings in advance. See Exhibit 4 to Second Amended Complaint, See Deed Restrictions, Para. 3 (emphasis added). Most significant to this lawsuit, however, was the express *exception* that deals with the trimming of vegetation on the AL. The exception specifically left the Town with “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.” See Deed Restrictions, Para. 2 (emphasis added). Thus, the deed restrictions did not conflict with, or in any way limit, the Town’s zoning ordinance in effect at the time that dealt with the trimming of vegetation on the AL. The Deed Restrictions also did not restrict in any meaningful way the Town’s authority to amend its zoning ordinances dealing with vegetation cutting in the future. Activity on the AL has thus been governed by the deed restrictions and the various Town zoning ordinances up to the present day.

The Town slightly revised its zoning ordinance governing cutting on the AL in 1995. See Para. 36, Second Amended Complaint, see also Copy of 1995 Ordinance attached. The 1995 version raised the after-cutting minimum height of vegetation on the AL from three (3’) feet to seven (7’) feet. It also limited the species that could be cut, stating: “the only vegetation that may be trimmed and pruned is limited to the following: Southern Waxmyrtle..., Eastern Baccharis ..., and Popcorn trees....” (See 1995 Ord., Sec 21-39.1E). Thus, live oak trees, pine trees, and other species could no longer be cut. In this sense the 1995 version was *more protective* of the AL and *more restrictive* than was the 1981 version of the ordinance that had been in place when the deed restrictions were imposed. See Para. 36, Second Amended

⁵ Drainage, Mosquito control, Public Walkways and emergency access to the Atlantic Ocean, Beach Renourishment, Erosion control, Vegetation Management, Education programs, Public Safety, Public health, and Scenic Enhancement.

Complaint. See also, N. Bluestein Depo, p. 71, lines 14-18. No challenge was ever filed against the 1995 ordinance and the Town and its citizens operated under it for ten years. See also, N. Bluestein Depo, p. 78, and p. 83 lines 5-9. Notably, the Bluestein plaintiffs sought permits on a number of occasions from the Town under the 1995 version of the ordinance and had vegetation on the AL cut.⁶ (The Albenesius plaintiffs bought the property in 2009 and hence never had any reason to seek permits under the 1981 or 1995 ordinances.)

The final alteration to the Town's zoning ordinance dealing with vegetation cutting on the AL came in 2005. See Para. 36, Second Amended Complaint. See also 2005 Ordinance. Copy attached. In that year the Town altered the minimum vegetation height from seven (7') back down to five (5') feet. The species limitation remained in place. Thus, the 2005 version of the ordinance allowed slightly more cutting than the 1995 version did, but was still more restrictive (allowed less cutting) than did the 1981 zoning ordinance in place at the time the deed restrictions were imposed. Again, no challenges were filed to the zoning ordinance and both the Town and its citizens operated under the 2005 zoning ordinance for years. Again, the Bluestein plaintiffs themselves secured cutting permits from the Town without complaint under the 2005 ordinance.⁷

It was not until 2010, fifteen years after the Town replaced the 1981 version of the ordinance, that the Plaintiffs filed suit. They basically argue that the Town has an obligation to keep the AL property in the *exact* condition it existed on the day the deed was delivered in

⁶ See Deposition of N. Bluestein, p 14, lines 7 – 12 and p 74, lines 3-14. See also, Deposition of E. Bluestein, p 12, lines 19-21. Nathan Bluestein transcript. Ettaleah Bluestein transcript attached. See also cutting permit applications by Blusteins and predecessor in interest to Albenesius (copies attached).

⁷ See Deposition of N. Bluestein, p 14, lines 7-12, p. 15, lines 2-11 and p 82, lines 15-17.

1991.⁸ Plaintiffs claim that by enforcing the 1995 and 2005 zoning ordinances the Town has injured them by incorrectly interpreting the deed to take away their ocean view and thus devalue their property since those zoning ordinances differ from the zoning ordinance version in place on the deed restriction date. Notably, however, the Plaintiffs' interpretation of these deed restrictions is not even shared by the Land Trust that originally placed the deed restrictions on the property and annually inspects the property for Town compliance. Far from finding the gross violations alleged by the Plaintiffs, the Land Trust has found the Town to be compliant. See Affidavit of Elizabeth Hagood, Executive Director of Lowcountry Open Land Trust (copy attached.)

In summary, the Plaintiffs' claims lack merit because, among other reasons, they possess no right to the view they claim to have lost. Plaintiffs have no right to exert control over land owned by their neighbor. This reality disposes of every claim raised by Plaintiffs.

I. THE PLAINTIFFS NEVER POSSESSED THE "RIGHT TO A VIEW" THAT THEY CLAIM THE TOWN HAS TAKEN FROM THEM.

A. Plaintiffs have been deprived of no common law or statutory right of view.

The Plaintiffs have never possessed the right they claim the Town has taken from them. The facts are undisputed and they matter. Even the Plaintiffs do not claim to own the AL that

⁸ The Plaintiffs essentially argue that "natural state" must mean the precise and exact condition of the property on the day that the deed restrictions were signed in 1991. The Town maintains that such an interpretation of the term "natural state" is not only at odds with the deed as a whole, but a physical impossibility given the changing tides, winds and other forces of nature that impact the property.

lies between them and the ocean.⁹ Even the Plaintiffs evidently agree that this AL is owned by the Town. See Second Amended Complaint at para. 20 – 27. Further, it is beyond dispute that the Town-owned Bayonne Avenue property lies between the Plaintiffs and the AL. See, Second Amended Complaint, exhibits 3 and 4 thereto (Diagram reproduced on Page 3, *infra*.) Thus, in order to see the ocean from their houses, the Plaintiffs must look across Town-owned land that is not subject to any deed restrictions (Bayonne Ave. land) and still more Town-owned land that is subject to the deed restrictions (AL). All of this is undisputed.

South Carolina law is just as undisputed when it comes to one homeowner's right to look across land owned by another in order to enjoy a scenic view. The South Carolina Supreme Court in Hill v. Beach Co., 306 S.E.2d 604 (SC 1983), dealt with front row homeowners' suing the owner of accreted land claiming impairment of scenic view. The Supreme Court disposed of the homeowner's claim quickly, stating "[i]n our view, the appellants' claim amounts to a prescriptive right to ocean view, breezes, light and air. Such right does not exist in South Carolina." Id. at 605. See also Young v. SC DHEC, 680 S.E.2d 784, 789(SC App. 2009)(Citing Hill for the same basic proposition.) In other words, one landowner has no right to control his neighbor's land.

The Hill facts are in many ways quite similar to those present here. In Hill the plaintiffs occupied homes that were located on the buildable lots located closest to the ocean at the time the houses were constructed. The plaintiffs' lots did not extend all the way to the public beach, however. Instead, the plaintiffs' lot lines stopped just a bit short of that point because the prior seller, J.C. Long, had retained ownership of that sliver. Thus, as sand accreted in the area the accreted sand added to the land owned by Long rather than the prior front-row homeowner. J.C.

⁹ Deposition of T. Albenesius p 46, line 10 – p 47, line 17; Deposition of K. Albenesius p 32, lines 11-12; Deposition of N. Bluestein p 106, line 24 – p 107, line 1; Deposition of E. Bluestein p 26, lines 1-6.

Long eventually sold the sliver of property to new owners when enough sand accreted to the point where the property was large enough to be a buildable lot. The pre-existing homeowners that had been "front row" thus were faced with the prospect of having a new row of houses constructed between their homes and the ocean. They complained that vertical activity (construction of new houses) on the accreted land would interfere with the view they had previously enjoyed of the ocean. The Supreme Court gave the plaintiffs no relief. While the plaintiffs may have for years enjoyed the ability to look unobstructed across the J.C. Long land in order to see the ocean, they had no common law or statutory *right* to that view.

Even more similar was the case this Court decided in Bloom v. Sullivan's Island Board of Zoning Appeals. Bloom, just as in this case, owned a house that abutted the town's AL and at one time could look across the AL to see the ocean. There, as here, trees grew up on the town's AL to a point where they blocked the homeowner's view and a lawsuit against the Town followed. There, as here, it was clear that the homeowner did not own the land on which the trees were growing. This Court quickly disposed of Bloom's claimed "lost view" by noting "[c]ontrary to the Blooms' argument, under South Carolina law, a property owner has no right to an unobstructed ocean view or breeze.... Easements of view are not recognized in this state. Thus, the decision of the BZA does not abridge any right of the Blooms. Because the Blooms have no right to a view, the decision of the BZA does not 'unreasonably restrict the utilization of the property' as a matter of law." See Order of Judge Scarborough, Bloom, 2005-CP-10-1014, at pg. 7.

That is same situation in which the Plaintiffs find themselves here. As in Hill, the Plaintiffs here live in houses that are the closest to the beach (i.e. front row). See Para. 50, Second Amended Complaint. As in Hill, the Plaintiffs do not actually own the land that adjoins

the beach. See diagrams attached to Exhibits 3 and 4 to Second Amended Complaint. As in Hill, there is an intervening land owner between the Plaintiffs and the beach. Id. As in Hill, the Plaintiffs here grew accustomed to looking across this land (the AL) that they did not own so as to view the ocean. As in Hill, changes have occurred on the AL (vegetation growth here, house construction in Hill) that now limit the Plaintiffs' ability to see the ocean. And, as in Hill, the Plaintiffs possess no statutory or common law right¹⁰ to view the ocean and cannot complain that activity on the AL has deprived them of anything.

Even the Plaintiffs (or at least Plaintiff Nathan Bluestein) seem to on some level accept that one property owner has no right to look across the land of another. Ironically, during deposition Plaintiff Bluestein, had no sympathy for the fact that his own house blocked the view of his inland neighbor.

Q: Let me ask you this, what's the guy's name that lives across the street from you?

A: You talking about straight across?

Q: Yeah, whatever, straight across.

A: Roy Williams

Q: What's his name?

A: Roy Williams.

Q: Can Roy see the beach from his house?

¹⁰ The Plaintiffs cannot argue that they somehow obtained a prescriptive view easement over the years. Under South Carolina law the Plaintiffs would have to take action on the AL that was contrary to the Town's asserted ownership / control interest in order to perfect a prescriptive easement. See Jones v. Daly, 609 S.E.2d 597, 599-600 (SC App. 2005)(listing as third element "that the use or enjoyment was adverse or under claim of right.") Clearly the Plaintiffs use wasn't adverse since they admit to having followed all of the Town's rules. See Plaintiffs' Response to Town's First Requests to Admit No. 3 (copy attached) in which Plaintiffs admit that they "have not during the period they have owned their relevant property illegally cut vegetation on the accreted land or otherwise interfered with Sullivan's Island's ownership rights to the accreted property." Further, the Bluestein's obtained many permits for trimming over the years and the Albenesius' applied for a permit (as did the Albenesius' predecessors in interest). Prior cutting by the Plaintiffs cannot have been under "claim of right" since they would not have been securing cutting permits from the Town if cutting was a right they already possessed.

A: No.

Q: If Roy – If you bulldozed your house down, could Roy see the beach from his house?

A: Probably. He might. His house is built low, he's got an old house.

....

Q: But right now your house is in the way of him seeing the ocean?

A: Uh-huh.

Q: And, so, you own the property between him and the ocean?

A: Uh-huh.

Q: Is that a yes?

A: Yes, I own it. No, I don't own it, my wife owns it.

Q: Your wife owns it. So you are blocking his view?

A: Yes

N. Bluestein deposition, p 110, line 20 – p 111, line 20.

.....

Q: Okay, but you are blocking his view?

A: But he had the right to, he could have bought my lot. I bought it [the Bluestein lot]....

But he could have bought it, it was for sale.

Q: Sure.

A: But I guess he elected he didn't want to be on the front beach"

N. Bluestein deposition, p 112, lines 5 – 13.

Plaintiff Bluestein's analysis is fatal to the Plaintiffs' claims here. Plaintiff Bluestein believes his neighbor has no right to view the ocean over the Bluestein property because Plaintiff Bluestein owns the intervening parcel. On that he is right. Exactly the same is true here.

Plaintiff Bluestein similarly has no right to a view of the ocean over the Town's property because the Town (not Mr. Bluestein) owns the intervening parcel. The same situation exists for all Plaintiffs in this case.

B. The Plaintiffs Have No "Right to a View" or Control Growth on Town Land Stemming from the Deed Restrictions.

Having no "right to a view" (i.e. control vertical growth on a neighbor's land) under South Carolina statutory or common law, the Plaintiffs cannot create such a right by reference to the deed restrictions. The most obvious reason, that the words of the deed restriction are irrelevant to Plaintiff's right to a view, is that the Plaintiffs' properties actually abut land that is not subject to any deed restrictions. The town-owned undeveloped portion of Bayonne Avenue (which is not deed restricted) lies between the Plaintiffs and the deed restricted land. See Diagram in Exhibit 4 to Second Amended Complaint. There is absolutely nothing preventing the Town from planting street trees or one day installing a street noise barrier along Bayonne Avenue that would completely block Plaintiffs' view of both the deed restricted Accreted Land and the ocean. This being the case, the deed-restricted Accreted Land could be clear cut or burned to the ground and Plaintiffs' might still have no view because of vegetation or other obstructions on Bayonne.

Even if the Plaintiffs did abut the deed restricted Accreted Land, the other obvious problem is that the deed restriction language does not create the view right they claim. The Plaintiffs basically argue that the 1991 deed restrictions say that the Town is required to maintain the property precisely as it existed in 1991. Plaintiffs's Complaint essentially argues that since the cutting height limit under Town zoning ordinance was a flat-top three (3') feet in 1991, the

deed restrictions vest them with a right that the cutting rule will always be a flat-top three (3') feet.

The Plaintiffs' argument ignores the words of the deed restrictions and is a reading to which only the Plaintiffs' subscribe. The Land Trust, the entity that originally placed and continues to monitor the deed restrictions, has "regularly visited the Accreted Land each year since 2001, reviewed the existing field conditions, compared the field conditions to the deed restrictions, and found nothing that violated the deed restrictions." See Hagood Affidavit at Para. 15, Copy Attached.

The Town agrees generally that the deed restrictions were intended to keep the AL undeveloped, yet the deed restrictions also specifically say that town may alter the rules governing vegetation height. The deed clearly allows the Town to enforce the ordinances about which Plaintiffs complain. Item 2 of the Deed Restrictions states that "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." (emphasis added.) This language is remarkably precise.

Paragraph 1 of the Deed Restrictions says that the AL shall remain in its "natural state." (This reference to "natural state" is the term Plaintiffs argue to mean the property must remain "exactly the same as in 1991" (i.e. flat-top cut to three (3') feet).¹¹) Paragraph 3 of the Deed Restrictions says that the Town must utilize specific procedures, including advance written fact findings, before making changes to the *property*. Plaintiffs argue that the Town violated both

¹¹ For a variety of reasons that will be explored later in this memorandum the Town disagrees with the Plaintiffs' basic premise that the deed restrictions placed an obligation on the Town to maintain the property in exactly the same state as it existed at the moment the deed restrictions were signed.

these provisions when it passed the challenged zoning ordinances (which govern vegetation trimming on the AL.)

The fatal problem for the Plaintiffs is that the deed restriction says that neither Paragraph 1 nor Paragraph 3 apply to vegetation trimming regulations enacted by the Town. Paragraph 2 specifically gives the Town the “unrestricted authority” to trim vegetation on the AL. Para. 2, Deed Restrictions. Paragraph 2 specifically says that this power is granted “notwithstanding Paragraphs 1 and 3.” The term “notwithstanding” is widely recognized to mean “in spite of the fact that” or “without prevention or obstruction from or by.”¹² In other words, the drafters of the Deed Restrictions not only said that the Town’s authority to trim vegetation was “unrestricted”, the drafters confirmed this again by specifically saying that the Town would not have to comply with limitations of Paragraphs 1 and 3 when it exercised its “unrestricted” authority¹³ to control vegetation. So, far from violating the deed restrictions, the Town was precisely following the deed requirements as it set the very rules about which the Plaintiffs complain.

The “more restrictive” clause contained within the Deed Restrictions further confirms that the Plaintiffs have no argument under the Deed Restrictions. The Plaintiffs’ basic complaint in this lawsuit is that the Town allows them to trim less vegetation now than when the Deed

¹² See Gibson v. Bonney, 2010 WL 104553 (10th Cir. 2010) at *5, Salvo v. United States Dept. of Agriculture, 226 F.Supp.2d 1234, 1237 (S.D. Cal. 2002); Symbol Technologies v. Voicenet, Ltd., 2008 WL 89626 at *2 (EDNY 2008)(“notwithstanding” means “‘takes precedence over’ and thus negates any contrary provision.”); Dayton Park Properties v. Pacific Life Ins. Co., 370 F.Supp.2d 869, 872 (D.Minn. 2005); Eurospark Industries v. Underwriters at Lloyds, 567 F.Supp.2d 345, 357-58 (E.D.N.Y. 2005).

¹³ The Plaintiffs cannot argue that the Town’s “authority” to trim amounts to a “duty” or “obligation” to trim for their benefit. First, the word “authority” is not an obligation, but rather a discretionary choice given to Council. Second, the inclusion of the word “unrestricted” would negate any such Plaintiffs’ argument. For if the term “authority” was an “obligation” to keep the vegetation trimmed at a certain height then the power of Council to control vegetation in paragraph 2 would be “restricted” since they would not be able to choose any set of rules other than those rules in effect in 1991.

Restrictions were imposed.¹⁴ In other words, they complain that the Town's current rules are "more restrictive" and, as a result, impair their view of the ocean, grow bugs, etc.¹⁵ Paragraph 6 of the Deed Restrictions, however, allows the Town to do *exactly* what the Plaintiffs are complaining about. Paragraph 6 states in pertinent part that the "Town may enact ordinances which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions." This language kills the Plaintiffs' arguments. It specifically allows the Town to enact "more restrictive" ordinances than were in effect at the time the Deed Restrictions were imposed. And there can be no argument that the 1995 and 2005 ordinances complained about by the Plaintiffs are "more restrictive." The Plaintiffs admitted at deposition that this is why they don't like the challenged ordinance.¹⁶ Their pleadings take the same position.¹⁷ The whole essence of the Plaintiffs case is their desire to be relieved from the more restrictive current regulations and instead be governed by the older "three (3') foot rule" that allowed them to cut more.¹⁸ Since the deed restrictions allow the Town to enact more restrictions on tree cutting the

¹⁴ See Deposition of T. Albenesius p 17, lines 4 – 7; p 18, line 15 – p 22, line 22. See also, Deposition of N. Bluestein p. 71, line 14 – 18; p 72, line 24 – p 74, line 2.

¹⁵ See Deposition of T. Albenesius p 17, lines 4 – 7; p 18, line 15 – p 22, line 22. See also, Deposition of N. Bluestein p. 71, line 14 – 18; p 72, line 24 – p 74, line 2.

¹⁶ See Deposition of T. Albenesius p 17, lines 4 – 7; p 18, line 15 – p 22, line 22. See also, Deposition of N. Bluestein p. 71, line 14 – 18; p 72, line 24 – p 74, line 2.

¹⁷ See Second Amended Complaint, Para. 133(b)(asking that the Town be enjoined from interfering (through the challenged zoning ordinance) with their "right" to cut all variety of trees and shrubs to a height of no less than 3 feet); See also, Para. 133(c) (asking the court to declare invalid all ordinances which limit what can be cut so as to put back in place the rules existing in 1991 when the deed restrictions were imposed.); see also Eighth Cause of Action "Inverse Condemnation" (claiming basically that Towns action denied them of the right to cut in the manner they believed existed in 1991 – in other words that the new rules were "more restrictive.")

¹⁸ The use of the disjunctive "or" in Paragraph 6 of the Deed Restrictions is also significant here. Paragraph 6 allows the Town to enact an ordinance that is "more restrictive" or which is "not inconsistent with these Restrictions." In other words, Paragraph 6 says that the Town need only meet one or the other criteria, not both. If the Town's new ordinance is "more restrictive" than the rules in place in 1991, then it is not a violation of the Deed Restriction terms for the new ordinance to be inconsistent with the 1991 Deed Restrictions. Here, Plaintiffs want to argue that some procedural requirements of the Deed Restrictions may have been ignored. While the Town disputes this, the dispute is of no consequence. Paragraph 6's use of "or" means that there was never a requirement that the Town be completely consistent with the Deed Restrictions since the 1995 and 2005 ordinances were unquestionably

Plaintiffs cannot show that the deed restrictions grant them any right to force trees to be cut in order to improve their view.

C. Plaintiffs' Interpretation of Deed Restrictions Would Constitute an Unlawful Impairment of Legislative Power.

The Plaintiffs' argument, if honored, would result in an unlawful impairment of legislative power. The Complaint is predicated on a belief that the Deed Restrictions the Town Council agreed to in 1991 legally deprived the Town of the power to enact certain ordinances for a period of fifty (50) years.¹⁹ For the Plaintiffs' Complaint to work, the Deed Restrictions must mean that the Town is powerless to adopt any cutting rule other than the flat-top three (3') foot rule in place when the Deed Restrictions were imposed in 1991. South Carolina law does not allow local legislatures to limit their powers in this fashion.

As a general rule, a contract is not binding if it purports to limit the exercise of a municipality's governmental power for a period longer than the remaining term of office of the councilmembers that voted for it. Piedmont Public Service District v. Cowart, 459 S.E.2d 876 (SC App. 1996). See also, Cunningham v. Anderson County, 741 S.E.2d 545 (SC App. 2013). In other words, the Council leaving office must pass on to the successor Council the full (unimpaired) government powers of the office and cannot, by contract, give away the powers that successor councils should enjoy. See Id. at 880-882. See also, Newman v. McCullough, 46 S.E.2d 252, 255-256 (SC 1948).

"more restrictive" than the rules in effect in 1991. This also makes common sense. LOLT is a conservation organization. Such organizations never object to a party being *more protective* of the environment. They only become concerned if a change is detrimental (less protective).

¹⁹ See Deposition of E. Bluestein p 36, lines 8 – 11 ("Q: Okay. So again, the crux of it is that you believe that the deed restricts the Town from passing laws that violate the deed?" "A Yeah.")

In Piedmont the District had entered into a twenty year employment contract with Douglas Cowart. Eventually the relationship soured and during litigation Cowart counterclaimed asking the court to enforce the contract. The court refused, noting that the term of the contract extended beyond the term of office of the voting members and thus would, if enforced, "impair the right of their successors to remove such officer [Cowart] and to appoint another in his place." Piedmont, 459, S.E.2d at 881.

The same logic applies here to thwart Plaintiffs' interpretation of the Deed Restrictions. Zoning is unquestionably a governmental power. See I'On v. Town of Mt. Pleasant, 526 S.E.2d 716. Pursuant to South Carolina's Local Government Comprehensive Development Act this power is to be exercised by Councils. See Title 6, Chapter 29 of the South Carolina Code of Laws. In other words, this power is statutorily bestowed upon each City Council member as he or she takes office. If one accepted the Plaintiffs' claim that the fifty (50) year Deed Restrictions, approved by Sullivan's Island Town Council in 1991, created a "view right" that bars changes in the zoning rules then the Deed Restrictions would have stripped fifty (50) years' worth of City Councilmen of a governmental power. This would be just as illegal as the employment contract in Piedmont.²⁰

²⁰ The Plaintiffs theory also runs afoul of "delegation of powers" concerns. The Supreme Court has previously explained on several occasions that a political subdivision may not "delegate away those powers and responsibilities which give life to it as a body politic. A municipal corporation ... created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise." G. Curtis Martin Investment Trust v. Clay, 266 S.E.2d 82, 85 (SC 1980); see also City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority, 480 S.E.2d 728, 732 (SC 1997). In other words, the State vested power in the political subdivision to make decisions and in so doing made clear that those decisions were not to be made by anyone else. This general logic has been specifically applied to prevent a municipal council from placing limits on its zoning authority. I'On LLC v. Town of Mt. Pleasant, 526 S.E.2d 716 (SC 2000)(Town Council could not delegate its power to determine zoning by deferring to result of a referendum.) Thus, contrary to Plaintiffs' desires, the Deed Restrictions cannot be read as a "contract" allowing the LOLT, the Plaintiffs, or anyone else to limit or dictate the zoning rules applicable in 2010 on the Town-owned AL. They also cannot be read as a contract installing some procedure (super-majority, referendums, etc) for changing a zoning ordinance because the procedure for zoning is set by state law. See S.C. Code Ann. Title 6, Chapter 29.

D. Plaintiffs' Interpretation of the Deed Restrictions Is Ridiculous on its Face

The Plaintiffs' attempt to read the deed restrictions to allow them to control town land is predicated on a ridiculous interpretation of the Deed Restrictions. The Deed Restrictions were imposed by the Low Country Open Land Trust (LOLT). The LOLT is dedicated to the preservation of open, natural land. See Para. 21, Second Amended Complaint. The Deed Restrictions explain that the purpose of the Restrictions is to "retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants, or wildlife." (emphasis added) See Exhibit 2 to Second Amended Complaint. The Restrictions go on to say that "'natural, 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 ... An aerial photograph of the Property...." Id.

Clearly what the document intends is to insure that the property, at future dates, will be at least as good for wildlife, plants, animals, etc as it was at the date of the grant. Plaintiffs, however, stretch this too far. Plaintiffs read the term "condition of the property at the time of this grant" literally to mean that the deed restrictions granted Plaintiffs a "view right" that property will remain in the exact condition as on February 12, 1991. They argue that because the cutting rule on that date was a flat-top 3' that the bushes must always be artificially maintained at that height.²¹ According to Plaintiffs the growth of plants, an act of nature, violates the "view right" they claim the Deed Restrictions created unless the Town repeatedly artificially cuts the plants back to three feet in height.

²¹ See Deposition of K. Albenesius p 21, lines 18 – 22 ("Q If you had to choose between the natural state of the accreted land, which blocks your view, or having human intervention to manicure it every year at three feet to keep that view, which would you choose?" "A Human Intervention.")

