

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

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FEB 28 2018

SC Court of Appeals

HONORABLE MARVIN H. DUKES, III, MASTER IN EQUITY
AND SPECIAL CIRCUIT COURT JUDGE

CASE NO.: 2013-CP-07-02066
APPELLATE COURT NO.: 2017-001555

CAROLINA CENTER BUILDING CORP.,

Appellant,

vs.

ENMARK STATIONS, INC. AND
THE TOWN OF HILTON HEAD ISLAND,

Respondents.

RECORD ON APPEAL
VOLUME I

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IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

HONORABLE MARVIN H. DUKES, III, MASTER IN EQUITY
AND SPECIAL CIRCUIT COURT JUDGE

CASE NO.: 2013-CP-07-02066

CAROLINA CENTER BUILDING CORP.,

Appellant,

vs.

ENMARK STATIONS, INC. AND
THE TOWN OF HILTON HEAD ISLAND,

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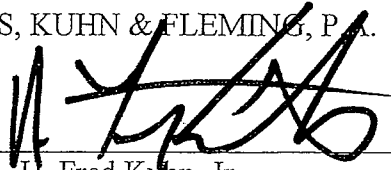
SC Court of Appeals

Respondents.

NOTICE OF APPEAL

The Appellant, Carolina Center Building Corp., hereby appeals the Order of the Honorable Marvin H. Dukes, III entitled Final Order Ending Case dated March 29, 2017 and the Form 4 Order denying Motion to Alter, Amend or Reconsider dated July 14, 2017, copies of which are attached hereto. Appellant received written notice of the entry of the Form 4 on July 14, 2017.

MOSS, KUHN & FLEMING, P.A.

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IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

HONORABLE MARVIN H. DUKES, III, MASTER IN EQUITY
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CASE NO.: 2013-CP-07-02066

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SC Court of Appeals

CAROLINA CENTER BUILDING CORP.,

Appellant,

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Respondents.

CERTIFICATE OF SERVICE

Undersigned certifies that the **Notice of Appeal**, to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

The Honorable Jerri Ann Roseneau
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in a post office or official depository under the exclusive care and custody of the United States
Postal Service, on July 17, 2017.

By: _____

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STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
CAROLINA CENTER BUILDING CORP.,)
Plaintiff,)
vs.)
ENMARK STATIONS, INC.; TOWN OF)
HILTON HEAD ISLAND,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL COURT
CIVIL ACTION NO.: 2013-CP-07-2066

FINAL ORDER ENDING CASE

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SC Court of Appeals

This case was tried before me over a two-day period commencing on June 20, 2016. Appearing on behalf of the Plaintiff, Carolina Center Building Corp. ("Carolina"), was H. Fred Kuhn, Jr. with Moss, Kuhn & Fleming, P.A. Appearing on behalf of the Defendant, Enmark Stations, Inc., ("Enmark"), was Russell P. Patterson of Russell P. Patterson, P.A., and representing the Town of Hilton Head Island ("Town"), was Gregory M. Alford of Alford & Thoreson, LLC.

This is a dispute over a paved roadway as depicted in red on Exhibit 74, a copy of which is attached hereto, used by patrons of Enmark, owner and operator of an Enmark service station, and the general public which traverses across the land owned by Carolina ("Roadway").

A. PROCEDURAL HISTORY

Carolina proceeded to trial under its Amended Complaint, dated November 19, 2014, setting forth seven (7) causes of action, as follows:

1. Declaratory judgment action seeking an Order that Enmark has no express easement over the Roadway;

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2. Declaratory judgment action seeking an Order that Enmark does not hold a prescriptive easement over the Roadway;
3. Declaratory judgment action seeking an Order that no easement exists and that Enmark is responsible for preventing any further illegal trespass by installing curbing in its parking area;
4. If the Court determines that Enmark holds easement rights over the Roadway, that Carolina can make reasonable changes to the location and dimensions of same, at the cost of Enmark;
5. A slander of title claim seeking actual and punitive damages;
6. A trespass cause of action seeking actual and punitive damages;
7. A nuisance cause of action seeking actual and punitive damages; and
8. A mandamus action against the Town seeking enforcement of the Town of Hilton Head Land Management Ordinance ("LMO").

Enmark filed an Answer and Counterclaim to Carolina's Amended Complaint, dated December 17, 2014. In addition to generally denying the material allegations of Carolina's Complaint, Enmark asserted defenses of waiver, estoppel, laches, acquiescence, statute of limitations, and privileged communications. Enmark also asserted a counterclaim requesting a declaratory judgment that it held a prescriptive easement over the Roadway and a second counterclaim requesting a declaratory judgment it held an easement by express grant.

The Town filed an Answer to the Amended Complaint, dated January 20, 2015. While it appears Carolina did not file a Reply to Enmark's Counterclaim dated December 17, 2014, it did file a Reply, dated October 7, 2013, to Enmark's Answer and Counterclaim, dated September 10, 2013, which was basically a general denial. Since the counterclaims in Enmark's Answer and Counterclaim dated December 17, 2014 are essentially the same as its original Answer and Counterclaim dated September 10, 2013, this Court in this Order deemed Carolina's original Reply to also be responsive to Enmark's Answer and Counterclaim, dated December 17, 2014.

Pursuant to a hearing on cross motions for Summary Judgment filed by Carolina and Enmark, this Court issued an Order dated October 23, 2015, finding that Enmark held no express easement rights. No appeal was filed of said Order.

The parties, prior to trial, agreed to the admission of a stipulated exhibit list consisting of 83 exhibits. Additional exhibits were introduced at trial. In addition to carefully considering the evidence submitted at trial, and arguments of counsel, the Court reviewed and considered the following written briefs submitted by the parties:

1. Enmark's Pre-Trial Brief, dated June 15, 2016;
2. Enmark's Post-Trial Brief, dated July 16, 2016;
3. Carolina's Post-Trial Brief, dated July 21, 2016;
4. Town's Post-Trial Brief, dated July 25, 2016;
5. Reply Brief of Carolina, dated August 25, 2016¹

B. LEGAL DISCUSSION

1. Burden of Proof

1. The party claiming a prescriptive easement has the burden of proof. *Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct.App. 1997). There is a strict standard of proof for prescriptive easement cases, and the party claiming such easement has the burden of proving all elements by clear and convincing evidence. *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 170 (2015). As will be discussed below in more detail, "[W]hen the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse." *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d

¹ Although Enmark objected to the Court's consideration of Carolina's August 25, 2016 Brief as being untimely and not pursuant to the Court's request for briefs in this matter, the Court accepted said filing and considered the arguments therein.

136, 141 (2006). Thereafter, the burden shifts to the title owner of the servient estate (ie. Carolina in this case) to rebut the presumption that the use was adverse. *Sanitary & Aseptic Package Co. v. Shealy*, 205 S.C. 198, 31 S.E.2d 253, 255 (1944). An attempt to claim adversely may be inferred by the acts and conducts of the dominant user. *Kelly v. Snyder*, 396 S.C. 564, 575, 722 S.E.2d 813, 819 (Ct.App. 2012).

2. Element of Prescriptive Easement

2. The elements for a prescriptive easement in South Carolina are well settled. “To establish an easement by prescription, a party must show the following: (1) the continued and uninterrupted use or enjoyment of a right for a full period of 20 years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse. *Paine Gayle Properties, LLC v. CSX Transportation, Inc.*, 400 S.C. 568, 583, 753 S.E.2d 528, 536 (Ct.App. 2012); *Simmons v. Berkley Elec. Coop., Inc.*, 404 S.C. 172, 182, 744 S.E.2d 580, 586 (Ct.App. 2013) (*reversed in part by Simmons v. Berkeley Elec. Coop., Inc.*, No. 2013-001447, 2016 WL 6520167 (S.C. Nov. 2, 2016) (“*Simmons 2016*”). Prior to the decision of *Simmons 2016*, the third element could have been met by a showing under a claim of right. *Simmons 2016* held a claim of right is no longer available to a party claiming a prescriptive easement. *Simmons 2016* at *4. Thus, while evidence and arguments at trial were presented on this element, the *Simmons 2016* decision issued after the trial makes clear a claim of right is no longer sufficient.

3. It is this Court’s finding that there is clear and convincing evidence as to each of the elements of a prescriptive easement and that Enmark is entitled to a prescriptive easement over the Roadway, for the reasons discussed below.

A. A continuous and uninterrupted use or enjoyment of the Roadway
for a full period of twenty (20) years

4. At the outset, it is clear that Enmark can rely not only on its use of the Roadway for the last seven (7) years since its purchase from Ms. Alice Mean's company, ASA, Inc, on March 19, 2009 (Ex. 5), but also the use of the two prior owners (Chevron Oil – Ex. 2; ASA – Ex. 3) dating back to when the station was first built by Chevron Oil Company ("Chevron") in 1984. A party may tack the period of use of prior owners in order to reach the 20-year requirement. This includes not only use by ancestors and heirs, but between parties in privity. *Kelley* at 575, 722 S.E.2d at 819.

5. The Chevron service station ("Chevron Station") was constructed by Chevron on approximately 0.65 acres on Palmetto Bay Road, Hilton Head Island, South Carolina as described in Ex. 1. The Chevron Station commenced operating on June 1, 1984, the date Beaufort County issued its Certificate of Occupancy. (Ex. 78, Bates 1460). The Roadway was in existence and used by patrons of the Chevron Station and others at the time of the opening of the Chevron Station, or very shortly thereafter. Originally the Roadway provided easy access to the Winn-Dixie, located to the southwest of the Chevron Station.

6. Shortly after completion of the Chevron Station, it was leased by Chevron to Mr. Ballenger, then married to Ms. Means, starting in 1985. Ms. Means lived in the Point Comfort area of Hilton Head, down the street from the Chevron Station, which was only the second gas station on the south end of Hilton Head at the time.

7. Ms. Means divorced Mr. Ballenger in 1989 and obtained the lease on the Chevron Station in 1989 as part of said domestic proceedings.

8. Ms. Means thereafter leased the Chevron Station until she purchased same on August 23, 1993, in the name of ASA, Inc. ("ASA"), a company she owned (Ex. 3). She

continued to own and operate the Chevron Station until March 19, 2009, when she sold it to Enmark (Ex. 5). Thus, Mr. Ballenger (Ms. Means' former husband), Ms. Means, or her company, ASA, have operated or owned the Chevron Station for twenty-four (24) consecutive years (1989 – 2009). Ms. Means testified credibly that the Roadway during that entire time period was in use and existence, in the same location as marked in red on Ex. 74. I find this witness's testimony as to the Roadway credible and compelling. It should be noted Ms. Means is truly an independent witness, with no stake of any kind in the outcome of this dispute.

9. Various aerial photographs and recorded plats further confirm and support this conclusion. The 1986 aerial photographs (Exs., 30, 31 and 89) show car tracks leading to the Roadway from the car wash, which were identified by Ms. Means. Aerial photographs taken in 1988 (Ex. 32); 1995 (Exs. 33, 34); 2002 (Ex. 36); 2012 (Ex. 40); and 2013 (Ex. 41) further evidence the location and usage of the Roadway.

10. In addition, PB 38 P 53, prepared on November 1, 1989 (Ex. 21 – "1989 Plat") is very compelling. This is an as-built of the property and improvements identified as the Sea Pines Welcome Center, now owned by Carolina ("Welcome Center"), which shows the Roadway. The legend on the 1989 Plat indicates the Roadway is comprised of "Asphalt Paving," consistent with the testimony of Ms. Means, who testified that her husband, Mr. Ballenger, prior to 1989, paved the Roadway with asphalt.

11. Mr. Scott Middleton is the son-in-law of Ms. Means. He undertook the day-to-day operations of the Chevron Station starting in 2000. While dating Ms. Means' daughter from 1995 to 2000, he visited Hilton Head on a regular basis and testified the Roadway was in use and existence during that time period. Further, he testified that Mr. Ballenger, while he ran the Chevron Station, made repairs to the Roadway with Quikcrete. When Mr. Middleton ran the

station for Ms. Means from 2000 until it was sold to Enmark on March 19, 2009, he testified the Roadway was continually used by patrons of the Chevron Station and the general public to access the adjoining shopping center and to by-pass the traffic on the adjoining Sea Pines Circle.

12. After Enmark purchased the property on March 19, 2009 (Ex. 5), the Roadway continued in use by the patrons of the station, now an Enmark Station, and by members of the public in the same location as it existed since 1984.

13. The continuous and uninterrupted use or enjoyment of the Roadway since 1984 is further supported by the extensive improvements made to the Roadway from 1984 to the present.

14. As stated above, I find the Roadway was paved with asphalt by Mr. Ballenger, or others, prior to 1989, when Ms. Means took over the lease of the Chevron Station. The asphalt paving of the Roadway was completed by November 1, 1989, as confirmed in the 1989 Plat. While memories may fade, the recorded plat clearly indicating the Roadway was paved with asphalt is very compelling evidence to the Court.

15. From 1989 until Ms. Means purchased the Chevron Station, there is credible testimony the asphalt Roadway was patched and repaired, and two (2) speed bumps were added. In part, this was due to patrons of the station and the public hitting potholes and complaining to Ms. Means and Mr. Middleton as to the condition of the Roadway.

16. After Ms. Means, through ASA, acquired the Chevron Station on August 23, 1993 (Ex. 5), in 1994 she re-paved the Roadway with asphalt, re-installing and repairing the two speed bumps. This is confirmed not only by the credible testimony of Ms. Means and Mr. Middleton, but also by the ASA Depreciation Schedule showing new paving during this time period (Ex. 75). Photographic evidence introduced at trial clearly shows two layers of asphalt paving (Exs. 43, 44(A)). Various witnesses, including Theresa B. Lewis, Town LMO Official;

Timothy M. Drake, a landscaper hired by Colonial; Curtis L. Coltrane, Colonial's expert witness on the LMO; Kumar Viswanathan, owner of Carolina, and Robert H. Demere, III with Enmark, all confirm there are two (2) layers of asphalt on the Roadway. This is consistent with the original paving of the Roadway prior to 1989 and the subsequent repaving by Ms. Means in 1994. It is logical Ms. Means would have waited until she acquired ownership of the Chevron Station prior to spending monies on substantial improvements, such as repaving the Roadway in 1994.

17. Finally, the Court took into consideration the existence of a drainage catch basin in the middle of the Roadway (Exs. 42, 50, 51), further evidencing the long-standing existence of the Roadway in its present location. Mr. Viswanathan testified he did not construct same, so it was in existence prior to his acquisition of the Welcome Center on October 31, 1996 (Ex. 15).

18. I find and conclude said Roadway has been in continuous and uninterrupted use or enjoyment by Enmark, ASA, Ms. Means, Mr. Ballenger, and Chevron for twenty-nine (29) years, from 1984 until said period was tolled by the Tolling Letter agreement entered into by Colonial and Enmark, on July 24, 2013 (Ex. 62 – Tolling Agreement).

(i) Interruption of 20-Year Period

19. Carolina asserts under *Pittman v. Lowther*, 363 S.C. 47, 610 S.E.2d 479 (2005) and *Kelley* that Enmark has not met this first requirement due to its actions to stop or interrupt Enmark's usage of the Roadway. Under these cases, the continuous period of use may be interrupted by "overt acts" of the servient landowner, such as erecting a physical barrier or perhaps verbal threats to stop said usage. *Pittman* at 52, 610 S.E.2d at 481; *Kelley* at 573, 722 S.E.2d at 818. It should be noted that no South Carolina case has ever found mere "verbal threats" was sufficient to interrupt the continuous use period for a prescriptive easement. This

Court has found no case anywhere in the United States which has held mere verbal threats or even just a demand letter was sufficient to interrupt the requisite time period. A close reading of the relevant authorities confirms this conclusion.

20. The Court in *Pittman* relied on an Oregon decision to adopt the "new" standard in South Carolina as to this issue, stating as follows:

We decline to adopt the analysis applied by the North Carolina Supreme Court and conclude a more reasoned approach was articulated by the Oregon Court of Appeals in *Garrett v. Mueller*, 144 Or.App. 330, 927 P.2d 612 (1996). The court embraced the opinion of Justice Oliver Wendell Holmes Jr., who stated the following in determining what a landowner must do to interrupt prescriptive use.

"A landowner ... is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an assertion interrupts the would-be dominant owner's impression of acquiescence, and the growth in his mind of a fixed association of ideas; or, if the principle of prescription be attributed solely to the acquiescence of the servient owner, it shows that acquiescence was not a fact." (emphasis added)

Pittman at 51, 610 S.E.2d at 481 (quoting *Garrett* at 617 (quoting *Brayden v. New York, N.H. & H.R. Co.*, 51 N.E. 1081, 1081-82 (Mass. 1898))).

21. In the Oregon *Garrett* decision, cited as the authority for the above "new" South Carolina rule, the plaintiff had put up gates, confronted personally the defendant on the disputed roadway, asserted he was trespassing, ordered him to leave, and later put locks on a gate when the defendant continued to try and use said road. *Garrett* at 616. Only when the locks were placed on the gate did the court in Oregon find an interruption of the time period for a prescriptive easement. *Id.* at 618. The Oregon Court held that if the actions of the plaintiff were sufficient to allow the defendant to file suit to enforce any alleged easement, said action would

be sufficient to stop the usage period. *Id.* The placement of a gate with locks met that requirement. *Id.*

22. In *Pittman*, our South Carolina Court relied exclusively on the fact that the servient landowner erected cables and poles across a disputed roadway on numerous occasions and called law enforcement to interrupt the continuous use period. *Pittman* at 52, 610 S.E.2d at 482. The South Carolina Court summarized the actions which resulted in the interruption of the twenty year period as follows:

Turning to the present case, we conclude Respondent's actions were sufficient to interrupt Petitioner's use of the land for the prescriptive period. Not only did Respondent set posts and cables across it, but Respondent also plowed the road every year and planted the road with rye a couple of years. When Petitioner removed the barriers, Respondent replaced them. Respondent also called law enforcement authorities when Petitioner used his tractor to destroy the barriers. Respondent's actions caused Petitioner to discontinue use of the land, *albeit* briefly, and were certainly sufficient to leave Petitioner with the impression that Respondent did not acquiesce in the use of his land.

Id. at 52, 610 S.E.2d at 481-82. It is very clear the South Carolina Court in *Pittman* did not rely on verbal warning or even written demands to interrupt the continuous use period.

23. In *Kelly*, also cited by Carolina, the servient owner took no action to prevent the use of a disputed roadway and thus said issue was not reached by the Court, although the Court quoted the *Pittman* rule. *Kelley*, 296 S.C. at 573, 722 S.E.2d at 818.

24. A review of the actions of Carolina in this case reveals its actions were not sufficient to interrupt the usage of the Roadway under the above cases. In the Oregon decision, the Court in *Garrett* appeared to establish a bright line that the assertion of rights by the servient would trigger a cause of action if an easement existed. See *Garrett* at 616. Nothing Carolina did would have allowed Ms. Means, her company, ASA, or Enmark to file suit to enforce their claimed easement rights until Carolina put up fence posts right before the litigation was filed (Ex. 42) and the parties entered into the Tolling Agreement on July 24, 2103 (Ex. 62). Again, in

none of the cases relied up on by Carolina, nor in any other case this Court has been able to find, has a court relied solely on verbal or written warnings. In every case, there was some overt, physical act that would legally allow the easement holder to file suit to protect his rights.

25. Carolina's evidence of "overt" acts consist primarily of three (3) letters it asserts cut off Enmark's rights under the above cases. The first is a June 15, 1994 letter written by Carolina's attorney, Cary S. Griffin, to John L. Wilson, counsel for the then owner of the station, ASA, Inc. and Ms. Means. (Ex.47). This letter is not sufficient to cut off the rights of Enmark under the above cases for several reasons. First, Carolina did not own the property at the time it was written, having only obtained title over 2½ years later on October 31, 1996 (Ex. 15-10/31/96 Deed into Carolina). Mr. Griffin's letter clearly states it was written on behalf of a "prospective purchaser". *Pittman* and *Kelley* require action by the owner of the servient estate. See *Pittman* at 52, 610 S.E.2d at 481-82; *Kelley* at 573, 722 S.E.2d at 818. In addition, the letter does not demand the Roadway be closed, but simply asks for additional title information. Clearly Ms. Means or her company, ASA, could not have sued Carolina to enforce its claimed easement right as to the Roadway based on said letter when Carolina was only a perspective purchaser, not the owner, and had done nothing to interfere with her use of the Roadway. Thus, the standard set in *Pittman* was not met.