There are a number of problems with the Plaintiffs' interpretation. (1) Even if the Court were to accept the Plaintiffs' premise that the deed restriction literally means that every bush must be kept trimmed to the exact height at which it existed on February 12, 1991, that is a far cry from saying that the every front beach property owner can today cut pursuant to the 3' rule. Using the Plaintiffs' own logic keeping the AL in the exact condition as shown in 1991 photographs would require that each plant be maintained as it then existed. In other words, if Property Owner A had not cut in 1990 / 1991 and had 10' high shrubs on the AL in front of his house on the date the Deed Restriction was signed, but Property Owner B had just trimmed the day prior and had 3' high shrubs in front of his house, then the deed restrictions would require those differing heights to be maintained in perpetuity because that was the exact condition on the date of the Deed Restrictions. Such a bush by bush, parcel by parcel interpretation of the Deed Restrictions is clearly unworkable. (2) Another problem with Plaintiffs' interpretation of the Deed Restrictions is that it would be impossible for anyone to maintain the land precisely as it existed in 1991. The Town can't stop acts of nature. For that matter, neither can the Plaintiffs. Yet that is what would be required if the phrase "condition of the Property at the time of this grant" were read literally as Plaintiffs demand. Every year some shrubs die and others spring to life on the AL. Every year hurricanes and high tides alter the vegetation and topography of the AL. Since there is no possible way to *literally* maintain the land exactly as it existed on February 12, 1991, it is clear that the Deed Restrictions must mean something other than what the Plaintiffs say. (3) The Plaintiffs' interpretation of the deed restrictions ironically conflicts with the entire point of the Deed Restrictions. One should not forget that the Deed Restrictions were supposed to help maintain the AL in a *natural* state. The Plaintiffs argument is that "natural state" basically means "a good ocean view for Plaintiffs" and thus requires yearly

artificial, unnatural pruning.²² Moreover, the Deed Restrictions were supposed to increase wildlife habitat. See Deed Restriction at third "Whereas" clause (Noting a purpose as being to maintain the land "as suitable habitat for fish, plants, or wildlife.") Yet the Plaintiffs argue that "too much natural wildlife" has resulted from the Town's management of the property. See Second Amended Complaint at Para. 58(e), (f), and (g); Page 14, fnt. 8, and Para 116 - 118.²³ The Plaintiffs' have lost sight of the forest while chopping at the trees when it comes to understanding the Deed Restrictions. (4) The Plaintiffs strict reading of the term "condition of the Property at the time of this grant" blatantly ignores the words that precede the phrase. The Plaintiffs' chosen clause is preceded by the following: "'natural, 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...." (emphasis added.) In other words, the paragraph is really saying that the Deed Restrictions are intended to foster the property as a "natural, scientific, educational, aesthetic, scenic and recreational resource." While the condition of the property as shown in photographs of February 12, 1991, is one measure of this, it is not intended to be the only measure. The condition of the property on February 12, 1991 was not intended to "limit[] the generality" of those broad terms. And yet that is precisely what Plaintiffs do in arguing they possess a "view right" that the Town must continue to artificially manipulate the AL to try to undo any act of nature (plant growth) that occurs.

²² See Deposition of K. Albenesius p 21, lines 18 - 22 ("Q If you had to choose between the natural state of the accreted land, which blocks your view, or having human intervention to manicure it every year at three feet to keep that view, which would you choose?" "A Human Intervention.")

²³ See also, Deposition of K. Albenesius p 20, lines 1 - 3 ("Q Now, your lawsuit says that the natural wildlife and plant growth on the accreted land is causing you harm, right?" "A Yes. I guess you could say that. I'm not positive."); Deposition of T. Albenesius p 26, line 20 - p 27, line 11. See also, Deposition of N. Bluestein p. 50, line 15 - 16 and p 71, lines 2-6.

The Plaintiffs' lack of any right to control neighboring property to assure a view invalidates every one of the nine causes of actions within the Complaint

Breach of Contract (Fourth Cause of Action), Breach of Contract by Fraudulent Act (Fifth Cause of Action) and Constitutional Impairment of Contract (Ninth Cause of Action)

The Town is entitled to Summary Judgment because it has not breached or impaired any contract (deed restrictions.) As described above in detail, the Town has faithfully honored the deed restrictions in all material respects. The deed restrictions are designed to protect the natural, undeveloped nature of the accreted land. See Deed Restrictions, Second and Third "Whereas" Clauses; See also, Exhibit 2 to Second Amended Complaint. The Town has done that. The deed restrictions are designed to allow wildlife and wildlife habitat to flourish. See *Id.* The Town's policies have been consistent with that. See Second Amended Complaint at Para. 58(e), (f), and (g); Page 14, fnt. 8, and Para 116 - 118. The deed restrictions are intended to preserve the scenic view of those people on the beach inward. See Exhibit 2 to Second Amended Complaint. The Town's policies have done that. The deed restrictions allow the Town the unrestricted authority to control cutting on the accreted land. See Para. 2 of Deed Restrictions. The Town has exercised this authority. The deed restrictions specifically allow the Town to pass cutting rules that are "more restrictive" and more protective of the environment than those that were in place in 1991. See Para. 6 of Deed Restrictions. The Town has done that. Even the Plaintiffs agree that the current ordinances they sue to invalidate are more protective.²⁴

²⁴ See Deposition of K. Albenesius p 21, lines 18 - 22 ("Q If you had to choose between the natural state of the accreted land, which blocks your view, or having human intervention to manicure it every year at three feet to keep that view, which would you choose?" "A Human Intervention.") See also, Deposition of K. Albenesius p 20, lines 1 - 3 ("Q Now, your lawsuit says that the natural wildlife and plant growth on the accreted land is causing you harm, right?" "A Yes. I guess you could say that. I'm not positive."); Deposition of T. Albenesius p 26, line 20 - p 27, line 11. See also, Deposition of N. Bluestein p. 50, line 15 - 16 and p 71, lines 2-6. See Deposition of T. Albenesius p 17, lines 4 - 7; p 18, line 15 - p 22, line 22. See also, Deposition of N. Bluestein p. 71, line 14 - 18; p

Ironically, the Plaintiffs' argument really boils down to this – the Town has done *too good* of a job protecting the Accreted Land and nature has become inconvenient for the Plaintiffs as it blocks their view. See Deposition of K. Albenesius p 21, lines 18 – 22 (“Q If you had to choose between the natural state of the accreted land, which blocks your view, or having human intervention to manicure it every year at three feet to keep that view, which would you choose?” “A Human Intervention.”) The Town has honored the deed restrictions in all material ways. There is no meaningful breach.

The Plaintiffs' claim for damages further demonstrates their fundamental misunderstanding of the deed restrictions. Plaintiffs contend that plant growth on the Accreted Land has violated the deed restrictions (and injured them) by “[e]liminating the Plaintiffs' views of the beaches and the Atlantic Ocean” and thus diminished their property values. See Para. 58, Second Amended Complaint. The Plaintiffs have it backwards. The deed restrictions actually protect the view of beachgoers looking inland, not the view of homeowners of the ocean. This is the view of the Lowcountry Open Land Trust, the owner of the restrictions! Exhibit 2 to the Second Amended Complaint, a document Plaintiffs themselves proffer as authoritative, states “[t]he scenic value of this property is due to its visibility from the Atlantic Ocean and the public beach.” (emphasis added.) It goes on to say that “[o]pen 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.” *Id.* Note that there is absolutely no mention that the view or open space value is intended to be protected by artificial pruning as the Plaintiffs demand here. That is because the deed restrictions are not designed to protect

72, line 24 – p 74, line 2. See Deposition of T. Albenesius p 17, lines 4 – 7; p 18, line 15 – p 22, line 22. See also, Deposition of N. Bluestein p. 71, line 14 – 18; p 72, line 24 – p 74, line 2.

Plaintiffs' house views. Plaintiffs can not seek damages based on deprivation of a right they do not possess.

Even if the deed restrictions did protect the view right of some homeowners, they create no compensable view right for the Plaintiffs since non-deed-restricted land lies between the Plaintiffs and the deed-restricted Accreted Land. Even if the deed restricted portion of the Accreted Land were mowed to the ground the view of the Plaintiffs could still be blocked and wildlife could still thrive. The Plaintiffs don't even have a right to look across Bayonne Avenue to see the deed-restricted land. They cannot therefore have been damaged by anything that happened on the Accreted Land.

Declaratory Judgment (First Cause of Action)

Plaintiffs seek a declaration from this court that basically adopts Plaintiffs erroneous interpretation of the deed restrictions, gives Plaintiffs the unlawful power to control property owned by another, and impairs governmental power. For the reasons stated above, Plaintiffs requested relief must be denied. South Carolina law clearly does not grant one property owner the ability to control land owned by another, even when an ocean view is at stake. See Hill v. Beach Company, 306 S.E.2d 604 (SC 1983). The deed restrictions in this case do not change that analysis. *First*, the declarations requested by the Plaintiffs contradict the actual language of the deed restrictions. The deed restrictions give the Town the unrestricted authority, without need for special referenda or procedures, to regulate vegetation trimming on the Accreted Land and also specifically contemplate that the Town might pass more restrictive cutting ordinances than the 1981 version. See Deed Restrictions, Paragraphs 2 and 6. The Town exercised the exact powers permitted by written the deed restrictions. The Plaintiffs cannot therefore expect to

obtain a judicial declaration that is contrary to the document itself. *Second*, the declarations sought by the Plaintiffs would amount to an unlawful impairment of legislative power. State law places zoning authority in the hands of elected town councilmen. Each councilman leaving office must pass on to his / her successor the same authority. The Plaintiffs' desired declarations would amount to a finding that the 1991 Town councilmen acted to freeze zoning (or alter state zoning procedures) and trimming rules on the Accreted Land for at least fifty (50) years, thus depriving all successor town councils of authority. This the law forbids. *Finally*, the Plaintiffs' requested declarations would require this court to interpret the deed restrictions in a manner that is ridiculous. The deed restrictions clearly state that they are intended to protect wildlife and nature. See Deed Restrictions, Second and Third "Whereas" clauses. The Plaintiffs argument is basically that the Town's 2005 ordinance does too good of a job of protecting trees and wildlife.²⁵ The Plaintiff's concept that the Deed Restrictions are intended to protect their homes' view of the ocean is perverse. Plaintiff's own Exhibit 2 to the Second Amended Complaint says just the opposite – that the scenic value protected by the Deed Restrictions is the view of beachgoers looking inland being able to see nature (i.e. not seeing the house).

Injunctive Relief²⁶ (Second Cause of Action)

The Plaintiffs seek an injunction from this Court that would forbid the Town from enforcing the 1995 and 2005 zoning ordinances because these ordinances conflict with *Plaintiffs'*

²⁵ See Deposition of K. Albenesius p 21, lines 18 – 22 ("Q If you had to choose between the natural state of the accreted land, which blocks your view, or having human intervention to manicure it every year at three feet to keep that view, which would you choose?" "A Human Intervention.") See also, Deposition of K. Albenesius p 20, lines 1 – 3 ("Q Now, your lawsuit says that the natural wildlife and plant growth on the accreted land is causing you harm, right?" "A Yes. I guess you could say that. I'm not positive."); Deposition of T. Albenesius p 26, line 20 – p 27, line 11. See also, Deposition of N. Bluestein p. 50, line 15 – 16 and p 71, lines 2-6.

²⁶ By separate motion the Town also challenges the viability of the Plaintiff's Injunctive Relief claim as it pertains to taxation issues.

reading of the Deed Restrictions. For all of the reasons previously stated, the Plaintiffs' reading of the Deed Restrictions is simply wrong. The Town has not violated the deed restrictions or any other law. Accordingly, there is no basis for the issuance of an injunction to stop the Town from operating in its current, lawful fashion.

Writ of Mandamus (Third Cause of Action)

The Plaintiffs are not entitled to a Writ of Mandamus compelling the Town to adopt Plaintiff's flawed reading of the Deed Restrictions. The Plaintiffs have no common law right to control neighboring land in order to preserve their view. They cannot use the deed restrictions to manufacture any such right because (as discussed above) the deed restrictions specifically authorize the 2005 Zoning Ordinance being challenged here. Thus, it would be error for this Court to issue a Writ of Mandamus that basically enforces a flawed reading

Unfair Trade Practices Act (Sixth Cause of Action);

The Plaintiff's UTPA Claim, based on their supposed loss of beachfront view and status (Second Amended Complaint, Para 110 and 111), cannot succeed since they have no right to such a view (or control vegetation) in the first place. As described above, the Plaintiff do not live immediately adjacent to the beach. They live one lot removed from the beach. See maps attached to Exh 3 & 4 of Plaintiffs' Second Amended Complaint. South Carolina law gives no "right to a view." See Hill v. Beach Co., 306, S.E.2d 604 (1983). The deed restrictions also give

Plaintiffs no right to a view. *First*, because the words of the deed restrictions specifically allow for the Town Ordinance the Plaintiffs complain about. *Second*, because the view protected by the Deed Restrictions is actually the ability of ocean and beach goers to look inland at natural land / vegetation. See Exhibit 2 to Plaintiffs' Second Amended Complaint ("The scenic value of this property is due to its visibility from the Atlantic Ocean and the public beach.")(emphasis added). The Deed Restrictions never stated that the Accreted Land would be pruned to make Plaintiffs houses *more visible* to beach goers so as to assure Plaintiffs could see the water. *Finally*, the Plaintiffs do not actually even abut the deed restricted land. Thus, the Plaintiffs have no right to even view the Accreted Land, much less look at the ocean on the far side of it. The Town's regulation of the Accreted Land therefore cannot have legally impacted Plaintiffs' view *rights* or caused an Unfair Trade Practice injury.

Inverse Condemnation (Eighth Cause of Action)

The Plaintiffs claim for Inverse Condemnation also fails as a matter of law. Inverse condemnation is a species of "taking" claim. Significantly, "[w]here the proscribed use is not part of the owner's title to begin with, no compensatory taking has occurred." McQueen v. SC Coastal Council, 580 S.E.2d 116, 119 (SC 2003); Lucas, 505 US at 1027. Thus, a seminal issue is whether or not the "right taken" was a right the plaintiff even owned.

In McQueen, the plaintiff owned two waterfront lots that, over the years, had reverted to wetlands. The Coastal Council denied plaintiffs request to add fill to wetlands to recreate high, buildable lots. McQueen then sued the Coastal Council claiming that the state regulations "took" all value from his land by denying his ability to add fill dirt. It was uncontested that the lots had no value with the Coastal Council barring fill dirt. Despite this, McQueen lost. The court noted that under State law McQueen did not own title to wetlands – the state did. As a result, he had

no right to place fill and bulkheads on wetland owned by the state and “the state need not compensate him for the denial of permits to do what he cannot otherwise do.” Id. at 120.

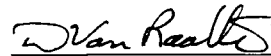
This case clearly falls within the rule of McQueen. The Town has taken nothing from the Plaintiffs that Plaintiffs own. The Plaintiffs claim that the Town has taken their view. The problem is, the Plaintiffs’ titles give them no right to a view. See Hill v. Beach Co., 306 S.E.2d 604 (SC 1983) (prior front row homeowners lawsuit over new houses built ahead of them on accreted land resolved with comment “[i]n our view, the appellants’ claim amounts to a prescriptive right to ocean view, breezes, light and air. Such right does not exist in South Carolina.”) Id. at 605. See also Young v. SC DHEC, 680 S.E.2d 784, 789(SC App. 2009)(Citing Hill for the same basic proposition.) Since the Plaintiffs clearly do not own the AL, clearly must look across the AL in order to see the ocean, and clearly have no right under SC law to look across the land of another, there can be no “taking” of any description here.

Plaintiffs claim of inverse condemnation also fails because it is clear that the Town has not taken the “action” that offends them. Since at least 1995 the same general rules governing cutting on the AL have been in place. Thus, no “action” *by the Town* has caused injury to the Plaintiffs. The only thing that has happened in the last fifteen (15) years is that nature has run its course. Trees and bushes that were once smaller have grown. This pure act of nature cannot constitute not a “taking” by the Town any more than could the waves of Hurricane Hugo that destroyed many homes on the island.

Additionally, inverse condemnation cannot stand here because the Plaintiffs have retained all use of their property and, in fact, the value of that property has actually increased since the current era of regulation began in 1995. The Town’s regulation deals with the ability of Plaintiffs to trim vegetation on land they do not own. The regulation does not in the slightest

regulate what activity Plaintiffs may engage in on their own properties. Moreover, there is simply no evidence that the Town's regulation has taken any value from the Plaintiffs. To the contrary, property records suggest that the properties continued to appreciate during the time that the Town's regulations have been in effect.²⁷ Ms. Albenesius even said she wouldn't accept a refund of the purchase price of her home - a clear indication that even she believes that her home is now worth more than what she paid for it.²⁸ At best the Plaintiffs might argue that their properties are not appreciating as fast as they believe they might under a different AL regulatory ordinance. That, however, is not an injury recognized under the law of inverse condemnation.

This 26 day of Feb, 2014



J. Brady Hair
Derk Van Raalte (9286)
PO Box 61896
North Charleston, SC 29419
843-572-8700
843-745-1082
derk@bradyhair.com

Attorneys for the Defendants

²⁷ See Deposition of N. Bluestein p 7, lines 5 – 10 (paid \$95,000 for lot in approximately 1980); See also Deposition of K. Albenesius p 26 – 27 (paid \$3.1 million for the property a few doors from that of Plaintiffs Bluestein, but despite claiming ordinance devalues her property she indicated she would not sell even if she could get \$3.1 million back today.)

²⁸ See Deposition of K. Albenesius p 26 – 27.

LOLT AFFIDAVIT

ROA 769

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Nathan Bluestein, Ettaleah Bluestein,	)	Case No. 10-CP-10-5449
Theodor Albenesius and Karen	)	
Albenesius,	)	
	)	
Plaintiffs,	)	<u>AFFIDAVIT</u>
	)	
Versus	)	
	)	
Town of Sullivan's Island and	)	
Sullivan's Island Town Council,	)	
	)	
Defendants.	)	

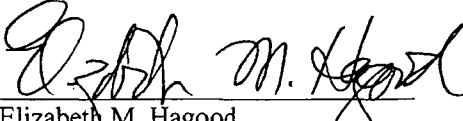
PERSONALLY appeared before me, Elizabeth M. Hagood, who duly sworn, deposes, and states as follows:

1. I am competent to make this Affidavit.
2. I am 18 years of age or older.
3. That the contents of this Affidavit are true, and are made based on my personal knowledge.
4. I currently serve as the Executive Director of the Lowcountry Open Land Trust (hereafter "LOLT).
5. LOLT is a 501(c)(3) corporation that was formed in 1986.
6. I served as the first Executive Director from 1989 until 1994.
7. In May 2010, I returned to serve as Executive Director.
8. I have also been involved with various other community service organizations, and I served as the Chair of the South Carolina Department of Health and Environmental Control from 2002 to 2006.
9. LOLT is a local land conservation organization that is focused on protecting ecologically,

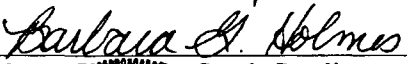
agriculturally, and historically significant land in the Lowcountry of South Carolina.

10. During my first term as the Executive of LOLT, the LOLT received a Title to Real Estate from the Town of Sullivan's Island pertaining to the real property described in the Title to Real Estate dated February 12, 1991.
11. On February 12, 1991, the LOLT executed and delivered a Title to Real Estate conveying the property described in the Title to Real Estate dated February 12, 1991 to the Town of Sullivan's Island.
12. I am familiar with the deed restrictions that apply to the land that is the subject of the Title to Real Estate dated February 12, 1991 (hereafter the "Accreted Land").
13. After LOLT conveyed the Accreted Land to the Towns of Sullivan's Island, employees of LOLT monitored the Accreted Land for the purpose of monitoring the Town's compliance with the deed restrictions.
14. The attached monitoring reports were copied from the business records of the LOLT, those reports were created at or about the time that the compliance inspections were conducted by employees of LOLT and those reports are true and accurate copies of the records maintained in the ordinary course of the LOLT's business operations.
15. The attached monitoring reports show that LOLT periodically and regularly visited the Accreted Land each year since 2001, reviewed the existing field conditions, compared the field conditions to the deed restrictions, and found nothing that violated the deed restrictions.

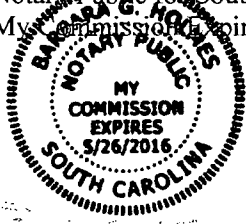
FURTHER THIS AFFIANT SAYETH NOT.


Elizabeth M. Hagood

SWORN to before me this
27th day of February 2014.


Notary Public for South Carolina

My commission expires: May 26, 2016





December 20, 2001

Karen McNamara
Town of Sullivan's Island
Town Hall
P.O. Box 427
Sullivan's Island, SC 29482

Dear Ms. McNamara:

Lowcountry Open Land Trust (LOLT) has recently conducted an annual monitoring site visit of Sullivan's Island Beach. Enclosed you will find a copy of the monitoring report prepared by LOLT stating that we found nothing that would violate the conditions of the deed restriction.

Enclosed you will also find a copy of the Property Contact Information Form we presently have on file. Please take a moment to fill it out and return it at your earliest convenience in the enclosed envelope or fax it to us at 577-0501. If you have any questions or concerns, please contact me at 577-6510. Thank you for helping to preserve the scenic values of South Carolina's Lowcountry.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle Wittouck", with a long horizontal line extending to the right.

Michelle Wittouck
Stewardship Coordinator

Scott Barnes, Thomas Blagden, Jr., Frank Brumley, Homei Burrous, Carmel R. Dodds, Harry D. Gregorie, John B. Howard, Hugh C. Lane, Jr., Pierre Manigault, Bradford Marshall, Barclay McFadden, III, Michael G. McShane, John D. Ohlandt, Douglas C. Plate, Theodore D. Stoney, Jr., Helen S. Warren

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DEED RESTRICTION MONITORING REPORT

Property: *Sullivan's Island Beach*

Focus Area: *CAWS - Sea Islands*

Current Owner: *Town of Sullivan's Island*

Date of Deed Restriction: *February 14, 1991*

Date of Last Monitoring Report: *N/A*

Date of This Monitoring Report: *November 7, 2001*

Lowcountry Open Land Trust representative:

Mary Pope Hutson

Did the property owner accompany the Lowcountry Open Land Trust representative?

☐ YES ☒ NO

If NO, identify who gave permission to monitor the property and how that permission was given:

Public access

Check any of the following that are currently in practice:

☐ Agriculture	☐ Aquaculture
☐ Commercial	☐ Fishing
☐ Forestry	☐ Hunting
☒ Recreational	☐ Research
☐ Residential	☐ Wildlife/Habitat Management

1. List acts or uses permitted by the deed restriction that have taken place since the last Monitoring Report:

None

2. List acts or uses prohibited by the deed restriction that have taken place since the last Monitoring Report:

None

3. List alterations to ecological and scenic features (trees or grounds) that have taken place since the last Monitoring Report:

None

4. List alterations to land-use features and activities (roads) that have taken place since the last Monitoring Report:

None

DEED RESTRICTION MONITORING REPORT

Property: *Sullivan's Island Beach*

Focus Area: *CAWS - Sea Islands*

5. List alterations to man-made features and activities (fence, gate, mailbox, and signs) that have taken place since last Monitoring Report:

None

6. List natural events (fire, hurricane) that have taken place since last monitoring Report:

None

7. List wildlife observed during this Monitoring Report:

None

Remarks:

Photos Taken?

YES

 X

NO

Photographs of possible easement violations and any made-made, natural or other changes in the property since the last Monitoring Report will be added to the property Notebook on file at the Lowcountry Open Land Trust.



April 25, 2002

Karen McNamara
Town of Sullivan's Island
P.O. Box 427
Sullivan's Island, SC 29482

RE: Sullivan's Island Beach Monitoring 2002

Dear Ms. McNamara:

The Lowcountry Open Land Trust has completed its 2002 annual monitoring duties on your property. A monitoring report has been filed and I am pleased to report that land uses were consistent with the terms of the deed restrictions and the conservation values were found intact. A copy of this report is enclosed for your records.

The Land Trust now protects 111 properties covering nearly 25,000 acres throughout coastal South Carolina. We are proud to have you as a partner in conservation and we would like to thank you again for your land protection efforts and support of our mission to preserve the irreplaceable natural and historically significant landscapes of the Lowcountry.

I look forward to monitoring your property again next year. Please feel free to contact me at 843-577-6510 with any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle Wittouck", written over a horizontal line.

Michelle Wittouck
Stewardship Coordinator

Scott Barnes, Thomas Blagden Jr., Frank Brumley, Homer Burrous, Carmel R. Dodds, Harry B. Gregorie Jr., John B. Hnward, Hugh C. Lane Jr.,
Pierre Manigault, Bradford Marshall, Barclay McFadden III, Michael G. McShane, John D. Ohlandt, Douglas C. Pate, Theodore D. Stoney Jr., Helen S. Warren

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2002 DEED RESTRICTION MONITORING REPORT

Property: Sullivan's Island Beach

Focus Area: CAWS - Sea Islands

Current Owner: Town of Sullivan's Island, contact Karen McNamara, Town Administrator

Date of Deed Restriction: February 14, 1991

Date of Last Monitoring Report: November 7, 2001

Date of This Monitoring Report: April 9 and April 24, 2002

Lowcountry Open Land Trust representative:

Michelle Wittouck

Did the property owner accompany the Lowcountry Open Land Trust representative?

☐ YES ☒ NO

If NO, identify who gave permission to monitor the property and how that permission was given:

Public access

Check any of the following that are currently in practice:

☐ Agriculture	☐ Aquaculture
☐ Commercial	☐ Fishing
☐ Forestry	☐ Hunting
☒ Recreational	☐ Research
☐ Residential	☐ Wildlife/Habitat Management

1. List acts or uses permitted by the deed restriction that have taken place since the last Monitoring Report:

Some boardwalks along access trails have been improved and new ones have been built at various access points. See file for details.

2. List acts or uses prohibited by the deed restriction that have taken place since the last Monitoring Report:

None

3. List alterations to ecological and scenic features (trees or grounds) that have taken place since the last Monitoring Report:

None

4. List alterations to land-use features and activities (roads) that have taken place since the last Monitoring Report:

None

2002 DEED RESTRICTION MONITORING REPORT

Property: *Sullivan's Island Beach*

Focus Area: *CAWS - Sea Islands*

5. List alterations to man-made features and activities (fence, gate, mailbox, and signs) that have taken place since last Monitoring Report:

None

6. List natural events (fire, hurricane) that have taken place since last monitoring Report:

None

7. List wildlife observed during this Monitoring Report:

None

Remarks:

Photos Taken?

 X

YES

NO

1,2 New boardwalk at Station 28 access

Photographs of possible deed restriction violations and any made-made, natural or other changes in the property since the last Monitoring Report will be added to the property Notebook on file at the Lowcountry Open Land Trust.

Signature of Monitor



Off the record general remarks:

Noticed new boardwalks and improvements to existing. Contacted Karen McNamara and she verified they were part of public access system and had been funded by grant. She will forward copy of map of new and improvements and schedule of completeion to LOLT.



2003 DEED RESTRICTION MONITORING REPORT

Property: *Sullivan's Island Beach* **Focus Area:** *CAWS - Sea Islands*

Current Owner: *Town of Sullivan's Island*
Date of Deed Restriction: *February 14, 1991*
Date of Last Monitoring Report: *April 9 and April 24, 2002*
Date of This Monitoring Report: *April 23, 2003*
Lowcountry Open Land Trust representative:

Michelle Wittouck

Did the property owner accompany the Lowcountry Open Land Trust representative?

 YES X NO

If NO, identify who gave permission to monitor the property and how that permission was given:

Public access

Check any of the following that are currently in practice:

<u> </u> Agriculture	<u> </u> Aquaculture
<u> </u> Commercial	<u> </u> Fishing
<u> </u> Forestry	<u> </u> Hunting
<u> X </u> Recreational	<u> </u> Research
<u> </u> Residential	<u> </u> Wildlife/Habitat Management

1. List acts or uses permitted by the deed restriction that have taken place since the last Monitoring Report:

Some boardwalks along access trails have been improved and new ones have been built at various access points. See file for details.

2. List acts or uses prohibited by the deed restriction that have taken place since the last Monitoring Report:

None

3. List alterations to ecological and scenic features (trees or grounds) that have taken place since the last Monitoring Report:

None

4. List alterations to land-use features and activities (roads) that have taken place since the last Monitoring Report:

None

2003 DEED RESTRICTION MONITORING REPORT

Property: *Sullivan's Island Beach*

Focus Area: *CAWS - Sea Islands*

5. List alterations to man-made features and activities (fence, gate, mailbox, and signs) that have taken place since last Monitoring Report:

None

6. List natural events (fire, hurricane) that have taken place since last monitoring Report:

None

7. List wildlife observed during this Monitoring Report:

None

Remarks:

Photos Taken?

X

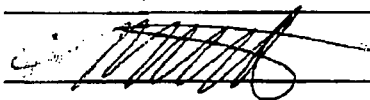
YES

 NO

Photographs taken at various station points along beach in order to complete documentation for property. Please see documentation book photograph section for photos.

Photographs of possible deed restriction violations and any made-made, natural or other changes in the property since the last Monitoring Report will be added to the property Notebook on file at the Lowcountry Open Land Trust.

Signature of Monitor
Signature of Stewardship
Coordinator





May 20, 2004

Andy Benke
Sullivan's Island Town Administrator
Town of Sullivan's Island
PO Box 427
Sullivan's Island, SC 29482

RE: Sullivan's Island Beach Deed Restriction Monitoring 2004

Dear Mr. Benke:

The Lowcountry Open Land Trust has completed its 2004 annual monitoring duties on the Sullivan's Island Beach. A monitoring report has been filed and I am pleased to report that land uses were consistent with the terms of the deed restriction and the conservation values were found intact. A copy of this report is enclosed for your records.

Thanks to some very generous easement donors in 2003, the Land Trust now protects 136 properties covering 34,661 acres throughout coastal South Carolina. The Land Trust currently protects 10,375 acres within the CAWS Basin Focus Area, covering close to 30% of the total acres protected by the Land Trust. We are proud of our recent accomplishments and would like to thank you for your continued support of our mission to preserve the Lowcountry of South Carolina.

Please feel free to contact me at 843-577-6510 with any questions you may have.

Sincerely,

A handwritten signature in cursive script that reads "Anna C. Nygaard".

Anna C. Nygaard
Stewardship Coordinator

Scott Y. Barnes, Margaret P. Blackmer, Thomas P. Blagden Jr., Frank W. Brumley, Homer C. Burrous, Bill A. Coleman, Harry B. Gregorie Jr., William L. Hiott Jr., John B. Howard, Bradford S. Marshall, Barclay McFadden III, Michael G. McShane, Douglas C. Plaie, Helen S. Warren

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2004 Deed Restriction Monitoring Report

Property: *Sullivan's Island Beach* Focus Area: *CAWS Basin - Sea Islands Initiative*

Current Owner: *Town of Sullivan's Island*

Date of Deed Restriction: *February 14, 1991*

Date of Last Monitoring Report: *April 23, 2003*

Date of This Monitoring Report: *May 9, 2004*

Lowcountry Open Land Trust representative:

Anna C. Nygaard

Did the property owner accompany the Lowcountry Open Land Trust representative?

☐ YES ☒ NO

If NO, identify who gave permission to monitor the property and how that permission was given:

Monitored from public beach and public access points

Check any of the following that are currently in practice:

☐ Agriculture	☐ Aquaculture
☐ Commercial	☐ Fishing
☐ Forestry	☐ Hunting
☒ Recreational	☐ Research
☐ Residential	☐ Wildlife/Habitat Management
☒ Open Space	

1. List acts or uses permitted by the deed restriction that have taken place since the last Monitoring Report:

New wooden fences/dune protection fences placed along dunes near Stations 18 and 18.5. Also noted several sail boats parked near the dune line within this same area.

2. List acts or uses prohibited by the deed restriction that have taken place since the last Monitoring Report:

None

3. List alterations to ecological and scenic features (trees or grounds) that have taken place since the last Monitoring Report, other than routine maintenance:

None

4. List alterations to land-use features and activities (access points) that have taken place since the last Monitoring Report, other than routine maintenance:

None

2004 Deed Restriction Monitoring Report

Property:

Sullivan's Island Beach

Focus Area:

CAWS Basin - Sea Islands Initiative

5. List alterations to man-made features and activities (fence, gate, mailbox, and signs) that have taken place since last Monitoring Report:

None

6. List natural events (fire, hurricane) that have taken place since last monitoring Report:

None

7. List wildlife observed during this Monitoring Report:

Numerous Shore and Wading Birds

Remarks:

Noted trash and other debris (from plastic to wooden poles) scattered along the beach, especially in the western end, near the rock jetties.

Photos Taken?

 X

YES

 NO

1a-b. Picture of newly erected dune protection fences along sand dunes near Stations 18 and 18.5

2. Picture of sail boats in the sand near Stations 18 and 18.5

3. Updated picture of rock jetties along the western end of the Island

4. Updated picture of bench along dunes at western end of Island

5. Updated picture of bench near Station 28

6. Picture of survey tape along dune line (near Station 28)

7. Picture of erosion wall along waterfront near Station 29

8. Updated picture of signs along public access (Station 29)

Photographs of possible deed restriction violations and any made-made, natural or other changes in the property since the last Monitoring Report will be added to the property Notebook on file at the Lowcountry Open Land Trust.

Signature of Monitor

Anna C. Nygaard

Signature of Stewardship Coordinator

Anna C. Nygaard



August 26, 2005

Town of Sullivan's Island
Attn: Andy Benke, Town Administrator
PO Box 427
Sullivan's Island, SC 29482

RE: Sullivan's Island 2005 Deed Restriction Monitoring

Dear Mr. Benke:

The Lowcountry Open Land Trust has completed its 2005 annual monitoring duties on Sullivan's Island Beach. A monitoring report has been filed and I am pleased to report that land uses were consistent with the terms of the deed restriction. A copy of this report is enclosed for your records.

Thanks to some very generous easement donors in 2004, the Land Trust now protects 156 properties covering 38,693 acres throughout coastal South Carolina. The Land Trust currently protects 10,564 acres within the CAWS Focus Area, covering close to 27% of the total acres protected by the Land Trust. We are proud of our recent accomplishments and would like to thank you for your continued support of our mission to preserve the Lowcountry of South Carolina. Without easement donors and landowners like you, we would not be so successful.

Please feel free to contact me at 843-577-6510 with any questions you may have.

Sincerely,

Anna C. Nygaard
Stewardship Coordinator

Scott Y. Barnes, Margaret P. Blackmer, Thomas P. Blyden Jr., Frank W. Brumley, Homer C. Burrows, Andrew E. Ceer III, Hanson L. Hewitt Jr., William L. Hiett Jr., John B. Hovance, Paula E. Kaye, Jim McConnel, Bradford S. Marshall, David Maybank III, Barclay McFadden III, Michael C. McShane

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2005 Deed Restriction Monitoring Report

Property: *Sullivan's Island*

Focus Area:

CAWS - Sea Islands Initiative

Current Owner: *Town of Sullivan's Island*

Date of Deed Restriction: *February 14, 1991*

Date of Last Monitoring Report: *May 9, 2004*

Date of This Monitoring Report: *August 17, 2005*

Lowcountry Open Land Trust representative:

Anna C. Nygaard

Did the property owner accompany the Lowcountry Open Land Trust representative?

☐ YES ☒ NO

If NO, identify who gave permission to monitor the property and how that permission was given:

Monitored from public access points and public beach

Check any of the following that are currently in practice:

☐ Agriculture	☐ Aquaculture
☐ Commercial	☐ Fishing
☐ Forestry	☐ Hunting
☒ Recreational	☐ Research
☐ Residential	☐ Wildlife/Habitat Management
☒ Open Space	☐ Historic Preservation

1. List acts or uses permitted by the deed restriction that have taken place since the last Monitoring Report:

None

2. List acts or uses prohibited by the deed restriction that have taken place since the last Monitoring Report:

None

3. List alterations to ecological and scenic features (trees or grounds) that have taken place since the last Monitoring Report:

Noted several Loggerhead Turtle nests, taped/roped off to prevent disturbance from the general public, within the sand dunes.

4. List alterations to land-use features and activities (roads) that have taken place since the last Monitoring Report:

None

2005 Deed Restriction Monitoring Report

Property: *Sullivan's Island*

Focus Area: *CAWS - Sea Islands Initiative*

5. List alterations to man-made features and activities (fence, gate, mailbox, and signs) that have taken place since last Monitoring Report:

Noted several Loggerhead Turtle nests, taped/roped off to prevent disturbance from the general public, within the sand dunes.

6. List natural events (fire, hurricane) that have taken place since last monitoring Report:

None

7. List wildlife observed during this Monitoring Report:

Pelicans, sea gulls, snipes, sandpipers and various other shore birds

Remarks:

The Land Trust is currently discussing with the Town of Sullivan's Island the notion of the Town donating (either through an amendment to the existing deed restriction or as a separate conservation easement) the land referred to as Battery Logan, near Station 16 and Fort Moultrie. This is a possible 2005 land protection project.

The Town Council of Sullivan's Island has the authority to enforce the Town's Vegetation and Tree Ordinances. No major changes to vegetation or trees noted during the annual visit.

Photos Taken?

 X YES NO

Description:

Loggerhead Turtle Nesting Sites

Photos of Battery Logan - possible addition of land to area already under protection

Photographs of possible deed restriction violations and any made-made, natural or other changes in the property since the last Monitoring Report will be added to the property Notebook on file at the Lowcountry Open Land Trust.

Signature of Monitor

Ara C. Nygaard

Signature of Stewardship Coordinator

Ara C Nygaard



July 28, 2006

Town of Sullivan's Island
Attn: Andy Benke, Town Administrator
PO Box 427
Sullivan's Island, SC 29482

RE: Sullivan's Island and Battery Logan – LOLT Deed Restrictions
2006 Monitoring

Dear Andy:

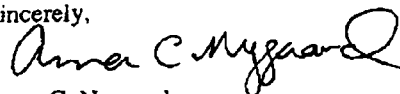
The Lowcountry Open Land Trust has completed its 2006 annual monitoring duties for the deed restrictions on Sullivan's Island Beach and Battery Logan. The Land Trust is pleased to report that land uses associated with Sullivan's Island Beach and Battery Logan were found to be consistent with the terms of the recorded deed restrictions. Monitoring reports have been filed for both Sullivan's Island Beach and Battery Logan; copies of these reports are enclosed for your records.

Enclosed you will also find the recorded copy of the Deed Restriction for Battery Logan. The document was re-recorded to correct for an incorrect TMS# on one of the pages of the document.

Thanks to some very generous easement donors in 2005, the Land Trust now protects 168 properties covering 45,482 acres throughout coastal South Carolina. The Land Trust currently protects 10,585 acres within the CAWS Focus Area, covering close to 23% of the total acres protected by the Land Trust. The Land Trust is proud of our perpetual conservation efforts and thank you for your continued support of our mission to preserve the Lowcountry of South Carolina. Without easement donors and landowners like you, we would not be so successful.

Please feel free to contact the Land Trust at 843-577-6510 with any questions or concerns you may have regarding the monitoring visit and/or the terms of your conservation easement.

Sincerely,


Anna C. Nygaard
Stewardship Coordinator

Enclosures

Scott Y. Barnes, Margaret P. Blackmer, Thomas P. Blagden Jr., Frank W. Brumley, Andrew E. Geer III, Batson L. Hewitt Jr., William L. Hiott Jr., John B. Howard, Paula L. Kuyk, Jan MacDougal, Bradford S. Marshall, David Maybank III, Stuart McDaniel, Charles Webb III, J. Rutledge Young Jr.

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2006 Deed Restriction Monitoring Report

Property: *Sullivan's Island Beach*

Focus Area:

CAWS - Sea Islands Initiative

Current Owner: *Town of Sullivan's Island*

Date Deed Restriction Recorded: *February 14, 1991*

Date of Last Monitoring Report: *August 17, 2005*

Date of This Monitoring Report: *July 19, 2006*

Lowcountry Open Land Trust representative:
Anna C. Nygaard

Did the property owner accompany the Lowcountry Open Land Trust representative?

☐ YES ☒ NO

If NO, identify who gave permission to monitor the property and how that permission was given:

Monitored from the public access points and the public beach

Check any of the following that are currently in practice:

☐ Agriculture	☐ Aquaculture
☐ Commercial	☐ Fishing
☐ Forestry	☐ Hunting
☒ Recreational	☐ Research
☐ Residential	☐ Wildlife/Habitat Management
☒ Open Space	☐ Historic Preservation

1. List acts or uses permitted by the deed restriction that have taken place since the last Monitoring Report other than general/routine maintenance:

None

2. List acts or uses prohibited by the deed restriction that have taken place since the last Monitoring Report:

None

3. List alterations to ecological and scenic features (trees or grounds) that have taken place since the last Monitoring Report other than general/routine maintenance:

None

4. List alterations to land-use features and activities (public access paths and boardwalks) that have taken place since the last Monitoring Report other than general/routine maintenance:

None

2006 Deed Restriction Monitoring Report

Property: *Sullivan's Island Beach*

Focus Area:

*CAWS - Sea Islands
Initiative*

5. List alterations to man-made features and activities (fences, gates and signs) that have taken place since last Monitoring Report other than general/routine maintenance:

None

6. List natural events (fire, hurricane) that have taken place since last monitoring Report:

None

7. List wildlife observed during this Monitoring Report:

Pelicans, sea gulls, snipes, sandpipers, various other shore bird species, horseshoe crab shells, hermit crabs and various other aquatic species (washed-up jelly fish, etc.)

Remarks:

The Town Council of Sullivan's Island has the authority to enforce the Town's Vegetation and Tree Ordinances. Public access paths and walkways/boardwalks are maintained and managed by the Town for ease of access, public safety and vegetation control. Routine installation, replacement and addition of warning signs, habitat signs and other public information signs along the access paths and dunes. Jetties, sea walls and other erosion control devices are repaired and maintained as needed.

No major changes to vegetation or trees noted during the annual visit.

Noted trash (fishing line, food wraps, etc.) and other debris (tractor tire, car fender, wood/dock piles) along the beach and dune line. Also noted a handful of sail boats situated on or near the beach - positioned for recreational use in the Atlantic Ocean.

Photos Taken?

 X YES NO

Descriptions:

Trash and Debris along the beach and dunes - wood debris, tractor tire, car fender

Scenic photos of the beach and dunes

Photo of new signs - public information and safety signs

Photographs of possible deed restriction violations and any made-made, natural or other change in the property since the last Monitoring Report will be added to the property Notebook on file at the Lowcountry Open Land Trust.

Signature of Monitor

Anna C. Nygaard

Signature of Stewardship Coordinator

Anna C. Nygaard



October 15, 2007

Town of Sullivan's Island
Attn: Andy Benke, Town Administrator
PO Box 427
Sullivan's Island, SC 29482

RE: Sullivan's Island and Battery Logan - LOLT Deed Restrictions
2007 Monitoring

Dear Mr. Benke:

The Lowcountry Open Land Trust has completed its 2007 annual monitoring duties for the deed restrictions on Sullivan's Island Beach and Battery Logan. The Land Trust is pleased to report that land uses associated with Sullivan's Island Beach and Battery Logan were found to be consistent with the terms of the recorded deed restrictions. Monitoring reports have been filed for both Sullivan's Island Beach and Battery Logan; copies of these reports are enclosed for your records.

Thanks to some very generous easement donors in 2006, the Land Trust now protects 183 properties covering 47,018 acres throughout coastal South Carolina. The Land Trust currently protects 11,646 acres on 99 protected properties within the CAWS Focus Area, covering close to 25% of the total acres protected by the Land Trust.

The Land Trust is proud of our perpetual conservation efforts and thank you for your continued support of our mission to preserve the Lowcountry of South Carolina. Please feel free to contact the Land Trust at 843-577-6510 with any questions or concerns you may have regarding the monitoring visit and/or the terms of your conservation easement.

Sincerely,

A handwritten signature in dark ink, reading "Anna C. Nygaard".

Anna C. Nygaard
Director of Stewardship

Scott E. Burton, Margaret P. Blackmer, Anna C. Nygaard, Ellen S. Smith, Laura M. Hughes, Andrew E. Lee, M. Bailey C. Stewart, Jr., William J. Thayer Jr., John H. Howard, Paula C. Kirk, An Ann Douglas, Daniel S. Davis III, J. Stuart Daniel, L. Bruce S. Eddy, III, Clayton Wilkins III, Charles A. Webb III, J. Katherine Young Jr.

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2007 Deed Restriction Monitoring Report

Property: Sullivan's Island Beach

Focus Area:

CAWS - Sea Islands Initiative

6. List natural events (fire, hurricane, tornado, flooding, etc.) that have taken place since last Monitoring Visit and Report:

None

7. List wildlife observed during this Monitoring Visit:

Pelicans, sea gulls, snipes, sandpipers, various other shore bird species, horseshoe crab shells, hermit crabs and various other aquatic species (washed-up jelly fish, etc.)

Remarks:

The Town Council of Sullivan's Island has the authority to enforce the Town's Vegetation and Tree Ordinances. Public access paths and walkways/boardwalks are maintained and managed by the Town for ease of access, public safety and vegetation control. Routine installation, replacement and addition of warning signs, habitat signs and other public information signs along the access paths and dunes. Jetties, sea walls and other erosion control devices are repaired and maintained as needed.

Sullivan's Island Town Council is in the initial stages of hiring a qualified planner to formulate an appropriate land management plan for the accreted land on the Island. The Town published the request for qualifications to solicit proposals from land management consultants to create a scientific based management plan for the accreted land. Copy of the Sullivan's Island Accreted Land Management Plan Request for Qualifications for Consultant Services is on file with the Land Trust. The Land Trust will not be involved in the selection process. The Land Trust asks that we stay informed of the process and that we receive final copies of the approved management plan for our files.

General Reference of Deed Restriction Terms (Paragraph 3) - The Sullivan's Island Town Council has the right to improve, change, modify or alter the protected property only if such actions are to further or effect one or more of the following enumerated public objectives or policies: Drainage, mosquito control, public walkways and emergency access to the Atlantic Ocean, beach renourishment, erosion control, vegetation management, educational programs, public safety, public health and scenic enhancement. Deed Restriction outlines how the process by which Sullivan's Island Town Council will review proposed activities and uses.

General Reference of Deed Restriction Terms (Paragraph 4) - Deed Restrictions prohibits any structure and building with a roof, any pavement (asphalt, concrete or other non-porous materials), electrical power lines (or accompanying stations, pads, wires, or conduits), sewer lines or pipes, commercial activities that related to the buying or selling of goods, services or things.

Noted trash (fishing line, food wraps, etc.) and other debris (wood/dock piles) along the beach and dune line. Also noted a handful of sail boats situated on or near the beach - positioned for recreational use in the Atlantic Ocean. Dead sea turtle noted near 901 and 853 Middle Street - police chief for the Town investigated the situation.

Noted vegetation clearing, mainly grasses and similar beach vegetation, between 1109 and 1105 Middle Street. Photo taken for reference and for future monitoring visits. Town of Sullivan's Island has the right of enforce vegetation management on the land adjacent to the accreted land associated with the deed restriction.

Photos Taken?

X

YES

NO

Vegetation clearing between 1109 and 1105 Middle Street

Updated views along the sand dunes and Visitors along the Beach

Various photos of the dead sea turtle, live crabs, horseshoe crabs and other wildlife critters

Various photos of debris, sail boats and other objects along the beach

Photographs of possible deed restriction violations and any made-made, natural or other changes in the property since the last Monitoring Report will be added to the property Notebook on file at the Lowcountry Open Land Trust.

Signature of Monitor

Signature of Director of Stewardship



2007 Deed Restriction Monitoring Report

Property: *Sullivan's Island Beach* **Focus Area:** *CAWS - Sea Islands Initiative*
Current Owner: *Town of Sullivan's Island*
Date Title of Real Estate to LOLT: *January 15, 1991*
Charleston County Deed Book and Page: *Book K 200 Page 484*
Date Deed Restriction - Transfer of Title to Town of Sullivan's Island Recorded: *February 14, 1991*
Charleston County Deed Book and Page: *Book K 200 Page 496*
Date of Last Monitoring Visit: *July 19, 2006*
Date of This Monitoring Visit: *August 26, 2007*
Lowcountry Open Land Trust representative: *Anna C. Nygaard*
Did the property owner accompany the Lowcountry Open Land Trust representative?
☐ YES ☒ NO

If NO, identify who gave permission to monitor the property and how that permission was given:

Monitored from the public access points and the public beach

Check any of the following that are currently in practice:

☐ Agriculture	☐ Aquaculture
☐ Commercial	☒ Fishing
☐ Forestry	☐ Hunting
☒ Recreational	☐ Research
☐ Residential	☐ Wildlife/Habitat Management
☒ Open Space	☐ Historic Preservation

1. List acts or uses permitted by the terms of the deed restriction that have taken place since the last Monitoring Visit and Report, other than general and routine upkeep and maintenance (mowing, vegetation control, landscaping, etc.):

None

2. List acts or uses prohibited by the terms of the deed restriction that have taken place since the last Monitoring Visit and Report:

None

3. List alterations to ecological, scenic (trees or grounds) and/or historic features of the protected property that have taken place since the last Monitoring Visit and Report, other than general and routine upkeep and maintenance (mowing, vegetation control, landscaping, etc.):

None

4. List alterations to land-use, historical features and/or third-party activities that have taken place since the last Monitoring Visit and Report:

None

5. List alterations to man-made features and activities (fence, gate, mailbox, signs, driveways and/or roads) or construction of any new structures that have taken place since last Monitoring Visit and Report:

None



August 11, 2008

Town of Sullivan's Island
Attn: Andy Benke, Town Administrator
PO Box 427
Sullivan's Island, SC 29482

RE: Sullivan's Island and Battery Logan – LOLT Deed Restrictions
2008 Monitoring

Dear Mr. Benke:

The Lowcountry Open Land Trust has completed its 2008 annual monitoring duties for the deed restrictions on Sullivan's Island Beach and Battery Logan. The Land Trust is pleased to report that land uses associated with Sullivan's Island Beach and Battery Logan were found to be consistent with the terms of the recorded deed restrictions. Monitoring reports have been filed for both Sullivan's Island Beach and Battery Logan; copies of these reports are enclosed for your records.

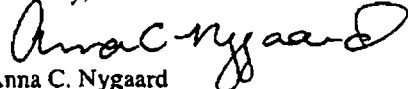
Although acquiring conservation easements is a major effort of the Land Trust, annual easement monitoring is perhaps more important. Monitoring is essential to ensure the conservation purposes as detailed in the conservation easement are upheld into perpetuity. It also gives the Land Trust an opportunity to spend time enjoying the land we have protected together. I can't think of a better way to spend a day at work!

Thanks to some very generous easement donors in 2007, the Land Trust now protects 210 properties covering 57,567 acres throughout coastal South Carolina. The Land Trust currently protects 15,554 acres on 109 protected properties within the CAWS Focus Area, covering close to 27% of the total acres protected by the Land Trust.

The Land Trust is proud of our perpetual conservation efforts and thank you for your continued support of our mission to preserve the Lowcountry of South Carolina. Without easement donors and landowners like you, we would not be so successful.

The Land Trust looks forward to monitoring Sullivan's Island Beach and Battery Logan again next year. Please feel free to contact the Land Trust at 843-577-6510 with any questions or concerns you may have regarding the monitoring visit and/or the terms of the deed restrictions.

Sincerely,


Anna C. Nygaard
Director of Stewardship

Board of Trustees

Scott V. Barnes, Margaret P. Blackmer, James G. Boyd, Elise S. Brown, Andrew E. Cren III, Elizabeth M. Hagood, Balson L. Hewitt Jr., William L. Hixon Jr., Paula L. Kuyk, Jan MacDougall, David Maybank III, J. Stuart McDaniel, T. Hunter McEckley, W. Clayton Walters III, Charles Webb III, J. Rutledge Young Jr.

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2008 Deed Restriction Monitoring Report

Protected *Sullivan's Island Beach* Focus Area: *CAWS -*
Property: *Sea Islands Initiative*

Current Owner: *Town of Sullivan's Island*

Date Title of Real Estate to
LOLT: *January 15, 1991*

Charleston County Deed

Book and Page recorded Title *Book K 200 Page 484*
to Real Estate:

Date Deed Restriction -

Transfer of Title to Town of *February 14, 1991*
Sullivan's Island Recorded:

Charleston County Deed

Book and Page for recorded *Book K 200 Page 496*
Transfer of Title to Town of
Sullivan's Island:

Date of This Monitoring Visit: *August 26, 2007*

Date of This Monitoring Visit: *July 28, 2008*

Lowcountry Open Land Trust representative: *Anna C. Nygaard*

Did the property owner accompany the Lowcountry Open Land Trust representative?

☐ YES ☒ NO

If NO, identify who gave permission to monitor the property and how that permission was given:

Monitored from the public access points and the public beach

Check any of the following that are currently in practice:

☐ Agriculture	☐ Aquaculture
☐ Commercial	☒ Fishing and/or Hunting
☐ Forestry	☐ Research
☒ Recreational	☐ Wildlife/Habitat Management
☐ Residential	☐ Historic Preservation
☒ Open Space	☐ Equine Activities

1. List acts or uses permitted by the terms of the deed restriction that have taken place since the last Monitoring Visit and Report:
None
2. List acts or uses prohibited by the terms of the deed restriction that have taken place since the last Monitoring Visit and Report:
None
3. List alterations to ecological, scenic (trees or grounds) and/or historic features of the protected property that have taken place since the last Monitoring Visit and Report:
None
4. List alterations to land-use, historical features and/or third-party activities that have taken place since the last Monitoring Visit and Report:
None
5. List alterations to man-made features and activities (fence, gate, mailbox, signs, driveways and/or roads) that have taken place since last Monitoring Visit and Report:
None

2008 Deed Restriction Monitoring Report

Protected

Sullivan's Island Beach

Focus Area:

CAWS -
Sea Islands Initiative

Property:

6. List natural events (fire, hurricane, tornado, flooding, etc.) that have taken place since last Monitoring Visit and Report: None

Remarks:

The Town Council of Sullivan's Island has the authority to enforce the Town's Vegetation, Tree and Beach Ordinances. Public access paths, walkways and boardwalks are maintained and managed by the Town - routine repairs and vegetation management along these established paths, walkways and boardwalks. Routine installation, replacement and addition of warning signs, habitat signs and other public information signs along the access paths and dunes. Jetties, sea walls, dune fencing, and other erosion control devices are maintained as needed.

In 2007 the Sullivan's Island Town Council hired a qualified planner to formulate an appropriate land management plan for the accreted land on the Island. A document referred to as "Sullivan's Island Maritime Forest Conservation Study" has been presented to the Town. A copy of this document is on file with the Land Trust. The Land Trust was not involved in the selection process and the copy of the document on file with the Land Trust was downloaded from the Town's official website.

Per the terms paragraph 3 within the recorded Deed Restriction, the Sullivan's Island Town Council has the right to improve, change, modify or alter the protected property only if such actions are to further or effect one or more of the following enumerated public objectives or policies: drainage, mosquito control, public walkways and emergency access to the Atlantic Ocean, beach renourishment, erosion control, vegetation management, educational programs, public safety, public health and scenic enhancement.

The Deed Restriction document outlines the process by which Sullivan's Island Town Council will review proposed activities and uses on the protected property.

Paragraph 4 of the Deed Restriction prohibits any structure and building with a roof, any pavement (asphalt, concrete or other non-porous materials), electrical power lines (or accompanying stations, pads, wires, or conduits), sewer lines or pipes, commercial activities which are related to the buying or selling of goods, services or things.