26. Carolina's second claimed interruption of the prescriptive period is a letter written on behalf of Carolina some fourteen (14) years later, on September 15, 2008 by Robert J. Arundell, then counsel for Carolina (Ex 55). Said letter is written some twenty-four (24) years since the Roadway was in continuous use starting in 1984. Assuming, *arguendo*, said letter by itself was a sufficient overt act to constitute an interruption of use, it came too late. I find and conclude the requisite twenty (20) year continuous use period had already been met. In addition,

said letter was written in the context of negotiations between the owners of the adjoining shopping center, ASA, as owner of Chevron Station, and Carolina as to a new roadway plan proposed by Carolina. No action was ever taken to limit, restrain, or prevent the use of said Roadway until posts were placed by Carolina adjacent to the Roadway in 2013 and the July 2013 Tolling Agreement (Ex. 62) was signed by the parties some five (5) years later. In other words, I find and conclude that ASA or Ms. Means could not have filed suit as of September 15, 2008, asserting a violation of their claimed prescriptive easement rights based on the Arundell letter.

27. Most importantly, pursuant to Mr. Arundell's following letter on the same issue, dated October 29, 2012 (Ex 61), Carolina's counsel stated his client had changed his mind after the September 15, 2008 letter due to a change in plans ("In 2008, in anticipation of prospective redevelopment plans, we notified ASA, Inc. that the encroachment would have to be closed. However, when those redevelopment plans were put on hold, my client decided to allow the encroachment to remain open" (emphasis added). Thus, this September 15, 2008 letter cannot satisfy a clear, unequivocal action by the servient owner to stop usage of the Roadway as required under *Pittman*. See *Pittman*, 363 S.C. 47 at 52, 610 S.E.2d at 481-82. Ms. Means testified she did not have the impression she was required in 1998 to quit using the Roadway, or any other time, since she was under the belief she had legal rights to use same based on a written easement (Ex. 48 – 2/23/94 letter Wilson to Griffin) and longstanding, historical use of the Roadway (Ex. 52 – 6/2/08 letter Wilson to Viswanathan – 2nd paragraph). Nothing was ever done to restrict or prohibit such continued usage until much, much later when the posts were constructed by Carolina in July 2013 and the parties entered into the Tolling Agreement (Ex. 62).

28. The third letter relied upon by Carolina is Mr. Arundell's letter of October 29, 2012, referenced above. (Ex. 61). While said letter does not provide a precise date of when the

Roadway was to be closed, said letter, coupled with the posts constructed adjacent to the Roadway (Ex. 42), does arguably meet the standard in *Pittman* to serve as an interruption of continued use. Upon the subsequent execution of the Tolling Agreement on July 24, 2013 (Ex. 62) and filing suit by Carolina on August 15, 2013, Enmark knew for certain the intent of Carolina was to seek the closure of the Roadway. In any event, assuming the October 29, 2012 letter (Ex. 61) was sufficient to interrupt or stop the time period, the paved Roadway had been in continuous use for over twenty-eight (28) years (1984 to 2012) – more than sufficient to meet the twenty (20) year continuous use requirement. Thus, none of the letters relied upon by Carolina prevent the fulfillment of this element. There was no other credible evidence of any other action by Carolina sufficient to “interrupt” the continuous use of the Roadway under *Pittman*.

B. The identity of the thing enjoyed

29. Ms. Means testified that the Roadway has been used by herself, her employees and patrons of the Chevron Station, including herself, in the same location from at least 1984 through today. Again, I find her testimony credible and compelling on this issue. Mr. Middleton’s testimony is also consistent with said facts. This same testimony was provided by numerous witnesses for the time periods they were familiar with the Roadway (See: Mr. Demere – 2009 to present; Ms. Lewis – 1998 to present; Mr. Green – 1992 to present). Additional evidence strongly supports this conclusion, including the aerial photographs since 1986, the 1989 Survey (Ex. 21); the October 20, 1992 as-built survey for Chevron showing the curb cut and Roadway (Ex. 45); and Carolina’s August 10, 2007 Conceptual Site Plan (Ex. 50).

30. Carolina argued that with the placement of a trash dumpster near the southeastern terminus of the Roadway, its location was materially changed. This Court disagrees. The aerial photographs first appear to show the existence of a trash dumpster sometime between 1988

(Ex. 32) and 1995 (Exs. 33, 34). However, the placement of this single dumpster did not materially change the location of the Roadway, as is evidenced by more recent photographs and surveys (Exs. 21, 42, 44A) and the testimony of Ms. Means and others. There is no credible evidence that the placement of this dumpster was placed on or near the Roadway in an effort to close or materially alter the Roadway. I find and conclude this is not sufficient to impact or diminish the identity of the Roadway or its location.

C. The use or enjoyment of the Roadway was Adverse

31. As noted above, “[W]hen the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse.” *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). Thereafter, the burden shifts to the title owner of the servient estate, Carolina in this case, to rebut the presumption that the use was adverse. *Sanitary & Aseptic Package Co. v. Shealy*, 205 S.C. 198, 31 S.E.2d 253, 255 (1944). An attempt to claim adversely may be inferred by the acts and conducts of the dominant user. *Kelly v. Snyder*, 396 S.C. 564, 575, 722 S.E.2d 813, 819 (Ct.App. 2012). I find and conclude that Enmark has established by clear and convincing evidence its use of the Roadway was open, notorious, continuous, and uninterrupted for a period in excess of twenty (20) years. The burden then shifts to Carolina to rebut said presumption, which it has failed to do. Carolina’s argument it granted permission for said use is not supported by the credible evidence.

(i) No Permission was Ever Granted by Plaintiff

32. Carolina asserts it provided permission to various owners in the chain of title, thus defeating any claim of adverse use. Mr. Viswanathan, principal of Carolina, testified he gave oral permission to ASA and Ms. Means to use the Roadway. I do not find said testimony

credible or supported by the evidence presented. There are several reasons I reached this conclusion.

33. First, it is inconsistent with the testimony of Ms. Means and Mr. Middleton, which I find more credible and convincing. Ms. Means testified unequivocally that she and her patrons used the paved Roadway since 1984, including the time she leased and owned the property commencing in 1989 through March 2009 when she sold same. She further testified she never obtained consent from anyone to use the Roadway or sought to obtain same. Again, this Court gives great weight to the testimony of Ms. Means. Mr. Middleton also testified credibly that he never obtained or sought permission from Carolina, the adjoining owner.

34. Second, the record reflects Mr. Viswanathan holds an undergraduate degree in engineering, a graduate degree in civil engineering, and an MBA, all from Purdue University. I find he was an extremely experienced developer, and routinely and consistently documented all important matters in writing. There is not in existence a single document referencing any grant of permission to use the Roadway, although there are many documents sent by Mr. Viswanathan and his attorneys from June 15, 1994 (Ex. 47), through October 29, 2012 (Ex. 61) concerning the Roadway – a period of over eighteen (18) years.

35. Another key fact I relied on is the February 8, 2008 easement proposal sent by Carolina to Mr. Middleton and ASA (Ex. 51). Not only did the letter and accompanying draft easement not request ASA to discontinue use of the Roadway, or grant "permission" to use same, but the proposed easement agreement provided Carolina would pay all costs of relocating the Roadway (Ex. 51). Mr. Viswanathan admitted at trial this was his offer. Common sense leads to the conclusion he recognized the legal rights of ASA, the adjoining owner in the Roadway, since it was a listed title exception in his October 1996 deed to his property (Ex. 5), as

well as its Contract of Sale (Ex. 46). In recognition of said rights from a negotiating point of view, he would have to pay 100% of the costs of relocation of same in order to induce ASA to give up its rights to the Roadway.

D. Claim of "Illegality" of Use Does Not Prevent a Prescriptive Easement

36. Carolina asserted at trial the prescriptive easement claim should be denied since the Roadway was established "illegally," asserting the construction and pavement of the Roadway and change in the 6" concrete curbing around the Chevron Station to allow access to the Roadway was completed without necessary governmental approvals. While I have determined said work was completed in compliance with the existing rules and regulations, as discussed in Section 3 of this Order below, even if that were not the case, this would not be fatal to the establishment of a prescriptive easement. Carolina has cited no specific legal authority for this argument and this Court has not located any case supporting said position.

37. This Court has construed this argument as analogous to an "un-clean" hands assertion, although no such defense or position was plead. This Court finds no resulting inequity to Carolina by recognizing the continued existence of a Roadway that has been in existence since 1984. From Carolina's perspective, I find and conclude prior to and at the time of its purchase of the Welcome Center parcel for \$1,500,000 on October 31, 1996 (Exs. 15, 46), Mr. Viswanathan clearly was aware of the existence of the Roadway and the purchase price reflected the existence of said Roadway. As a "prospective purchaser", on June 15, 1994, two and one-half (2½) years prior to his purchase, Mr. Viswanathan's attorney wrote Ms. Means' attorney as to the "alleged encroachment of a driveway" (Ex. 48). Said letter further provided as follows:

"There is an encroachment of a driveway that is shown on Plat Book 38 Page 53 (position attached). It is obvious that this area is utilized for access from The Market Place general parking to the Chevron Station."

The Roadway was paved, open and obvious to all. It was listed as a specific title exception in the Contract of Sale and deed of conveyance (Exs. 15, recorded Page 1278, Para. O – DB 38 P 53 – Ex. 21; Ex. 46, Page CC0108, para. D). Mr. Viswanathan, who had to pass this property on a daily basis to reach his home in Sea Pines Plantation and whose office was nearby, would have clearly seen said Roadway. His testimony he perhaps did not walk behind the property or see the Roadway as part of his pre-purchase due diligence is not credible. This is especially true since it appears he completed extensive, detailed due diligence, including third-parties inspecting the interior, noting numerous defects (Ex. 46, § 15). I thus find nothing inequitable as to this Court's recognition of the prescriptive rights of Enmark in the Roadway, as the Roadway was clearly a part of the property Carolina purchased. Carolina's purchase price took into consideration said Roadway.

E. Plaintiff's Claim That a Prescriptive Easement Must Connect to a Public Road is Without Merit

38. Carolina argued at trial Enmark's prescriptive easement claim fails since it is an "easement to nowhere" (i.e. no terminus at a public road). There simply is no such requirement under South Carolina law that an easement has to terminate at a public road. Carolina has not cited any legal authority for this position. Whether users of the Roadway traverse other parties' property who are not parties to this action does not impact this Court's power to determine the relative rights in the Roadway between the parties before the Court. This Order is clearly not binding on other property owners who are not parties. Carolina's argument Enmark's claim should be denied since it did not name these adjoining owners as parties falls on deaf ears, since Carolina instituted this case and could have named said parties in its original Complaint, or its two (2) amended Complaints filed thereafter.

3. Plaintiff's Request for a Mandamus is Denied

39. A "mandamus is the highest judicial writ and is issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy." *City of Rock Hill v. Thompson*, 349 S.C. 197, 199, 563 S.E.2d 101, 102 (2002). It is only available against a public official to perform a mandatory legal duty that is ministerial in nature. *Id.* at 200, 563 S.E.2d 102. When the legal right is doubtful, the performance of a duty rests in the discretion of the public official, or there is an alternative remedy, mandamus is not available. *Id.*; *In the Interest of Lyde*, 284 S.C. 419, 421, 327 S.E.2d 70, 71 (1985); *Andrews Bearing Corp. v. Brady*, 261 S.C. 533, 201 S.E.2d 241 (1973). A writ of mandamus is not available where an available administrative remedy has not been pursued to its end. *Bradley v. State Human Affairs Commission*, 293 S.C. 376, 380, 360 S.E.2d 537, 539 (1972). Where a party has another adequate remedy, a writ of mandamus will not be granted. *In Re Tyson*, 282 S.C. 212, 318 S.E.2d 279 (1984). As is discussed below, Carolina has met none of the requirements for an order from this Court requiring the Town to issue an enforcement order under the LMO for Enmark to remove or shut down the Roadway under these authorities.

A. No Mandamus Available Since a Violation of the LMO is Doubtful and Uncertain

40. Ms. Lewis, the LMO official, candidly admitted she made no final determination the Roadway violated the LMO since she could not determine if the construction activities related to the Roadway were in violation of the LMO. After consideration of all of the testimony and voluminous trial exhibits this Court can certainly understand why she reached such a conclusion under her discretion as the LMO official. Under *City of Rock Hill*, and *Interest of Lyde*, this Court cannot issue a Mandamus where the claims asserted by Carolina as to LMO violations are doubtful, which is certainly the case at bar. See *City of Rock Hill*, 349 S.C. at 199,

563 S.E.2d at 102; *In the Interest of Lyde*, 284 S.C. at 421, 327 S.E.2d at 71. For this reason alone, the drastic remedy of Mandamus is not appropriate. As discussed below, based on this Court's analysis and application of the LMO to the facts in this matter, I also find no violation of the LMO, thus Mandamus is not an appropriate remedy.

(i) The Initial Construction of the Roadway was not a Violation of the Town LMO

41. Even if the issues of Carolina not exhausting its administrative remedies, or the doubt and uncertainty by the LMO Official of an actual violation were not present, I find and conclude there was no violation of the LMO as to the construction and maintenance of the Roadway. As discussed below, this Court finds that Carolina has not shown by a preponderance of evidence the Roadway was constructed, improved or maintained in violation of the LMO.

42. The Town was incorporated in 1984 and adopted the LMO in 1987. As stated above, I find and conclude that the Roadway was in existence almost three (3) years before the adoption of the LMO when the station opened in 1984. There was no evidence the construction of the Roadway or curb cut violated any then applicable ordinance. When the Town adopted the LMO in 1987, no Town permit or approval was required for the continued existence of the original Roadway since it was a valid non-conforming use under § 16-7-101 et. seq. of the LMO (Ex. 83). Section 16-7-103 of the LMO provides "nonconformities shall be allowed to continue in accordance with the regulations of this Chapter" (Ex. 83). A "nonconforming use" is defined in § 16-10-201 (Ex. 83) as follows:

"Nonconforming Use: Any legally established activity using land, buildings or structures which was legally established, but that fails to conform in any respect to an applicable use requirement set forth in this title, in any applicable and approved development plan or in any permit issued hereunder."

There is no evidence the original Roadway was not a legally established activity under the Beaufort County Development Standards Ordinance ("DSO"), the predecessor to the 1987

LMO. In fact, the DSO was never put into evidence. Thus, there is no evidence that under the DSO anyone was even required to obtain a permit or approval for a Roadway of this nature.

43. I find and conclude the original Roadway is not a violation of the LMO and thus the remedy of Mandamus is not available to Plaintiff.

(ii) The Subsequent Paving of the Roadway was not a Violation of the Town LMO

44. Having determined the original Roadway is an allowed, nonconforming use under the 1987 LMO, the Court must determine if the original paving required a permit under the applicable LMO. Carolina and its expert, Mr. Coltrane, assumed the Roadway was paved sometime between 2002 and 2008. However, Ms. Lewis, the Town LMO Official, was unable to determine a date of the original paving. As set forth above, I find and conclude the Roadway was originally paved sometime shortly after the station opened in 1984. Section 16-1-105 of the 1988 LMO (Ex. 83) lists the “development activities” that trigger a requirement for a permit from the Town. A careful reading of this section reveals the simple action of paving an existing Roadway does not constitute development requiring a permit. This may be one reason the Town never raised any issue with the Roadway over the last 27 years that the Roadway has been paved (1989 – 2016), despite inspecting the site at least twelve (12) times (Ex. 79).

45. I find the original repaving of a lawfully permitted roadway was not a violation of the applicable LMO.

(iii) The Subsequent Repaving of the Roadway was not a Violation of the LMO

46. Finally, this Court must determine if the subsequent repaving and construction of two (2) speed bumps on the Roadway constitutes a violation of the LMO. I find and conclude the answer to this question is no. First, the Court must determine if repaving a Roadway constitutes a development activity triggering permit requirements under § 16-1-105 of the LMO

(Ex. 83), the same analysis applied above to the original paving. Since the original paving did not constitute development activity under this section, the repaving of same is even an easier conclusion to reach. Ms. Lewis, the Town LMO Official, confirmed in her testimony no permit is required to repave an existing roadway. Thus, the mere repaving and installation of speed bumps on the Roadway by Ms. Means on or about July 1994 was not a violation of the LMO and Carolina's request for a Mandamus as to this activity should be denied.

47. As an alternate basis for my conclusion of no violation of the LMO as to the subsequent repaving, the LMO provisions dealing with existing nonconformities must be considered. Section 16-7-103 of the LMO (Ex. 84) clearly provided all "nonconformities shall be allowed to continue in accordance with the regulations of this Chapter." Section 16-7-106(B) provides the Town Administration may waive various provisions as to setbacks, development review, zoning regulations, etc, if any proposed improvement to an existing non-conformity does not occupy a greater footprint (Ex. 83). Testimony from Ms. Means and Mr. Middleton confirmed that the repaving and speed bumps of the Roadway was in the same location as the prior existing paved Roadway. Thus, the ability or right of the Town LMO to exercise her discretion (i.e., LMO states she "may waive") to waive setback provisions for the repaving precludes this Court from issuing a Mandamus, as this decision is clearly discretionary. No Mandamus is allowed for such discretionary decisions. *See City of Rock Hill*, 349 S.C. at 199, 563 S.E.2d at 102; *In the Interest of Lyde*, 284 S.C. at 421, 327 S.E.2d at 71.

- B. Assuming, arguendo, a Permit for the Original Construction, Original Paving or Re-Paving Was Required and Was Not Obtained,
What are the Town's Options as to Enforcement?

48. Even if this Court finds, *arguendo*, there is a clear, absolute violation of the LMO as to the original Roadway construction, its original paving, or its subsequent repaving, and that Carolina had properly exhausted its administrative remedies (discussed below in Section C), the Court cannot usurp the Town's discretion as to what is the appropriate remedy. *See City of Rock Hill* at 199, 563 S.E.2d at 102; *In the Interest of Lyde* at 421, 327 S.E.2d at 71. Section 16-8-107 of the current LMO (Ex. 83) lists eight (8) possible remedies available to the Administrator for a LMO violation. These include the discretion under § 16-8-106(F) to take action to abate any alleged violation, or to simply impose a fine under a misdemeanor criminal action (16-8-106(G)), or to impose a fine under the catch-all remedies section of 16-8-106(H) ("Take any other action at law or in equity to prevent or remedy any violation, or otherwise enforce the provisions of this Ordinance"). Ms. Lewis also testified that pursuant to recent LMO amendments, an after-the-fact permit can be issued since the 20' setback requirement between commercial properties had been eliminated.

49. Ms. Lewis testified in deciding the appropriate remedy for a violation she must use her discretion, deciding each violation on a case-by-case basis. Factors she considers include: (a) the Roadway has been in existence since at least 1984; (b) there is evidence Ms. Means or her contractor contacted the Town as to permitting when it was repaved sometime in July 1994; (c) that the current owner, Enmark, was not involved in any of the work associated with the Roadway (i.e., original construction, original paving or re-paving); (d) the Town has never had an issue with the Roadway or sought to stop the repaving of same in the past for a very long period of time, while also issuing other permits and conducting site inspections at least twelve (12) times (Ex. 79); (e) the severity of the violation; and (f) there is no evidence of repeat violations; and other conditions.

50. The LMO Administrator, in her discretion, might decide to order an abatement plan of some additional landscaping, or impose a simple fine, or require an after-the-fact permit. This Court simply does not have the authority under the cases of *City of Rock Hill* and *In the Interest of Lyde* to make such a discretionary decision. *City of Rock Hill* at 199, 563 S.E.2d at 102; *In the Interest of Lyde* at 421, 327 S.E.2d at 71. In addition, without the benefit of years of enforcing the LMO on Hilton Head, the Court obviously does not have the requisite knowledge or experience necessary to issue the appropriate LMO remedy under these complicated facts.