In April the Town was notified of the cutting, trimming and/or removal of several hardwood trees from the accreted area between Station 25 and Station 27 - the activity was reported to Sullivan's Island officials and an investigation was launched by the town officials. The regulations which govern vegetation along the accreted land permits property owners to hire licensed contractors to trim the wax myrtle, shrubs, and tallow trees (popcorn trees) to five feet in height with the appropriate permit(s) in place. The Town had granted two owners in this area the right to trim wax myrtles to three feet, due to the fact that the houses on the highland are built at ground level and not on pilings or stilts. Monitoring photos of the area between Stations 25 and 27 were taken during this monitoring visit. Based on the terms of the deed restriction the Town of Sullivan's Island and its elected Town Council have the right to issue permits for vegetation management and the right to enforce the rules, regulations and/or guidelines as they deem appropriate for the situation.

Description of Photos Taken:

Vegetation management between Station 25 and Station 27

Various scenic photos (wildlife photos)

Updated photos of signage and public access points

Photographs of possible deed restriction violations and any made-made, natural or other changes in the property since the last Monitoring Report will be added to the property Notebook on file at the Lowcountry Open Land Trust.

Signature of Monitor

Signature of Director of Stewardship

Anna C. Nygaard
Anna C. Nygaard



August 14, 2009

Town of Sullivan's Island
Attn: Andy Benke, Town Administrator
PO Box 427
Sullivan's Island, SC 29482

RE: Sullivan's Island and Battery Logan - LOLT Deed Restrictions
2009 Monitoring

Dear Mr. Benke:

The Lowcountry Open Land Trust has completed its 2009 annual monitoring duties for the deed restrictions on Sullivan's Island Beach and Battery Logan. The Land Trust is pleased to report that land uses associated with Sullivan's Island Beach and Battery Logan were found to be consistent with the terms of the recorded deed restrictions. Monitoring reports have been filed for both Sullivan's Island Beach and Battery Logan; copies of these reports are enclosed for your records.

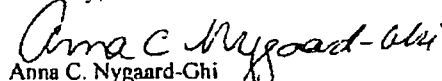
Although acquiring conservation easements is a major effort of the Land Trust, annual easement monitoring is a perpetual responsibility that the Land Trust has agreed to fulfill. Monitoring is essential to ensure the conservation purposes as detailed in the conservation easement are upheld into perpetuity. Not to mention, it also gives the Land Trust's stewardship staff an opportunity to spend time enjoying the land we have protected together. I can't think of a better way to spend a day at work!

Thanks to our 2008 easement donors, the Lowcountry Open Land Trust now protects 226 properties covering 76,534 acres in 12 counties throughout coastal South Carolina. The Land Trust currently protects 16,028 acres on 113 protected properties within the CAWS (Cooper River, Ashley River, Wando River and Sea Islands) Focus Area, covering close to 21% of the total acres protected by the Land Trust.

The Land Trust is proud of our perpetual conservation efforts and thank you for your continued support of our mission to preserve the Lowcountry of South Carolina. Without easement donors and landowners like you, we would not be so successful.

The Land Trust looks forward to monitoring Sullivan's Island Beach and Battery Logan again next year. Please feel free to contact the Land Trust at 843-577-6510 with any questions or concerns you may have regarding the monitoring visit and/or the terms of the deed restrictions.

Sincerely,


Anna C. Nygaard-Ghi
Director of Stewardship

Board of Trustees

Scott Y. Barnes, Margaret P. Blackmer, James C. Boyd, Elise S. Brown, Andrew E. Ceer III, Elizabeth M. Hagood, Batson L. Hewitt Jr., William L. Hiett Jr., Paula L. Kuyk, Jan MacDougall, David Maybank III, J. Stuart McDaniel, T. Hunter McFadyry, W. Crayton Walters III, Charles Webb III, J. Rutledge Young Jr.

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2009 Deed Restriction Monitoring Report

Protected Property: Sullivan's Island Beach

Focus Area: CAWS - Sea Islands Initiative

Current Owner: Town of Sullivan's Island

Approximate Acreage: 80 acres

Date Title to Real Estate Signed: January 15, 1991

Charleston County Deed Book and Page for Book K 200 Page 484

Date Deed Restriction Signed: February 14, 1991

Charleston County Deed Book and Page for recorded Deed Restriction: Book K 200 Page 496

Date of Last Monitoring Visit: July 28, 2008

Date of This Monitoring Visit: June 29, 2009

Lowcountry Open Land Trust representative: Anna C. Nygaard-Ghi

Did the property owner accompany the Lowcountry Open Land Trust representative?

YES

X

NO

If NO, identify who gave permission to monitor the property and how that permission was given:

Monitored from the public access points and the public beach

Check any of the following that are currently in practice:

☐ Agriculture	☐ Aquaculture
☐ Commercial	☐ Hunting and/or Fishing
☐ Forestry	☐ Research
☒ Recreational	☐ Wildlife/Habitat Management
☐ Residential	☐ Historic Preservation
☒ Open Space	☐ Equine Activities

1. List acts or uses permitted by the terms of the deed restriction that have taken place since the last Monitoring Visit:

None

2. List acts or uses prohibited by the terms of the deed restriction that have taken place since the last Monitoring Visit:

None

3. List alterations to ecological, scenic (trees or grounds) and/or historic features of the protected property that have taken place since the last Monitoring Visit:

None

4. List alterations to land-use, historical features and/or third-party activities that have taken place since the last Monitoring Visit:

None

5. List alterations to man-made features and activities (fence, gate, mailbox, signs, driveways and/or roads) that have taken place since last Monitoring Visit:

None

2009 Deed Restriction Monitoring Report

Protected Property: Sullivan's Island Beach

6. List natural events (fire, hurricane, tornado, flooding, etc.) that have taken place since last Monitoring Visit:

2008 Tropical Storms and Hurricanes

Remarks:

Public access paths, walkways and boardwalks are maintained and managed by the Town of Sullivan's Island - general repairs, improvements and vegetation management along these established public access paths, walkways and boardwalks. Routine installation, replacement and addition of warning signs, Town signs (restrictions/limitations), habitat signs and other public information signs along the access paths and dunes.

Jetties, sea walls, dune fencing, and other erosion control devices are maintained as needed.

Per the terms paragraph 3 within the recorded Deed Restriction, the Sullivan's Island Town Council has the right to improve, change, modify or alter the protected property only if such actions are to further or effect one or more of the following enumerated public objectives or policies: drainage, mosquito control, public walkways and emergency access to the Atlantic Ocean, beach renourishment, erosion control, vegetation management, educational programs, public safety, public health and scenic enhancement.

The Deed Restriction document outlines the process by which Sullivan's Island Town Council will review proposed activities and uses on the property protected under the terms of the Deed Restriction.

Paragraph 4 of the Deed Restriction prohibits any structure and building with a roof, any pavement (asphalt, concrete or other non-porous materials), electrical power lines (or accompanying stations, pads, wires, or conduits), sewer lines or pipes, commercial activities which are related to the buying or selling of goods, services or things.

Based on the terms of the deed restriction the Town of Sullivan's Island and its elected Town Council have the right to issue permits for vegetation management and the right to enforce the rules, regulations and/or guidelines as they deem appropriate. The Town Council has the authority to enforce the Town's Vegetation, Tree and Beach Ordinances.

The Town is currently reviewing and taking public comment on the draft Accreted Land Management Plan. The Town hired the consulting team of Coastal Science & Engineering, Sabine & Waters and Dewberry, Inc. The Town will keep the Land Trust reasonably informed as to the discussions related to the Accreted Land Management Plan and a final version of the plan will be forwarded to the Land Trust for our files.

Photos Taken?

X

YES

 NO

Descriptions

Various scenic photos - horseshoe crabs, sand dunes and beach
Sea Turtle Nesting Sites

Photographs of possible deed restriction violations and any made-made, natural or other changes in the property since the last Monitoring Report will be added to the property Notebook on file at the Lowcountry Open Land Trust.

Signature of Monitor

Anna Mygaard-Ghi

Signature of Director of Stewardship

Anna Mygaard-Ghi



August 2, 2010

Town of Sullivan's Island
Attn: Andy Benke, Town Administrator
PO Box 427
Sullivan's Island, SC 29482

RE: Sullivan's Island and Battery Logan - LOLT Deed Restrictions
2010 Monitoring

Dear Mr. Benke:

The Lowcountry Open Land Trust has completed its 2010 annual monitoring duties for the deed restrictions on Sullivan's Island Beach and Battery Logan. The Land Trust is pleased to report that land uses associated with Sullivan's Island Beach and Battery Logan were found to be consistent with the terms of the recorded deed restrictions. Monitoring reports have been filed for both Sullivan's Island Beach and Battery Logan; copies of these reports are enclosed for your records.

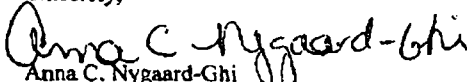
Although acquiring conservation easements is a major effort of the Land Trust, annual easement monitoring is a perpetual responsibility that the Land Trust has agreed to fulfill. Monitoring is essential to ensure the conservation purposes as detailed in the conservation easement are upheld into perpetuity. Not to mention, it also gives the Land Trust's stewardship staff an opportunity to spend time enjoying the land we have protected together. I can't think of a better way to spend a day at work!

Thanks to our 2009 easement donors, the Lowcountry Open Land Trust now protects **247 properties** covering **81,188 acres** in **13 counties** throughout coastal South Carolina. The Land Trust currently protects 16,508 acres on 117 protected properties within the CAWS (Cooper River, Ashley River, Wando River and Sea Islands) Focus Area, covering close to 20% of the total acres protected by the Land Trust.

The Land Trust is proud of our perpetual conservation efforts and thank you for your continued support of our mission to preserve the Lowcountry of South Carolina. Without easement donors and landowners like you, we would not be so successful.

The Land Trust looks forward to monitoring Sullivan's Island Beach and Battery Logan again next year. Please feel free to contact the Land Trust at 843-577-6510 with any questions or concerns you may have regarding the monitoring visit and/or the terms of the deed restrictions.

Sincerely,


Anna C. Nygaard-Ghi
Director of Stewardship

Board of Trustees

Margaret P. Blackmer, James C. Boyd, Elise S. Brannen, Andrew F. Cates III, Elizabeth M. Hagood, Batson L. Hewitt Jr., William L. Hiett Jr., Paula L. Kuyk, Jan MacDougal, David Maybank III, J. Stuart McDaniell, T. Hunter McCurdy, Ford P. Menefee, G. Trenton Walker, W. Clayton Walters III, Charles Webb III, J. Rutledge Young Jr.

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2010 Deed Restriction Monitoring Report

Protected Property: Sullivan's Island Beach

Focus Area: CAWS - Sea Islands Initiative
Current Owner: Town of Sullivan's Island
Approximate Acreage: 80 acres
Date Title to Real Estate Signed: January 15, 1991
Charleston County Deed Book and Page for: Book K 200 Page 484
Date Deed Restriction Signed: February 14, 1991
Charleston County Deed Book and Page for recorded Deed Restriction: Book K 200 Page 496
Date of Last Monitoring Visit: June 29, 2009
Date of This Monitoring Visit: July 1, 2010
Lowcountry Open Land Trust representative: Anna C. Nygaard-Ghi

Did the property owner accompany the Lowcountry Open Land Trust representative?

YES

X

NO

If NO, identify who gave permission to monitor the property and how that permission was given:

Permission granted by Andy Benke, Sullivan's Island Town Administrator
Monitored from the public access points and the public beach

Check any of the following that are currently in practice:

☐ Agriculture	☐ Aquaculture
☐ Commercial	☐ Hunting and/or Fishing
☐ Forestry	☐ Research
☒ Recreational	☐ Wildlife/Habitat Management
☐ Residential	☐ Historic Preservation
☒ Open Space	☐ Equine Activities

- List acts or uses permitted by the terms of the deed restriction that have taken place since the last Monitoring Visit:
*New Station Markers/Signs installed along the public beach - installed for public safety and awareness.
The new markers indicate the station number and/or access point which is situated at the given location.*
- List acts or uses prohibited by the terms of the deed restriction that have taken place since the last Monitoring Visit:
None observed
- List alterations to ecological, scenic (trees or grounds) and/or historic features of the protected property that have taken place since the last Monitoring Visit:
None observed
- List alterations to land-use, historical features and/or third-party activities that have taken place since the last Monitoring Visit:
None observed
- List alterations to man-made features and activities (fence, gate, mailbox, signs, driveways and/or roads) that have taken place since last Monitoring Visit:
*New Station Markers/Signs installed along the public beach - installed for public safety and awareness.
The new markers indicate the station number and/or access point which is situated at the given location.*
- List natural events (fire, hurricane, tornado, flooding, etc.) that have taken place since last Monitoring Visit:

Tropical Storms, Hurricanes and other Weather Related Phenomena

Page 1 of 2

2010 Deed Restriction Monitoring Report

Protected Property: Sullivan's Island Beach

Remarks:

Public access paths, walkways and boardwalks are maintained and managed by the Town of Sullivan's Island - general repairs, improvements and vegetation management along these established public access paths, walkways and boardwalks. Routine installation, replacement and addition of warning signs, Town signs (restrictions/limitations), habitat signs and other public information signs along the access paths and dunes. Jetties, sea walls, dune fencing, and other erosion control devices are maintained as needed.

Per the terms paragraph 3 within the recorded Deed Restriction, the Sullivan's Island Town Council has the right to improve, change, modify or alter the protected property only if such actions are to further or effect one or more of the following enumerated public objectives or policies: drainage, mosquito control, public walkways and emergency access to the Atlantic Ocean, beach renourishment, erosion control, vegetation management, educational programs, public safety, public health and scenic enhancement.

The Deed Restriction document outlines the process by which Sullivan's Island Town Council will review proposed activities and uses on the property protected under the terms of the Deed Restriction.

Paragraph 4 of the Deed Restriction prohibits any structure and building with a roof, any pavement (asphalt, concrete or other non-porous materials), electrical power lines (or accompanying stations, pads, wires, or conduits), sewer lines or pipes, commercial activities which are related to the buying or selling of goods, services or things.

Based on the terms of the deed restriction the Town of Sullivan's Island and its elected Town Council have the right to issue permits for vegetation management and the right to enforce the rules, regulations and/or guidelines as they deem appropriate. The Town Council has the authority to enforce the Town's Vegetation, Tree and Beach Ordinances.

The Town Council and citizens of the Town continue to debate and discuss options proposed within the Accreted Land Management Plan. The Town will keep the Land Trust reasonably informed as to the discussions related to the Accreted Land Management Plan and a final version of the plan will be forwarded to the Land Trust for our files. The Land Trust provided a comment letter dated December 2, 2009 stating the terms of the recorded deed restrictions for Sullivan's Island. Copies of comment letters from the SC DNR and SC DHEC related to the Accreted Land Management Plan are on file with the Land Trust.

Descriptions of Photos Taken: *Photos of New Station Signs along the Beach*
Various scenic photos - horseshoe crabs, sand dunes and beach
Sea Turtle Nesting Sites

Photographs of possible deed restriction violations and any made-made, natural or other changes in the property since the last Monitoring Report will be added to the property Notebook on file at the Lowcountry Open Land Trust.

Signature of Monitor

Anna Nygaard-Chi

Signature of Director of Stewardship

Anna Nygaard-Chi



August 15, 2011

Town of Sullivan's Island
Attn: Andy Benke, Town Administrator
PO Box 427
Sullivan's Island, SC 29482

RE: Sullivan's Island and Battery Logan - LOLT Deed Restrictions
2011 Monitoring

Dear Mr. Benke:

The Lowcountry Open Land Trust has completed its 2011 annual monitoring duties for the deed restrictions on Sullivan's Island Beach and Battery Logan. The Land Trust is pleased to report that land uses associated with Sullivan's Island Beach and Battery Logan were found to be consistent with the terms of the recorded deed restrictions. Monitoring reports have been filed for both Sullivan's Island Beach and Battery Logan; copies of these reports are enclosed for your records.

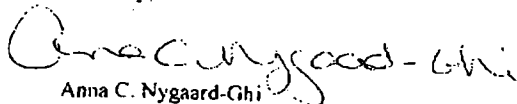
Although acquiring conservation easements is a major effort of the Land Trust, annual easement monitoring is a perpetual responsibility that the Land Trust has agreed to fulfill. Monitoring is essential to ensure the conservation purposes as detailed in the conservation easement are upheld into perpetuity. Not to mention, it also gives the Land Trust's stewardship staff an opportunity to visit with landowners and spend time enjoying the land we have protected together.

Since 1986, we have worked with landowners to protect 257 properties in 13 counties for a total of 83,332 acres protected. The Land Trust currently protects 16,508 acres on 117 protected properties within the CAWS (Cooper River, Ashley River, Wando River and Sea Islands) Focus Area, covering close to 20% of the total acres protected by the Land Trust.

The Lowcountry Open Land Trust is dedicated to the conservation of the lowcountry, not only for our own benefit, but for that of future generations. As we celebrate our 25th Anniversary, our "Silver Moon Celebration Year", we want to invite you to join us in our celebration. The Land Trust is proud of our perpetual conservation efforts and thank you for your continued support of our mission to preserve the Lowcountry of South Carolina. Without easement donors and landowners like you, we would not be so successful.

The Land Trust looks forward to monitoring Sullivan's Island Beach and Battery Logan again next year. Please feel free to contact the Land Trust at 843-577-6510 with any questions or concerns you may have regarding the monitoring visit and/or the terms of the deed restrictions.

Sincerely,


Anna C. Nygaard-Ghi
Director of Stewardship

Board of Directors

Margaret P. Blackman, James G. Boyd, Doug S. Brown, Andrew L. Carr III, Elizabeth M. Elgund, Rayon E. Hewitt Jr., William L. Hiron Jr., Paula L. Kuyk, Lon MacDougal, David Maynard III, E. Stuart McDaniel, E. James McEaddy, Paul P. Menckoff, C. Benjamin Walker, W. Clayton Walters III, Charles Webb III, E. Rutledge Young Jr.

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2011 Deed Restriction Monitoring Report

Protected Property: Sullivan's Island Beach

Remarks:

Public access paths, walkways and boardwalks are maintained and managed by the Town of Sullivan's Island. Continuous engagement in general repairs, upkeep, improvements and vegetation management along these established public access paths, walkways and boardwalks. Routine installation, replacement and addition of warning signs, town signs (restrictions/limitations), habitat signs and other public information signs along the access paths and dunes. The Town continuously updates and installs new station markers and signs along the public beach and access points. The signs are installed for the purposes of public safety and awareness. Trash cans and other receptacles for disposal of debris are located at public access points. Jetties, sea walls, dune fencing, and other erosion control devices are maintained as needed.

Per the terms paragraph 3 within the recorded Deed Restriction, the Sullivan's Island Town Council has the right to improve, change, modify or alter the protected property only if such actions are to further or effect one or more of the following enumerated public objectives or policies: drainage, mosquito control, public walkways and emergency access to the Atlantic Ocean, beach renourishment, erosion control, vegetation management, educational programs, public safety, public health and scenic enhancement. The Deed Restriction document outlines the process by which Sullivan's Island Town Council will review proposed activities and uses on the property protected under the terms of the Deed Restriction.

Paragraph 4 of the Deed Restriction prohibits any structure and building with a roof, any pavement (asphalt, concrete or other non-porous materials), electrical power lines (or accompanying stations, pads, wires, or conduits), sewer lines or pipes, commercial activities which are related to the buying or selling of goods, services or things.

Based on the terms of the deed restriction the Town of Sullivan's Island and its elected Town Council have the right to issue permits for vegetation management and the right to enforce the rules, regulations and/or guidelines as they deem appropriate. The Town Council has the authority to enforce the Town's Vegetation, Tree and Beach Ordinances.

In May/June 2011 the Town of Sullivan's Island submitted an application to the Charleston County Urban Grants Program to secure approximately \$198,000 for a project named the 'Protected Accreted Land Preserve Access Plan'. The application states that these funds will be used by the Town for minor improvements, such as creating and maintaining a network of unpaved trails and footpaths on the accreted land associated with Sullivan's Island. A copy of the draft application is on file with the Land Trust. The Land Trust provided a comment letter, dated May 31, 2011, to the staff of the Charleston County Urban Grant/Greenbelt Grant Program. The Land Trust will monitor for improvements related to this project during future monitoring/annual visits.

The Town Council and citizens of the Town continue to debate and discuss options proposed within the Accreted Land Management Plan. The Town will keep the Land Trust reasonably informed as to the discussions related to the Accreted Land Management Plan and a final version of the plan will be forwarded to the Land Trust for our files.

Descriptions of Photos Taken: Photos showing examples of signs at access points and along the Beach
Various scenic photos of the beach and associated natural resources

Photographs of possible deed restriction violations and any made-made, natural or other changes in the property since the last Monitoring Report will be added to the property Notebook on file at the Lowcountry Open Land Trust.

Signature of LOLT Representative

Signature of Director of Stewardship

Anna Mygaard - LOLT
Anna Mygaard - LOLT



2011 Deed Restriction Monitoring Report

Protected Property: Sullivan's Island Beach

Focus Area: CAWS- Sea Islands Initiative
Current Owner: Town of Sullivan's Island
Approximate Acreage: 80 acres
Date Title to Real Estate Signed: January 15, 1991
Charleston County Deed Book and Page for recorded Deed Restriction: Book K 200 Page 484
Date Deed Restriction Signed: February 14, 1991
Charleston County Deed Book and Page for recorded Deed Restriction: Book K 200 Page 496
Date of Last Monitoring Visit: July 1, 2010
Date of This Monitoring Visit: June 16, 2011
Lowcountry Open Land Trust representative: Anna C. Nygaard-Ghi

Did the property owner accompany the Lowcountry Open Land Trust representative?

YES

X

NO

If NO, identify who gave permission to monitor the property and how that permission was given:

Permission granted by Andy Benke, Sullivan's Island Town Administrator - met with Mr. Benke prior to the monitoring visit.
Monitored from the public access points and the public beach

Check any of the following that are currently in practice:

☐ Agriculture	☐ Aquaculture
☐ Commercial	☐ Hunting and/or Fishing
☐ Forestry	☐ Research
☒ Recreational	☐ Wildlife/Habitat Management
☐ Residential	☐ Historic Preservation
☒ Open Space	☐ Equine Activities

1. List acts or uses permitted by the terms of the deed restriction that have taken place since the last Monitoring Visit:

See Remarks section for information regarding activities, uses, and practices which are conducted on the protected property.

2. List acts or uses prohibited by the terms of the deed restriction that have taken place since the last Monitoring Visit:

None observed

3. List alterations to ecological, scenic (trees or grounds) and/or historic features of the protected property that have taken place since the last Monitoring Visit:

See Remarks section for information regarding activities, uses, and practices which are conducted on the protected property.

4. List alterations to land-use, historical features and/or third-party activities that have taken place since the last Monitoring Visit:

None observed

5. List alterations to man-made features and activities (fence, gate, mailbox, signs, driveways and/or roads) that have taken place since last Monitoring Visit:

See Remarks section for information regarding activities, uses, and practices which are conducted on the protected property.

6. List natural events (fire, hurricane, tornado, flooding, etc.) that have taken place since last Monitoring Visit:

Tropical Storms, Hurricanes and other Weather Related Phenomena



REC'D MAY 28 2013

May 15, 2013

Andy Benke
Town Administrator
Town of Sullivan's Island
P.O. Box 427
Sullivan's Island, SC 29482

RE: Deed Restriction Monitoring; Accreted Land Management & Proposed
Nature Trail Work

Dear Andy:

I am following up on my recent monitoring visit and tour of the Sullivan's Island accreted land and Battery Logan. I hope this finds you well.

The day was exemplary and I thoroughly enjoyed the tour and seeing the progress made to date on creating a publicly accessible nature trail through the accreted land. I wanted to take the opportunity to address the pertinent questions posed in your previous emails and during our walk.

Deed Restrictions – Monitoring

First, let this letter serve as confirmation that the Lowcountry Open Land Trust has completed its annual monitoring of the Deed Restrictions for the Sullivan's Island Beach (accreted land) and Battery Logan. We are pleased to report that the land uses and management of both properties appear to be consistent with the terms of the recorded deed restrictions. Please find monitoring reports for both Sullivan's Island Beach and Battery Logan enclosed.

Deed Restriction – Interpretation

To take your first several questions together, you noted in your original email that the Town has an interest in constructing a number of signs, interpretive and/or restrictive, as well as several dune walkovers that would lead pedestrians to the beach. The Town also intends to implement an invasive species management plan. The erection of signs, construction of walkovers and vegetation management are addressed in the Deed Restrictions, Paragraph 3(a-j), where it states that the Town of Sullivan's Island 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

Board of Trustees

Robert M. Baldwin, Samuel C. Carlton, Carol B. Ervin, Stephen F. Gates, Batson L. Hewitt Jr., Thomas D.W. Hutto, Ann C. Kulze, M.D., Bradford S. Marshall, Burnet R. Maybank III, David Maybank III, Michael G. McShane, Fred P. Menefee, Richard W. Salmons Jr., C. Trenholm Walker, J. Rutledge Young Jr., J. Conrad Zimmerman

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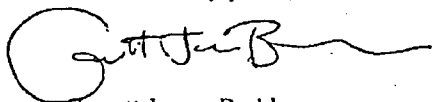
('Public Policies'): a) Drainage; b) Mosquito control; c) Public walkways and emergency access to the Atlantic Ocean; d) Beach re-nourishment; e) Erosion control; f) Vegetation management; g) Educational programs; h) Public safety; i) Public health; and j) Scenic enhancement." The stated activities would qualify under Paragraph 3, specifically sections (c, f, g, h & i).

Regarding a suggested "buffer zone," between residences and the accreted land, the creation of said buffer would qualify as vegetation management (Paragraph 3(f)) that ultimately benefits public safety and public health (Paragraph 3(h-i)). Generally, the Town of Sullivan's Island retains the right to manage vegetation within the accreted land and Battery Logan, inclusive of invasive species controls, nature trail construction, and buffer creation and management.

The last question involves commercial activity within the accreted land, and how that might intersect with the Sullivan's Island zoning ordinance. Commercial activity is addressed in the Deed Restrictions Paragraph 4(f), which reads, "[i]n all events, the following activities, improvements and structures shall be prohibited on the Property: ... (f) commercial activities in any way related to the buying or selling of things, goods or services." Our reading of this provision interprets the Deed Restrictions to prohibit any and all commercial activity on the accreted land. Absent any additional circumstances or information that might influence this interpretation, the Land Trust would recommend that the provision be applied uniformly to all activity.

I hope our input is helpful to you and Town Council in moving forward with management decisions for the accreted land. If you have any additional questions or concerns, please do not hesitate to call. Look forward to seeing you and the beach in the near future.

Most sincerely yours,

A handwritten signature in black ink, appearing to read "Garrett James Budds". The signature is fluid and cursive, with a large initial "G" and a stylized "B" at the end.

Garrett James Budds
Stewardship Manager



2013 Deed Restriction Monitoring Report

Protected Property: Battery Logan

Focus Area: CAWS - Sea Islands Initiative
Current Owner: Town of Sullivan's Island
Charleston County TMS#: 523-07-00-119
Acreage: 2 acres
Date Title to Real Estate Signed: December 20, 2005
Date Title to Real Estate Recorded: December 29, 2005 (re-recorded to correct TMS# April 12, 2006)
Charleston County Deed Book and Page for recorded Deed Restriction: Book O 579 at Page 710
Date Deed Restriction Signed: December 28, 2005
Date Deed Restriction Recorded: December 29, 2005 (re-recorded to correct TMS# April 12, 2006)
Charleston County Deed Book and Page for recorded Deed Restriction: Book O 579 at Page 718
Date of Last Monitoring Visit: October 8, 2012
Date of This Monitoring Visit: May 1, 2013
Lowcountry Open Land Trust representative: Garrett James Budds

Did the property owner accompany the Lowcountry Open Land Trust representative?