51. Carolina asserts that under § 16-8-110 of the LMO (Ex. 83) the fact that a violation has existed for a long period of time does not constitute any type of waiver or implied approval by the Town and the Town is required to remove the Roadway. Such a simplistic argument ignores the many unusual facts concerning the long history of the existence of the Roadway, the fact I have found its construction and repaving did not violate the LMO, that Ms. Lewis could not make a determination of any violation, and the broad discretion afforded Ms. Lewis in determining an appropriate remedy. Under *City of Rock Hill* and *In the Interest of Lyde*, this Court declines to order a removal of the Roadway.

C. Failure to Exhaust Administrative Remedies

52. At trial, there were two (2) opposing arguments as to each party asserting the other failed to exhaust its administrative remedies under the LMO. I find that Carolina failed to exhaust its administrative remedies for the reasons discussed below and thus the writ of mandamus is not available, even if the Roadway was constructed in violation of the LMO.

53. The Town, by letters dated January 16, 2014 and February 4, 2014, notified Carolina's then counsel, Robert J. Arundell, that it had determined in its discretion the Roadway was a "legal nonconformity" under § 16-10-201 of the LMO and it was taking no action as to the

Roadway. (Exs. 66, 68). The Town's attorney specifically advised Carolina's counsel that if his client, Carolina, did not agree with said decision, an appeal should be filed under § 16-3-205 of the LMO in fourteen (14) days. Section 16-10-201 required Carolina to file an appeal or be bound by said decision. No appeal was filed and I find Carolina did not exhaust its administrative remedies under the LMO, thus the extraordinary relief of Mandamus is not available.

54. Carolina argues that Enmark failed to appeal a final determination of the LMO Official, a letter dated August 8, 2013 (Ex. 62), from Ms. Lewis, and thus the Town and Enmark are bound by said decision since no appeal was filed by Enmark. I find and conclude that the August 8, 2013 letter was not a final determination under the LMO. Ms. Lewis, who I find an impartial and credible witness, testified that she issued the August 8, 2013 letter based entirely on information she received from Carolina's counsel. Upon receipt of additional information from counsel for Enmark (Ex. 64), and consultation with Mr. Gregg Alford, the Town's outside counsel, she rescinded or corrected her initial decision and worked with Mr. Alford to issue a revised determination through Mr. Alford's office, as reflected in Mr. Alford's January 16, 2014 (Ex. 66), and February 4, 2014 (Ex. 68) letters.

55. Ms. Lewis testified she almost always consults with legal counsel (either the Town's in-house counsel or outside counsel) when attorneys representing property owners contact her office as to LMO issues. She confirmed at trial that the Town attorney, Mr. Alford, on behalf of her office, communicated her final decision on the Roadway issue set forth in Exhibits 66 and 68. Thus, I do not find Enmark failed to file an appeal of the August 8, 2013 letter of Ms. Lewis (Ex. 63).

56. Another reason I find that the August 8, 2013 letter from Ms. Lewis is not a final LMO Determination binding on Enmark is that it was admittedly never sent to Enmark. Under § 16-8-105(C)(1) of the LMO, upon determination of a violation, the Town "shall deliver to the person responsible for the violation, a written notice of violation(s)." Subsection C(3) also confirms written notice must be sent "to any other person responsible for the violations." It is this notice that triggers the obligation to appeal within fourteen (14) days of notice of the decision under § 16-8-305 of the LMO. As Enmark was never sent the August 8, 2013 letter which Carolina asserts is a final determination by the LMO Official, it could not timely appeal same and thus it did not fail to exhaust its administrative remedies. Carolina's LMO expert witness, Curtis L. Coltrane, testified that since it is clear Enmark received through other means the August 8, 2013 letter, as evidenced by Enmark's counsel's e-mail to Ms. Lewis dated August 26, 2013. He testified this "acknowledged receipt" meets the obligations of the Town as to delivering notice of the determination to Enmark. I do not agree with said position for two reasons. First, in two separate provisions of § 16-8-305, cited above, the term "shall" is used, indicating it is a mandatory requirement. This requirement was admittedly not met by the Town and is fatal to Carolina's argument. In addition, the only evidence of the date of "acknowledged receipt" of the August 8, 2013 letter is Enmark's counsel's e-mail to Ms. Lewis, dated August 26, 2013 (Ex. 64). This is sixteen (16) days after the letter was issued, well past the fourteen (14) day appeal period.

57. I find and conclude that Carolina has thus failed to pursue all administrative remedies available to it and the drastic remedy of a mandamus as a matter of law is not available.

58. For all of these reasons, the remedy of a Mandamus requiring the removal of the Roadway is not appropriate and is denied.

4. Plaintiff Did Not Prove a Slander of Title

59. “[T]o maintain a claim for slander of title, the plaintiff must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff’s title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties.” *Huff v. Jennings*, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct.App. 1995). “Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff’s rights.” *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994); *see also Solley v. Navy Federal Credit Union, Inc.*, 397 S. C. 192, 204, 723 S. E. 2d 597, 603 (Ct.App. 2012). Carolina cannot meet any of these elements. Carolina asserts through the August 26, 2013 e-mail from Enmark’s counsel (Ex. 64) and its counsel’s April 30, 2014 letter (Ex. 66), Enmark slandered its title by asserting easement rights or making other statements as to the Roadway. A review of the requisite elements of this claim find Carolina has failed to meet its burden of proof on this cause of action.

A. No False Statement

60. As discussed above, this Court has found and concluded that in fact Enmark does have easement rights over the Roadway. Thus, this cause of action fails since any assertion Enmark holds easement rights over the Roadway is true.

B. No Publication of a False Statement to a Third Party

61. In addition, I find there was no publication of a false statement to a third party by Enmark. In most, if not all, of the reported decisions involving slander of title, a defendant has recorded a lien, deed, mortgage, or some other claim of title at the courthouse. In the subject case, Enmark recorded no document at the courthouse asserting it held title to the Roadway other than filing Counterclaims seeking a Declaratory Judgment in this litigation. Pursuant to an

agreement of the parties dated July 24, 2013 (Ex. 62) the parties entered a "Tolling Agreement" which expressly provided Carolina would file a declaratory judgment action to determine title and rights in the Roadway. Carolina agreed during the pendency of the litigation "not to take any action to close or impede traffic on the Roadway." When Carolina, asserted by Enmark to be violative of the terms of the Tolling Agreement, contacted the Town of Hilton Head to request it close the Roadway, Enmark's counsel communicated to the Town in writing on two (2) occasions.

62. By e-mail of August 26, 2013 (Ex. 64), Enmark's counsel advised the Town of the Tolling Agreement and the respective claims of the parties to be determined in a declaratory judgment by the Court. Enmark did not assert title to the Roadway- only that there was a dispute to same to be resolved by the Court. Additional information in Paragraph 3 of said e-mail was clearly provided as a statement of opinion – not a statement of facts ("As we discussed, my client believes..."). Mere statements of opinion do not constitute an actionable representation. *Gilbert v. Mid-South Machinery Co. Inc.*, 267 S.C. 211, 220, 227 S.E.2d 189, 193 (1976). Said paragraph reads as follows:

"As we discussed, my client believes this driveway was built prior to the incorporation of the Town in 1983, and certainly prior to the passage of the LMO in 1987. I've attached Plat Book 38 Page 53, dated February 11, 1974 which shows the existence of this roadway. I've talked to numerous individuals who have lived on the island for the last 30+ years and they all have confirmed the existence of this roadway for a very long period of time. I have lived on the island for over 29 years and the driveway has been in existence the entire time I have been on the island. In addition, we have reviewed various aerial photographs which show the existence of this roadway." (emphasis added)

63. Carolina's primary argument that this e-mail is a false statement derogatory to its title is the erroneous reference to PB 38 P 53 being dated February 11, 1974. Upon obtaining a more legible copy of this admittedly hard-to-read document, it is actually dated November 1,

1989. Facts readily apparent from either reading the document or from reviewing same directly from the public records cannot support a false representation claim. *Robertson v. First Union National Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (2002); *Schnellmann v. Roettger*, 368 S.C. 17, 21, 627 S.E.2d 742, 745 (Ct.App. 2007). The Town, Carolina or any other party, could have easily confirmed the date of this document since it was a recorded plat. Further, the evidence is clear from the testimony of Ms. Lewis and Ex. 81 that when the Town was advised of the correct recording date of the plat at a subsequent meeting between all parties, the Town did not alter its position as to the Roadway after said meeting. I find there is no false statement that is derogatory to Plaintiff's title in this document for the reasons discussed above.

64. As Carolina continued its efforts, asserted by Enmark to be violative of the Tolling Agreement, to have the Town close the Roadway, Enmark's counsel again wrote the Town on April 30, 2014 (Ex. 69), providing to the Town an update on the ongoing litigation. Said letter clearly provided it would be up to the Court to determine the respective rights of the parties. This letter is simply a summary of the two opposing parties' position as to the Roadway, which was at that time in litigation. Enmark's counsel stated "[o]n behalf of Enmark, I have asserted that my client has a prescriptive easement and met all applicable regulatory requests at the time it was constructed." The letter concludes it will be up to the Court to determine the disputed issues. I find this letter meets none of the required elements for a slander of title claim since there is no false statements derogatory to Carolina's title. These two communications are simply not sufficient to show a publication of a "false" claim of ownership in the Roadway. There is no other evidence of any other publication to a third party.

65. When the Court raised questions on this issue at trial, Carolina asserted there were "misrepresentations" in the 1984 permitting of the Chevron Station, a failure to obtain Sea Pines

Architectural Review Board approval of the construction of the Roadway, and similar actions related directly to the original permitting and construction of the Chevron Station and Roadway. None of these actions were conducted by Enmark. In addition, they do not constitute false statements as to Carolina's title. There was absolutely no evidence of a false representation as to the title to Carolina's property by Enmark. Carolina has failed to meet the elements of this cause of action.

C. No Malice

66. "Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff's rights." *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994). "[M]alice merely means a lack of legal justification and is to be presumed if the disparagement is false, if it caused damage, and if it is not privileged." *Home Invs. Fund v. Robertson*, 295 N.E.2d 85, 87 (1973).

67. I find that Enmark never acted maliciously in this matter. It filed no documents at the courthouse claiming title, and entered into the Tolling Agreement directing that the parties seek a declaratory judgment by the court. The evidence at trial showed the Roadway has been in use and existence since 1984 – well over 32 years. I find no malice on behalf of Enmark in asserting its rights over a Roadway with such a long-standing use in the same location and used for the same purpose for that extraordinary length of time. I find that the erroneous date referenced by Enmark's counsel to a recorded plat in Exhibit 64 in an e-mail was a simple mistake due to the legibility of the document, and was not made recklessly, wantonly or with conscious disregard of Carolina's rights.

D. No Damage to Carolina

68. In addition to the above, no publication of a false statement by Enmark caused Carolina any damages – special or otherwise. Carolina provided no competent, compelling evidence on this issue. This is true since the Roadway was in existence and taken into consideration in the purchase price Carolina paid when it acquired said property. (See: Ex. 15 – Deed, listing as an exception PB 38 P 53 (Ex. 21), showing the Roadway on recorded page 1278, Exception D). In addition, after an extensive face-to-face meeting with Carolina, its litigation counsel, and Chester C. Williams, Esquire, its LMO expert, the Town did not change its position as to an LMO violation. There simply is no competent evidence of a diminished value of Carolina's property in the eyes of a third party.

E. Carolina is not Entitled to Recovery of any Attorney Fees

69. Finally, Carolina is seeking litigation costs as a form of “special damages” under its slander of title cause of action. *See Solley v. Navy Federal Credit Union, Inc.*, 397 S. C. 192, 211, 723 S.E. 2d 597, 607 (Ct.App. 2012). Assuming, *arguendo*, Carolina met all the requirements of this cause of action, as this Court has already ruled at trial, Carolina did not specifically include in its Amended Complaint, dated November 19, 2014 (or its two prior Complaints), a request for attorney fees under this cause of action – or any other cause of action. Special damages not properly plead are not recoverable under long-standing South Carolina law. *SCRCP Rule 9(g); AJG Holdings, LLC v. Dunn*, 392 S. C. 160, 168, 708 S. E. 2d 218, 223 (Ct.App. 2011). No change of this ruling is needed and testimony as to attorney fees and costs was not admitted for this reason. Having found Carolina did not meet the required elements of this claim, it obviously is not entitled to recover attorney fees and costs in any event.

5. Carolina Has Not Proven a Nuisance

70. The traditional concept of private nuisance requires Carolina to demonstrate that Enmark unreasonably interfered with the ownership or possession of its land. *Ravan v. Greenville County*, 315 S.C. 447, 464, 434 S.E.2d 296, 306 (Ct.App. 1993). A nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property. *Id.* It is anything which hurts, inconveniences, or damages or anything which essentially interferes with the enjoyment of life or property. *Strong v. Winn-Dixie Stores, Inc.*, 240 S.C. 244, 253, 125 S.E.2d 628, 632 (1962). This cause of action fails as the Court has recognized the easements rights asserted by Enmark, and thus no nuisance claim can exist.

71. Even if Enmark's easement rights were not recognized, I find and conclude this cause of action fails. The Roadway has been in continuous use for over 32 years in the same location and in the same manner. When Carolina purchased its property in October 31, 1996 from Sea Pines, the deed (Ex. 15) and Contract of Sale (Ex. 46) specifically listed as an exception to the title Plat Book 38 at Page 53 (Ex. 21), which clearly indicated the existence of the paved Roadway. Carolina completed substantial due diligence prior to its purchase. Mr. Viswanathan, a longtime resident of Hilton Head and experienced real estate investor, surely would have been aware of the existence and use of the Roadway, since it was obvious to anyone, even on a cursory examination, although he testified "he really didn't look at the back of the property prior to closing." In addition, Mr. Viswanathan holds an undergraduate and graduate's engineering degrees, as well as an MBA. This Court finds that he is an extremely experienced, savvy, successful commercial real estate developer. His testimony that he was not aware of the existence of the Roadway at the Chevron Station used by many, many people, which was across the street from where he worked, and was adjacent to the main road to his house in Sea Pines is simply not credible to the Court. It is clear Carolina purchased the property with the full

knowledge of the existence and use of the Roadway and the price of the property it paid took into consideration the Roadway. Its continued use was no surprise and was not an unreasonable use of the property.

72. Finally, I find and conclude there is no compelling evidence that the use of the Roadway has damaged Carolina. Thus, I find even if a nuisance was proven, no damages should be awarded to Carolina.

6. Carolina Has Not Proven a Trespass

73. A trespass is any interference with "one's right to the exclusive, peaceable possession of his property." *Ravan* at 463, S.E.2d at 306. For the same reasons as discussed above as to the nuisance, I find and conclude there is no trespass since Enmark has easement rights over the Roadway. Even if said rights are not recognized, no damages should be awarded under this claim as there is no evidence of any recoverable damages resulting from the use of the Roadway, Carolina took title and possession with the full knowledge of the existence and use of the Roadway.

It is therefore Ordered, Adjudged and Decreed as follows:

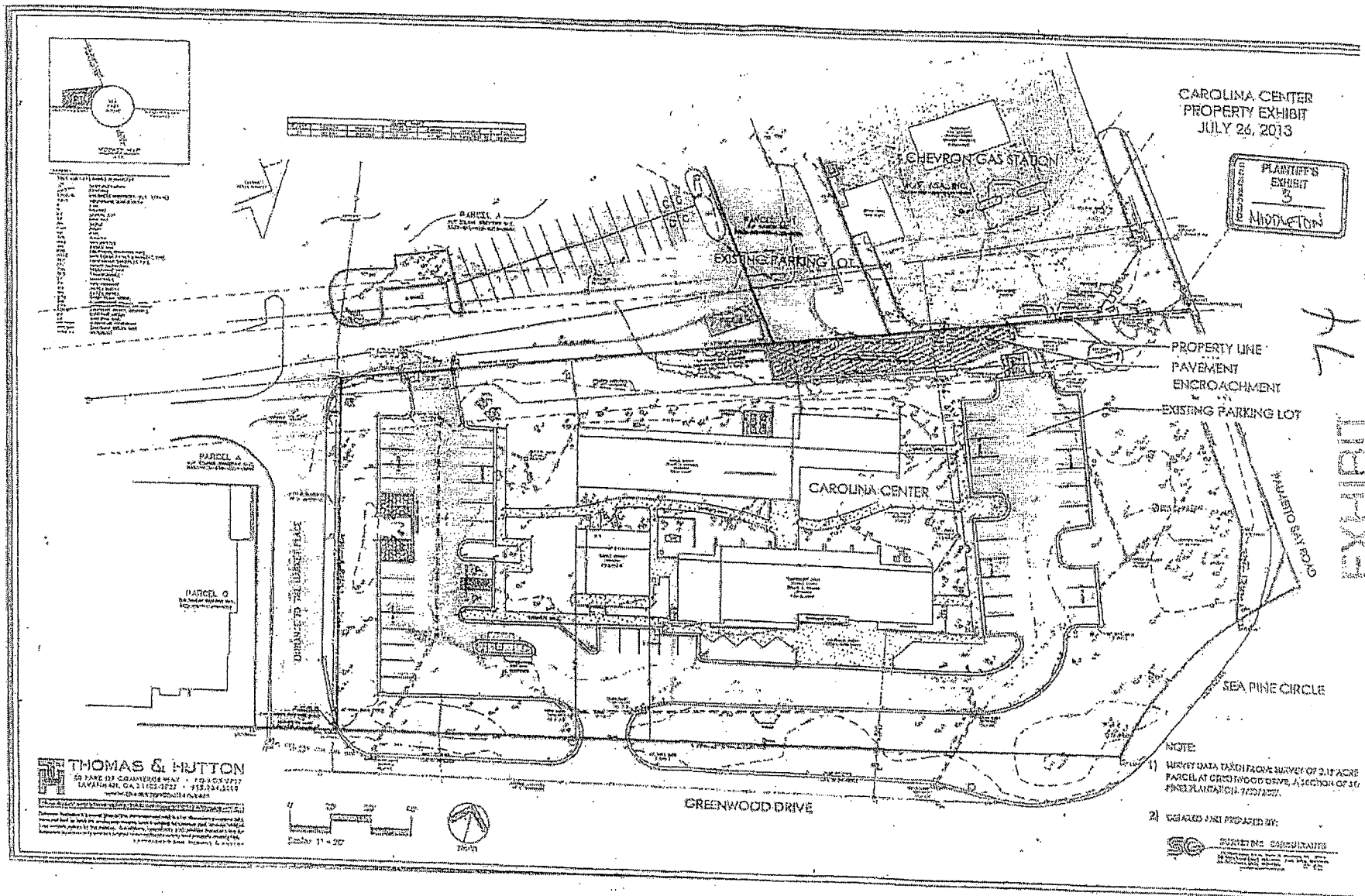
1. That Enmark, its successors and assigns, has a prescriptive easement for ingress and egress over the Roadway.
2. That Carolina cannot close said Roadway, or take any action to obstruct or divert Enmark, or its guests and invitees, from using the Roadway.
3. That Enmark shall be responsible for the continued maintenance and repair to said Roadway.
4. That Carolina's causes of action for slander of title, trespass and nuisance are dismissed, with prejudice.

5. That Carolina's request for a mandamus is denied.
6. Each party shall be responsible for their own attorney fees and costs.

AND IT IS SO ORDERED.