☒ YES ☐ NO

If NO, identify who gave permission to monitor the property and how that permission was given:

Accompanied by Sullivan's Island Town Administrator, Andy Benke

Check any of the following that are currently in practice:

☐ Agriculture	☐ Aquaculture
☐ Commercial	☐ Hunting and/or Fishing
☐ Forestry	☐ Research
☐ Recreational	☐ Wildlife/Habitat Management
☐ Residential	☒ Historic Preservation
☒ Open Space	☐ Equine Activities

1. List acts or uses permitted by the terms of the deed restriction that have taken place since the last Monitoring Visit:

See Remarks section for information regarding activities, uses, and practices which are conducted on the protected property.

2. List acts or uses prohibited by the terms of the deed restriction that have taken place since the last Monitoring Visit:

None observed

3. List alterations to ecological, scenic (trees or grounds) and/or historic features of the protected property that have taken place since the last Monitoring Visit:

See Remarks section for information regarding activities, uses, and practices which are conducted on the protected property.

4. List alterations to land-use, historical features and/or third-party activities that have taken place since the last Monitoring Visit:

None observed

5. List alterations to man-made features and activities (fence, gate, mailbox, signs, driveways and/or roads) that have taken place since last Monitoring Visit:

See Remarks section for information regarding activities, uses, and practices which are conducted on the protected property.

2013 Deed Restriction Monitoring Report

Protected Property: Battery Logan

6. List natural events (fire, hurricane, tornado, flooding, etc.) that have taken place since last Monitoring Visit:

Tropical Storms, Hurricanes and other Weather Related Phenomena - no direct impact from any storm cycle.

Remarks:

The public access path/trail at Battery Logan (also Station 16) is maintained and managed by the Town of Sullivan's Island. General improvements and vegetation management along the access path for Station 16. Trash cans and other receptacles for disposal of debris are located at the access point for Station 16.

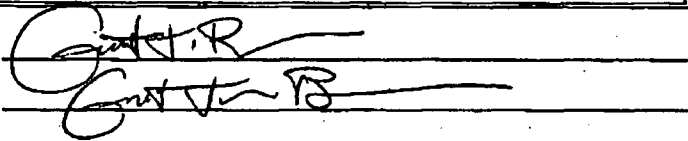
Access to the new nature trail through the accreted land will exist at Station 16/Battery Logan. Creation of and access to the nature trail, and management of the vegetation on Battery Logan & Accreted Land complies with Paragraph 3 of the Deed Restrictions.

Descriptions of Photos from Battery Logan Taken during this Monitoring Visit: None Taken

Photographs of possible deed restriction violations and any made-made, natural or other changes in the property since the last Monitoring Report will be added to the property Notebook on file at the Lowcountry Open Land Trust.

Signature of LOLT Representative

Signature of Director of Stewardship Manager

The block contains two handwritten signatures in black ink. The first signature is written over a horizontal line and appears to be "C. R.". The second signature is written below the first, also over a horizontal line, and appears to be "G. J. B.". Both signatures are stylized and cursive.



2013 Deed Restriction Monitoring Report

Protected Property: Sullivan's Island Beach

Focus Area: CAWS - Sea Islands Initiative

Current Owner: Town of Sullivan's Island

Approximate Acreage: 80 acres

Date Title to Real Estate Signed: January 15, 1991

Charleston County Deed Book and Page for recorded Deed Restriction: Book K 200 Page 484

Date Deed Restriction Signed: February 14, 1991

Charleston County Deed Book and Page for recorded Deed Restriction: Book K 200 Page 496

Date of Last Monitoring Visit: October 8, 2012

Date of This Monitoring Visit: May 1, 2013

Lowcountry Open Land Trust representative: Garrett James Budds

Did the property owner accompany the Lowcountry Open Land Trust representative?

X

YES

NO

If NO, identify who gave permission to monitor the property and how that permission was given:

Accompanied by Sullivan's Island Town Administrator, Andy Benke

Check any of the following that are currently in practice:

☐ Agriculture	☐ Aquaculture
☐ Commercial	☐ Hunting and/or Fishing
☐ Forestry	☐ Research
☒ Recreational	☒ Wildlife/Habitat Management
☐ Residential	☐ Historic Preservation
☒ Open Space	☐ Equine Activities

1. List acts or uses permitted by the terms of the deed restriction that have taken place since the last Monitoring Visit:

See Remarks section for information regarding activities, uses, and practices which are conducted on the protected property.

2. List acts or uses prohibited by the terms of the deed restriction that have taken place since the last Monitoring Visit:

None observed

3. List alterations to ecological, scenic (trees or grounds) and/or historic features of the protected property that have taken place since the last Monitoring Visit:

Town of Sullivan's Island has begun work on the nature trail through the southern end of the accreted land. Trail traverses both dunes and forested areas of the accreted land.

4. List alterations to land-use, historical features and/or third-party activities that have taken place since the last Monitoring Visit:

None observed

5. List alterations to man-made features and activities (fence, gate, mailbox, signs, driveways and/or roads) that have taken place since last Monitoring Visit:

None observed

6. List natural events (fire, hurricane, tornado, flooding, etc.) that have taken place since last Monitoring Visit:

Regular cycle of tropical storms and other weather related phenomena. No direct hits from any tropical storm.

Remarks:

Public access paths, walkways and boardwalks are maintained and managed by the Town of Sullivan's Island. Continuous engagement in general repairs, upkeep, improvements and vegetation management along these established public access paths, walkways and boardwalks. Routine installation, replacement and addition of warning signs, town signs (restrictions/limitations), habitat signs and other public information signs along the access paths and dunes. The Town continuously updates and installs new station markers and signs along the public beach and access points. The signs are installed for the purposes of public safety and awareness. Trash cans and other receptacles for disposal of debris are located at public access points. Jetties, sea walls, dune fencing, and other erosion control devices are maintained as needed.

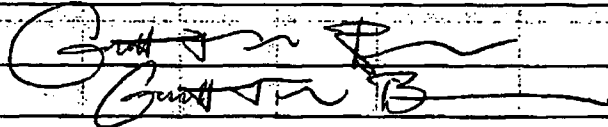
The Town of Sullivan's Island has begun the construction/creation of a nature trail through the forested (southern) end of the accreted land. The creation of this trail complies with Paragraph 3 of the recorded Deed Restriction, where the Sullivan's Island Town Council has the right to improve, change, modify or alter the protected property only if such actions are to further or effect one or more of the following enumerated public objectives or policies: drainage, mosquito control, public walkways and emergency access to the Atlantic Ocean, beach re-nourishment, erosion control, vegetation management, educational programs, public safety, public health and scenic enhancement.

Descriptions of Photos Taken: None taken - photos of nature trail will be taken upon completion, only preliminary work to date.

Photographs of possible deed restriction violations and any made-made, natural or other changes in the property since the last Monitoring Report will be added to the property Notebook on file at the Lowcountry Open Land Trust.

Signature of LOLT Representative

Signature of LOLT Stewardship Manager

The block contains two handwritten signatures. The top signature is for the LOLT Representative and the bottom signature is for the LOLT Stewardship Manager. Both signatures are written in dark ink and are somewhat stylized.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

NINTH JUDICIAL CIRCUIT

Nathan Bluestein, Ettaleah Bluestein,))

Case No. 10-CP-10-5449

Theodor Albenesius and Karen)

Albenesius,)

Plaintiffs,)

Defendants' Motion for Partial Summary Judgment

Regarding Nuisance Claims

Versus)

Town of Sullivan's Island and)

Sullivan's Island Town Council,)

Defendants.)

FILED
2014 FEB 28 AM 11:38
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

PLEASE TAKE NOTICE that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, the Defendants, by and through their undersigned counsel, will move before the Hon. Judge Scarborough in Charleston County, South Carolina, for an Order granting Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. This motion is based, in part, on law which indicates that a nuisance remedy against a governmental entity cannot be granted to stop lawful activity, cannot be issued against a government body for lawful acts, and/or cannot be based upon acts not performed by the government. This motion is further supported by statutory law, caselaw and by the Defendants' Supporting Memorandum.

This 26th day of Feb., 2014



J. Brady Hair
Derk Van Raalte (9286)
PO Box 61896
North Charleston, SC 29419
843-572-8700
843-745-1082
derk@bradyhair.com

Attorneys for the Defendants

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Nathan Bluestein, Ettaleah Bluestein,	)	Case No. 10-CP-10-5449
Theodor Albenesius and Karen	)	
Albenesius,	)	Memorandum in Support of
	)	Defendants' Motion for Partial Summary Judgment
Plaintiffs,	)	Regarding Nuisance Claims
	)	
Versus	)	
	)	
Town of Sullivan's Island and	)	
Sullivan's Island Town Council,	)	
	)	
Defendants.	)	

FILED
 2014 FEB 28 AM 11:36
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

SUMMARY OF ARGUMENT

The Plaintiffs "nuisance" claims are invalid as a matter of law. Plaintiffs argue that naturally occurring plants and animals present on the accreted land pose a nuisance to them since they live next door to the OCRM critical zone land owned and zoned by the Town. They argue that the Town is responsible based on the idea that the Town's tree protection zoning rule allows this wildlife habitat. There are at least three (3) reasons that compel dismissal. *First*, a duly enacted law cannot constitute a "nuisance." This is precisely the Plaintiffs' theory and it fails. *Second*, the Plaintiffs' ignore the fact that the Town is not responsible for acts of nature, even if they flow from lawfully enacted regulations. If Plaintiffs' theory was correct then virtually every acre of national forest and every acre of land protected by the State OCRM's critical zone designation would constitute a nuisance because woods and marshes harbor wildlife that venture onto neighboring private land. *Third*, to the extent the Plaintiffs seek monetary damages, the South Carolina Tort Claims Act specifically bars damages based on nuisance claims. See S.C. Code Ann. 15-78-60(7).

FACTS

Plaintiffs sued the Town of Sullivan's Island complaining over the Town's management of Town-owned land. Naturally occurring plants located on the Town's land have grown to a height that partially obscures the Plaintiffs' view of the beach. Plaintiffs contend that the Town violated various rights and duties by failing to cut (or allow others to cut) trees and shrubbery growing on town-owned land that lies between Plaintiffs' houses and the ocean. Plaintiffs further claim that nature has become a nuisance.

The Plaintiffs occupy "front row" lots on Sullivan's Island, meaning that no other *buildable lots* exist between Plaintiffs and the ocean. (Plaintiffs' parcels are 529-10-00-064 and 070). See Para. 50, Second Amended Complaint. That is not to say, however, that the Plaintiffs actually abut the beach. To the contrary, as shown in the following diagram at least one platted parcel (Parcel 529-10-00-087) owned by the Town exists between the Plaintiffs and the water. See diagram within Exhibit 4 to Second Amended Complaint.



Diagram taken from: <http://ccgisweb.charlestoncounty.org/website/Charleston/viewer.htm>¹

¹ A very similar map was provided by Plaintiffs as part of Exhibits 3 & 4 to the Second Amended Complaint. For reading ease the official Charleston County electronic image is used herein.

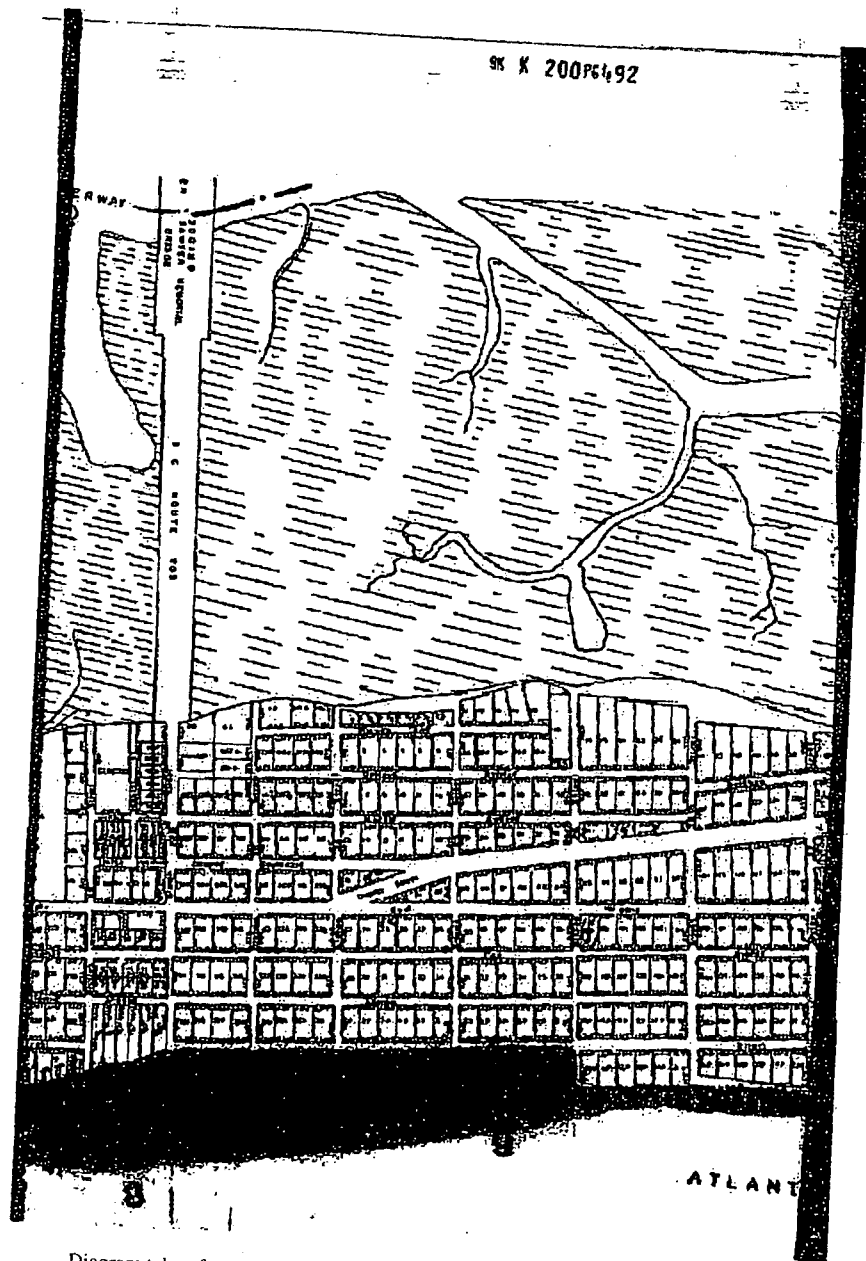


Diagram taken from Exh 3 to Second Amended Complaint²

² An identical diagram is contained within Exh 4 to the Second Amended Complaint (deed from LOLT to Town), recorded Bk K 200 PG507. The version from Exh. 3 is reproduced herein as it has a higher photocopy quality.

Over the years the Town's parcel 087 (hereinafter known as the "accreted land" or "AL") has grown in size due to sand accretion. See Para. 19, Second Amended Complaint. Plants growing on the AL have also matured. See Footnote 8, Second Amended Complaint. The Town has permitted nearby residents, such as the Plaintiffs, to enter the Town-owned AL to trim vegetation under certain terms and conditions specified by a zoning ordinance. See Para. 42 and 43, Second Amended Complaint. Some, but not all, island residents have trimmed pursuant to the zoning ordinance over the years. Presumably those that undertook trimming did so to preserve or enhance the view of the ocean enjoyed from their residences since they must gaze across the Town-owned land if they are to see the water. The Plaintiffs, now dissatisfied with the Town's longstanding vegetation trimming rules, have sued to invalidate them. The Complaint basically asks that the Court roll back the clock, invalidate more than 15 years' worth of intervening zoning regulations passed by the legislature of the Town, and restore to the books a 1981 version of the Town's zoning ordinance. See Para. 73, Second Amended Complaint.

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') feet and allowed all species of plants to be cut. The 1981 ordinance thus allowed the vegetation to be given a "flat top". Copy of 1981 Ordinance attached.

The Town slightly revised its zoning ordinance governing cutting on the AL in 1995. See Para. 36, Second Amended Complaint. See also, Copy of 1995 Ordinance attached. The 1995 version raised the after-cutting minimum height of vegetation on the AL from three (3') feet to seven (7') feet. It also limited the species that could be cut, stating: "the only vegetation that may be trimmed and pruned is limited to the following: Southern Waxmyrtle..., Eastern

Baccharis ..., and Popcorn trees...." (See 1995 Ord, Sec 21-39.1E). Thus, live oak trees, pine trees, and other species could no longer be cut. In this sense the 1995 version was *more protective* of the AL and *more restrictive* than was the 1981 version of the ordinance that had been in place when the deed restrictions were imposed. See Para. 36, Second Amended Complaint; See also, Deposition of Nathan Bluestein, p. 71, lines 14-18 (Copy attached).

The final alteration to the Town's zoning ordinance dealing with vegetation cutting on the AL came in 2005. See Para. 36, Second Amended Complaint. See also 2005 Ordinance, Copy attached. In that year the Town altered the minimum vegetation height from seven (7') back down to five (5') feet. The species limitation remained in place. Thus, the 2005 version of the ordinance allowed slightly more cutting than the 1995 version did, but was still more restrictive (allowed less cutting) than did the 1981 zoning ordinance in place at the time the deed restrictions were imposed.

The Plaintiffs now argue that the Town has an obligation to keep the AL property in the *exact* condition it existed on the day the deed was delivered in 1991.³ Plaintiffs claim that by enforcing the 1995 and 2005 zoning ordinances the Town has created a nuisance because more plants and wildlife live on the Accreted Land than would exist under the ordinance in effect in 1991. This is not an actionable nuisance.

³ The Plaintiffs argue that "natural state" must mean the precise and exact condition of the property on the day that the deed restrictions were signed in 1991. The Town maintains that such an interpretation of the term "natural state" is not only at odds with the deed as a whole, but a physical impossibility given the changing tides, winds and other forces of nature that impact the property.

ARGUMENT

The Plaintiffs' claims that the AL constitutes a "nuisance" fails as a matter of law. The Plaintiffs basically argue that "unchecked" plant growth on the AL constitutes a nuisance by blocking their views and providing wildlife habitat. See Second Amended Complaint at para 116 – 118. Obviously the Town doesn't directly grow trees or reproduce mosquitos. These are acts of nature. Recognizing this, the Complaint ties this back to the Town by alleging that the problem didn't exist when the land was governed by a 1981 ordinance and that the problem was created when the Town enacted and enforced 1995 and 2005 ordinance amendments. See Second Amended Complaint at Para. 36.

The Plaintiffs' allegations of nuisance cannot stand against the Town since their argument is that a duly enacted *law* constitutes a nuisance. The Complaint complains that the Town passed ordinances that changed the cutting rules applicable to the AL. See Second Amended Complaint, Para. 36. The Complaint then cites all the ways in which Plaintiffs claim this change in the law has harmed them – more mosquitos, less ocean view, etc. Regardless of the consequences, the "*action*" by the Town can only be viewed as the passage and enforcement of the 1995 and 2005 zoning laws. The problem for the Plaintiffs is this: a law cannot constitute a "nuisance." "Nothing is a nuisance which the law itself authorizes." Home Sales, Inc. v. City of North Myrtle Beach, 382 S.E.2d 463, 469 (SC App. 1989); See also, Brading v. County of Georgetown, 490 S.E.2d 4, 8 (SC 1997). A "lawful act" is simply not a wrongful act upon which nuisance may be predicated. Id. Here the Town's legislative passage of a law certainly is a "lawful act".

The other problem with the Nuisance claim is that the Plaintiffs fail to appreciate the distinction between "town action" and action by other forces. Both Home Sales and Brading

recognized the fact that any nuisance which might subsequently develop after a lawful government act would be the result of acts other than the government. For instance, both cases dealt with road openings. The actual "government act" (opening of the road) was authorized by law and therefore could not be a "nuisance." The court recognized that a nuisance might later develop as a result of the Government act. For instance, the possibility existed that people driving improperly on the lawfully opened road might drive in a way that constituted a nuisance. However, such improper driving would be by members of the public (the drivers), not the government and thus was not a "wrongful act" *by the government* to support a nuisance suit against the government.

The logic of Home Sales and Brading fully disposes of Plaintiffs' nuisance claim in this case. The 1995 and 2005 zoning ordinances were zoning laws passed by the Town. State law gives Towns the authority to enact zoning ordinances. See S.C. Code Ann. Title 6, Chpt. 29. Thus, there was clearly nothing "wrongful" about Town council voting to pass the cutting ordinance. Council's passage of a law was the only "act" that the Town took in this instance. That act cannot, as a matter of law, be a "nuisance." As discussed in Brading and Home Sales, it might be possible that negative effects (such as trees growing to obscure views) might later develop after the Town amended the ordinances in 1995 and 2005. But there is no evidence that Council planted trees, fertilized bushes, or imported wildlife. Tree growth and mosquito mating are acts of nature. Since the Town did not perform those acts of nature, those acts of nature cannot be a wrongful act *by the Town*. Home Sales and Brading tell us that a nuisance action will not work under such circumstances.

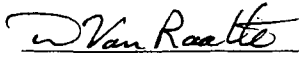
A variety of common examples confirm that nuisance cannot lie here. For better or worse property owners have their values impacted by the interplay of law and Acts of Nature on

a daily basis and none of these constitute a "nuisance." For instance, the State of South Carolina and United States Army Corps of Engineers protect wetlands and prohibit the filling / clearing of marshes and dunes. See, among others, S.C. Code Ann. 48-39-310 "Prohibition of destruction of any beach or dune vegetation seaward of setback line." Undoubtedly the protection of marshes in this manner allows a habitat for rodents and such rodents may at times venture onto the lots of marsh front property owners (act of nature). Yet no one suggests that South Carolina or the United States Army Corps of Engineers is guilty of a nuisance for protecting marshes. Similarly, government regulations may prohibit the installation of a seawall that could prevent the loss of a house to ocean erosion (act of nature). No one suggests that the government is guilty of a nuisance because waves washed away a house. The United States Government and South Carolina Department of Natural Resources own and manage and protect the Francis Marion National Forest. Wildlife undoubtedly traipses from the forest onto the land of surrounding property owners (act of nature). Yet no one suggests that the United States or State have engaged in a "nuisance" by protecting the national forest.⁴ All of these examples are analogous to the claim presented by the Plaintiffs here and all confirm that the nuisance claim fails.

Finally, to the extent the Plaintiffs might seek monetary damages, they overlook the fact that the South Carolina Tort Claims Act bars nuisance damages from being awarded against the Town. "The governmental entity is not liable for a loss resulting from: (7) a nuisance." S.C. Code Ann. 15-78-60(7).

⁴ This example can be made even more similar to Plaintiffs' claim. Imagine that the United States allowed a timbering operation to clear cut a parcel. For a short while the dirt is bare and little wildlife exists there. Thus, there is little wildlife to cross onto the lands of adjoining owners. Quickly, however, nature takes over and plant growth recovers the clear-cut area. The plants grow, wildlife moves back in, and it becomes more likely (as a result of nature) that wildlife will begin crossing onto the lands of adjoining property owners. This is hardly a nuisance. It happens every day.

This 26th day of Feb., 2014



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Attorneys for the Defendants

Page 70	Page 72
1 A You know, there might've been some talk, but I really 2 wasn't concerned or really wasn't involved, really more so 3 until things started getting out of control. 4 Q Okay. Do you know whether or not you got any permits 5 under the '95 ordinance where you could cut to seven feet? 6 A I might have. I don't think so, I'm not sure. I'm really 7 am not sure. I really don't know. 8 Q Now, this version, the '95 version, changed the cutting 9 height from three feet to seven feet. Does that appear 10 accurate? 11 A Yeah. I guess so. 12 Q Okay. Now, is that something that you like or don't like? 13 A To go to seven feet? 14 Q Yes. 15 A No. Don't like that. 16 Q Don't like that, okay. And why is that? 17 A It is only certain species you could cut. 18 Q Okay. 19 A And it's -- I think seven feet's too high. 20 Q Okay. Fair enough. If there was a provision that allowed 21 you just to cut everything at seven feet, would that solve 22 your problems? 23 A No. 24 Q Because it's too high? 25 A Too high.	1 in this ordinance that the restriction about the 2 Waxmyrtles, and the Popcorn, and the other one is in this 3 one? 4 A Right. 5 Q It wasn't in the '81 when we looked at it? 6 A It was not -- '81 you could cut anything? 7 Q Yeah. 8 A All right. Let's go back to that, that's fine. 9 Q So, this one is more restrictive than the first one? 10 A I like the '81 better then. 11 Q Fair enough. Now, let's go back to J-C, okay. Now, this 12 is the one we started out talking about, the 2005 13 Ordinance, which is in affect today. 14 A Okay. 15 Q And, so, what we see here is, looks like the same 16 restrictions on the species that was in '95. Right? 17 A Okay. 18 Q The Waxmyrtles, the Popcorn, and the -- 19 A The same three. 20 Q Same three. Then the difference, it appears, is that this 21 one allows you to cut to five feet versus seven feet in 22 1995. Is that correct? 23 A Yeah. 24 Q Okay. So, am I correct that, from you're perspective, 25 this is a little bit of an improvement over the 1995
Page 71	Page 73
1 Q Okay. 2 A Too high is one. I think it will not be able to control 3 the mosquitoes, the snakes, the rats, which are a major 4 problem on the beach. And not only the front beach, all 5 over the island. And the rats come out of there. I'm 6 very fortunate, I don't have a rat problem. 7 Q Right. 8 A You know why? 9 Q Why? 10 A Because my neighbor across the street has a bunch of cats. 11 The cats live in my yard. They're the fattiest and the 12 happiest cats you can imagine. But all my neighbors up 13 and down the island have rat problems. 14 Q That's a good solution. So, would you agree with me that 15 with regard to the cutting rules the 1995 ordinance, that 16 makes you cut at seven feet, is more restrictive than the 17 1981 ordinance that allowed you to cut at three feet? 18 A Yeah, definitely. 19 Q And it's also more restrictive in that for the first time, 20 it appears, they limited the type of species that you 21 could cut? 22 A Brady, I can't give you an answer, because I don't know 23 the laws. I don't know what the three foot law was, the 24 seven foot. I'd have to study it. 25 Q But, now, we can go back through it. But I mean, you see	1 ordinance? 2 A No. The height is different. 3 Q And it's better for you, because you said you didn't like 4 seven feet. So, it's better at five feet than seven feet? 5 A You know -- I guess I'm going to be talking too much and 6 Bobby's probably going to give me hell later. You know 7 why it was changed to five feet? 8 Q No. Why? 9 A Do you have any idea? 10 Q I have no idea. 11 A Okay. Because the Mexican's couldn't reach seven feet, 12 and they were the ones doing the cutting. So they brought 13 it down to five feet so ... And that was the complaint 14 from the people, who were the contractors. 15 Q Okay. But the fact of the matter is you like five feet 16 cutting better than you do seven feet cutting? 17 A I like -- It's not acceptable, I like three feet better. 18 Q You like three feet better than any of them? 19 A I like no feet better than any of them. 20 Q All right. I think I understand where you're coming from, 21 okay. But all I'm trying to talk to you about is, you 22 like five feet better than seven feet, and you like three 23 feet better than five feet. And if you had a choice would 24 you like no feet? 25 A Let me re-phrase it. I will not accept five feet. I

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Nathan Bluestein, Ettaleah Bluestein,	)	C/A No. 2010-CP-10-5449
M.D., Theodore Albenesius, III, and	)	
Karen Albenesius,	)	
	)	
<i>Plaintiffs,</i>	)	
	)	PLAINTIFFS' NOTICE OF MOTION
Versus	)	AND MOTION TO RECONSIDER,
	)	ALTER, OR AMEND
Town of Sullivan's Island and Sullivan's	)	
Island Town Council,	)	
	)	
<i>Defendants.</i>	)	

FILED
 DEC 23 AM 9:20
 JUDGE ARNOLD
 CLERK OF COURT

TO: J. BRADY HAIR, ATTORNEY FOR THE DEFENDANTS:

PLEASE TAKE NOTICE THAT Plaintiffs Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III and Karen Albenesius, by and through their undersigned attorneys, will move before the Master-In-Equity for Charleston County for an Order vacating, altering, amending and/or reversing the Court's prior Order granting Defendants' Motion for Summary Judgment as to Plaintiffs' claim for Breach of Contract Accompanied by a Fraudulent Act and any other relief the Court deems appropriate.