Marvin H. Dukes, III
Beaufort County Master in Equity

Beaufort, South Carolina
_____, 2017





Beaufort Common Pleas

Case Caption: Carolina Center Building Corp VS Enmark Stations Inc , defendant,
et al
Case Number: 2013CP0702066
Type: Master/Order/Other

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2017-03-29 13:53:23 page 35 of 35

000038

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-07-02066

Carolina Center Building Corp

Enmark Stations Inc., et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This came before me June 7, 2017 on Plaintiff's Motion to Alter, Amend or Reconsider my Order filed March 30, 2017. After hearing from parties I hereby deny the motion.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	\$N/A
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

3069

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

H. Fred Kuhn

Russell P. Patterson

Lauren P. Williams

Greg M. Alford

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

ELECTRONICALLY FILED - 2017 Jul 14 3:21 PM - BEAUFORT - COMMON PLEAS - CASE#2013CP0702066



Beaufort Common Pleas

Case Caption: Carolina Center Building Corp VS Enmark Stations Inc , defendant,
et al
Case Number: 2013CP0702066
Type: Order/Form 4

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2017-07-14 14:21:40 page 3 of 3

000041

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL COURT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2013-CP-07-2066
	)	
CAROLINA CENTER BUILDING CORP.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	FINAL ORDER ENDING CASE
	)	
ENMARK STATIONS, INC.; TOWN OF	)	
HILTON HEAD ISLAND,	)	
	)	
Defendants.	)	
	)	

This case was tried before me over a two-day period commencing on June 20, 2016. Appearing on behalf of the Plaintiff, Carolina Center Building Corp. ("Carolina"), was H. Fred Kuhn, Jr. with Moss, Kuhn & Fleming, P.A. Appearing on behalf of the Defendant, Enmark Stations, Inc., ("Enmark"), was Russell P. Patterson of Russell P. Patterson, P.A., and representing the Town of Hilton Head Island ("Town"), was Gregory M. Alford of Alford & Thoreson, LLC.

This is a dispute over a paved roadway as depicted in red on Exhibit 74, a copy of which is attached hereto, used by patrons of Enmark, owner and operator of an Enmark service station, and the general public which traverses across the land owned by Carolina ("Roadway").

A. PROCEDURAL HISTORY

Carolina proceeded to trial under its Amended Complaint, dated November 19, 2014, setting forth seven (7) causes of action, as follows:

1. Declaratory judgment action seeking an Order that Enmark has no express easement over the Roadway;

2. Declaratory judgment action seeking an Order that Enmark does not hold a prescriptive easement over the Roadway;
3. Declaratory judgment action seeking an Order that no easement exists and that Enmark is responsible for preventing any further illegal trespass by installing curbing in its parking area;
4. If the Court determines that Enmark holds easement rights over the Roadway, that Carolina can make reasonable changes to the location and dimensions of same, at the cost of Enmark;
5. A slander of title claim seeking actual and punitive damages;
6. A trespass cause of action seeking actual and punitive damages;
7. A nuisance cause of action seeking actual and punitive damages; and
8. A mandamus action against the Town seeking enforcement of the Town of Hilton Head Land Management Ordinance ("LMO").

Enmark filed an Answer and Counterclaim to Carolina's Amended Complaint, dated December 17, 2014. In addition to generally denying the material allegations of Carolina's Complaint, Enmark asserted defenses of waiver, estoppel, laches, acquiescence, statute of limitations, and privileged communications. Enmark also asserted a counterclaim requesting a declaratory judgment that it held a prescriptive easement over the Roadway and a second counterclaim requesting a declaratory judgment it held an easement by express grant.

The Town filed an Answer to the Amended Complaint, dated January 20, 2015. While it appears Carolina did not file a Reply to Enmark's Counterclaim dated December 17, 2014, it did file a Reply, dated October 7, 2013, to Enmark's Answer and Counterclaim, dated September 10, 2013, which was basically a general denial. Since the counterclaims in Enmark's Answer and Counterclaim dated December 17, 2014 are essentially the same as its original Answer and Counterclaim dated September 10, 2013, this Court in this Order deemed Carolina's original Reply to also be responsive to Enmark's Answer and Counterclaim, dated December 17, 2014.

Pursuant to a hearing on cross motions for Summary Judgment filed by Carolina and Enmark, this Court issued an Order dated October 23, 2015, finding that Enmark held no express easement rights. No appeal was filed of said Order.

The parties, prior to trial, agreed to the admission of a stipulated exhibit list consisting of 83 exhibits. Additional exhibits were introduced at trial. In addition to carefully considering the evidence submitted at trial, and arguments of counsel, the Court reviewed and considered the following written briefs submitted by the parties:

1. Enmark's Pre-Trial Brief, dated June 15, 2016;
2. Enmark's Post-Trial Brief, dated July 16, 2016;
3. Carolina's Post-Trial Brief, dated July 21, 2016;
4. Town's Post-Trial Brief, dated July 25, 2016;
5. Reply Brief of Carolina, dated August 25, 2016¹

B. LEGAL DISCUSSION

1. Burden of Proof

1. The party claiming a prescriptive easement has the burden of proof. *Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct.App. 1997). There is a strict standard of proof for prescriptive easement cases, and the party claiming such easement has the burden of proving all elements by clear and convincing evidence. *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 170 (2015). As will be discussed below in more detail, "[W]hen the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse." *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d

¹ Although Enmark objected to the Court's consideration of Carolina's August 25, 2016 Brief as being untimely and not pursuant to the Court's request for briefs in this matter, the Court accepted said filing and considered the arguments therein.

136, 141 (2006). Thereafter, the burden shifts to the title owner of the servient estate (ie. Carolina in this case) to rebut the presumption that the use was adverse. *Sanitary & Aseptic Package Co. v. Shealy*, 205 S.C. 198, 31 S.E.2d 253, 255 (1944). An attempt to claim adversely may be inferred by the acts and conducts of the dominant user. *Kelly v. Snyder*, 396 S.C. 564, 575, 722 S.E.2d 813, 819 (Ct.App. 2012).

2. Element of Prescriptive Easement

2. The elements for a prescriptive easement in South Carolina are well settled. “To establish an easement by prescription, a party must show the following: (1) the continued and uninterrupted use or enjoyment of a right for a full period of 20 years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse. *Paine Gayle Properties, LLC v. CSX Transportation, Inc.*, 400 S.C. 568, 583, 753 S.E.2d 528, 536 (Ct.App. 2012); *Simmons v. Berkley Elec. Coop., Inc.*, 404 S.C. 172, 182, 744 S.E.2d 580, 586 (Ct.App. 2013) (*reversed in part by Simmons v. Berkeley Elec. Coop., Inc.*, No. 2013-001447, 2016 WL 6520167 (S.C. Nov. 2, 2016) (“*Simmons 2016*”). Prior to the decision of *Simmons 2016*, the third element could have been met by a showing under a claim of right. *Simmons 2016* held a claim of right is no longer available to a party claiming a prescriptive easement. *Simmons 2016* at *4. Thus, while evidence and arguments at trial were presented on this element, the *Simmons 2016* decision issued after the trial makes clear a claim of right is no longer sufficient.

3. It is this Court’s finding that there is clear and convincing evidence as to each of the elements of a prescriptive easement and that Enmark is entitled to a prescriptive easement over the Roadway, for the reasons discussed below.

A. A continuous and uninterrupted use or enjoyment of the Roadway
for a full period of twenty (20) years

4. At the outset, it is clear that Enmark can rely not only on its use of the Roadway for the last seven (7) years since its purchase from Ms. Alice Mean's company, ASA, Inc, on March 19, 2009 (Ex. 5), but also the use of the two prior owners (Chevron Oil – Ex. 2; ASA – Ex. 3) dating back to when the station was first built by Chevron Oil Company ("Chevron") in 1984. A party may tack the period of use of prior owners in order to reach the 20-year requirement. This includes not only use by ancestors and heirs, but between parties in privity. *Kelley* at 575, 722 S.E.2d at 819.

5. The Chevron service station ("Chevron Station") was constructed by Chevron on approximately 0.65 acres on Palmetto Bay Road, Hilton Head Island, South Carolina as described in Ex. 1. The Chevron Station commenced operating on June 1, 1984, the date Beaufort County issued its Certificate of Occupancy. (Ex. 78, Bates 1460). The Roadway was in existence and used by patrons of the Chevron Station and others at the time of the opening of the Chevron Station, or very shortly thereafter. Originally the Roadway provided easy access to the Winn-Dixie, located to the southwest of the Chevron Station.

6. Shortly after completion of the Chevron Station, it was leased by Chevron to Mr. Ballenger, then married to Ms. Means, starting in 1985. Ms. Means lived in the Point Comfort area of Hilton Head, down the street from the Chevron Station, which was only the second gas station on the south end of Hilton Head at the time.

7. Ms. Means divorced Mr. Ballenger in 1989 and obtained the lease on the Chevron Station in 1989 as part of said domestic proceedings.

8. Ms. Means thereafter leased the Chevron Station until she purchased same on August 23, 1993, in the name of ASA, Inc. ("ASA"), a company she owned (Ex. 3). She

continued to own and operate the Chevron Station until March 19, 2009, when she sold it to Enmark (Ex. 5). Thus, Mr. Ballenger (Ms. Means' former husband), Ms. Means, or her company, ASA, have operated or owned the Chevron Station for twenty-four (24) consecutive years (1989 – 2009). Ms. Means testified credibly that the Roadway during that entire time period was in use and existence, in the same location as marked in red on Ex. 74. I find this witness's testimony as to the Roadway credible and compelling. It should be noted Ms. Means is truly an independent witness, with no stake of any kind in the outcome of this dispute.

9. Various aerial photographs and recorded plats further confirm and support this conclusion. The 1986 aerial photographs (Exs., 30, 31 and 89) show car tracks leading to the Roadway from the car wash, which were identified by Ms. Means. Aerial photographs taken in 1988 (Ex. 32); 1995 (Exs. 33, 34); 2002 (Ex. 36); 2012 (Ex. 40); and 2013 (Ex. 41) further evidence the location and usage of the Roadway.

10. In addition, PB 38 P 53, prepared on November 1, 1989 (Ex. 21 – “1989 Plat”) is very compelling. This is an as-built of the property and improvements identified as the Sea Pines Welcome Center, now owned by Carolina (“Welcome Center”), which shows the Roadway. The legend on the 1989 Plat indicates the Roadway is comprised of “Asphalt Paving,” consistent with the testimony of Ms. Means, who testified that her husband, Mr. Ballenger, prior to 1989, paved the Roadway with asphalt.

11. Mr. Scott Middleton is the son-in-law of Ms. Means. He undertook the day-to-day operations of the Chevron Station starting in 2000. While dating Ms. Means' daughter from 1995 to 2000, he visited Hilton Head on a regular basis and testified the Roadway was in use and existence during that time period. Further, he testified that Mr. Ballenger, while he ran the Chevron Station, made repairs to the Roadway with Quikcrete. When Mr. Middleton ran the

station for Ms. Means from 2000 until it was sold to Enmark on March 19, 2009, he testified the Roadway was continually used by patrons of the Chevron Station and the general public to access the adjoining shopping center and to by-pass the traffic on the adjoining Sea Pines Circle.

12. After Enmark purchased the property on March 19, 2009 (Ex. 5), the Roadway continued in use by the patrons of the station, now an Enmark Station, and by members of the public in the same location as it existed since 1984.

13. The continuous and uninterrupted use or enjoyment of the Roadway since 1984 is further supported by the extensive improvements made to the Roadway from 1984 to the present.

14. As stated above, I find the Roadway was paved with asphalt by Mr. Ballenger, or others, prior to 1989, when Ms. Means took over the lease of the Chevron Station. The asphalt paving of the Roadway was completed by November 1, 1989, as confirmed in the 1989 Plat. While memories may fade, the recorded plat clearly indicating the Roadway was paved with asphalt is very compelling evidence to the Court.

15. From 1989 until Ms. Means purchased the Chevron Station, there is credible testimony the asphalt Roadway was patched and repaired, and two (2) speed bumps were added. In part, this was due to patrons of the station and the public hitting potholes and complaining to Ms. Means and Mr. Middleton as to the condition of the Roadway.

16. After Ms. Means, through ASA, acquired the Chevron Station on August 23, 1993 (Ex. 5), in 1994 she re-paved the Roadway with asphalt, re-installing and repairing the two speed bumps. This is confirmed not only by the credible testimony of Ms. Means and Mr. Middleton, but also by the ASA Depreciation Schedule showing new paving during this time period (Ex. 75). Photographic evidence introduced at trial clearly shows two layers of asphalt paving (Exs. 43, 44(A)). Various witnesses, including Theresa B. Lewis, Town LMO Official;

Timothy M. Drake, a landscaper hired by Colonial; Curtis L. Coltrane, Colonial's expert witness on the LMO; Kumar Viswanathan, owner of Carolina, and Robert H. Demere, III with Enmark, all confirm there are two (2) layers of asphalt on the Roadway. This is consistent with the original paving of the Roadway prior to 1989 and the subsequent repaving by Ms. Means in 1994. It is logical Ms. Means would have waited until she acquired ownership of the Chevron Station prior to spending monies on substantial improvements, such as repaving the Roadway in 1994.

17. Finally, the Court took into consideration the existence of a drainage catch basin in the middle of the Roadway (Exs. 42, 50, 51), further evidencing the long-standing existence of the Roadway in its present location. Mr. Viswanathan testified he did not construct same, so it was in existence prior to his acquisition of the Welcome Center on October 31, 1996 (Ex. 15).

18. I find and conclude said Roadway has been in continuous and uninterrupted use or enjoyment by Enmark, ASA, Ms. Means, Mr. Ballenger, and Chevron for twenty-nine (29) years, from 1984 until said period was tolled by the Tolling Letter agreement entered into by Colonial and Enmark, on July 24, 2013 (Ex. 62 – Tolling Agreement).

(i) Interruption of 20-Year Period

19. Carolina asserts under *Pittman v. Lowther*, 363 S.C. 47, 610 S.E.2d 479 (2005) and *Kelley* that Enmark has not met this first requirement due to its actions to stop or interrupt Enmark's usage of the Roadway. Under these cases, the continuous period of use may be interrupted by "overt acts" of the servient landowner, such as erecting a physical barrier or perhaps verbal threats to stop said usage. *Pittman* at 52, 610 S.E.2d at 481; *Kelley* at 573, 722 S.E.2d at 818. It should be noted that no South Carolina case has ever found mere "verbal threats" was sufficient to interrupt the continuous use period for a prescriptive easement. This

Court has found no case anywhere in the United States which has held mere verbal threats or even just a demand letter was sufficient to interrupt the requisite time period. A close reading of the relevant authorities confirms this conclusion.

20. The Court in *Pittman* relied on an Oregon decision to adopt the “new” standard in South Carolina as to this issue, stating as follows:

We decline to adopt the analysis applied by the North Carolina Supreme Court and conclude a more reasoned approach was articulated by the Oregon Court of Appeals in *Garrett v. Mueller*, 144 Or.App. 330, 927 P.2d 612 (1996). The court embraced the opinion of Justice Oliver Wendell Holmes Jr., who stated the following in determining what a landowner must do to interrupt prescriptive use.

“A landowner ... is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an assertion interrupts the would-be dominant owner's impression of acquiescence, and the growth in his mind of a fixed association of ideas; or, if the principle of prescription be attributed solely to the acquiescence of the servient owner, it shows that acquiescence was not a fact.” (emphasis added)

Pittman at 51, 610 S.E.2d at 481 (quoting *Garrett* at 617 (quoting *Brayden v. New York, N.H. & H.R. Co.*, 51 N.E. 1081, 1081-82 (Mass. 1898))).

21. In the Oregon *Garrett* decision, cited as the authority for the above “new” South Carolina rule, the plaintiff had put up gates, confronted personally the defendant on the disputed roadway, asserted he was trespassing, ordered him to leave, and later put locks on a gate when the defendant continued to try and use said road. *Garrett* at 616. Only when the locks were placed on the gate did the court in Oregon find an interruption of the time period for a prescriptive easement. *Id.* at 618. The Oregon Court held that if the actions of the plaintiff were sufficient to allow the defendant to file suit to enforce any alleged easement, said action would

be sufficient to stop the usage period. *Id.* The placement of a gate with locks met that requirement. *Id.*

22. In *Pittman*, our South Carolina Court relied exclusively on the fact that the servient landowner erected cables and poles across a disputed roadway on numerous occasions and called law enforcement to interrupt the continuous use period. *Pittman* at 52, 610 S.E.2d at 482. The South Carolina Court summarized the actions which resulted in the interruption of the twenty year period as follows:

Turning to the present case, we conclude Respondent's actions were sufficient to interrupt Petitioner's use of the land for the prescriptive period. Not only did Respondent set posts and cables across it, but Respondent also plowed the road every year and planted the road with rye a couple of years. When Petitioner removed the barriers, Respondent replaced them. Respondent also called law enforcement authorities when Petitioner used his tractor to destroy the barriers. Respondent's actions caused Petitioner to discontinue use of the land, *albeit* briefly, and were certainly sufficient to leave Petitioner with the impression that Respondent did not acquiesce in the use of his land.

Id. at 52, 610 S.E.2d at 481-82. It is very clear the South Carolina Court in *Pittman* did not rely on verbal warning or even written demands to interrupt the continuous use period.

23. In *Kelly*, also cited by Carolina, the servient owner took no action to prevent the use of a disputed roadway and thus said issue was not reached by the Court, although the Court quoted the *Pittman* rule. *Kelley*, 296 S.C. at 573, 722 S.E.2d at 818.

24. A review of the actions of Carolina in this case reveals its actions were not sufficient to interrupt the usage of the Roadway under the above cases. In the Oregon decision, the Court in *Garrett* appeared to establish a bright line that the assertion of rights by the servient would trigger a cause of action if an easement existed. *See Garrett* at 616. Nothing Carolina did would have allowed Ms. Means, her company, ASA, or Enmark to file suit to enforce their claimed easement rights until Carolina put up fence posts right before the litigation was filed (Ex. 42) and the parties entered into the Tolling Agreement on July 24, 2103 (Ex. 62). Again, in

none of the cases relied up on by Carolina, nor in any other case this Court has been able to find, has a court relied solely on verbal or written warnings. In every case, there was some overt, physical act that would legally allow the easement holder to file suit to protect his rights.

25. Carolina's evidence of "overt" acts consist primarily of three (3) letters it asserts cut off Enmark's rights under the above cases. The first is a June 15, 1994 letter written by Carolina's attorney, Cary S. Griffin, to John L. Wilson, counsel for the then owner of the station, ASA, Inc. and Ms. Means. (Ex.47). This letter is not sufficient to cut off the rights of Enmark under the above cases for several reasons. First, Carolina did not own the property at the time it was written, having only obtained title over 2½ years later on October 31, 1996 (Ex. 15-10/31/96 Deed into Carolina). Mr. Griffin's letter clearly states it was written on behalf of a "prospective purchaser". *Pittman* and *Kelley* require action by the owner of the servient estate. See *Pittman* at 52, 610 S.E.2d at 481-82; *Kelley* at 573, 722 S.E.2d at 818. In addition, the letter does not demand the Roadway be closed, but simply asks for additional title information. Clearly Ms. Means or her company, ASA, could not have sued Carolina to enforce its claimed easement right as to the Roadway based on said letter when Carolina was only a perspective purchaser, not the owner, and had done nothing to interfere with her use of the Roadway. Thus, the standard set in *Pittman* was not met.

26. Carolina's second claimed interruption of the prescriptive period is a letter written on behalf of Carolina some fourteen (14) years later, on September 15, 2008 by Robert J. Arundell, then counsel for Carolina (Ex 55). Said letter is written some twenty-four (24) years since the Roadway was in continuous use starting in 1984. Assuming, *arguendo*, said letter by itself was a sufficient overt act to constitute an interruption of use, it came too late. I find and conclude the requisite twenty (20) year continuous use period had already been met. In addition,

said letter was written in the context of negotiations between the owners of the adjoining shopping center, ASA, as owner of Chevron Station, and Carolina as to a new roadway plan proposed by Carolina. No action was ever taken to limit, restrain, or prevent the use of said Roadway until posts were placed by Carolina adjacent to the Roadway in 2013 and the July 2013 Tolling Agreement (Ex. 62) was signed by the parties some five (5) years later. In other words, I find and conclude that ASA or Ms. Means could not have filed suit as of September 15, 2008, asserting a violation of their claimed prescriptive easement rights based on the Arundell letter.

27. Most importantly, pursuant to Mr. Arundell's following letter on the same issue, dated October 29, 2012 (Ex 61), Carolina's counsel stated his client had changed his mind after the September 15, 2008 letter due to a change in plans ("In 2008, in anticipation of prospective redevelopment plans, we notified ASA, Inc. that the encroachment would have to be closed. However, when those redevelopment plans were put on hold, my client decided to allow the encroachment to remain open" (emphasis added). Thus, this September 15, 2008 letter cannot satisfy a clear, unequivocal action by the servient owner to stop usage of the Roadway as required under *Pittman*. See *Pittman*, 363 S.C. 47 at 52, 610 S.E.2d at 481-82. Ms. Means testified she did not have the impression she was required in 1998 to quit using the Roadway, or any other time, since she was under the belief she had legal rights to use same based on a written easement (Ex. 48 – 2/23/94 letter Wilson to Griffin) and longstanding, historical use of the Roadway (Ex. 52 – 6/2/08 letter Wilson to Viswanathan – 2nd paragraph). Nothing was ever done to restrict or prohibit such continued usage until much, much later when the posts were constructed by Carolina in July 2013 and the parties entered into the Tolling Agreement (Ex. 62).

28. The third letter relied upon by Carolina is Mr. Arundell's letter of October 29, 2012, referenced above. (Ex. 61). While said letter does not provide a precise date of when the

Roadway was to be closed, said letter, coupled with the posts constructed adjacent to the Roadway (Ex. 42), does arguably meet the standard in *Pittman* to serve as an interruption of continued use. Upon the subsequent execution of the Tolling Agreement on July 24, 2013 (Ex. 62) and filing suit by Carolina on August 15, 2013, Enmark knew for certain the intent of Carolina was to seek the closure of the Roadway. In any event, assuming the October 29, 2012 letter (Ex. 61) was sufficient to interrupt or stop the time period, the paved Roadway had been in continuous use for over twenty-eight (28) years (1984 to 2012) – more than sufficient to meet the twenty (20) year continuous use requirement. Thus, none of the letters relied upon by Carolina prevent the fulfillment of this element. There was no other credible evidence of any other action by Carolina sufficient to “interrupt” the continuous use of the Roadway under *Pittman*.

B. The identity of the thing enjoyed

29. Ms. Means testified that the Roadway has been used by herself, her employees and patrons of the Chevron Station, including herself, in the same location from at least 1984 through today. Again, I find her testimony credible and compelling on this issue. Mr. Middleton’s testimony is also consistent with said facts. This same testimony was provided by numerous witnesses for the time periods they were familiar with the Roadway (See: Mr. Demere – 2009 to present; Ms. Lewis – 1998 to present; Mr. Green – 1992 to present). Additional evidence strongly supports this conclusion, including the aerial photographs since 1986, the 1989 Survey (Ex. 21); the October 20, 1992 as-built survey for Chevron showing the curb cut and Roadway (Ex. 45); and Carolina’s August 10, 2007 Conceptual Site Plan (Ex. 50).

30. Carolina argued that with the placement of a trash dumpster near the southeastern terminus of the Roadway, its location was materially changed. This Court disagrees. The aerial photographs first appear to show the existence of a trash dumpster sometime between 1988

(Ex. 32) and 1995 (Exs. 33, 34). However, the placement of this single dumpster did not materially change the location of the Roadway, as is evidenced by more recent photographs and surveys (Exs. 21, 42, 44A) and the testimony of Ms. Means and others. There is no credible evidence that the placement of this dumpster was placed on or near the Roadway in an effort to close or materially alter the Roadway. I find and conclude this is not sufficient to impact or diminish the identity of the Roadway or its location.

C. The use or enjoyment of the Roadway was Adverse

31. As noted above, “[W]hen the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse.” *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). Thereafter, the burden shifts to the title owner of the servient estate, Carolina in this case, to rebut the presumption that the use was adverse. *Sanitary & Aseptic Package Co. v. Shealy*, 205 S.C. 198, 31 S.E.2d 253, 255 (1944). An attempt to claim adversely may be inferred by the acts and conducts of the dominant user. *Kelly v. Snyder*, 396 S.C. 564, 575, 722 S.E.2d 813, 819 (Ct.App. 2012). I find and conclude that Enmark has established by clear and convincing evidence its use of the Roadway was open, notorious, continuous, and uninterrupted for a period in excess of twenty (20) years. The burden then shifts to Carolina to rebut said presumption, which it has failed to do. Carolina’s argument it granted permission for said use is not supported by the credible evidence.

(i) No Permission was Ever Granted by Plaintiff

32. Carolina asserts it provided permission to various owners in the chain of title, thus defeating any claim of adverse use. Mr. Viswanathan, principal of Carolina, testified he gave oral permission to ASA and Ms. Means to use the Roadway. I do not find said testimony

credible or supported by the evidence presented. There are several reasons I reached this conclusion.

33. First, it is inconsistent with the testimony of Ms. Means and Mr. Middleton, which I find more credible and convincing. Ms. Means testified unequivocally that she and her patrons used the paved Roadway since 1984, including the time she leased and owned the property commencing in 1989 through March 2009 when she sold same. She further testified she never obtained consent from anyone to use the Roadway or sought to obtain same. Again, this Court gives great weight to the testimony of Ms. Means. Mr. Middleton also testified credibly that he never obtained or sought permission from Carolina, the adjoining owner.

34. Second, the record reflects Mr. Viswanathan holds an undergraduate degree in engineering, a graduate degree in civil engineering, and an MBA, all from Purdue University. I find he was an extremely experienced developer, and routinely and consistently documented all important matters in writing. There is not in existence a single document referencing any grant of permission to use the Roadway, although there are many documents sent by Mr. Viswanathan and his attorneys from June 15, 1994 (Ex. 47), through October 29, 2012 (Ex. 61) concerning the Roadway – a period of over eighteen (18) years.

35. Another key fact I relied on is the February 8, 2008 easement proposal sent by Carolina to Mr. Middleton and ASA (Ex. 51). Not only did the letter and accompanying draft easement not request ASA to discontinue use of the Roadway, or grant "permission" to use same, but the proposed easement agreement provided Carolina would pay all costs of relocating the Roadway (Ex. 51). Mr. Viswanathan admitted at trial this was his offer. Common sense leads to the conclusion he recognized the legal rights of ASA, the adjoining owner in the Roadway, since it was a listed title exception in his October 1996 deed to his property (Ex. 5), as

well as its Contract of Sale (Ex. 46). In recognition of said rights from a negotiating point of view, he would have to pay 100% of the costs of relocation of same in order to induce ASA to give up its rights to the Roadway.

D. Claim of "Illegality" of Use Does Not Prevent a Prescriptive Easement

36. Carolina asserted at trial the prescriptive easement claim should be denied since the Roadway was established "illegally," asserting the construction and pavement of the Roadway and change in the 6" concrete curbing around the Chevron Station to allow access to the Roadway was completed without necessary governmental approvals. While I have determined said work was completed in compliance with the existing rules and regulations, as discussed in Section 3 of this Order below, even if that were not the case, this would not be fatal to the establishment of a prescriptive easement. Carolina has cited no specific legal authority for this argument and this Court has not located any case supporting said position.

37. This Court has construed this argument as analogous to an "un-clean" hands assertion, although no such defense or position was plead. This Court finds no resulting inequity to Carolina by recognizing the continued existence of a Roadway that has been in existence since 1984. From Carolina's perspective, I find and conclude prior to and at the time of its purchase of the Welcome Center parcel for \$1,500,000 on October 31, 1996 (Exs. 15, 46), Mr. Viswanathan clearly was aware of the existence of the Roadway and the purchase price reflected the existence of said Roadway. As a "prospective purchaser", on June 15, 1994, two and one-half (2½) years prior to his purchase, Mr. Viswanathan's attorney wrote Ms. Means' attorney as to the "alleged encroachment of a driveway" (Ex. 48). Said letter further provided as follows:

"There is an encroachment of a driveway that is shown on Plat Book 38 Page 53 (position attached). It is obvious that this area is utilized for access from The Market Place general parking to the Chevron Station."

The Roadway was paved, open and obvious to all. It was listed as a specific title exception in the Contract of Sale and deed of conveyance (Exs. 15, recorded Page 1278, Para. O – DB 38 P 53 – Ex. 21; Ex. 46, Page CC0108, para. D). Mr. Viswanathan, who had to pass this property on a daily basis to reach his home in Sea Pines Plantation and whose office was nearby, would have clearly seen said Roadway. His testimony he perhaps did not walk behind the property or see the Roadway as part of his pre-purchase due diligence is not credible. This is especially true since it appears he completed extensive, detailed due diligence, including third-parties inspecting the interior, noting numerous defects (Ex. 46, § 15). I thus find nothing inequitable as to this Court's recognition of the prescriptive rights of Enmark in the Roadway, as the Roadway was clearly a part of the property Carolina purchased. Carolina's purchase price took into consideration said Roadway.

E. Plaintiff's Claim That a Prescriptive Easement Must Connect to a Public Road is Without Merit

38. Carolina argued at trial Enmark's prescriptive easement claim fails since it is an "easement to nowhere" (i.e. no terminus at a public road). There simply is no such requirement under South Carolina law that an easement has to terminate at a public road. Carolina has not cited any legal authority for this position. Whether users of the Roadway traverse other parties' property who are not parties to this action does not impact this Court's power to determine the relative rights in the Roadway between the parties before the Court. This Order is clearly not binding on other property owners who are not parties. Carolina's argument Enmark's claim should be denied since it did not name these adjoining owners as parties falls on deaf ears, since Carolina instituted this case and could have named said parties in its original Complaint, or its two (2) amended Complaints filed thereafter.

3. Plaintiff's Request for a Mandamus is Denied

39. A “mandamus is the highest judicial writ and is issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy.” *City of Rock Hill v. Thompson*, 349 S.C. 197, 199, 563 S.E.2d 101, 102 (2002). It is only available against a public official to perform a mandatory legal duty that is ministerial in nature. *Id.* at 200, 563 S.E.2d 102. When the legal right is doubtful, the performance of a duty rests in the discretion of the public official, or there is an alternative remedy, mandamus is not available. *Id.*; *In the Interest of Lyde*, 284 S.C. 419, 421, 327 S.E.2d 70, 71 (1985); *Andrews Bearing Corp. v. Brady*, 261 S.C. 533, 201 S.E.2d 241 (1973). A writ of mandamus is not available where an available administrative remedy has not been pursued to its end. *Bradley v. State Human Affairs Commission*, 293 S.C. 376, 380, 360 S.E.2d 537, 539 (1927). Where a party has another adequate remedy, a writ of mandamus will not be granted. *In Re Tyson*, 282 S.C. 212, 318 S.E.2d 279 (1984). As is discussed below, Carolina has met none of the requirements for an order from this Court requiring the Town to issue an enforcement order under the LMO for Enmark to remove or shut down the Roadway under these authorities.

A. No Mandamus Available Since a Violation of the LMO is Doubtful and Uncertain

40. Ms. Lewis, the LMO official, candidly admitted she made no final determination the Roadway violated the LMO since she could not determine if the construction activities related to the Roadway were in violation of the LMO. After consideration of all of the testimony and voluminous trial exhibits this Court can certainly understand why she reached such a conclusion under her discretion as the LMO official. Under *City of Rock Hill*, and *Interest of Lyde*, this Court cannot issue a Mandamus where the claims asserted by Carolina as to LMO violations are doubtful, which is certainly the case at bar. See *City of Rock Hill*, 349 S.C. at 199,

563 S.E.2d at 102; *In the Interest of Lyde*, 284 S.C. at 421, 327 S.E.2d at 71. For this reason alone, the drastic remedy of Mandamus is not appropriate. As discussed below, based on this Court's analysis and application of the LMO to the facts in this matter, I also find no violation of the LMO, thus Mandamus is not an appropriate remedy.

(i) The Initial Construction of the Roadway was not a Violation of the Town LMO

41. Even if the issues of Carolina not exhausting its administrative remedies, or the doubt and uncertainty by the LMO Official of an actual violation were not present, I find and conclude there was no violation of the LMO as to the construction and maintenance of the Roadway. As discussed below, this Court finds that Carolina has not shown by a preponderance of evidence the Roadway was constructed, improved or maintained in violation of the LMO.

42. The Town was incorporated in 1984 and adopted the LMO in 1987. As stated above, I find and conclude that the Roadway was in existence almost three (3) years before the adoption of the LMO when the station opened in 1984. There was no evidence the construction of the Roadway or curb cut violated any then applicable ordinance. When the Town adopted the LMO in 1987, no Town permit or approval was required for the continued existence of the original Roadway since it was a valid non-conforming use under § 16-7-101 et. seq. of the LMO (Ex. 83). Section 16-7-103 of the LMO provides "nonconformities shall be allowed to continue in accordance with the regulations of this Chapter" (Ex. 83). A "nonconforming use" is defined in § 16-10-201 (Ex. 83) as follows:

"Nonconforming Use: Any legally established activity using land, buildings or structures which was legally established, but that fails to conform in any respect to an applicable use requirement set forth in this title, in any applicable and approved development plan or in any permit issued hereunder."

There is no evidence the original Roadway was not a legally established activity under the Beaufort County Development Standards Ordinance ("DSO"), the predecessor to the 1987

LMO. In fact, the DSO was never put into evidence. Thus, there is no evidence that under the DSO anyone was even required to obtain a permit or approval for a Roadway of this nature.

43. I find and conclude the original Roadway is not a violation of the LMO and thus the remedy of Mandamus is not available to Plaintiff.

(ii) The Subsequent Paving of the Roadway was not a Violation of the Town LMO

44. Having determined the original Roadway is an allowed, nonconforming use under the 1987 LMO, the Court must determine if the original paving required a permit under the applicable LMO. Carolina and its expert, Mr. Coltrane, assumed the Roadway was paved sometime between 2002 and 2008. However, Ms. Lewis, the Town LMO Official, was unable to determine a date of the original paving. As set forth above, I find and conclude the Roadway was originally paved sometime shortly after the station opened in 1984. Section 16-1-105 of the 1988 LMO (Ex. 83) lists the “development activities” that trigger a requirement for a permit from the Town. A careful reading of this section reveals the simple action of paving an existing Roadway does not constitute development requiring a permit. This may be one reason the Town never raised any issue with the Roadway over the last 27 years that the Roadway has been paved (1989 – 2016), despite inspecting the site at least twelve (12) times (Ex. 79).

45. I find the original repaving of a lawfully permitted roadway was not a violation of the applicable LMO.

(iii) The Subsequent Repaving of the Roadway was not a Violation of the LMO

46. Finally, this Court must determine if the subsequent repaving and construction of two (2) speed bumps on the Roadway constitutes a violation of the LMO. I find and conclude the answer to this question is no. First, the Court must determine if repaving a Roadway constitutes a development activity triggering permit requirements under § 16-1-105 of the LMO

(Ex. 83), the same analysis applied above to the original paving. Since the original paving did not constitute development activity under this section, the repaving of same is even an easier conclusion to reach. Ms. Lewis, the Town LMO Official, confirmed in her testimony no permit is required to repave an existing roadway. Thus, the mere repaving and installation of speed bumps on the Roadway by Ms. Means on or about July 1994 was not a violation of the LMO and Carolina's request for a Mandamus as to this activity should be denied.

47. As an alternate basis for my conclusion of no violation of the LMO as to the subsequent repaving, the LMO provisions dealing with existing nonconformities must be considered. Section 16-7-103 of the LMO (Ex. 84) clearly provided all "nonconformities shall be allowed to continue in accordance with the regulations of this Chapter." Section 16-7-106(B) provides the Town Administration may waive various provisions as to setbacks, development review, zoning regulations, etc, if any proposed improvement to an existing non-conformity does not occupy a greater footprint (Ex. 83). Testimony from Ms. Means and Mr. Middleton confirmed that the repaving and speed bumps of the Roadway was in the same location as the prior existing paved Roadway. Thus, the ability or right of the Town LMO to exercise her discretion (i.e., LMO states she "may waive") to waive setback provisions for the repaving precludes this Court from issuing a Mandamus, as this decision is clearly discretionary. No Mandamus is allowed for such discretionary decisions. *See City of Rock Hill*, 349 S.C. at 199, 563 S.E.2d at 102; *In the Interest of Lyde*, 284 S.C. at 421, 327 S.E.2d at 71.

- B. Assuming, *arguendo*, a Permit for the Original Construction, Original Paving or Re-Paving Was Required and Was Not Obtained, What are the Town's Options as to Enforcement?

48. Even if this Court finds, *arguendo*, there is a clear, absolute violation of the LMO as to the original Roadway construction, its original paving, or its subsequent repaving, and that Carolina had properly exhausted its administrative remedies (discussed below in Section C), the Court cannot usurp the Town's discretion as to what is the appropriate remedy. *See City of Rock Hill* at 199, 563 S.E.2d at 102; *In the Interest of Lyde* at 421, 327 S.E.2d at 71. Section 16-8-107 of the current LMO (Ex. 83) lists eight (8) possible remedies available to the Administrator for a LMO violation. These include the discretion under § 16-8-106(F) to take action to abate any alleged violation, or to simply impose a fine under a misdemeanor criminal action (16-8-106(G)), or to impose a fine under the catch-all remedies section of 16-8-106(H) ("Take any other action at law or in equity to prevent or remedy any violation, or otherwise enforce the provisions of this Ordinance"). Ms. Lewis also testified that pursuant to recent LMO amendments, an after-the-fact permit can be issued since the 20' setback requirement between commercial properties had been eliminated.

49. Ms. Lewis testified in deciding the appropriate remedy for a violation she must use her discretion, deciding each violation on a case-by-case basis. Factors she considers include: (a) the Roadway has been in existence since at least 1984; (b) there is evidence Ms. Means or her contractor contacted the Town as to permitting when it was repaved sometime in July 1994; (c) that the current owner, Enmark, was not involved in any of the work associated with the Roadway (i.e., original construction, original paving or re-paving); (d) the Town has never had an issue with the Roadway or sought to stop the repaving of same in the past for a very long period of time, while also issuing other permits and conducting site inspections at least twelve (12) times (Ex. 79); (e) the severity of the violation; and (f) there is no evidence of repeat violations; and other conditions.

50. The LMO Administrator, in her discretion, might decide to order an abatement plan of some additional landscaping, or impose a simple fine, or require an after-the-fact permit. This Court simply does not have the authority under the cases of *City of Rock Hill* and *In the Interest of Lyde* to make such a discretionary decision. *City of Rock Hill* at 199, 563 S.E.2d at 102; *In the Interest of Lyde* at 421, 327 S.E.2d at 71. In addition, without the benefit of years of enforcing the LMO on Hilton Head, the Court obviously does not have the requisite knowledge or experience necessary to issue the appropriate LMO remedy under these complicated facts.

51. Carolina asserts that under § 16-8-110 of the LMO (Ex. 83) the fact that a violation has existed for a long period of time does not constitute any type of waiver or implied approval by the Town and the Town is required to remove the Roadway. Such a simplistic argument ignores the many unusual facts concerning the long history of the existence of the Roadway, the fact I have found its construction and repaving did not violate the LMO, that Ms. Lewis could not make a determination of any violation, and the broad discretion afforded Ms. Lewis in determining an appropriate remedy. Under *City of Rock Hill* and *In the Interest of Lyde*, this Court declines to order a removal of the Roadway.

C. Failure to Exhaust Administrative Remedies

52. At trial, there were two (2) opposing arguments as to each party asserting the other failed to exhaust its administrative remedies under the LMO. I find that Carolina failed to exhaust its administrative remedies for the reasons discussed below and thus the writ of mandamus is not available, even if the Roadway was constructed in violation of the LMO.

53. The Town, by letters dated January 16, 2014 and February 4, 2014, notified Carolina's then counsel, Robert J. Arundell, that it had determined in its discretion the Roadway was a "legal nonconformity" under § 16-10-201 of the LMO and it was taking no action as to the

Roadway. (Exs. 66, 68). The Town's attorney specifically advised Carolina's counsel that if his client, Carolina, did not agree with said decision, an appeal should be filed under § 16-3-205 of the LMO in fourteen (14) days. Section 16-10-201 required Carolina to file an appeal or be bound by said decision. No appeal was filed and I find Carolina did not exhaust its administrative remedies under the LMO, thus the extraordinary relief of Mandamus is not available.