When the evidence is viewed in the light most favorable to Plaintiffs (the nonmoving party), Defendants cannot show an absence of material facts in genuine dispute as to Plaintiffs' claim for Breach of Contract Accompanied by a Fraudulent Act claim. Therefore, as a matter of law, summary judgment against this claim is inappropriate. Accordingly, the Court must reconsider, alter, amend and/or reverse its Order from December 4, 2014 granting summary judgment. This Motion is supported by a memorandum of law being filed contemporaneously with this Motion and any additional documents Plaintiffs may submit prior to the hearing.

Respectfully submitted,



Robert H. Hood, Sr. (SC# 2599)
S. Scott Bluestein (SC# 65103)
Michael J. Brickman (SC# 874)
Molly H. Craig (SC# 6960)
Robert H. Hood, Jr. (SC# 13491)
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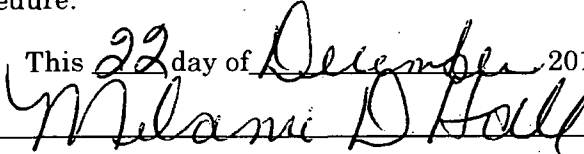
*Attorneys for the Plaintiffs, Nathan
Bluestein, Ettaleah Bluestein, M.D.,
Theodore Albenesius, III, and Karen
Albenesius*

December 22, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the *Plaintiffs' Notice of Motion and Motion to Reconsider, Alter, or Amend* was served on each party or counsel of record by ☐ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 22 day of December 2014



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiffs,

Versus

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

Defendants.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) C/A No. 10-CP-10-5449

) **PLAINTIFFS' MEMORANDUM OF**
) **LAW IN SUPPORT OF THEIR**
) **MOTION TO RECONSIDER, ALTER,**
) **OR AMEND**

FILED
24 DEC 23 AM 9:21
JULIE J. ARMSTRONG
CLERK OF COURT

In support of Plaintiffs' motion to reconsider, alter and/or amend summary judgment entered against their claim for Breach of Contract Accompanied by a Fraudulent Act (the "BCAF" claim), Plaintiffs file the following memorandum:

RELEVANT BACKGROUND

Plaintiffs bring this action against Defendants Town of Sullivan's Island and Sullivan's Island Town Council alleging, *inter alia*, claims for Breach of Contract and BCAF. This lawsuit arises out of Defendants' failure to comply with a 1991 deed related to the management of certain accreted lands owned by the Town situated immediately between Plaintiffs' homes and property on Sullivan's Island and the beach/ocean, thereby depriving (or at least impairing) Plaintiffs' property rights as enunciated in the Second Amended Complaint.

As explained more fully in Plaintiffs' Memorandum in Support of their Motion for Partial Summary Judgment filed on February 28, 2014 (which is attached as Exhibit A hereto and incorporated by reference), Defendants are in breach of contract and/or deed restrictions to which Plaintiffs are third party beneficiaries.

Additionally, and as explained more fully in Section V (pp. 20 – 22) of Plaintiffs' Memorandum in Opposition to Defendants' Motions for Summary Judgment filed on February 28, 2014 (which is attached as Exhibit B hereto and incorporated by reference), Defendants committed acts of bad faith, subterfuge and unfair dealing in their efforts to manipulate the Town's tax-paying citizens.

On December 4, 2014,¹ this Court granted Defendants' motion for summary judgment as to Plaintiffs' BCAF claim, reasoning that Defendants are granted immunity against this claim by the S.C. Tort Claims Act (the "TCA"). Plaintiffs now move the Court to reconsider, amend, alter and/or reverse that Order because, as shown herein, the TCA in general, and in particular the TCA provisions cited and relied upon by the Court, do not apply to Plaintiffs' BCAF claim.

Therefore, Plaintiffs request that the Court reverse its order of summary judgment, as Plaintiffs have established that genuine issues of material fact exist as to Plaintiffs' BCAF claim.

STANDARD

The purpose of a Rule 59(e) motion is to request the trial judge "to reconsider matters properly encompassed in a decision on the merits." Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (S.C. 2006) (quoting Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (S.C. 1992)). The Supreme Court of South Carolina has enunciated "two basic situations in which a party should consider filing a Rule 59(e) motion." Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (S.C. 2004). First, "[a] party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to

¹ Plaintiffs' counsel first received a copy of the order on December 11.

rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.” Id. Additionally, “[a] party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” Id.

“There is nothing inherently unfair in allowing a party one final chance not only to call the court’s attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.” Id. at 22, 602 S.E.2d at 779.

ARGUMENT

The Court’s Order of December 4, 2014 states, “The Court finds that Summary Judgment is appropriate because the Defendants are immune from suit under the South Carolina Tort Claims Act.” This holding must be reversed under Rule 59(e) because the TCA is inapplicable to Plaintiffs’ BCAF claim.

Also, the Court noted in a footnote of its Order “[a]s an additional sustaining ground . . . that none of the alleged fraudulent acts, which occurred in or around 2009, appear to relate to either of the two ordinances being challenged.” This ruling also must be altered, as it misapprehends the nature of Plaintiffs’ BCAF claim and misconstrues applicable law.

I. The South Carolina Tort Claims Act Does Not Apply to Plaintiffs’ BCAF Claim

A BCAF claim is one in contract, not tort; and the TCA applies only to, and provides immunity only against, *tort* claims. Additionally, even if the TCA did generally apply to BCAF claims, the specific immunity provisions cited by the court in granting summary judgment are inapplicable to Plaintiffs’ particular BCAF claim: Plaintiffs’ claim is not one alleging loss resulting from “actual fraud” (§ 15-78-

60(17)) or from "legislative" or "administrative" action or inaction. (§ 15-78-60(1)(2)(4)).

1. BCAF is a Claim in Contract—Not Tort

"An action for breach of contract accompanied by a fraudulent act is an action in contract." Ateyeh v. Volkswagen of Florence, Inc., 288 S.C. 101, 103, 341 S.E.2d 378, 379 (S.C. 1986); *see also* Peeples v. Orkin Exterminating Co., 244 S.C. 173, 178 135 S.E.2d 845, 847 (S.C. 1964) ("An action for breach of contract accompanied by a fraudulent act is an action ex contractu, not ex delicto"); Wilson Group, Inc. v. Quorum Health Resources, 880 F. Supp. 416, 424 n.6 (D.S.C. 1995) ("Although a cause of action for breach of contract accompanied by a fraudulent act has elements of contract and tort, it is considered contractual in nature."); Dunsil v. Jones Chevrolet Co., Inc., 268 S.C. 291, 295, 233 S.E.2d 101, 103 (S.C. 1977) (jury instruction was "clearly erroneous" because the "trial judge jumbled propositions of law applicable to fraudulent breach of contract actions (ex contractu) with principles applicable to fraud and deceit actions (ex delicto).").

2. The South Carolina Tort Claims Act Does Not Apply to Contract Claims.

As its name suggests, the South Carolina Tort Claims Act does not apply to contract claims. In fact, S.C. Code § 15-78-20(d) of the TCA states in no uncertain terms: "Nothing in this chapter affects liability based on contract nor does it affect the power of the State or its political subdivisions to contract."

Instead, the TCA restricts only *tort* claims against the government. In § 15-78-60, the very section on which the Court relied in granting summary judgment, the TCA states that "the governmental entity is not liable for a loss resulting from [enumerated list of legal action]." (emphasis added). However, the

TCA's definition of "loss" is limited to only certain "damages recoverable in actions for *negligence*." S.C. Code § 15-78-30(f) (emphasis added). Therefore, § 15-78-60's list of actions against which the state is immune applies only to tort or negligence claims, not contract claims.

Similarly, § 15-78-20(b) of the TCA states, "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." (emphasis added).

3. Even if the TCA Did Apply (Which it Does Not), § 15-78-60(17) Does Not Grant Defendants Immunity Against Plaintiffs' BCAF Claim

Section 15-78-60(17) of the TCA states that a "governmental entity is not liable for a loss resulting from . . . 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." (emphasis added). The Court relies upon this section in granting summary judgment against Plaintiff's BCAF claim, stating in the Order: "The Tort Claims Act tells us that the government is immune from fraud claims." This reasoning constitutes an error in law, because a BCAF claim is not a claim for "actual fraud" under South Carolina law.

"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. . . . It is not necessary to allege the elements of common law fraud and deceit." Harper v. Ethridge, 348 S.E.2d 374, 378, 290 S.C. 112, 118–19 (SC Ct. App. 1986); *see also* Ball v. Canadian American Exp. Co., Inc., 442 S.E.2d 620, 622, 314 S.C. 272, 276 (S.C. 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.").

In order to state a claim for BCAF, 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. Harper v. Ethridge, 348 S.E.2d 374, 378, 290 S.C. 112, 119 (S.C. Ct. App. 1986).

"'Fraud,' [for a BCFA claim], 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." Conner v. City of Forest Acres, 560 S.E.2d 606, 612, 466, 348 S.C. 454, 465-66 (SC 2002) (finding that Court of Appeals did not err in reversing summary judgment on claim for BCAF) (quoting Sullivan v. Calhoun, 117 S.C. 137, 139, 108 S.E. 189 (S.C. 1921)).

The fraudulent act in a BCAF claim can be "any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design." Harper v. Ethridge, 348 S.E.2d 374, 378, 290 S.C. 112, 119 (S.C. Ct. App. 1986). "Such proof may or may not involve false representations." Ball v. Canadian American Exp. Co., Inc., 442 S.E.2d 620, 623, 314 S.C. 272, 276 (S.C. Ct. App. 1994).

The quantum of wrongdoing necessary to prove a claim for BCAF is separate and distinct from the elements a plaintiff must prove in a common law claim of fraud or deceit. Under S.C. law, "In order to recover in an action for fraud and deceit, based upon misrepresentation, the following elements must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its

materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury. Failure to prove any one of the foregoing elements is fatal to recovery." Kahn Const. Co. v. Sc Nat'l Bk of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (S.C. 1980).

The above-listed distinctions between a claim of common law fraud and a claim for BCAF is significant when considering whether TCA § 15-78-60(17)'s prohibition of claims of "actual fraud" bars Plaintiff's BCAF claim. The intent of § 15-78-60(17) is to provide immunity to the state against claims for intentional wrongful acts of state employees done outside the scope of employment. In this case, on the other hand, Plaintiffs contend that the town and town council, *acting in its official capacities*, committed acts of "dishonesty in fact [and] unfair dealing" in conduct related to its breach of contract. The General Assembly did not intend for § 15-78-60(17) to provide immunity against such a claim.

4. Even if the TCA Did Apply (Which it Does Not), § 15-78-60 (1), (2) & (4) Do Not Grant Defendants Immunity Against Plaintiffs' BCAF Claim

The Court stated in its Order, "[T]he allegedly fraudulent conduct, such as communicating with a consultant and drafting a public input questionnaire, unquestionably relates to the Town Council's legislative fact-finding process as it considered whether to adopt a future ordinance change." Citing TCA § 15-78-60 (1)(2), & (4), the Court reasoned that "[l]egislative activities, and administrative action supporting legislative activities, are immune from suit." This holding misinterprets both the nature of Plaintiffs' claim and its application under § 15-78-60.

Section 15-78-60 of the TCA states that a “governmental entity is not liable for a loss resulting from . . . (1) legislative . . . action or inaction; and (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature; [and] (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.” (emphasis added).

Therefore, immunity is granted under § 15-78-60 only against those claims for loss *resulting from* such legislative or administrative action or inaction. The Court, however, concluded that Defendants were granted immunity under this section merely because “the allegedly fraudulent conduct . . . *relates* to the Town Council’s legislative fact-finding process.”

Whether certain conduct “relates to” legislative activity is not the standard under § 15-78-60; instead the alleged loss must have *resulted* from it. Plaintiffs’ loss resulted from the Defendants’ continual refusal to comply with its contractual obligations to trim (or allow others to trim) the vegetation in the accreted land. Defendants’ obligation was born out of contract—not legislation. Therefore, § 15-78-60 (1), (2) or (4) do not bar Plaintiffs’ claim.

II. The Timing of the Fraudulent Acts Relative to the Two Town Ordinances Does not Negate Plaintiffs’ Claim

The Court stated in footnote three of the Order, “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.” The Court apparently accepted Defendants’ argument that Defendants’ conduct relating to the input questionnaire necessarily cannot be a “fraudulent act” because

it occurred *after* passage of the town ordinances relating to the accreted land. This final ground is also an improper basis for granting summary judgment against Plaintiffs' claim, as it misapprehends the nature of Plaintiffs' claim and misapplied S.C. case law.

First, the "fraudulent act" necessary to prove a BCAF claim can occur "prior to, contemporaneous with, or subsequent to the breach of contract," so long as it is connected with the breach and not too remote in time or character. Floyd v. Country Squire Mobile Homes, Inc., 336 S.E.2d 502, 504, 287 S.C. 51, 54 (S.C. 1985).

Moreover, the Court's footnote would suggest that Plaintiffs contend that the act of passing the two ordinances in 1995 and 2005 is what constituted Defendants' breach. That is not the case. Defendants have a contractual duty to maintain and trim the vegetation on the accreted land, and they continue to be in breach of these duties on each day they refuse to do so. Defendants' contractual obligations (and their refusal to comply with the same) exist irrespective of any legislative or administrative action the Town may take. Defendants may attempt (unsuccessfully) to justify their breach by relying on the 1995 and 2005 town ordinances, but that does not change the nature of Plaintiffs' contract claim.

III. Plaintiffs Have Proffered Sufficient Evidence to Support Their Breach of Contract with Fraudulent Act Claim.

As established herein, there are no independent "legal" grounds to grant summary judgment against Plaintiffs' BCAF claim when Plaintiffs' breach of contract claim unquestionably survives summary judgment. Indeed, under S.C. law, "[t]here is no cause of action distinct from breach of contract for breach of contract accompanied by a fraudulent act. Rather, in order to recover punitive damages for breach of contract, the plaintiff must show the breach was accomplished with a

fraudulent intention and was accompanied by a fraudulent act.” Smith v. Canal Insurance Co., 269 S.E.2d 348, 350, 275 S.C. 256, 260 (S.C. 1980).

Therefore, where—as here—the plaintiff has proffered sufficient evidence to establish a question of fact as to whether the defendant maintained fraudulent intent and committed fraudulent action connected to the its breach, the BCAF claim must survive summary judgment. In such a case, it would be an incongruent and inappropriate result to grant summary judgment against a BCAF claim when the Breach of Contract claim survives.

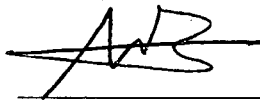
As established in Section V (pp. 20 – 22) of Plaintiffs’ Memorandum in Opposition to Defendants’ Motions for Summary Judgment filed on February 28, 2014 (Exhibit “B”), Plaintiffs have indeed proffered sufficient evidence to establish a question of fact as to whether Defendants’ breach was accomplished with a fraudulent intention and accompanied by a fraudulent act. Plaintiffs hereby refer to and incorporate Section V of Exhibit B as if stated herein.

CONCLUSION

The Court’s Order granting summary judgment against Plaintiffs’ BCAF claim misapprehends the nature of Plaintiffs’ claim and misapplies legal standards. Because Plaintiff’s claim sounds in contract instead of tort, the S.C. Tort Claims Act is inapplicable. Additionally, the more general “dishonesty in fact [or] unfair dealing” standard for Plaintiff’s BCAF claim is not the type of “actual fraud” intended to be barred under the TCA. Finally, the Court incorrectly focuses on the relative timing of the Town’s two ordinances relating to the accreted land when compared to the alleged fraudulent conduct. When, in fact, the breaching conduct is Defendants’ continual refusal to trim and maintain the accreted lands; the breach

continues day by day. Defendants' manipulative and underhanded behavior surrounding the questionnaire form—when asking for public commentary on whether to actually comply with its contractual obligations—is “dishonest” and “unfair dealing” connected to Defendants' continual breach. Therefore, Plaintiffs' claim for BCAF must survive summary judgment, and the Court must accordingly revise and amend its December 4, 2014 Order.

Respectfully submitted,



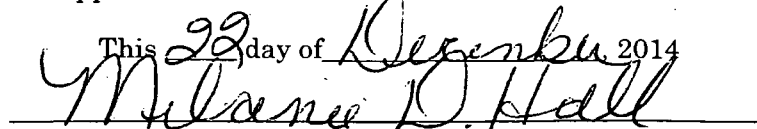
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*Attorneys for the Plaintiffs, Nathan
Bluestein, Ettaleah Bluestein, M.D.,
Theodore Albenesius, III, and Karen
Albenesius*

December 22, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the *Plaintiffs' Memorandum of Law in Support of their Motion to Reconsider, Alter, or Amend* was served on each party or counsel of record by ☐ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 22 day of December, 2014


STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiffs,

Versus

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

Defendants.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) C/A No. 10-CP-10-5449

PLAINTIFFS' MEMORANDUM OF
LAW AND EQUITY IN OPPOSITION
TO DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT AND
MOTION TO STRIKE

The Defendants in the above-referenced matter have filed seven (7) Motions for Summary Judgment and one (1) Motion to Strike. Although the Plaintiffs have pled nine (9) separate and distinct causes of actions, Plaintiffs elected to file only a single motion for partial summary judgment on a single one of their claims, addressing solely the question of whether the Defendants have breached the restrictive covenants of a 1991 deed and/or contract. As for all of Plaintiffs other causes of actions, Plaintiffs assert in this memorandum that:

- (1) Disputed questions of contested fact exist;
- (2) Sufficient ambiguity in various documents preclude summary judgment;
- (3) Contested disputes exist as to the conclusions or inferences to be drawn from evidentiary facts, even though there may be no dispute as to evidentiary facts themselves (particularly applicable to breach of contract accompanied with fraudulent act); and
- (4) Plaintiffs have asserted novel questions of law and/or equity.¹

¹ In the impairment of contract claims, under both state and federal law, Plaintiffs submit that summary judgment is not appropriate because further inquiry into the facts of the case are needed to clarify the application of the law to certain aspects of those claims and therefore summary judgment is inadvisable on this ground (as well as others). See Simmons v. Berkeley Elec. Co-op. Inc., 404 S.C. 172, 178, 744 S.E.2d 580, 584 (Ct. App. 2013).



if limited to a mere three winter months (the Court can take judicial notice that virtually nothing grows in this dormant season), makes the right to trim and cut virtually an utter nullity. If that is valid due process of law, and if this is lawful zoning restrictions, it sure would be interesting to see what the Defendants would call inappropriate and unlawful activity.

4. Changing the height of what can be trimmed and cut.

Finally, just to make absolutely certain that no part of any of Defendants' promises, so formerly deemed valuable in 1991, was actually worth the paper they were written on, the Defendants added the following new Section in 1995: the Town limited the type of pruning that can be done (See Sec. 21-39.1E) and the length of the pruning (See Sec. 21-39.1E "no less than 7 feet").

Plaintiffs' submit that this case calls out for a full trial on the merits. In fact, Plaintiffs respectfully submit that one of the core policy questions in this case, is whether a Town in South Carolina can totally, unilaterally and arbitrarily tear up its own contracts? Moreover, due process concerns are explicitly raised by the inexplicable mystery surrounding the "consultant's" recommended public survey, that someone on Town Council deliberately tampered with, that not only raises further serious questions about the "transparency" of the Town, and its motives, it also directly related to a breach of contract accompanied with a fraudulent act discussed in the next section of this Memorandum.

V. PLAINTIFFS HAVE PROFFERED SUFFICIENT EVIDENCE TO SUPPORT THEIR BREACH OF CONTRACT WITH FRAUDULENT ACT CLAIM.

Nothing about Plaintiffs' contract claim accompanied with equitable fraud is contrary to the TCA or forbidden by either State or Federal law. From the earliest of days, South Carolina has recognized that "fraud is peculiarly a matter of equitable

cognizance." See Dubose v. Kell, 56 S.E.968, 969 (1907). Similarly, a lawsuit against a Town in South Carolina that acts beyond its powers is well established. See Southern Fruit Co. v Porter, 199 S.E. 537 (1938) (any reasonable doubt concerning the existence of a power of a municipal corporation to enact a certain ordinance is resolved against the municipality).

Now, as to what the Defendants did that constitutes a fraudulent act — there is a great deal of conflicting testimony. Council Member Pat O'Neil testified that there was a decision made by Town Council to change the survey matrix/questionnaire that was prepared by the consultants hire by Town Council before it was submitted to the Town residents:

Plaintiffs' attorney: Was there a motion made in session with regards to what information should be contained on the questionnaire that Tim Kana had presented?

Pat O'Neil: There was a discussion in open session about that. . . [T]he decision of Council was that the survey that was to be used for people to evaluate the different options would include only the elements that he was going to include in his presentation. Therefore, if he was not going to include property values, the questionnaire would not - or the survey form, whatever you want to call it, would not include property values.

O'Neil dep., 104:12 – 105:6. Exhibit 4 (emphasis added).

No other current or former Town Council member agrees with Mr. O'Neil's assertion that Town Council actually made a decision to remove property values from the consideration of Town residents as to how best to manage the Accreted Land. To the contrary, Mr. O'Neil's testimony was directly contradicted by Carl Smith who was Town Mayor at the time of the Defendants' submission of the questionnaire. Specifically, then-Mayor Smith testified that he delegated to Pat O'Neil the task of finalizing the survey matrix.

Plaintiffs' attorney: Do you agree with me that Pat O'Neil was responsible for the final format?

Mayor Smith: I would agree to that, but I can't tell you specifically why something would have been added or deleted.

Smith dep., 21:4 – 22:3. **Exhibit 5** (emphasis added).

Therefore, Plaintiffs have proffered evidence that someone on Council (likely Pat O'Neil) went behind the rest of Town Council and the public and – without telling anyone – altered the public survey form that was paid for by the Defendants' consultants and recommended to be circulating to the entire Town of Sullivan's Island, for the sole purpose of completely deleting and categorically reducing in importance the issues of "Ocean Views" and "Property Values" on the survey form.

For purposes of summary judgment consideration, Plaintiffs' breach of contract with a fraudulent act should not be dismissed because the Defendants have elicited some evidence that would support their breach of contract with a fraudulent act claim.

VI. PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF SAME AS TO ALL CAUSES OF ACTION DUE TO ALLEGED EXPIRATION OF STATUTE OF LIMITATIONS OR UNREASONABLE DELAY.

In their Memorandum in Support of their Motion for Summary Judgment as to all of Plaintiffs' causes of action premised upon the theory of an alleged expiration of the statute of limitations or unreasonable delay ("Defendants' MIS-MSJ Statute of Limitations"), the Defendants repeatedly misinterpret, mischaracterize and oversimplify Plaintiffs' allegations and requested relief. For instance, the Defendants state over and over again that Plaintiffs merely seek to overturn zoning ordinances enacted by the Defendants in 1995 and 2005. In fact, Plaintiffs are complaining not only of the Defendants' actions (including zoning ordinances and other conduct), but also of the Defendants' *inaction* with regard to their management (or lack thereof) of

STATE OF SOUTH CAROLINA)
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COUNTY OF CHARLESTON)
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Nathan Bluestein, Ettaleah Bluestein,))
Theodore Albenesius and Karen)
Albenesius,)
Plaintiffs,)
)
Versus)
)
Town of Sullivan's Island and)
Sullivan's Island Town Council,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Case No. 10-CP-10-5449

Town's Response to Plaintiffs'
Motion to Reconsider, Alter or Amend
Order regarding Breach of Contract
Accompanied by Fraudulent Act¹

FILED
2015 FEB 23 PM 12:49
JULIE J. ARMSTRONG
CLERK OF COURT

I. INTRODUCTION

The Plaintiffs have lost sight of the forest for the trees. They incant latin phrases like "ex contractu" and "ex delicto". They parse clauses of the Tort Claims Act. What Plaintiffs *don't* want to spend any time doing is explaining how they can lawfully obtain the punitive damages that differentiate their Breach of Contract by Fraudulent Act (BCFA) claim from their Breach of Contract (BOC) claim. Failing that, there would be little point in reinstating anything. The Plaintiffs are also unable to separate their claimed "fraudulent act" from activity immunized by the Tort Claims Act.

¹ Any references to contracts, duties, currently undismissed claims, etc are not intended as acknowledging the validity of the same, but at most merely assumed for purposes of argument.

I. There is little point in reinstating the BCFA claim given that punitive damages are barred.

The Plaintiffs argument to reinstate the claim for BCFA boils down to a request for punitive damages. Compare the prayer for relief included in Plaintiffs' Second Amendment Complaint for BCFA against their prayer in the Breach of Contract (BOC) Claim:

"Plaintiffs are entitled to such additional consequential, actual, and / or punitive damages as the Court may see fit for the independent and tortious wrong associated with the breach of the contract" BCFA, para. 107, Second Amended Complaint.

"Plaintiffs are entitled to actual damages, reasonable attorneys fees, legal fees and such other and further relief as the court may deem just and proper. BOC, para 92, Second Amended Complaint.

The material distinction is the request for punitive damages.

Punitive damages may not be permissibly awarded against a Governmental entity. Our Supreme Court in MacMurphy v. SC Department of Highways, 367 S.E.2d 150, 151 (1988) said it unmistakably:

"[I]n the absence of statutory authority, there is no right to recover exemplary or punitive damages against a municipal corporation ... or state ..." *See generally*, 57 Am.Jur.2d, *Municipal, Etc., Tort Liability*, § 318. *Cf., Clarke v. City of Greer*, 231 S.C. 327, 98 S.E.2d 751 (1957) (punitive damages against municipality nonrecoverable because municipality is merely agent of state for governmental purposes). Presently, there is no statute authorizing the recovery of punitive damages from the State of South Carolina or its agencies. There being no legislation or case law authorizing the recovery of punitive damages against the state or its agencies, we affirm the ruling of the circuit court.

Moreover, in the *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101

S.Ct. 2748, 69 L.Ed.2d 616 (1981), the United States Supreme Court recognized that recovery of punitive damages against governmental entities are contrary to sound public policy because such awards would burden the taxpayers and citizens for whose benefit the wrongdoer is assessed punitive damages. *Id.*, at 262, 101 S.Ct. at 2757. The principle of punitive damages is to “punish” the tortfeasor and to “deter” him from such conduct in the future. It is not clear that punitive damages will deter future misconduct or punish governmental tortfeasors since they are not personally liable **152 for damages; therefore, such awards in all likelihood would have a nugatory effect.