54. Carolina argues that Enmark failed to appeal a final determination of the LMO Official, a letter dated August 8, 2013 (Ex. 62), from Ms. Lewis, and thus the Town and Enmark are bound by said decision since no appeal was filed by Enmark. I find and conclude that the August 8, 2013 letter was not a final determination under the LMO. Ms. Lewis, who I find an impartial and credible witness, testified that she issued the August 8, 2013 letter based entirely on information she received from Carolina's counsel. Upon receipt of additional information from counsel for Enmark (Ex. 64), and consultation with Mr. Gregg Alford, the Town's outside counsel, she rescinded or corrected her initial decision and worked with Mr. Alford to issue a revised determination through Mr. Alford's office, as reflected in Mr. Alford's January 16, 2014 (Ex. 66), and February 4, 2014 (Ex. 68) letters.

55. Ms. Lewis testified she almost always consults with legal counsel (either the Town's in-house counsel or outside counsel) when attorneys representing property owners contact her office as to LMO issues. She confirmed at trial that the Town attorney, Mr. Alford, on behalf of her office, communicated her final decision on the Roadway issue set forth in Exhibits 66 and 68. Thus, I do not find Enmark failed to file an appeal of the August 8, 2013 letter of Ms. Lewis (Ex. 63).

56. Another reason I find that the August 8, 2013 letter from Ms. Lewis is not a final LMO Determination binding on Enmark is that it was admittedly never sent to Enmark. Under § 16-8-105(C)(1) of the LMO, upon determination of a violation, the Town “shall deliver to the person responsible for the violation, a written notice of violation(s).” Subsection C(3) also confirms written notice must be sent “to any other person responsible for the violations.” It is this notice that triggers the obligation to appeal within fourteen (14) days of notice of the decision under § 16-8-305 of the LMO. As Enmark was never sent the August 8, 2013 letter which Carolina asserts is a final determination by the LMO Official, it could not timely appeal same and thus it did not fail to exhaust its administrative remedies. Carolina’s LMO expert witness, Curtis L. Coltrane, testified that since it is clear Enmark received through other means the August 8, 2013 letter, as evidenced by Enmark’s counsel’s e-mail to Ms. Lewis dated August 26, 2013. He testified this “acknowledged receipt” meets the obligations of the Town as to delivering notice of the determination to Enmark. I do not agree with said position for two reasons. First, in two separate provisions of § 16-8-305, cited above, the term “shall” is used, indicating it is a mandatory requirement. This requirement was admittedly not met by the Town and is fatal to Carolina’s argument. In addition, the only evidence of the date of “acknowledged receipt” of the August 8, 2013 letter is Enmark’s counsel’s e-mail to Ms. Lewis, dated August 26, 2013 (Ex. 64). This is sixteen (16) days after the letter was issued, well past the fourteen (14) day appeal period.

57. I find and conclude that Carolina has thus failed to pursue all administrative remedies available to it and the drastic remedy of a mandamus as a matter of law is not available.

58. For all of these reasons, the remedy of a Mandamus requiring the removal of the Roadway is not appropriate and is denied.

4. Plaintiff Did Not Prove a Slander of Title

59. “[T]o maintain a claim for slander of title, the plaintiff must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff’s title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties.” *Huff v. Jennings*, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct.App. 1995). “Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff’s rights.” *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994); *see also Solley v. Navy Federal Credit Union, Inc.*, 397 S. C. 192, 204, 723 S. E. 2d 597, 603 (Ct.App. 2012). Carolina cannot meet any of these elements. Carolina asserts through the August 26, 2013 e-mail from Enmark’s counsel (Ex. 64) and its counsel’s April 30, 2014 letter (Ex. 66), Enmark slandered its title by asserting easement rights or making other statements as to the Roadway. A review of the requisite elements of this claim find Carolina has failed to meet its burden of proof on this cause of action.

A. No False Statement

60. As discussed above, this Court has found and concluded that in fact Enmark does have easement rights over the Roadway. Thus, this cause of action fails since any assertion Enmark holds easement rights over the Roadway is true.

B. No Publication of a False Statement to a Third Party

61. In addition, I find there was no publication of a false statement to a third party by Enmark. In most, if not all, of the reported decisions involving slander of title, a defendant has recorded a lien, deed, mortgage, or some other claim of title at the courthouse. In the subject case, Enmark recorded no document at the courthouse asserting it held title to the Roadway other than filing Counterclaims seeking a Declaratory Judgment in this litigation. Pursuant to an

agreement of the parties dated July 24, 2013 (Ex. 62) the parties entered a "Tolling Agreement" which expressly provided Carolina would file a declaratory judgment action to determine title and rights in the Roadway. Carolina agreed during the pendency of the litigation "not to take any action to close or impede traffic on the Roadway." When Carolina, asserted by Enmark to be violative of the terms of the Tolling Agreement, contacted the Town of Hilton Head to request it close the Roadway, Enmark's counsel communicated to the Town in writing on two (2) occasions.

62. By e-mail of August 26, 2013 (Ex. 64), Enmark's counsel advised the Town of the Tolling Agreement and the respective claims of the parties to be determined in a declaratory judgment by the Court. Enmark did not assert title to the Roadway- only that there was a dispute to same to be resolved by the Court. Additional information in Paragraph 3 of said e-mail was clearly provided as a statement of opinion – not a statement of facts ("As we discussed, my client believes ..."). Mere statements of opinion do not constitute an actionable representation. *Gilbert v. Mid-South Machinery Co. Inc.*, 267 S.C. 211, 220, 227 S.E.2d 189, 193 (1976). Said paragraph reads as follows:

"As we discussed, my client believes this driveway was built prior to the incorporation of the Town in 1983, and certainly prior to the passage of the LMO in 1987. I've attached Plat Book 38 Page 53, dated February 11, 1974 which shows the existence of this roadway. I've talked to numerous individuals who have lived on the island for the last 30+ years and they all have confirmed the existence of this roadway for a very long period of time. I have lived on the island for over 29 years and the driveway has been in existence the entire time I have been on the island. In addition, we have reviewed various aerial photographs which show the existence of this roadway." (emphasis added)

63. Carolina's primary argument that this e-mail is a false statement derogatory to its title is the erroneous reference to PB 38 P 53 being dated February 11, 1974. Upon obtaining a more legible copy of this admittedly hard-to-read document, it is actually dated November 1,

1989. Facts readily apparent from either reading the document or from reviewing same directly from the public records cannot support a false representation claim. *Robertson v. First Union National Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (2002); *Schnellmann v. Roettger*, 368 S.C. 17, 21, 627 S.E.2d 742, 745 (Ct.App. 2007). The Town, Carolina or any other party, could have easily confirmed the date of this document since it was a recorded plat. Further, the evidence is clear from the testimony of Ms. Lewis and Ex. 81 that when the Town was advised of the correct recording date of the plat at a subsequent meeting between all parties, the Town did not alter its position as to the Roadway after said meeting. I find there is no false statement that is derogatory to Plaintiff's title in this document for the reasons discussed above.

64. As Carolina continued its efforts, asserted by Enmark to be violative of the Tolling Agreement, to have the Town close the Roadway, Enmark's counsel again wrote the Town on April 30, 2014 (Ex. 69), providing to the Town an update on the ongoing litigation. Said letter clearly provided it would be up to the Court to determine the respective rights of the parties. This letter is simply a summary of the two opposing parties' position as to the Roadway, which was at that time in litigation. Enmark's counsel stated "[o]n behalf of Enmark, I have asserted that my client has a prescriptive easement and met all applicable regulatory requests at the time it was constructed." The letter concludes it will be up to the Court to determine the disputed issues. I find this letter meets none of the required elements for a slander of title claim since there is no false statements derogatory to Carolina's title. These two communications are simply not sufficient to show a publication of a "false" claim of ownership in the Roadway. There is no other evidence of any other publication to a third party.

65. When the Court raised questions on this issue at trial, Carolina asserted there were "misrepresentations" in the 1984 permitting of the Chevron Station, a failure to obtain Sea Pines

Architectural Review Board approval of the construction of the Roadway, and similar actions related directly to the original permitting and construction of the Chevron Station and Roadway. None of these actions were conducted by Enmark. In addition, they do not constitute false statements as to Carolina's title. There was absolutely no evidence of a false representation as to the title to Carolina's property by Enmark. Carolina has failed to meet the elements of this cause of action.

C. No Malice

66. "Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff's rights." *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994). "[M]alice merely means a lack of legal justification and is to be presumed if the disparagement is false, if it caused damage, and if it is not privileged." *Home Invs. Fund v. Robertson*, 295 N.E.2d 85, 87 (1973).

67. I find that Enmark never acted maliciously in this matter. It filed no documents at the courthouse claiming title, and entered into the Tolling Agreement directing that the parties seek a declaratory judgment by the court. The evidence at trial showed the Roadway has been in use and existence since 1984 – well over 32 years. I find no malice on behalf of Enmark in asserting its rights over a Roadway with such a long-standing use in the same location and used for the same purpose for that extraordinary length of time. I find that the erroneous date referenced by Enmark's counsel to a recorded plat in Exhibit 64 in an e-mail was a simple mistake due to the legibility of the document, and was not made recklessly, wantonly or with conscious disregard of Carolina's rights.

D. No Damage to Carolina

68. In addition to the above, no publication of a false statement by Enmark caused Carolina any damages – special or otherwise. Carolina provided no competent, compelling evidence on this issue. This is true since the Roadway was in existence and taken into consideration in the purchase price Carolina paid when it acquired said property. (See: Ex. 15 – Deed, listing as an exception PB 38 P 53 (Ex. 21), showing the Roadway on recorded page 1278, Exception D). In addition, after an extensive face-to-face meeting with Carolina, its litigation counsel, and Chester C. Williams, Esquire, its LMO expert, the Town did not change its position as to an LMO violation. There simply is no competent evidence of a diminished value of Carolina’s property in the eyes of a third party.

E. Carolina is not Entitled to Recovery of any Attorney Fees

69. Finally, Carolina is seeking litigation costs as a form of “special damages” under its slander of title cause of action. *See Solley v. Navy Federal Credit Union, Inc.*, 397 S. C. 192, 211, 723 S.E. 2d 597, 607 (Ct.App. 2012). Assuming, *arguendo*, Carolina met all the requirements of this cause of action, as this Court has already ruled at trial, Carolina did not specifically include in its Amended Complaint, dated November 19, 2014 (or its two prior Complaints), a request for attorney fees under this cause of action – or any other cause of action. Special damages not properly plead are not recoverable under long-standing South Carolina law. *SCRCP Rule 9(g); AJG Holdings, LLC. v. Dunn*, 392 S. C. 160, 168, 708 S. E. 2d 218, 223 (Ct.App. 2011). No change of this ruling is needed and testimony as to attorney fees and costs was not admitted for this reason. Having found Carolina did not meet the required elements of this claim, it obviously is not entitled to recover attorney fees and costs in any event.

5. Carolina Has Not Proven a Nuisance

70. The traditional concept of private nuisance requires Carolina to demonstrate that Enmark unreasonably interfered with the ownership or possession of its land. *Ravan v. Greenville County*, 315 S.C. 447, 464, 434 S.E.2d 296, 306 (Ct.App. 1993). A nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property. *Id.* It is anything which hurts, inconveniences, or damages or anything which essentially interferes with the enjoyment of life or property. *Strong v. Winn-Dixie Stores, Inc.*, 240 S.C. 244, 253, 125 S.E.2d 628, 632 (1962). This cause of action fails as the Court has recognized the easements rights asserted by Enmark, and thus no nuisance claim can exist.

71. Even if Enmark's easement rights were not recognized, I find and conclude this cause of action fails. The Roadway has been in continuous use for over 32 years in the same location and in the same manner. When Carolina purchased its property in October 31, 1996 from Sea Pines, the deed (Ex. 15) and Contract of Sale (Ex. 46) specifically listed as an exception to the title Plat Book 38 at Page 53 (Ex. 21), which clearly indicated the existence of the paved Roadway. Carolina completed substantial due diligence prior to its purchase. Mr. Viswanathan, a longtime resident of Hilton Head and experienced real estate investor, surely would have been aware of the existence and use of the Roadway, since it was obvious to anyone, even on a cursory examination, although he testified "he really didn't look at the back of the property prior to closing." In addition, Mr. Viswanathan holds an undergraduate and graduate's engineering degrees, as well as an MBA. This Court finds that he is an extremely experienced, savvy, successful commercial real estate developer. His testimony that he was not aware of the existence of the Roadway at the Chevron Station used by many, many people, which was across the street from where he worked, and was adjacent to the main road to his house in Sea Pines is simply not credible to the Court. It is clear Carolina purchased the property with the full

knowledge of the existence and use of the Roadway and the price of the property it paid took into consideration the Roadway. Its continued use was no surprise and was not an unreasonable use of the property.

72. Finally, I find and conclude there is no compelling evidence that the use of the Roadway has damaged Carolina. Thus, I find even if a nuisance was proven, no damages should be awarded to Carolina.

6. Carolina Has Not Proven a Trespass

73. A trespass is any interference with "one's right to the exclusive, peaceable possession of his property." *Ravan* at 463, S.E.2d at 306. For the same reasons as discussed above as to the nuisance, I find and conclude there is no trespass since Enmark has easement rights over the Roadway. Even if said rights are not recognized, no damages should be awarded under this claim as there is no evidence of any recoverable damages resulting from the use of the Roadway, Carolina took title and possession with the full knowledge of the existence and use of the Roadway.

It is therefore Ordered, Adjudged and Decreed as follows:

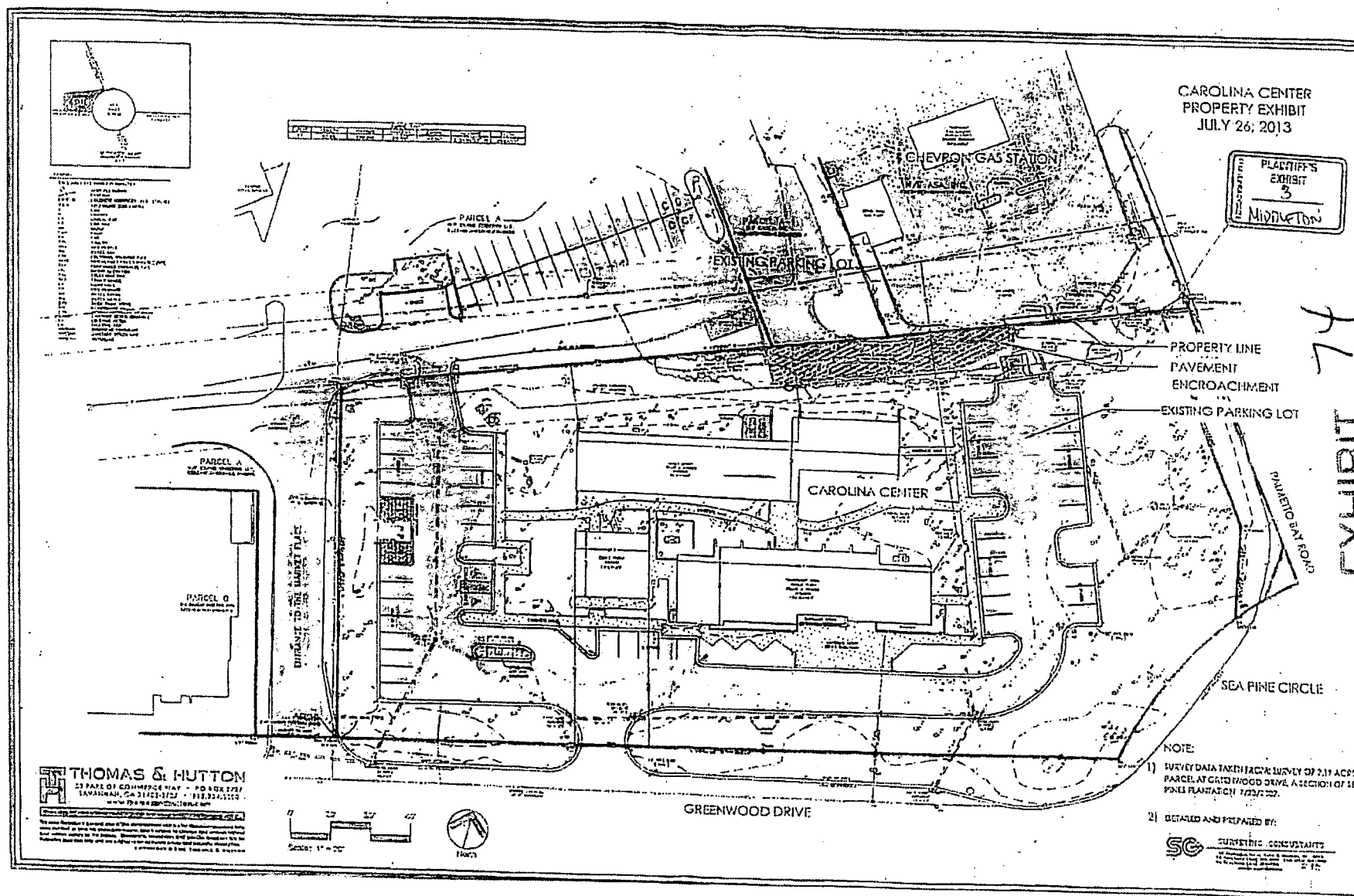
1. That Enmark, its successors and assigns, has a prescriptive easement for ingress and egress over the Roadway.
2. That Carolina cannot close said Roadway, or take any action to obstruct or divert Enmark, or its guests and invitees, from using the Roadway.
3. That Enmark shall be responsible for the continued maintenance and repair to said Roadway.
4. That Carolina's causes of action for slander of title, trespass and nuisance are dismissed, with prejudice.

5. That Carolina's request for a mandamus is denied.
6. Each party shall be responsible for their own attorney fees and costs.

AND IT IS SO ORDERED.

Marvin H. Dukes, III
Beaufort County Master in Equity

Beaufort, South Carolina
_____, 2017





Beaufort Common Pleas

Case Caption: Carolina Center Building Corp VS Enmark Stations Inc , defendant,
et al
Case Number: 2013CP0702066
Type: Master/Order/Other

So Ordered:

s/Marvin H. Dukes III #3069

Electronically signed on 2017-03-29 13:53:23 page 35 of 35

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STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

) CASE NO: 2013CP0702066

Carolina Center Building Corp

)
)
) Plaintiff(s)

ORDER REFERRING NON-JURY
ACTION TO THE BEAUFORT
COUNTY MASTER IN EQUITY

vs.

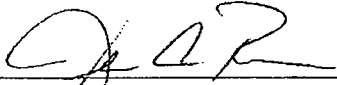
Enmark Stations Inc

)
)
) Defendant(s)

2015 NOV 30 PM 1:02
JERRI ROSENEAU
CLERK OF COURT
BEAUFORT COUNTY, S.C.

Pursuant to an Order of the South Carolina Supreme Court this Non-Jury matter is now referred to the Beaufort County Master in Equity with Finality. The Plaintiff is responsible for paying the Reference Fee pursuant to South Carolina Code of Laws Section 14-11-310. (\$100.00 for Partition Actions and Foreclosures and \$50.00 for all other cases); **however, if the Plaintiff's case is over, any remaining party seeking Affirmative Relief will be responsible for paying the fee.** The Reference Fee shall be paid within 45 days from the date this Order is signed or the Master will dismiss the case for non-payment of the Reference Fee.

IT IS SO ORDERED:



Jerri Roseneau
Beaufort County Clerk of Court

Dated: 11-30-15
Beaufort, South Carolina

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-07-02066

CAROLINA CENTER BUILDING CORP

ENMARK STATION INC, ET AL.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

THIS CAME BEFORE ME ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, FILED 10/1/2014. AFTER HEARING FROM PARTIES, I HEREBY DENY THE MOTION EXCEPT AS IT PERTAINS TO DEFENDANT ENMARK'S COUNTERCLAIM FOR EXPRESS EASEMENT. AS TO EXPRESS EASEMENT, THE MOTION IS GRANTED.