The Court of Appeals had no difficulty understanding this in Brinkley v South Carolina Dept. of Corrections, 687 S.E.2d 54, 57 (SC App. 2009), when it cited MacMurphy for the proposition that an award “could not, and should not, have contained any element of punitive or deterrent-based damages, because the defendant was a governmental entity.”

The same rule should apply here. The Plaintiffs’ prayers for relief make clear that the BCFA claim is mainly about punitive damages as the Plaintiffs’ BOC claim already asks for actual damages and other relief associated with the alleged breach. Given this punitive damages focus it makes little sense to delve into the minutia of Plaintiffs arguments or reinstate the claim. Even if the Court were inclined to reinstate the claim, it should do so in a manner that strikes any possibility of punitive damages or similar relief.

II. The Plaintiffs’ cannot convincingly show that the conduct complained of is not protected by the Tort Claims Act.

While it may or may not be theoretically possible to plead a BCFA claim in a contractual manner that avoids the Tort Claims Act, the Plaintiffs have not done so here. The Plaintiffs’ motion asserts that their BCFA claim should be treated as a contract action outside the scope of the Tort Claims Act. But the Plaintiffs’ argument contradicts their

Complaint. In paragraph 92 of the Second Amended Complaint they seek damages from the breach of contract. With the contract based damages pled, the Plaintiffs in Para. 107 of the Second Amended Complaint describe the additional relief sought under the BCFA as being based on “the independent and tortious wrong associated with the breach of the contract.” (emphasis added.)

Think about what the Plaintiffs are actually saying: (1) the claimed BCFA damages are based on a tortious wrong that is “independent” of the contract; (2) the independent act is “tortious” (“Tortious” sure makes it sound like they are complaining about a tort); and (3) the tortious, independent wrong is “associated with” the breach of the contract. The Plaintiffs have plainly told the Court that in this instance they seek damages under BCFA not for a contract, but to punish the Town for some other, independent and tortious act they believe relates to an alleged contract.

The Plaintiffs are also unable to rationally explain why the conduct they complain of is not protected by the specific Tort Claims Act (TCA) sub-sections cited in the challenged Order. For instance, Plaintiffs try to distinguish the “actual fraud” TCA rule² by claiming that it applies only to “intentional wrongful acts of state employees done outside the scope of employment.” See Plaintiffs’ Memorandum, pg. 7. The Plaintiffs’ characterization of the rule doesn’t fit the statutory text. S.C. Code Ann. 15-78-60(17) actually says that “fraud” immunity applies when a public employee conduct is outside the scope of his official duty “or which constitutes actual fraud, actual malice, intent to harm....(emphasis added) “Or” means that there is no statutory requirement that Town employees have been outside the scope of employment. Immunity attaches whenever a

² S.C. Code Ann. 15-78-60(17)

public employee is accused of “actual fraud, actual malice, intent to harm.” That is precisely what the Plaintiffs allege here. Plaintiffs’ own Memorandum says “Plaintiffs contend that the town and town council, acting in its official capacities, committed acts of “dishonesty in fact [and] unfair dealing.....” Plaintiffs’ Memorandum at p. 7. The Second Amended Complaint says that Town officials engaged in acts that show “fraudulent intent”, made “false representations”, and intended by the allegedly fraudulent acts to appropriate the Plaintiffs’ property rights. Second Amended Complaint at para. 103 – 106. There is no getting around the “fraud” rule of S.C. Code 15-78-60(17).

Plaintiffs are equally unable to avoid the Tort Claims Act rules that protect legislative, administrative and enforcement activity. See S.C. Code Ann. 15-78-60(1), (2) and (4). Plaintiffs try to avoid these rules with word parsing. What they cannot do is explain how the Town’s change in cutting rules (the seed that underlies the entire Complaint) is anything but a legislative act (ordinance). They cannot explain how the Town’s refusal to allow the Plaintiffs’ to cut as they please can be anything other than the town staff “enforcing” and “administering” an ordinance. They cannot explain how this legislative fact finding (the questionnaire) isn’t immune.

III. Plaintiffs’ argument about the temporal gap between the alleged breach and the alleged fraudulent conduct is unavailing.

The Plaintiffs cannot change time. Assuming the Town breached anything by changing the cutting law, that change occurred when the Town amended the cutting law in 1995. Plaintiffs’ alleged “fraudulent” activity occurred in 2009, some fourteen years later. Plaintiffs’ alleged “fraudulent activity” (questionnaire) relates to a contemplated,

legislative draft that was never adopted. For this claim to bear fruit, the Plaintiffs don't need a Motion to Reconsider – the Plaintiffs need different facts.

This 20 day of Feb, 2015


Derk Van Raalte
Brady Hair
2500 City Hall Lane
North Charleston, SC 29406
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843-200-9344

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiffs,

Versus

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

Defendants.

) IN THE COURT OF COMMON PLEAS

)

) NINTH JUDICIAL CIRCUIT

) C/A No. 10-CP-10-5449

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**PLAINTIFFS' REPLY IN SUPPORT
OF THEIR MOTION TO
RECONSIDER, ALTER, OR AMEND
REGARDING BREACH OF
CONTRACT ACCOMPANIED BY A
FRAUDULENT ACT**

Plaintiffs hereby submit this Reply Memorandum in support of their motion to reconsider, alter and/or amend summary judgment entered against their claim for Breach of Contract Accompanied by a Fraudulent Act (the "BCAF" claim). This Memorandum is filed in reply to Defendants' memorandum in opposition filed and served on February 23.

Plaintiffs established in their Motion to Reconsider that the S.C. Tort Claims Act does not apply to BCAF claims, such that summary judgment should be vacated, as the ruling was based on Plaintiffs' claims being barred by the TCA. Defendants apparently agree that the TCA is inapplicable to BCAF claims and do not attempt to refute this conclusion in their memorandum.

Instead, Defendants move for summary judgment against Plaintiffs' BCAF claim, not because the claim fails as a matter of law, but because they contend that punitive damages are not allowed against municipalities and, Defendants argue, because the other remedies available for a BCAF claim are also available on Plaintiffs' Breach of Contract claims, summary judgment should therefore be entered against Plaintiffs' BCAF claims.

Defendants do not present this argument in the appropriate procedural posture. This argument is first posited by Defendants in a Response Memorandum in opposition to Plaintiffs' Motion for Reconsideration; importantly, the summary judgment order about which Plaintiffs' requested reconsideration does not discuss whether or not punitive damages are available against Defendants, and Defendants' original motion for summary judgment does not pertain to this issue. Instead, Defendants' original motion argued only that Plaintiffs' BCAF claim was barred by the S.C. Tort Claims Act and the Court made its ruling based on the same basis. Therefore, Plaintiffs' Motion for Reconsider also dealt only with this issue, showing that summary judgment should be vacated because the TCA does not apply to BCAF claims. Defendants cannot now raise other separate grounds for summary judgment in a memorandum in opposition relating only to the TCA issue.

Additionally, Plaintiffs' counsel received Defendants' Response Memorandum on February 23, two days prior to the scheduled hearing. An issue of such public importance as to whether punitive damages are barred against a municipality under any circumstance is too important and too complex to be fully briefed and dealt with on two days' notice, and should not be handled on this incorrect procedural basis.

Defendants are free to file a Motion to Strike punitive damages under Plaintiffs' BCAF. Whether a plaintiff can recover punitive damages from a municipality for a BCAF claim is a novel issue that has not been decided under S.C. law. The cases relied upon by Defendants in their argument to punitive damages arose from and applied only to *tort* actions.

Defendants have brought this issue to the Court's attention on faulty procedural posture and without providing sufficient notice to Plaintiffs to allow an opportunity to fully and fairly respond on the merits. This motion pertains to whether Plaintiffs' BCAF claim is barred by the S.C. Tort Claims Act; Plaintiffs have established that it is not.

Plaintiffs' filed Memorandum in Support properly disposes of Defendants' arguments set forth in Subsection II and Subsection III of their Response Memorandum.

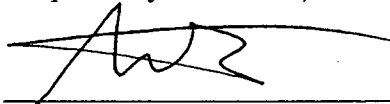
In short, as to Subsection II, Defendants continue to argue that Plaintiffs' BCAF claim is barred by the S.C. Tort Claims Act. However, Plaintiffs have established that the S.C. Tort Claims Act does not apply to contract claims and that BCAF is a contract claim under S.C. law. The TCA clearly and unambiguously states: "Nothing in this chapter affects liability based on contract nor does it affect the power of the State or its political subdivisions to contract." Simply put, as a matter of law, the provisions of the TCA cannot serve as grounds for summary judgment against claims for Breach of Contract Accompanied with a Fraudulent Act.

As for Subsection III, Defendants argue that summary judgment is appropriate because Defendants' fraudulent activity occurred after the 1995 town ordinance. This argument misses the mark, as Defendants again incorrectly suggest that this action is merely a challenge by Plaintiffs to the Town's legislative activity. Defendants' breaching conduct is allowing vegetation on the Accreted Lands to have grown far in excess of the levels at which the vegetation existed at the time the Deed Restrictions were executed. This breach continues so long as the vegetation

remains at such levels, so there is no such temporal gap. Moreover, under S.C. law, the fraudulent act under a BCAF claim can occur "prior to, contemporaneous with, or subsequent to the breach of contract." Floyd v. Country Squire Mobile Homes, Inc., 336 S.E.2d 502, 504, 287 S.C. 51, 54 (S.C. 1985).

The TCA does not act to bar Plaintiffs' BCAF claims; therefore, Defendants cannot show they are entitled to judgment as a matter of law. Genuine issues of material fact exists as to Plaintiffs' BCAF claim.

Respectfully submitted,



Robert H. Hood, Sr. (SC# 2599)
S. Scott Bluestein (SC# 65103)
Michael J. Brickman (SC# 874)
Molly H. Craig (SC# 6960)
Robert H. Hood, Jr. (SC# 13491)
James B. Hood (SC# 70212)
Barry Krell (SC# 3573)
Jonathan F. Krell (SC# 16691)
Robert T. Lyles, Jr. (SC# 10299)
Alice F. Paylor (SC# 4380)
Stephen A. Spitz (SC # 5287)
A. Walker Barnes (SC #78485)

*Attorneys for the Plaintiffs, Nathan
Bluestein, Ettaleah Bluestein, M.D.,
Theodore Albenesius, III, and Karen
Albenesius*

February ²⁴, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Nathan Bluestein, Ettaleah Bluestein,	)	C/A No. 10-CP-10-5449
M.D., Theodore Albenesius, III, and	)	
Karen Albenesius,	)	
	)	
	)	
Plaintiffs,	)	
	)	PLAINTIFFS' NOTICE OF MOTION
Versus	)	AND MOTION FOR
	)	RECONSIDERATION and
Town of Sullivan's Island and Sullivan's	)	CLARIFICATION
Island Town Council,	)	
	)	
	)	
Defendants.	)	

TO: J. BRADY HAIR, ATTORNEY FOR THE DEFENDANTS:

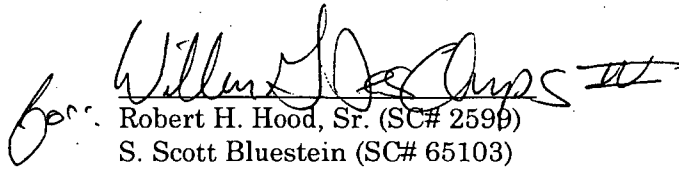
PLEASE TAKE NOTICE THAT Plaintiffs Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III and Karen Albenesius, by and through their undersigned attorneys, will move before the Master-In-Equity for Charleston County to reconsider and vacate/alter/amend and the Court's prior orders filed July 30, 2015, to wit: Order Granting Defendants' Motion to Strike Damages Claim Due to Location of OCRM Critical Line and Order Granting Summary Judgment to Defendants Based on Plaintiffs' Lack of Right to a View. In addition, the Plaintiffs seek clarification of the Order Granting Summary Judgment in combination with the Form 4 Order filed August 4, 2015, denying the Defendants' Motion for summary judgment on Plaintiffs' causes of action for declaratory judgment, claim of mandamus, nuisance, breach of contract and contract clause.

The orders filed July 30, 2015 were received by Counsel for the Plaintiffs on August 5, 2015. The orders filed August 4, 2015 were received by Counsel for the Plaintiffs on August 13, 2015.

FILED
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 JULIE J. ARISTIDE
 CLERK OF COURT

Plaintiffs respectfully submit that the Court misapprehends and/or overlooks the full and complete nature of their claims, the supporting evidence, and the applicable law as previously presented and argued in their prior filings which are incorporated herein as fully as if restated. In addition, this Motion is supported by a memorandum of law being filed contemporaneously with this Motion and any additional documents Plaintiffs may submit prior to the hearing.

Respectfully submitted,



Robert H. Hood, Sr. (SC# 2599)
S. Scott Bluestein (SC# 65103)
Michael J. Brickman (SC# 874)
Molly H. Craig (SC# 6960)
Robert H. Hood, Jr. (SC# 13491)
James B. Hood (SC# 70212)
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Stephen A. Spitz (SC # 5287)
A. Walker Barnes (SC #78485)

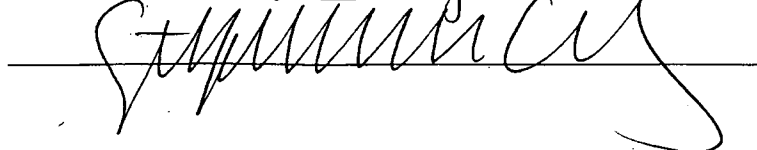
Attorneys for the Plaintiffs, Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius

August 17, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☐ mailing, ☒ e-mailing, ☐ facsimile, or ☒ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 17 day of August, 2015



2015 AUG 17 PM 3:51
CLERK OF COURT

FILED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	2010
Nathan Bluestein, Ettaleah Bluestein, M.D.,	)	C/A No. ~~210~~ -CP-10-5449
Theodore Albenesius, III, and Karen	)	
Albenesius,	)	
	)	
<i>Plaintiffs,</i>	)	
	)	PLAINTIFFS' MEMORANDUM OF LAW
Versus	)	IN SUPPORT OF THEIR MOTION FOR
	)	RECONSIDERATION AND
Town of Sullivan's Island and Sullivan's	)	CLARIFICATION
Island Town Council,	)	
	)	
<i>Defendants.</i>	)	

FILED
 2015 AUG 17 10:3:52
 CLERK OF COURT
 J. ARTHUR STRONG

In support of Plaintiffs' motion for reconsideration and clarification of the Order filed July 30, 2015 and August 4, 2015, Plaintiffs file the following memorandum:

RELEVANT BACKGROUND

The details of the underlying facts and evidentiary foundation have been well and repeatedly set forth on the record before this Court. The Plaintiffs crave the Court's attention to all previous filings by the Plaintiffs and offer the following to focus on this particular motion at this stage of the litigation. Fundamentally, this lawsuit arises out of Defendants' refusal to abide by the contractual terms of the 1991 deed/contract and to trim (or allow others to trim) vegetation and natural growth on certain accreted lands owned by the Town situated immediately between Plaintiffs' homes and property on Sullivan's Island and the nearby beach/ocean, thereby depriving (or at least impairing) Plaintiffs of an ocean view, and diminishing the market value of Plaintiffs' property.¹ Plaintiffs bring this action against Defendants Town of Sullivan's Island and Sullivan's Island Town Council asserting claims for a declaratory judgment, temporary and

¹ The Plaintiffs also assert other damages including, diminished ocean breezes, increased fire hazards, increased mosquito populations, and increased "varmint populations". See Second Amended Complaint ¶58.

permanent injunctive relief, a writ of mandamus, breach of contract, breach of contract accompanied by a fraudulent act, violation of the SC Unfair Trade Practices Act, nuisance, inverse condemnation and violation of the contract clause of the US and SC Constitutions. At the core of the Plaintiffs' claims is the Defendants' breach of a contract and/or deed restrictions to which Plaintiffs are third party beneficiaries as a result of the Defendants failure to trim (or allow trimming of) the vegetation on the town-owned accreted lands.

As of this date, by various orders the Court has granted summary judgment on certain claims and parts of claims. To recap, by earlier orders, the Defendants have been granted summary judgment on the claims for SCUTPA and breach of contract accompanied by a fraudulent act, and the Plaintiffs made motions for reconsideration to preserve their appeal rights, which were denied by an order of August 5, 2015. The Court also granted summary judgment to the Defendants on Plaintiffs' claim for injunctive relief on tax issues, which order was also preserved for appeal in a timely motion for reconsideration denied in the August 5, 2015 order. Accordingly, those claims have been finally disposed of in this Court and await further review on any future appeal. To the extent that this Court relies upon the holdings in support of their prior ruling on that claims/remedies [see Right to view SJ Order, footnote 8, p. 12], the Plaintiffs seek reconsideration for each and every reason/ground set forth in the prior filings and hearing together with the grounds and arguments set forth herein.

I. The Court has misapprehended or overlooked the relevant facts and law regarding the location of the OCRM Critical Line.

By order filed July 30, 2015, the Court has stricken the Plaintiffs' claims for monetary damages on the stated grounds that the Plaintiffs have not been damaged because irrespective of the Town's ordinances, they have not obtained permission from the appropriate State agency to

perform the desired cutting in the OCRM Critical Zone.² The Court misapprehends the facts regarding the vegetation in question and the OCRM lines. Contrary to the Court's finding, not all the vegetation about which the Plaintiffs complain lies within the OCRM Critical Zone; in fact, certain of the AL lies outside of that Zone. Also contrary to the Court's finding, the lack of a permit from the State agency to cut in the Critical Zone does not diminish or negate their claims to enforce their rights, as third party beneficiaries, against the Town. The State regulations/policies related to the AL within the OCRM critical line is not absolute and does not negate the Town's obligations – separate and independent – to honor and comply with the 1991 contract and Deed restrictions.

Under S.C. Regulation § 30-11D(6), as referenced in the DHEC letter of January 24, 2014, trimming of vegetation is not totally prohibited; rather, it addresses destruction – not trimming – and the regulations allows “destruction” where there is no feasible alternative with certain required mitigation. 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. Most significantly, the Court misapprehends or overlooks that these Plaintiffs cannot apply for a “cutting permit” without the Town's permission first; for 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.”

² 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 Town owns the accreted land and will not grant permission; thus, these Plaintiffs cannot even apply for a permit. Thus, there is no factual or legal basis for the Court's conclusion that the Plaintiffs could not materially improve their view if the Town were required to comply with its obligations. The facts and law do not support the conclusions that:

- "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.";
- "since the OCRM Critical Line means that the Plaintiffs could not cut enough to obtain a view even if the Town repealed its ordinance tomorrow. The fact that State regulations mean that the Plaintiffs still cannot cut demonstrates that the Town's ordinance has effectively "taken" nothing from the Plaintiffs."; or
- "whatever diminished view they complain about would be basically unchanged even if the Town repealed the ordinance."

The crux of the matter is that the Town, as accreted landholder, and under its obligations per contract and the deed restrictions, should keep the vegetation cut to the 1991 conditions, or at least in the alternative, it should not be allowed to prohibit these Plaintiffs and/or other third party beneficiaries by denying permission to cut to the 1991 conditions, which in turn, prevents the Plaintiffs from applying to the State agency. And, even in the event that such permission might not be forthcoming from the Coastal Council at this time under the current setback lines/critical zone, the law requires that the setback lines be reevaluated every 8 to 10 years. The lines were last revised in 2009, and thus, a change within the next few years may adjust the lines to allow permitting of at least some of the affected accreted land in issue. The Plaintiffs should

not have to wait until that time to fight this battle with the Town again. The Plaintiffs are entitled to have their rights determined now so that they can apply to the Coastal Council under the current provisions, or at such time and upon such conditions when the lines are reevaluated and redrawn in 2017-2019.

II. The Court has misapprehended or overlooked the relevant facts and law regarding the Plaintiffs' rights under the 1991 Lowcountry Open Land Trust transfers and related deed restrictions in finding that the Plaintiffs have no right to a view.

While there may not be any common law or statutory right to a view easement under current precedent, these Plaintiffs submit that the unique circumstances of the 1991 land transfers and deed restrictions have created a contractual right enforceable in this case.

First, the Trust, as Grantor, is not the only party with interests enforceable under the deed/contracts. These Plaintiffs are Third Party Beneficiaries with separate and independent rights to seek enforcement of the deed restrictions under ¶5. Accordingly, the 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.

Second, the Plaintiffs' lack of any right to control neighboring property to assure a view should not invalidate any of the causes of action. The cutting/trimming on the accreted land in issue is an independent right/obligation, and the degree of impairment associated with the obstruction on the accreted land serves as a separate, remediable issue.

While Paragraph 2 contains language that the Town has "unrestricted authority" to trim and control growth, under the circumstances of the transactions including the guiding purpose of the transactions, and the language of the documents as whole, amount to and constitute an obligation to trim and control growth for various purposes including to provide views of the oceans. The purpose of the transactions in 1991 was to prevent development and to preserve and

maintain the Island and its beaches/beachfront properties. The only reasonable interpretation 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.

Paragraph 6 allows the Town to enact “more restrictive” ordinances and regulations but they cannot be inconsistent with the deed restrictions. Again, in the context of the very fundamental purpose of the land transfers and the deed restrictions as a whole, “more restrictive” should not be read to allow the Town to change the standards/regulations to impair the ocean views and dune conditions.

The cited case of Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 132, 459 S.E.2d 876, 880 (Ct. App. 1995) aff’d, 324 S.C. 239, 478 S.E.2d 836 (1996), stands for the proposition that the Town Council cannot enter a contract that impairs the governmental function of appointing and removing public officers beyond their terms. However, it does not support the proposition that the Town Council did not have legal authority in the exercise of its business or propriety powers to execute the land transfers or bind the Town to the deed restrictions. Such a proposition/holding might raise a daunting question as to the Town’s very authority to enter the land transfers with the 50 year/50 year extension if the Town cannot enter binding deed restrictions beyond the term of the Council.

To the extent that the regulations and the Town’s routine practice of approving permits under the 1981 Ordinance in place in 1991 may not have given the Plaintiffs an absolute, perpetual right to cut for a view, those regulations (with the then existing custom and policies for enforcement) by virtue of the transfers and the resulting deed restrictions have created a unique

set of obligations and rights, including the right to an ocean view. The Plaintiffs request that the Court reconsider granting summary judgment on the claims for injunctive relief in regards to the Town's enforcement of the 1995/2005 zoning ordinances to the extent that they deprive the Plaintiffs of the rights created under the 1991 transfer/deed restrictions.

One key concept misapprehended or overlooked is that the right to an ocean view has been recognized by the Town 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 ocean view is a relevant legal property right that has been taken and is a cognizable basis for the eighth cause of action for “taking”/condemnation.

These transfers and the deed restrictions are unique circumstances that created certain rights and obligations that may not have been legally recognized under state law in the past. However, the legal obligations of the Town and the rights of these Plaintiffs must be determined under the terms of the deed restrictions in light of the background and purpose of the 1991 transactions. The Plaintiffs would respectfully submit that summary judgment is inappropriate at this time under the concept referenced by the S.C. Supreme Court in the very recent case of Chestnut v. AVX Corp., Appellate Case No. 2012-212143, Op. No. 27557 (S.C. Sup. Ct. filed August 5, 2015). In that environmental tort case, the trial court had dismissed the claims of property owners whose property has not been physically contaminated, but the Supreme Court considered that the case presents a novel question of whether stigma damages should be

recognized and reversed/remanded for factual development. The Plaintiffs respectfully submit that notwithstanding the cross motions for summary judgment, the Court should allow further factual development at trial on the novel question presented on the interpretation of the unique deeds/contracts in issue. See also Tyler v. Macks Stores of S. Carolina, Inc., 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980) (novel issue is best decided in light of the testimony to be adduced at trial).

III. Request for Clarification of Claims and Issues left for Trial

In the Order filed July 30, 2015 (granting summary judgment on right to a view), the Court struck through certain paragraphs/sections related to the first cause of action for declaratory judgment, the third cause of action for a writ of mandamus, the fourth cause of action for breach of contract, the seventh cause of action for nuisance, and the ninth cause of action for constitutional violation of the contract clause(s). By order filed August 4, 2015 (Form 4), the Court states that the Defendants' motion for summary judgment is denied as to the causes of action for declaratory judgment, mandamus, nuisance, untimeliness, breach of contract, and contract clause. Given the various rulings of the Court on the myriad of issues covered in these and the prior orders, the Plaintiffs seek clarification as to what issues and claims are left for trial. The Plaintiffs seek clarification so that the parties can proceed with needed discovery and planning for an anticipated trial in November 2015.

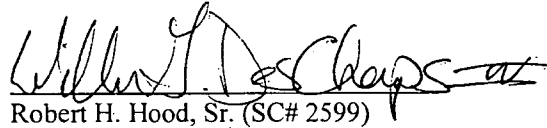
CONCLUSION

Under the facts and law, the OCRM regulations do not establish an absolute or permanent prohibition from cutting vegetation in the Critical Zone but Plaintiffs cannot even apply for an OCRM permit to cut vegetation on the accreted lands without first obtaining the Town's permission. In addition, under the facts and circumstances, there are triable questions

regarding whether the transfers/deed restrictions create obligations and rights regarding cutting and trimming vegetation on the accreted land in question which include a component of a "right to an ocean view" which has been impaired by the Town's cutting/trimming regulations/policies.

Wherefore, based on the foregoing, in addition to all grounds and arguments raised in prior filings, the Plaintiffs respectfully move to the Court to reconsider and allow the Plaintiffs to trial their claims based on a lack of view and any consequential, causally related monetary damages.

Respectfully submitted,


cc: Robert H. Hood, Sr. (SC# 2599)

S. Scott Bluestein (SC# 65103)

Michael J. Brickman (SC# 874)

Molly H. Craig (SC# 6960)

Robert H. Hood, Jr. (SC# 13491)

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Alice F. Paylor (SC# 4380)

Stephen A. Spitz (SC # 5287)

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*Attorneys for the Plaintiffs, Nathan Bluestein,
Ettaleah Bluestein, M.D., Theodore Albenesius,
III, and Karen Albenesius*

August 17, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Nathan Bluestein, Ettaleah Bluestein,))
Theodore Albenesius and Karen)
Albenesius,)
)
Plaintiffs,)
)
Versus)
)
Town of Sullivan's Island and)
Sullivan's Island Town Council,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Case No. 10-CP-10-5449

Town's Response to Plaintiffs'
Motion to Reconsider, Alter or Amend
Orders Regarding OCRM Critical Line
and Right to a View¹

FILED
2015 SEP 11 PM 12:41
JULIE J. ARMSTRONG
CLERK OF COURT

This Court should stand firm on its prior rulings regarding the Plaintiffs' lack of a right to a view and the Plaintiffs' lack of OCRM approval to cut in the critical zone. The Court was right.

The Deed Never Protected the Plaintiffs' View.

Documents show that the Plaintiffs are wrong about what the deed was intended to do. The Plaintiffs repeatedly advance the idea that the 1991 Deed intended to protect the view from their houses towards the ocean. See Plaintiffs' Memo at pp. 1, 4, 5, 6, 7. They imply that the Grantor Lowcountry Land Trust, with its yearly inspections, has forgotten what the deed originally meant. See Plaintiffs' Memo at p. 5. This is simply not true.