ORDER INFORMATION

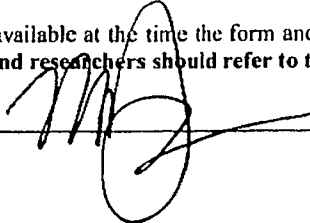
This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

3069
Judge Code

10/23/15
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

H. FRED KUHN

RUSSELL P. PATTERSON
GREG M. ALFORD

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

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STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

CAROLINA CENTER BUILDING)
CORP.,)

Plaintiff,)

v.)

ENMARK STATIONS, INC.)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION FILE NO. 2013-CP-07- 02006

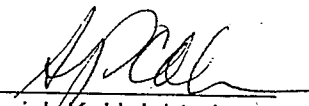
SUMMONS
(Non-Jury)

2013 AUG 15 AM 10:34
JERRI ANN ROSENBAUM
BEAUFORT COUNTY, S.C.
CLERK OF COURT

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber at his office, 1000 William Hilton Parkway, The Clarendon Building, Suite 203, Village at Wexford, Post Office Drawer 6067, Hilton Head Island, South Carolina 29938, within thirty (30) days after the service hereof, exclusive of the day of such service, AND IF YOU FAIL TO APPEAR AND DEFEND THE ACTION AS REQUIRED BY LAW, JUDGMENT BY DEFAULT WILL BE RENDERED AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

MINOR, HAIGHT & ARUNDELL, P.C.

By: 

Ehrick K. Haight, Jr.
Stacey S. Collins
P. O. Drawer 6067
Hilton Head Island, SC 29938
(843) 785-8040
Attorneys for Plaintiff

Hilton Head Island, South Carolina
This 14 day of August, 2013.

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STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

CAROLINA CENTER BUILDING)
CORP.,)

Plaintiff,)

v.)

ENMARK STATIONS, INC.)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION FILE NO. 2013-CP-07- 02066

COMPLAINT
(Non-Jury)

2013 AUG 15 AM 10:38
JERRI ANN ROSENEA
BEAUFORT COUNTY, S.C.
CLERK OF COURT

TO: THE DEFENDANT ABOVE-NAMED:

The Plaintiff, Carolina Center Building Corp. (hereinafter referred to as "Carolina Center"), pursuant to S.C. Code Ann. §15-53-10, et seq. (2005) and Rule 57, SCRCP, complaining of the Defendant, Enmark Stations, Inc. (hereinafter referred to as "Enmark"), would respectfully show this Court as follows:

FIRST CAUSE OF ACTION

(No Express Easement)

1. That the Plaintiff, Carolina Center, is a corporation organized and existing under the laws of the State of South Carolina, which owns that certain real property in Beaufort County, South Carolina having an address of 2 Greenwood Drive, Hilton Head Island (hereinafter referred to as the "Subject Property"), and is subject to the jurisdiction of this court.

2. That the Defendant, Enmark, is a Georgia corporation registered to do business in the State of South Carolina, and which owns real property in Beaufort County, South Carolina having an address of 3 Palmetto Bay Road, Hilton Head Island (hereinafter referred to as the "Gas Station") and is subject to the jurisdiction of this court.

3. That Carolina Center acquired the Subject Property by way of Deed from Sea Pines Company, Inc. dated October 31, 1996, recorded on December 31, 1996, in the Office

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of the Register of Deeds for Beaufort County, in Deed Book 911, Page 1274, a true and correct copy of which is attached hereto and incorporated herein as Exhibit "A".

4. That Enmark acquired the Gas Station by way of deed from ASA, Inc. dated March 19, 2009, recorded on March 20, 2009, in the Office of the Register of Deeds for Beaufort County, in Deed Book 2822, Page 1941, a true and correct copy of which is attached hereto and incorporated herein as Exhibit "B", which deed does not contain any reference to an easement over the Subject Property.

5. That the general public intermittently crossed over an unimproved section of the Subject Property, situated adjacent to the Gas Station, which over time became a dirt track to and from an adjacent shopping center, now or formerly known as, Market Place Shopping Center, to the Gas Station (hereinafter referred to as the "Encroachment").

6. Upon information and belief, that certain "As-Built Survey" of 2.26 Acres, Job Number 19,070, depicting Sea Pines Reception Center, prepared by Coastal Surveying Engineering Co, Inc. for Fogelman Properties, dated November 1, 1989, and recorded on March 9, 1990, in the Office of the Clerk of Court for Beaufort County, South Carolina in Plat Book 38, Page 53 (hereinafter referred to as the "1989 As Built Survey"), a true and correct copy of which is attached hereto as Exhibit "C", was the first survey to show the Encroachment.

7. That the 1989 As Built Survey does not identify any associated easement with the Encroachment.

8. That a survey, prepared by Metro Engineering and Surveying Co., Inc. for Chevron U.S.A. (Defendant, Enmark's predecessor in title), bearing Job No. 92-8437, and dated October 20, 1992, a true and correct copy of which is attached hereto as Exhibit "D" and incorporated herein by reference, does not show any easement associated with the Encroachment, nor does it depict the Encroachment with any specificity in its rendering of the Gas Station property.

9. That by way of letter dated June 15, 1994, from Cary S. Griffin, Esq., then counsel for Carolina Center, to John L. Wilson, Esq., then counsel for ASA, Inc. (a predecessor in title to

Defendant, Enmark), a true and correct copy of said letter (without attachments) is attached hereto as Exhibit "E" and made a part hereof by reference (hereinafter, the "Initial Demand Letter"), Carolina Center demanded the removal of the Encroachment.

10. That by way of a reply letter dated June 23, 1994, from John Wilson, Esq. to Cary S. Griffin, Esq., a true and correct copy of which is attached hereto and incorporated herein as Exhibit "F" (hereinafter, the "Notice Letter"), ASA, Inc. claimed it had an express easement over the Subject Property.

11. That said Notice Letter was the first indication that ASA, Inc. claimed an express easement with respect to the Encroachment and was the first notice of any kind regarding an adverse claim of right to the use thereof.

12. That the easement agreement referred to in said Notice Letter is, in fact, that certain Relocation of Easement Agreement by and between Sea Pines Plantation Company, Inc. and Central Electric Power Cooperative, Inc. dated May 15, 1973, and recorded in the Office of the Register of Deeds for Beaufort County in Deed Book 210, Page 1065 (hereinafter, the "Relocation Agreement"), which is incorporated herein by reference, a copy of which is included in Exhibit "F" attached hereto.

13. That said Relocation Agreement was a mere reservation of rights in favor of Sea Pines Plantation Company and did not establish an express easement over the Subject Property in favor of Sea Pines Plantation Company's successors in interest, including the Defendant, Enmark.

14. That Carolina Center is entitled to a declaration that no express easement exists in favor of Enmark.

SECOND CAUSE OF ACTION

(No Prescriptive Easement)

15. Plaintiff re-alleges Paragraphs 1-14 above as if repeated verbatim.

16. That any use made of the Encroachment after the Initial Demand Letter was done permissively and not under any adverse claim of right or adverse use and therefore such use can not attain to a prescriptive easement.

17. That any use by ASA, Inc. and/or Enmark was not continuous in nature because such use was abandoned when the asphalt over the Encroachment was not maintained and was allowed to deteriorate following Carolina Center's acquisition of the Subject Property, as evidenced by that certain letter dated August 30, 2007, from Carolina Center to Mr. David Oliver of Stafford Properties discussing a dirt encroachment, a true and correct copy of which (without enclosures) is attached hereto as Exhibit "G".

18. That ASA, Inc., Enmark's predecessor in title, failed to make a distinct and positive assertion of a right hostile to Carolina Center prior to being contacted by Carolina Center regarding its intent to redevelop and/or improve the Subject Property and receiving that certain Conceptual Site Plan prepared for Carolina Center by Atlantic International dated February 12, 2008 bearing Project No. 20720-001 (hereinafter, referred to as the "Site Plan"), a copy of which is attached hereto as Exhibit "H" and incorporated herein by reference.

19. That the first distinct and positive assertion of a right hostile to Carolina Center predicated on adverse use by ASA, Inc. was made by way of letter dated June 2, 2008 from ASA, Inc.'s counsel John L. Wilson, Esq. to Carolina Center's President, Kumar Viswanathan (hereinafter referred to as the "Notice of Prescriptive Claim"). A true and correct copy of said Notice of Prescriptive Claim is attached hereto as Exhibit "I" and incorporated herein by reference.

20. That to the extent Enmark's predecessor, ASA, Inc. claimed an adverse right to use the Encroachment, such adverse use was subsequently interrupted by Carolina Center by way of letter dated September 15, 2008, from Robert J. Arundell, Esq., counsel for Carolina Center, to John L. Wilson, Esq., demanding that the Encroachment must be removed (hereinafter, the "Second Demand"). A true and correct copy of said letter is attached hereto as Exhibit "J" and incorporated herein by reference.

21. By way of certified letter dated October 29, 2012, from Robert J. Arundell, Esq. to Enmark, Carolina Center again demanded closure of the Encroachment (hereinafter, the "Third Demand"). A true and correct copy of the Third Demand letter is attached hereto as Exhibit "K" and incorporated herein by reference.

22. That Enmark has declined to remove same.

23. That neither Enmark, nor its predecessor ASA, Inc., maintained continued and uninterrupted adverse use of the Encroachment for twenty years.

24. That Carolina Center is entitled to a declaration that no prescriptive easement exists.

THIRD CAUSE OF ACTION

(REMOVAL OF ILLEGAL ENCROACHMENT)

25. Plaintiff re-alleges Paragraphs 1-24 above as if repeated verbatim.

26. That neither Enmark, nor its predecessors in title, ever obtained a permit for the installation of the asphalt over the Encroachment.

27. That the Encroachment is not, and never has been, sufficient to meet the construction standards imposed by the Town of Hilton Head Island or other governing authority having jurisdiction over the construction of same.

28. That by letter dated August 8, 2013, the Town of Hilton Head Island has demanded that Carolina Center remove the asphalt and restore a vegetative buffer between the Subject Property and the Gas Station. A true and correct copy of said letter is attached hereto as Exhibit "L".

29. No adequate remedy at law exists for the removal of the illegal Encroachment.

30. That Carolina Center is entitled to have the Encroachment closed and the asphalt removed at Enmark's expense.

31. That Carolina Center is entitled to a declaration that no easement exists by virtue of Enmark's illegal use of the Encroachment and further that Enmark is responsible for preventing

any further illegal trespass over the Subject Property by its patrons and the general public utilizing Enmark's property to gain access over and across the Subject Property.

32. That Enmark should be required to take reasonable preventative measures to prevent such trespass by installing curbing along its parking area.

ALTERNATIVE FOURTH CAUSE OF ACTION

(RELOCATION AND COMPLIANCE)

33. Plaintiff re-alleges Paragraphs 1-32 above as if repeated verbatim.

34. That in the event it is found that Enmark does have an easement, express or otherwise, which Carolina Center expressly denies, such easement is indefinite as to its location and scope.

35. That in the event an easement, prescriptive or otherwise, is found to exist, which Carolina Center expressly denies, Carolina Center is entitled to a declaration that the Encroachment, the current location of which is depicted in Exhibit "M" attached hereto and incorporated herein by reference, is indefinite in scope and location and not in compliance with the Town of Hilton Head Island's land management ordinance governing the construction and installation of such roadways.

36. That in the event it is found that Enmark does have an easement, express or otherwise, which Carolina Center expressly denies, Carolina Center, as the owner of the servient estate, is entitled to make reasonable changes in the location and dimension of such easement unilaterally.

37. That because the asphalt over the Encroachment was installed without a permit and was not, at the time of its installation, nor is it now in compliance with the applicable construction standards imposed by the Town of Hilton Head Island, or other governing authority having jurisdiction over the construction thereof, Carolina Center is entitled to have the costs of any

such changes assessed against Enmark.

WHEREFORE, the Plaintiff, Carolina Center, respectfully requests that the court inquire into the matters set forth herein and award the following relief:

- a. For the entry of an order in favor of Plaintiff, Carolina Center, and against Defendant, Enmark, declaring that no easement (express, prescriptive, or otherwise) exists over or across the Subject Property in favor of the Defendant, Enmark;
- b. For the entry of an order in favor of Plaintiff, Carolina Center, and against Defendant, declaring that no easement exists by virtue of Enmark's illegal use of the Encroachment and further directing Defendant, Enmark, to remove the asphalt Encroachment and to place a curb along its property to deter the use by the general public of the illicit cut-through; and
- c. Should this court find that an easement, express or otherwise, does exist in favor of the Defendant, Enmark (which Plaintiff, Carolina Center expressly denies), then for an order permitting the Plaintiff, Carolina Center, to make reasonable changes in the location or dimension of such easement, and to assess the costs associated therewith against the Defendant, Enmark; and
- d. For such other and further relief in favor of the Plaintiff, Carolina Center, as the court deems just and appropriate.

MINOR, HAIGHT & ARUNDELL, P.C.

By: 

Ehrick K. Haight, Jr.
Stacey S. Collins
P. O. Drawer 6067
Hilton Head Island, SC 29938
(843) 785-8040
Attorneys for Plaintiff

Hilton Head Island, South Carolina
This 14th day of August, 2013.

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STATE OF SOUTH CAROLINA)
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COUNTY OF BEAUFORT)
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CAROLINA CENTER BUILDING CORP.,)
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Plaintiff,)
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vs.)
)
ENMARK STATIONS, INC.,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL COURT
CIVIL ACTION NO.: 2013-CP-07-2066

DEFENDANT'S ANSWER
AND COUNTERCLAIMS

13 SEP 13 PM 3:48
CLERK OF COURT
BEAUFORT COUNTY, S.C.

TO: THE PLAINTIFF, CAROLINA CENTER BUILDING CORP., AND ITS
ATTORNEY, EHRICK K. HAIGHT, JR.:

The Defendant, Enmark Stations, Inc. ("Enmark" or "Defendant"), hereby responds to the Plaintiff's Complaint dated August 14, 2013, and asserts the Counterclaims listed below, as follows:

FOR A FIRST DEFENSE
(General Denial)

1. That the Defendant, Enmark, denies each and every allegation contained in the Plaintiff's Complaint not hereinafter admitted, qualified or explained.
2. That the Defendant, Enmark, lacks sufficient information upon which to form an opinion as to the truth or falsity of the allegations of paragraphs 1, 3, 26, and 27 of the Plaintiff's Complaint, and therefore denies same.
3. That the Defendant, Enmark, admits the allegations of paragraphs 2 and 22 of the Plaintiff's Complaint.
4. That the Defendant, Enmark, denies the allegations of paragraphs 11, 13, 14, 16, 17, 18, 19, 20, 23, 24, 29, 30, 31, 32, 34, 35, 36, and 37.

5. That as to the allegations of paragraph 4, Enmark would admit it acquired title by the deed from ASA recorded in Book 2822 at Page 1941, but would deny the remaining allegations of said paragraph.

6. That as to the allegation of paragraph 5, the Defendant would admit that the general public, and others, have used the subject roadway, as delineated on Ex. M to the Plaintiff's Complaint ("Roadway") for a substantial period of time. Any allegation of paragraph 5 inconsistent with said assertion is denied.

7. That as to the allegation of paragraph 6, the Defendant would admit that the 1989 as-built survey is recorded at Plat Book 38 at Page 53, but would deny that this is the first survey to show the Encroachment or the Roadway.

8. That as to the allegation of paragraph 7, the Defendant would deny that the 1989 as-built survey does not identify any associated easement with the Encroachment.

9. That as to the allegation of paragraph 8, the Defendant would deny that Chevron USA is a party in the chain of title. The Defendant further lacks sufficient information upon which to form an opinion as to the truth or falsity of the allegations of paragraph 8 which state that Exhibit B is a survey prepared by Chevron USA. Further, the Defendant would deny that said survey does not show the Encroachment or the subject Roadway.

10. That as to the allegation of paragraph 9, the Defendant would admit upon information and belief that Exhibit E appears to be a letter from Cary S. Griffin to John Wilson dated June 15, 1995. As to the statements contained in said letter, the Defendant would direct the parties' and the Court's attention to the express terms thereof. Any allegation inconsistent with the above is denied.

11. That as to the allegation of paragraph 10, the Defendant, Enmark, upon information and belief, would admit that attached as Exhibit F appears to be a letter from John Wilson to Cary Griffin dated June 23, 1994. That as to the statements contained in said letter, the Defendant, Enmark, would direct the parties' and the Court's attention to the express terms and provisions of said letter. Any allegation inconsistent with same is denied.

12. That as to the allegation of paragraph 12, the Defendant would admit that recorded at Deed Book 210 at Page 1065 is the document which is attached as Exhibit F to the Plaintiff's Complaint. All other allegations contained in paragraph 12 are denied.

13. That the Defendant is informed and believes that no response is necessary to the allegations of paragraphs 15, 25 or 33. If a response is necessary, said allegations are denied.

14. That as to the allegations of paragraph 21 of the Plaintiff's Complaint, the Defendant, Enmark, upon information and belief, would admit that attached as Exhibit K appears to be a copy of a letter dated October 29, 2012 from Robert J. Arundell. As to the statements contained in said letter, the Defendant, Enmark, would direct the parties' and the Court's attention to the express terms thereof. Any allegation inconsistent with the above is denied.

15. That as to the allegations of paragraph 28, the Defendant would admit that attached as Exhibit L, upon information and belief, is a letter dated August 8, 2013 from the Town of Hilton Head. As to the statements contained in said letter, the Defendant, Enmark, would direct the parties' and the Court's attention to the express terms and provisions thereof. Any allegation inconsistent with the above is denied.

FOR A SECOND DEFENSE
(Failure to State a Cause of Action)

16. That the Defendant, Enmark, repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 15 above.

17. That the various claims and allegations asserted by the Plaintiff fail or insufficiently state valid causes of action under South Carolina law and should therefore be dismissed.

FOR A THIRD DEFENSE
(Waiver, Estoppel, Laches, Acquiescence)

18. That the Defendant, Enmark, repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 17 above.

19. That the Plaintiff, prior to and after the time of its purchase of the Carolina Center on October 31, 1996 (Deed Book 911 at Page 1274), had knowledge of and was aware of the existence of the Roadway providing ingress and egress to the Defendant's service station.

20. That since 1996, the Plaintiff has not taken any substantive steps to remove, block or prevent the use of said Roadway by the guests, invitees and patrons of the Defendant's service station.

21. That as a result of said actions or inactions over the course of over seventeen (17) years of continuous ownership, the Plaintiff is barred by the equitable doctrine of estoppel, laches, acquiescence, and waiver from asserting the claims asserted in the Complaint.

FOR A FOURTH DEFENSE
(Statute of Limitations)

22. That the Defendant, Enmark, repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 21 above.

23. That the Plaintiff's claims are barred by the applicable South Carolina Statute of Limitations.

**FOR A FIFTH DEFENSE
AND AS A FIRST COUNTERCLAIM
(Declaratory Judgment – Prescriptive Easement)**

24. That the Defendant, Enmark, repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 23 above.

25. That this counterclaim is filed pursuant to the South Carolina Declaratory Judgment Action (§ 15-53-10, et. seq. of the SC Code of Laws (1976)) and Rule 57, SCRPC.

26. That there is a justifiable dispute or controversy between the Plaintiff and the Defendant as to the rights, title, and interest of the two parties as to the Roadway, as depicted on Exhibit M to the Plaintiff's Complaint.

27. That the Defendant, Enmark, is informed and believes that it has the right to continue to use, maintain and have free, unfettered access to said Roadway for ingress and egress in perpetuity, for both itself and its guests, invitees and patrons, based upon a prescriptive easement, based upon the following:

28. That the Defendant, Enmark, as well as other parties in privity with same and in the chain of title, have continued an uninterrupted use of the Roadway for ingress and egress for a period in excess of twenty (20) years;

29. That the Roadway has been used for such purposes in excess of twenty (20) years, in the general location as depicted on Exhibit M to the Plaintiff's Complaint, providing ingress and egress to the rear, or southern portion of the Plaintiff's service station;

30. Said use is either adverse, or pursuant to a claim of right;

31. That said use of the Roadway has been open, notorious, continuous, and uninterrupted for a period in excess of twenty (20) years.