The Land Trust's documents clearly and repeatedly stated that the view protected by the deed is NOT the view from Plaintiffs' homes towards the ocean. Not

¹ Any references to contracts, duties, currently undismissed claims, etc are not intended as acknowledging the validity of the same, but at most merely assumed for purposes of argument.

one single time does the deed say its goal is to protect homeowner views.² The Grantor confirmed this reading of its own deed in it's own Summary of Deed Restrictions (Copy Attached.) There the Land Trust reported:

- 1) "The scenic value of this property is due to its visibility *from the Atlantic Ocean and the public beach.*" Summary of Deed Restrictions, p. 2 (emphasis added).
- 2) "Open Space values derive from the undeveloped natural character of the entire property." *Id.*
- 3) The wildlife habitat value of the property "will be protected by limitation on subdivision, building, and commercial use, as well as the limited ability to alter vegetation." *Id.*, p. 3.
- 4) the LOLT / Town transaction was predicated on the belief that "something should be done to protect it [AL] before it became a target for developers." Summary of Deed Restrictions, p. 1.
- 5) "The primary design elements [of the easement] revolved around maintaining the natural character of the property and protecting the accreted beach from future development and commercialization." Summary of Deed Restrictions, p. 2.

The deed protects the view of beachgoers and wildlife against having to see houses.³

The deed protects all islanders against developers building on the AL. The deed does NOT protect the porch views of front row owners. Not once in the deed or Deed Restriction Summary does it ever say that.

² The Plaintiffs cannot even point to Paragraph 2 to support such an argument. Paragraph 2 says that Town Council has the "unrestricted authority" to trim for a variety of reasons, including homeowner views. It is simply not possible to transform the words "unrestricted authority" into "contractual obligation to homeowners" as would be required for the Plaintiffs' argument to make any sense.

³ The wildlife aspect of this makes perfect sense. As one example, it has long been reported that manmade light sources interfere with the survival of sea turtle hatchlings. See, among others, http://news.nationalgeographic.com/news/2003/03/0310_030310_turtlelight.html. See also, Sullivan's Island Municipal Code 14-23 dealing with manmade light sources.

The Plaintiffs have simply based their Motion for Reconsideration arguments on a backwards view of the documents at issue. They argue the court should reconsider because the 1991 deed created special homeowner rights. The Plaintiffs are wrong. The Court should deny the Motion for Reconsideration.

Responses to Plaintiffs' Specific Arguments

A. Defendant's Memorandum in Response to Plaintiffs' Challenge to Master's OCRM Ruling

The Master correctly decided that the Plaintiffs' lack of cutting approval from OCRM means that the Town's cutting ordinance can't yet have caused the Plaintiffs' financial harm. The Plaintiffs advance several arguments in hopes of reversing the Court's decision. Each of the Plaintiffs' arguments are flawed.

1. The Plaintiffs' Argument About the Critical Line Covering the Entire Accreted Land is Based Upon A Mistaken Reading of the Order.

The Plaintiffs attack the Court's ruling by stating "[c]ontrary to the Court's finding, not all the vegetation about which the Plaintiffs complain lies within the OCRM Critical Zone; in fact, certain of the AL lies outside of that zone." The problem is, that's not what the Court wrote. The Court's Order specifically recognized two things. *First*, the Court recognized that a small sliver of the disputed land in front of

the Plaintiffs houses is landward of the setback line.⁴ Thus, the Court did not err at all. *Second*, the Court correctly recognized that the cutting / non-cutting of the small landward sliver of AL would not have a material impact on the Plaintiffs' view since the Plaintiffs lack approval from OCRM to cut the lion's share of the land which is seaward.⁵

The Plaintiffs next argument is similarly based on a mistaken characterization of the Order. The Plaintiffs argue that "contrary to the Court's finding, the lack of a permit from a State agency to cut in the Critical Zone does not diminish or negate their claims to enforce their rights, as third party beneficiaries, against the Town." Again, the Plaintiffs' statement does not reflect what the Court actually ruled. The Court never said that the presence of the critical line changed contractual obligations between the Town and the Plaintiffs. The Court's ruling instead recognized that, the Plaintiffs would not currently have a materially improved view regardless of whether the Town allowed cutting. They haven't even applied with OCRM. As a result, the Town's position can't yet have caused the Plaintiffs *financial* harm. Put another way, until the Plaintiffs have even applied to OCRM financial damage claims are not yet ripe.

⁴ The Court specifically noted that critical line did not cover ALL of the AL, but rather the "overwhelming majority of the land which the Plaintiffs wish to cut"

⁵ The Plaintiffs also forget about the significance of the Bayonne Avenue Extension that lies between their houses and the AL. There is nothing in the Deed Restrictions that would stop the Town from allowing vegetation to grow up on Bayonne Avenue Extension such that the Plaintiffs are unable to even see the AL portion that is landward of the Setback Line.

2. The Plaintiffs Argument About the Need for Town "Permission" in Order to Apply for OCRM Cutting Approval Undercuts Plaintiffs' Theory of the Case.

The Plaintiffs argue that the Court cannot fault them for having failed to secure OCRM cutting approval because OCRM will not let the Plaintiffs apply for permission without Town consent. This argument undercuts the Plaintiffs' entire theory of the case.

As the Plaintiffs state, applying to OCRM requires submitting "[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' entire lawsuit is based on an argument that the AL Deed gives the Plaintiffs a clearly documented right to keep the AL cut as it existed in 1991. Were this true the Plaintiffs could apply to OCRM by attaching a certified copy of the AL deed as evidence of an easement to cut. If the Deed actually said what Plaintiffs' claim (which it does not), then it certainly would appear to be prima facie proof of an easement.^{6 7}

⁶ "The generally approved definition of an easement is that it is a liberty, privilege or advantage without profit, which the owner of one parcel of land may have in the lands of another; or to state it from the opposite point of view, it is a service which one estate owes to another, or a right or privilege in one man's estate for the advantage or convenience of the owner of another estate." See Forrest Land Co. v. Black, 57 S.E.2d 420 (SC 1950).

⁷ It may be that the Town would have later filed an objection with OCRM during the permitting process (See Too Tacky Partnership v. SC DHEC, 686 S.E.2d 194, 198(SC App. 2009))(cert. later granted, then dismissed as improvident)) thus staying issuance of a permit until a civil court ruled. However, the Plaintiffs failed to ever procedurally advance the ball to that point. Thus, at present the Plaintiffs cannot contend that the Town has delayed their view until the Plaintiffs have themselves taken all necessary predicate steps with OCRM to force the Town to respond to OCRM.

B. Plaintiffs' Own Statement of the Issue Displays why Summary Judgment, Not Trial, is the Appropriate Disposition.

The Plaintiffs own description of the central issue in this case shows that this is a Summary Judgment question of the legal interpretation of an undisputed document.

"The crux of the matter is that the Town, as accreted landholder, and under its obligations per contract and the deed restrictions, should keep the vegetation cut to 1991 conditions...." Plaintiffs' Memorandum in Support of Motion to Reconsider, p. 4.

The question of how undisputed contract language applies to undisputed facts is a classic question of law to be decided by the Court. In this case no party disputes what words are written on the page of either the Deed or the various ordinances. Similarly, no one disputes what the land looked like in 1991 or what it looks like today. The sole question is whether the words of the Deed mean that the vegetation must be cut back to earlier standards. Even as framed by the Plaintiffs, this is a question of law, not fact. No trial is required.

C. Plaintiffs Lack a Right to a View.

1. No Right to a View.

The Plaintiffs' Memo tries to transform their supposed Deed "cutting rights" into a "right to a view" with damages for view obstruction. The Plaintiffs fail to appreciate the significance of Bayonne Avenue Extension.

Bayonne Avenue Extension means that even if a “right to cut” existed⁸, it would still not amount to a “right to a view.” As previously discussed, the Town-owned Bayonne Avenue Extension property lies between the Plaintiffs’ lots and the most landward edge of the AL. The Deed Restrictions pertaining to the AL do not touch the Bayonne Avenue Extension property. Thus, there is nothing that would stop the Town from planting trees or building a structure on Bayonne Avenue Extension that would obstruct the Plaintiffs’ ability to even see the closest edge of the AL.⁹ Since the Plaintiffs have no right to see from their house to the closest edge of the AL, they certainly cannot have any right to look from their house to the *far* side of the AL or to the ocean. Thus, the presence of Bayonne Avenue Extension means that regardless of what cutting rights Plaintiffs might possess by virtue of the AL deed, the right to cut does not amount to a right to an ocean view. This means that the Plaintiffs claims for monetary damages based on ocean view obstruction cannot survive.

2. The Plaintiffs arguments about Paragraph 2 and 6 of the Deed Restriction Are closer to “Admissions Against Interest” than Assignments of Error.

The Plaintiffs argument about Paragraph 2 of the Deed Restriction constitutes an admission against interest more than it demonstrates any error in the Court’s prior rulings. The Plaintiffs admit here that the Deed Restriction allows the

⁸ Such a right as conceived by the Plaintiffs does not exist. However, for purposes of this argument the Town will assume the Deed did give Plaintiffs a right to cut to three feet as claimed.

⁹ The Plaintiffs have admitted in this litigation that there is no general common law or statutory right to a view and thus have based their arguments on the presence of deed restrictions on the AL.

Town "unrestricted authority" to trim and control growth. Plaintiffs' Memorandum at 5. Plaintiffs then ask the Court to ignore this undisputed language and rule in the Plaintiffs favor because the Plaintiffs believe that the "circumstances of the transaction" and the "guiding purpose of the transactions" was to specifically protect the view from their porches. This is an invitation by the Plaintiffs for the Court to admit parole evidence and use it to "read out of the contract" provisions that the Plaintiffs find inconvenient. That would be error.

The Plaintiffs argument about Paragraph 6 of the Deed Restriction contains a similar admission. The Plaintiffs admit that "Paragraph 6 allows the Town to enact 'more restrictive'¹⁰ ordinances and regulations...." Plaintiffs' Memorandum at p. 6. To avoid this admission ending their case the Plaintiffs then erroneously claim that Paragraph 6 requires that such a Town ordinance must be **both** more restrictive **and** that such ordinances may not conflict with other provisions of the Deed Restrictions. The Plaintiffs say **both** tests must be satisfied for a new ordinance to be valid. The problem with Plaintiffs' argument is that the text of Paragraph 6 specifically forbids it. Paragraph 6 says that the Town may enact ordinance which are "more restrictive ... or which are not inconsistent with these Restrictions." Deed Restrictions, Paragraph 6. (emphasis added). The Deed itself uses "or" to say that a

¹⁰ "More restrictive" in the context of this case means more protective of plant growth and the environment. In other words, the 2005 ordinance is "more restrictive" and than 1981 ordinance because the 2005 ordinance allows fewer species to be cut and sets a taller cut-off limit. The Plaintiffs, in deposition, previously admitted that the 1995 and 2005 ordinances subject to challenge here are "more restrictive." See Deposition of Nathan Bluestien, p. 71, lines 14 - 18 ("That's a good solution. So you would 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.") See also Deposition of T. Albenesius, p. 17 - 20. Specifically, p. 18, lines 18 - 23 ("Q: And you'd agree with me that the 1981 Zoning Ordinance dealt with a three foot height rule, right?" A: "Right" Q: "And that's the one you favor, correct?" A: "Correct" Q: "And the reason that you like that 1981 three foot rule better than the current one is that it lets you cut more, correct?" A: "Correct".)

town ordinance is allowed if it passes just one, not both, standards. The “or” specifically allows a more restrictive cutting rule even though it might conflict with other deed paragraphs the Plaintiffs say gives them a right to an unchanged view.¹¹ What we are left with is an admission in the Plaintiffs’ brief that Paragraph 6 allows “more restrictive” ordinances to be passed and previous admissions by Plaintiffs that the 1995/2005 ordinances are being challenged because they are more protective of the environment (i.e. more restrictive.)¹² This is fatal to the Plaintiffs’ entire case because the “or” in Paragraph 6 means that the Town’s rule is allowed regardless of whether the more restrictive rule decreases views.

3. The Plaintiffs Argument that the Town Has Recognized Valuable “View” Rights Through Tax Classification Is Based on Mistaken Identity.

The Plaintiffs argue that the Town has recognized the Plaintiffs’ supposed “right to an ocean view” by virtue of tax assessment. The Plaintiffs, however, fail to recognize that the Town does not perform tax assessment. Tax assessment is a function of County Government. Thus, the Town has not characterized or recognized anything by virtue of Plaintiffs tax assessment.

¹¹ Again, the Town does not believe that any such right exists to begin with.

¹² See Deposition of Nathan Bluestien, p. 71, lines 14 – 18 (“That’s a good solution. So you would 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.”) See also Deposition of T. Albenesius, p. 17 – 20. Specifically, p. 18, lines 18 – 23 (“Q: And you’d agree with me that the 1981 Zoning Ordinance dealt with a three foot height rule, right?” A: “Right” Q: “And that’s the one you favor, correct?” A: “Correct” Q: “And the reason that you like that 1981 three foot rule better than the current one is that it lets you cut more, correct?” A: “Correct”.)

CONCLUSION

The Court correctly concluded that the Plaintiffs lack any right to a view and that, if even such a right did exist, the Town's ordinances cannot yet have even theoretically caused the Plaintiffs harm because they haven't yet even applied to OCRM. For the foregoing reasons the Town urges the Court to deny the Plaintiffs' motions for reconsideration and summarily dispose of this case based on the absence of a triable factual issue and absence of any legal right.

This 1st day of Sept, 2015


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North Charleston, SC 29406
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843-200-9344

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
Nathan Bluestein, Ettaleah Bluestein,) C/A No. 2010-CP-10-5449
M.D., Theodore Albenesius, III, and)
Karen Albenesius,)
) *Plaintiffs,*) **PLAINTIFFS' REPLY IN SUPPORT**
) **OF THEIR MOTION FOR**
Versus) **RECONSIDERATION and**
) **CLARIFICATION AND IN**
Town of Sullivan's Island and Sullivan's) **OPPOSITION TO THE**
Island Town Council,) **DEFENDANTS' OPPOSITION BRIEF**
) **AND SUPPLEMENTAL MOTION**
) **FOR SUMMARY JUDGMENT**

Defendants.)

FILED
2015 SEP 30 AM 9:32
JULIA ARMSTRONG
CLERK OF COURT

TO: J. BRADY HAIR, ATTORNEY FOR THE DEFENDANTS:

In further support of Plaintiffs' motion for reconsideration and clarification of the Orders filed July 30, 2015 and August 4, 2015, and in opposition to Defendants' recent briefs, including a new Motion for Summary filed by the Defendants months after the parties have already filed numerous briefs and memoranda and the court had conducted at least two hearings as to the same, Plaintiffs file the following memorandum:

The issues have been fully and repeatedly argued in the motions and memoranda previously submitted and at the hearings before this Court. In addition to preserving all the points previously presented, Plaintiffs offer these points in Reply to the Town's latest response to the motions for reconsideration and in opposition to the Town's motion for summary judgment.

1. **What was the Deed intended to do? It was intended to preserve the accreted land in "the condition of the Property at the time of the grant."**

That is the question – a question that is the very point of disagreement – a question that is not answerable from language of the Deed alone. For example, to the extent that the Defendant Town is relying on documents outside of the Deed – i.e. the Summary of Deed Restrictions – it is acknowledging that the Deed is ambiguous and the intent of the parties is subject to proof by extrinsic evidence.

To the extent that the Deed speaks of the aesthetic value of the property, the Deed does not make any specific reference to visibility *from* the ocean. It would be illogical, if not absurd, that the Town would have intended to protect the land view of those passing by on the beach/ocean, but not to protect the ocean view of the homeowners or other persons from the inland. On the other hand, the Deed does, however, expressly provide that property owners have enforcement rights. The absence of express language documenting the homeowners' "right to a view" does not negate the rights of these homeowners – as third party beneficiaries – to enforce the rights and obligations under the Deed to preserve the property in the condition "at the time of the grant" – not to allow a virtual jungle to grow.

2. **Lack of clarity in the Court's rulings on certain points of fact and law.**

The Defendants claim that the Plaintiffs are mistaken in their reading of this Court's orders. However, to the extent that the Trial Court's statements are inconsistent, the Plaintiffs would seek clarification.

For example, the Trial Court dismissed the damages claim on the stated grounds that the Plaintiffs have not been damaged because irrespective of the Town's ordinances, they have not obtained permission from the appropriate State agency to perform the desired cutting in the OCRM Critical Zone. If the Trial Court fully comprehends that not all the vegetation about which the Plaintiffs complain lies within the OCRM Critical Zone, then the stated basis would not apply to the cutting on that portion of the land. Whether there is, in fact, accreted land outside of the Critical Zone beyond the jurisdiction of the OCRM, or whether there is Town-owned land on Bayonne Avenue Extension that is not subject to the deed restrictions at issue, the point still remains that the Deed does place restrictions on the accreted land that the Plaintiffs, as property owners, are entitled to enforce to preserve that land in the condition it existed in 1991. 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."

The Defendants insist, and the Trial Court so held, that the Plaintiffs' claims are not yet ripe because they have not applied to OCRM for permission to cut within the Critical Zone. As stated previously, these Plaintiffs cannot, under the applicable regulations, apply for a "cutting permit" without permission from the Town as the owner of title. It defies credulity for the Defendants to argue that the Plaintiffs should have submitted the Deed to the OCRM as proof of their right to cut or to proffer by footnote that they **might** have objected in the OCRM during the permitting process. 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.

In the prior memorandum, the Plaintiffs noted that a key concept misapprehended or overlooked is that the right to an ocean view has been recognized as a unique component of coastal property rights through the property tax jurisprudence. The Defendants point out that the Town does not perform the tax assessment. However, the point to be made by the Plaintiffs is that the ocean view is a relevant legal property right that has been taken and is a cognizable basis for the eighth cause of action for “taking”/condemnation.

3. The Plaintiffs’ arguments do not amount to dispositive admissions.

The Defendants contend that they are entitled to summary judgment because the Plaintiffs have “admitted” – by argument in memorandum and in deposition testimony of Mr. Bluestein and Mr. Albenesius – that the Deed Restrictions authorize the Town’s revised cutting ordinances. The argument as to the language of the Deed does not amount to “admissions against interest” dispositive of the questions in issue.¹ The statement in argument as to what the language of Paragraph 6 literally provides – more restrictive ordinances and regulations – does not amount to an admission or concession that isolated verbiage of Paragraph 6

¹ To the extent that issues about admissions of a party and declarations against interest are evidentiary matters, they are not before the Trial Court at this point. See generally, Trial Handbook for South Carolina Lawyers § 18:1. Distinguishing between admissions and declarations against interest.

allows the Town to avoid its obligation meet to the primary purpose of the Deed which is to preserve the accreted land in the condition as of 1991. Acknowledgement in deposition testimony or legal memorandum that the deed contains certain words does not constitute an admission of the intent of those words as argued by the Town. While the Plaintiffs acknowledge that the Deed says what it says, they vehemently dispute the meaning of the literal language, particularly, the Paragraph 6 language about more restrictive regulations.

Likewise, the testimony of the witnesses, quoted in isolation, does not amount to an admission or concession that the Town can allow the AL grow into a jungle. Thus, the ambiguity/dispute extends to the meaning of "more restrictive," namely, is it more restrictive – from whose perspective – to allow growth beyond the three foot limit in place in 1991 in contrast to forcing vegetation to be cut even shorter than the 1991 - 3" limit. Again, the disputes over meaning in application to these circumstances supports the case for full and complete presentation of evidence of the parties' original intent in drafting these Deed restrictions.

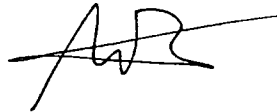
4. Summary Judgment is not appropriate because there is ambiguity.

The fact that no one disputes the words in the deed does not mean that the meaning of those words is a question of law for the Court. Obviously, the parties dispute the meaning of those words, particularly in the context of the circumstances presented. Literally, the Deed does not explicitly state that the vegetation must be cut and maintained at the heights in 1991. However, the Plaintiffs maintain, and deserve to the opportunity to present the evidence to prove, that right/obligation is

encompassed in the intention of the contracting parties by virtue of the stated purpose of the Deed to preserve the property in the condition the time of the grant.

These transfers and the deed restrictions are unique circumstances that created certain rights and obligations that are presenting novel questions to the Trial Court for decision without a jury. The Plaintiffs submit that the Trial Court should allow both parties the opportunity to present evidence of the background circumstances and intent of the contracting parties to make a full and complete record for the inevitable appeal. See Chestnut v. AVX Corp., 413 S.C. 224, 776 S.E.2d 82 (2015) (remanding for factual development of claims before ruling on novel question); see also Tyler v. Macks Stores of S. Carolina, Inc., 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980)(novel issue is best decided in light of the testimony to be adduced at trial).

Respectfully submitted,



Robert H. Hood, Sr. (SC# 2599)
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Theodore Albenesius, III, and Karen
Albenesius*

September 29, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Nathan Bluestein, Ettaleah Bluestein,	)	Case No. 10-CP-10-5449
Theodore Albenesius and Karen	)	
Albenesius,	)	Notice of Motion and Motion for Summary
	)	Judgment Based on Plaintiffs' Admissions
Plaintiffs,	)	and Deed Restriction Paragraph 6 with
	)	Incorporated Memorandum of Law
Versus	)	
	)	
Town of Sullivan's Island and	)	
Sullivan's Island Town Council,	)	
	)	
Defendants.	)	

TO: BOBBY HOOD AND ADDITIONAL COUNSEL FOR THE PLAINTIFFS:

PLEASE TAKE NOTICE THAT the Defendants, by and through counsel, will move before the Master-in Equity for Charleston County for an Order granting Summary Judgment based upon Deed Language and Plaintiffs' admissions which, when coupled, display as a matter of law that the Town's 1995 and 2005 Ordinances are fully deed compliant. This motion is supported by the statutory, caselaw and common law of the State of South Carolina, and any additional documents and evidence the Defendants may submit at or prior to the hearing. This motion is further supported by the argument appearing below.

Argument

The Plaintiffs most recent pleadings, when coupled with prior deposition testimony and the plain language of Paragraph 6 of the Deed Restrictions, conclusively

establish the Town's entitlement to a Summary Judgment. The following two admissions are fatal:

- 1) **"Paragraph 6 allows the Town to enact 'more restrictive'¹ ordinances and regulations...."** Plaintiffs' Memorandum at p. 6.
- 2) **Plaintiffs admit that the 2005 / 1995 Ordinance they challenge here are more restrictive than the version in place when the Deed issued.** They specifically said it in deposition. See Deposition of Nathan Bluestien, p. 71, lines 14 – 18 ("That's a good solution. So you would 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.") See also Deposition of T. Albenesius, p. 17 – 20. Specifically, p. 18, lines 15 – 23 ("Q: And you'd agree with me that the 1981 Zoning Ordinance dealt with a three foot height rule, right?" A: "Right" Q: "And that's the one you favor, correct?" A: "Correct" Q: "And the reason that you like that 1981 three foot rule better than the current one is that it lets you cut more, correct?" A: "Correct".)

To avoid admission #1 from ending their case the Plaintiffs' recent brief erroneously claim that Paragraph 6 requires that such a Town ordinance must be **both** more restrictive **and** that such ordinances may not conflict with other provisions of the Deed Restrictions. See Plaintiffs' Memorandum in Support, at P.6. The Plaintiffs say **both** tests must be satisfied for a new ordinance to be valid.

The problem with Plaintiffs' avoidance argument is that the text of Paragraph 6 specifically forbids it. Paragraph 6 says that the Town may enact ordinance which are "more restrictive ... or which are not inconsistent with these Restrictions." Deed Restrictions, Paragraph 6. (emphasis added).² The word "or" means that a town

¹ "More restrictive" in the context of this case means more protective of plant growth and the environment. In other words, the 2005 ordinance is "more restrictive" and than 1981 ordinance because the 2005 ordinance allows fewer species to be cut and sets a taller cut-off limit.

² "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

ordinance is permissible if it passes just one, not both, standards.³ Applied here, "or" specifically allows a more restrictive cutting rule to survive even though it might conflict with other deed paragraphs the Plaintiffs say gives them a right to an unchanged 1991 era view.⁴

Conclusion

The Plaintiffs admissions, coupled with unmistakable deed language, conclusively entitle the Town to Summary Judgment. The Plaintiffs admit that the Deed allows the Town to pass a "more restrictive ordinance" and that the challenged ordinances are "more restrictive." The Plaintiffs try to avoid obvious dismissal by employing a distinction that is expressly forbidden by the words of the Deed Restrictions. Summary Judgment should be granted.

Respectfully submitted,



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and regulations affecting the property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions." (Deed Restrictions, Para. 6 (emphasis added.))

³ Moreover, when it comes to vegetation trimming, one must remember that the Deed gives the Town "unrestricted authority" to trim and control growth. See Deed Restriction Para. 2.

⁴ Again, the Town does not believe that any such right exists to begin with.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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DEC 11 2015

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

SC Court of Appeals

Case No. 2010-CP-10-5449

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.

NOTICE OF APPEAL

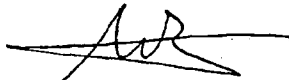
Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius appeal from the orders of the Master-in-Equity for Charleston County, the Honorable Mikell Scarborough, to whom the case was referred with finality by Order of Reference filed February 7, 2012, including:

1. Form 4 Order (granting Defendants motion for summary judgment), filed May 21, 2104;
2. Order Granting Summary Judgment to Defendants Regarding Plaintiffs Request for an Injunction Barring the Collection of Certain Property Tax, filed December 4, 2014;
3. Order Granting Summary Judgment to Defendants Regarding Breach of Contract by Accompanied by Fraudulent Act, filed December 4, 2014;

4. Order Granting Summary Judgment to Defendants Regarding Unfair Trade Practices Act Claim, filed December 4, 2014;
5. Order Granting Summary Judgment to Defendants based on Plaintiffs' Lack of Right to a View, filed July 30, 2015;
6. Order Granting Defendants' Motion to Strike Damages Claim Due to Location of OCRM Critical Line, filed July 30, 2015;
7. Form 4 Order, denying Plaintiffs' motion to reconsider, alter or amend, filed August 4, 2015;
8. Form 4 Order, denying Plaintiffs' motion for summary judgment on breach of contract, filed August 5, 2015;
9. Form 4 Order, denying Plaintiffs' motion for reconsideration, filed November 5, 2015; and
10. Order Granting Defendants' Motion for Summary Judgment on Plaintiffs' Nuisance, Breach of Contract, and Mandamus Claims, filed November 10, 2015, which ended the case.

The undersigned received written notice of entry of the final order ending the case on November 10, 2015.

Hood Law Firm, LLC



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December 8, 2015

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Attorneys for the Respondents

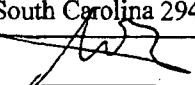
Certificate of Service

I, Walker Barnes, attorney for the Appellants do hereby certify that on December 8, 2015, I served a copy of the Notice of Appeal on Counsel for Respondents, via U.S. Mail, first class, postage prepaid to the following address:

Hair, J. Brady
Van Raalte, Derk IV (SC # 9286)
Law Office of Brady Hair
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N. Charleston SC 29419

I further certify that I filed a copy of the Notice of Appeal to the Clerk of the Court for Charleston on this same date at:

Julie Armstrong, Clerk
Charleston County – Court of Common Pleas
100 Broad Street, Suite 106
Charleston, South Carolina 29401-2258



A. Walker Barnes