32. That the Defendant, Enmark, is entitled to an Order of the Court that it holds the perpetual right to continue to use and maintain the Roadway under a prescriptive easement.

**FOR A SIXTH DEFENSE
AND AS A SECOND COUNTERCLAIM
(Declaratory Judgment – Easement by Express Grant)**

33. That the Defendant, Enmark, repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 32 above.

34. That if it is determined that the Defendant, Enmark, does not have easement rights under a prescriptive easement, that it is entitled to continue to use and maintain the Roadway in perpetuity under an express easement pursuant to the rights granted to it, and other parties in its chain of title, under that certain Easement dated December 19, 1960, recorded at Book 105 at Page 101 at the Beaufort County Register of Deeds (“ROD”), that certain Relocation of Easement Agreement, dated May 15, 1973, recorded at Book 210 at Page 1065, as well as other documents in the chain of title to the Plaintiff’s and Defendant’s respective properties.

35. That the Defendant, Enmark, is entitled to an Order of the Court that it held the perpetual right to continue to use and maintain the Roadway under an express easement.

**FOR A SEVENTH DEFENSE
AND AS A THIRD COUNTERCLAIM
(Declaratory Judgment – Easement by Estoppel,
Acquiescence, Implied Reservation)**

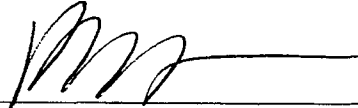
36. That the Defendant, Enmark, repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 35 above.

37. That the Defendant, Enmark, as a result of the actions and inactions of the Plaintiff, and parties in its chain of title, is entitled to an Order from this Court finding it has a perpetual right to continue to use and maintain the Roadway based upon Estoppel, Acquiescence or implied reservation.

WHEREFORE, the Defendant, Enmark, prays for an Order as follows:

1. To dismiss the Plaintiff's Causes of Action.
2. For an Order confirming the rights of the Defendant, Enmark, to use and maintain in perpetuity the Roadway, to provide ingress and egress to the rear or southern portion of its property, either under a prescriptive easement, express easement, estoppel, acquiescence and/or implied reservation.
3. For such other and further relief as this Court deems just and proper.

RUSSELL P. PATTERSON, P.A.



Russell P. Patterson
P.O. Drawer 8047
Hilton Head Island, SC 29938
(843) 341-9300
russell@russellpattersonlaw.com
Attorney for the Defendant,
Enmark Stations, Inc.

Hilton Head Island, South Carolina
September 17, 2013

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

CASE NO.: 2013-CP-07-02066

CAROLINA CENTER BUILDING
CORP.,)

Plaintiff,)

AMENDED SUMMONS)

vs.)

ENMARK STATIONS, INC. and
TOWN OF HILTON HEAD,)

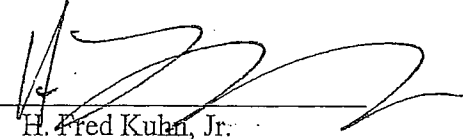
Defendants.)

2014 NOV 19 PM 3:55
JAMAR ROSEHEAD
CLERK OF COURT
BEAUFORT COUNTY, S.C.

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to Answer the Amended Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer upon the subscribed at his office, Post Office Drawer 507/1501 North Street, Beaufort, South Carolina 29901, within thirty (30) days from the service hereof, exclusive of the day of such service; and if you fail to Answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded.

MOSS, KUHNS & FLEMING, P.A.

By: 

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373
(843)524-1302 – facsimile

Attorneys for the Plaintiff

Beaufort, South Carolina
November 19, 2014

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CASE NO.: 2013-CP-07-02066

CAROLINA CENTER BUILDING
CORP.,

Plaintiff,

vs.

ENMARK STATIONS, INC. and
TOWN OF HILTON HEAD,

Defendants.

AMENDED COMPLAINT

2014 NOV 19 PM 3:55
JIM ROSEHEAD
CLERK OF COURT
BEAUFORT COUNTY, S.C.

TO: THE DEFENDANTS ABOVE-NAMED:

The Plaintiff, Carolina Center Building Corp. (hereinafter referred to as "Carolina Center"), pursuant to S.C. Code Ann. §15-53-10, et seq. (2005) and Rule 57 SCRCP complaining of the Defendant, Enmark Stations, Inc. (hereinafter referred to as "Enmark") and the Defendant the Town of Hilton Head (hereinafter referred to as the "Town"), would respectfully show this Court as follows:

FIRST CAUSE OF ACTION

(Enmark Defendant – No Express Easement)

1. That the Plaintiff, Carolina Center, is a corporation organized and existing under the laws of the State of South Carolina, which owns that certain real property in Beaufort County, South Carolina having an address of 2 Greenwood Drive, Hilton Head Island (hereinafter referred to as the "Subject Property"), and is subject to the jurisdiction of this Court.
2. The Defendant, Enmark, is a Georgia corporation registered to do business in the State of South Carolina, and which owns real property located in Beaufort County, South

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Carolina having an address of 3 Palmetto Bay Road, Hilton Head Island (hereinafter referred to as the "Gas Station") and is subject to the jurisdiction of this Court.

3. That Carolina Center acquired the Subject Property by way of Deed from Sea Pines Company, Inc. dated October 31, 1996, recorded on December 31, 1996, in the Office of the Register of Deeds for Beaufort County, in Deed Book 911, Page 1274, a true and correct copy of which is attached hereto and incorporated herein as Exhibit "A".

4. That Enmark acquired the Gas Station by way of deed from ASA, Inc. dated March 19, 2009, recorded on March 20, 2009, in the Office of the Register of Deeds for Beaufort County, in Deed Book 2822, Page 1941, a true and correct copy of which is attached hereto and incorporated herein as Exhibit "B", which deed does not contain any reference to an easement over the Subject Property.

5. That the general public intermittently crossed over an unimproved section of the Subject Property, situated adjacent to the Gas Station, which over time became a dirt track to and from an adjacent shopping center, now or formerly known as, Market Place Shopping Center, to the Gas Station (hereinafter referred to as the "Encroachment").

6. Upon information and belief, that certain "As-Built Survey" of 2.26 Acres, Job Number 19,070, depicting Sea Pines Reception Center, prepared by Coastal Surveying Engineering Co., Inc. for Fogelman Properties, dated November 1, 1989, and recorded on March 9, 1990, in the Office of the Clerk of Court for Beaufort County, South Carolina in Plat Book 38, Page 53 (hereinafter referred to as the "1989 As Built Survey"), a true and correct copy of which is attached hereto as Exhibit "C", was the first survey to show the Encroachment.

7. That the 1989 As Built Survey does not identify any associated easement with the Encroachment.

8. That a survey, prepared by Metro Engineering and Surveying Co., Inc. for Chevron U.S.A. (Defendant, Enmark's predecessor in title), bearing Job 92-8437, and dated October 20, 1992, a true and correct copy of which is attached hereto as Exhibit "D" and incorporated herein by reference, does not show any easement associated with the Encroachment, nor does it depict the Encroachment with any specificity in its rendering of the Gas Station property.

9. That by way of letter dated June 15, 1994, from Cary S. Griffin, Esquire, then counsel for Carolina Center, to John L. Wilson, Esquire, then counsel for ASA, Inc. (a predecessor in title to Defendant, Enmark), a true and correct copy of said letter (without attachments) is attached hereto as Exhibit "E" and made a part hereof by reference (hereinafter, the "Initial Demand Letter"), Carolina Center demanded the removal of the Encroachment.

10. That by way of a reply letter dated June 23, 1994, from John Wilson, Esquire to Cary S. Griffin, Esquire, a true and correct copy of which is attached hereto and incorporated herein as Exhibit "F" (hereinafter, the "Notice Letter"), ASA, Inc. claimed it had an express easement over the Subject Property.

11. That said Notice Letter was the first indication that ASA, Inc. claimed an express easement with respect to the Encroachment and was the first notice of any kind regarding an adverse claim of right to use thereof.

12. That the easement agreement referred to in said Notice Letter is, in fact, that certain Relocation of Easement Agreement by and between Sea Pines Plantation Company, Inc. and Central Electric Power Cooperative, Inc. dated May 15, 1973, and recorded in the Office of the Register of Deeds for Beaufort County in Deed Book 210, Page 1065 (hereinafter, the

"Relocation Agreement"), which is incorporated herein by reference, a copy of which is included in Exhibit "F" attached hereto.

13. That said Relocation Agreement was a mere reservation of rights in favor of Sea Pines Plantation Company and did not establish an express easement over the Subject Property in favor of Sea Pines Plantation Company's successors in interest, including the Defendant, Enmark.

14. That Carolina Center is entitled to a declaration that no express easement exists in favor of Enmark.

SECOND CAUSE OF ACTION

(Enmark Defendant – No Prescriptive Easement)

15. Plaintiff re-alleges Paragraphs 1-14 above as if repeated verbatim.

16. That any use made of the Encroachment after the Initial Demand Letter was done permissively and not under any adverse claim or right or adverse use and therefore such use can not attain to a prescriptive easement.

17. That any use by ASA, Inc. and/or Enmark was not continuous in nature because such use was abandoned when the asphalt over the Encroachment was not maintained and was allowed to deteriorate following Carolina Center's acquisition of the Subject Property, as evidenced by that certain demand letter dated August 30, 2007, from Carolina Center to Mr. David Oliver of Stafford Properties discussing a dirt encroachment, a true and accurate copy of which (without enclosures) is attached hereto as Exhibit "G".

18. That ASA, Inc., Enmark's predecessor in title, failed to make a distinct and positive assertion of a right hostile to Carolina Center prior to being contacted by Carolina Center regarding its intent to redevelop and/or improve the Subject Property and receiving that

certain Conceptual Site Plan prepared for Carolina Center by Atlantic International dated February 12, 2008 bearing Project No. 20720-001 (hereinafter referred to as the "Site Plan"), a copy of which is attached hereto as Exhibit "H" and incorporated herein by reference.

19. That the first distinct and positive assertion of a right hostile to Carolina Center predicated on adverse use by ASA, Inc. was made by way of letter dated June 2, 2008 from ASA, Inc.'s counsel John W. Wilson, Esquire to Carolina Center's President, Kumar Viswanathan (hereinafter referred to as the "Notice of Prescriptive Claim"). A true and correct copy of said Notice of Prescriptive Claim is attached hereto as Exhibit "I" and incorporated herein by reference.

20. That to the extent Enmark's predecessor, ASA, Inc. claimed an adverse right to use the Encroachment, such adverse use was subsequently interrupted by Carolina Center by way of letter dated September 15, 2008, from Robert J. Arundell, Esquire, counsel for Carolina Center, to John L. Wilson, Esquire, demanding that the Encroachment must be removed (hereinafter, the "Second Demand"). A true and correct copy of said letter is attached hereto as Exhibit "J" and incorporated herein by reference.

21. By way of certified letter dated October 29, 2012, from Robert J. Arundell, Esquire to Enmark, Carolina Center again demanded closure of the Encroachment (hereinafter, the "Third Demand"). A true and correct copy of the Third Demand letter is attached hereto as Exhibit "K" and incorporated herein by reference.

22. That Enmark has declined to remove same.

23. That neither Enmark, nor its predecessor ASA, Inc., maintained continued and uninterrupted adverse use of the Encroachment for twenty years.

24. That Carolina Center is entitled to a declaration that no prescriptive easement exists.

THIRD CAUSE OF ACTION

(Enmark Defendant – Removal of Illegal Encroachment)

25. Plaintiff re-alleges Paragraphs 1-24 above as if repeated verbatim.

26. That neither Enmark, nor its predecessors in title, ever obtained a permit for the installation of the asphalt over the Encroachment.

27. That the Encroachment is not, and never has been, sufficient to meet the construction standards imposed by the Town of Hilton Head Island or other governing authority having jurisdiction over the construction of same.

28. That by letter dated August 8, 2013, the Town of Hilton Head Island has demanded that Carolina Center remove the asphalt and restore the vegetation buffer between the Subject Property and the Gas Station. A true and correct copy of said letter is attached hereto as Exhibit "L".

29. No adequate remedy at law exists for the removal of the illegal Encroachment.

30. That Carolina Center is entitled to have the Encroachment closed and the asphalt removed at Enmark's expense.

31. That Carolina Center is entitled to a declaration that no easement exists by virtue of Enmark's illegal use of the Encroachment and further that Enmark is responsible for preventing any further illegal trespass over the Subject Property by its patrons and the general public utilizing Enmark's property to gain access over and across the Subject Property.

32. That Enmark should be required to take reasonable preventative measures to prevent such trespass by installing curbing along its parking area.

ALTERNATIVE FOURTH CAUSE OF ACTION

(Enmark Defendant – Relocation and Compliance)

33. Plaintiff re-alleges Paragraphs 1-32 above as if repeated verbatim.

34. That in the event it is found that Enmark does have an easement, express or otherwise, which Carolina Center expressly denies, such easement is indefinite as to its location and scope.

35. That in the event an easement, prescriptive or otherwise, is found to exist, which Carolina Center expressly denies, Carolina Center is entitled to a declaration that the Encroachment, the current location of which is depicted in Exhibit "M" attached hereto and incorporated herein by reference, is indefinite in scope and location and not in compliance with the Town of Hilton Head Island's land management ordinance governing the construction and installation of such roadways.

36. That in the event it is found that Enmark does have an easement, express or otherwise, which Carolina Center expressly denies, Carolina Center, as the owner of the servient estate, is entitled to make reasonable changes in the location and dimension of such easement unilaterally.

37. That because the asphalt over the Encroachment was installed without a permit and was not, at the time of its installation, nor is it now in compliance with the applicable construction standards imposed by the Town of Hilton Head Island, or other governing authority having jurisdiction over the construction thereof, Carolina Center is entitled to have the costs of any such changes assessed against Enmark.

FIFTH CAUSE OF ACTION

(Enmark Defendant – Slander of Title)

38. Plaintiff re-alleges Paragraphs 1-37 above as if repeated verbatim.

39. The Defendant Enmark has publically declared and published to third parties the declaration that it holds an easement over the Encroachment.

40. The aforesaid declaration and publication by Enmark is false.

41. Enmark has made the aforesaid declaration and publication with knowledge that it is false, or with a reckless disregard for its truth or falsity.

42. The aforesaid declaration and publication is derogatory to the Plaintiff's title.

43. As a result of the Defendant Enmark's slander of the Plaintiff's title the value of Plaintiff's property has been diminished.

44. As a direct and proximate result of the Defendant Enmark's slander of the Plaintiff's title the Plaintiff has suffered injuries and damages in that the value of its property has been diminished, the fair rental value of his property has been diminished, the marketability of his property has been impaired, and he has had to deal with tenant complaints regarding dust, noise and vibrations, and he will incur costs from moving the Encroachment and restoring his property to its original condition.

SIXTH CAUSE OF ACTION

(Enmark Defendant – Trespass)

45. Plaintiff re-alleges Paragraphs 1-44 above as if repeated verbatim.

46. The Defendant Enmark, by utilizing the Encroachment, has continually and repeatedly trespassed upon Plaintiff's property by entering upon Plaintiff's property without authority or consent.

47. As a direct and proximate result of the Defendant Enmark's trespass upon the Plaintiff's land the Defendant Enmark has interfered with the Plaintiff's right to possess said land, has diminished the value of said land, has interfered with the Plaintiff's peaceful enjoyment of said land, has impaired the marketability of Plaintiff's property, and has diminished the rental value of said property, all to Plaintiff's detriment and damage.

SEVENTH CAUSE OF ACTION

(Enmark Defendant – Nuisance)

48. Plaintiff re-alleges Paragraphs 1-47 above as if repeated verbatim.

49. The Defendant's utilization of the Encroachment by its servants, agents, employees and customers has interfered with the Plaintiff's right to the quiet and peaceful enjoyment of his property.

50. The utilization of the Encroachment by the Defendant, its agents, servants, employees and customers, has caused excessive dust, noise, vibration and traffic.

51. The Defendant Enmark's utilization of the aforesaid Encroachment constitutes a nuisance as a direct and proximate result the Plaintiff has been deprived of the quiet enjoyment of his property, its marketability and rental value has been impaired, all to Plaintiff's detriment and damage.

EIGHTH CAUSE OF ACTION

(Town – Mandamus)

52. Plaintiff re-alleges Paragraphs 1-52 above as if repeated verbatim.

53. The Defendant Town of Hilton Head Island is a political subdivision of the State of South Carolina, and is a municipality located within Beaufort County and subject to the jurisdiction of this Court.

54. The Town of Hilton Head Island has passed a Land Management Ordinance (hereinafter referred to as "LMO"), which was enacted for the benefit of the public in general and the Plaintiff in particular.

55. The Town of Hilton Head Island is charged with the responsibility of enforcing the LMO.

56. That the creation, expansion, and maintenance by the Defendant of the Encroachment violates the LMO:

57. The Plaintiff has made demand upon the Defendant Town that it enforce the LMO with respect to the Encroachment by the Defendant upon Plaintiff's property.

58. Although the Town has both actual and constructive notice of the violation of the LMO by the Defendant in the creation, expansion, improvement and maintenance of the Encroachment, the Town has failed and refused to enforce the LMO.

59. Plaintiff is informed and believes that it is entitled to a Writ of Mandamus compelling the Town to enforce the LMO against the Defendant with respect to the Encroachment.

WHEREFORE, the Plaintiff, Carolina Center, respectfully requests that the court inquire into the matters as set forth herein and award the following relief:

a. For the entry of an order in favor of Plaintiff, Carolina Center, and against Defendant Enmark, declaring that no easement (express, prescriptive, or otherwise) exists over or across the Subject Property in favor of the Defendant, Enmark;

b. For the entry of an order in favor of Plaintiff, Carolina Center, and against Defendant, declaring that no easement exists by virtue of Enmark's illegal use of the Encroachment and further directing Defendant, Enmark, to remove the asphalt Encroachment

and to place a curb along its property to deter the use by the general public of the illicit cut-through;

c. Should this court find that an easement, express or otherwise, does exist in favor of the Defendant, Enmark (which Plaintiff, Carolina Center expressly denies), then for an order permitting the Plaintiff, Carolina Center, to make reasonable changes in location or dimension of such easement, and to assess the costs associated therewith against the Defendant, Enmark;

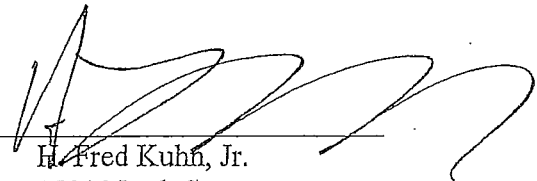
d. For an order enjoining and prohibiting the Defendant from utilizing the Encroachment or entering on Plaintiff's property;

e. For judgment against the Defendant for a fair and reasonable amount of both actual and punitive damages;

f. For a Writ of Mandamus compelling the Town to enforce the LMO against the Defendant; and

g. For such other and further relief in favor of the Plaintiff, Carolina Center, as the court deems just and appropriate.

MOSS, KUHN & FLEMING, P.A.

By: 

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373
(843)524-1302 -- facsimile

Attorneys for the Plaintiff

Beaufort, South Carolina
August 12, 2014

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State of South Carolina,
COUNTY OF Beaufort

NS&W
File Number: 016
858.134

OUR TAX NOTICE WILL BE SENT TO
THE ADDRESS SHOWN ON THE RECORD
IF YOU HAVE AN ADDRESS CHANGE,
PLEASE CONTACT THE COUNTY ADMINISTRATOR

50407

1274

ATTENTION HOMEOWNERS!
YOU MAY QUALIFY FOR A LOWER TAX
RATE ON YOUR PRIMARY RESIDENCE.
PLEASE CONTACT THE COUNTY ADMINISTRATOR
OFFICE FOR FURTHER INFORMATION

KNOW ALL MEN BY THESE PRESENTS, THAT
Sea Pines Company, Inc.

BEAUFORT COUNTY, S.C.
RECORDING FEES COLLECTED
TRANSFER FEES \$3750.00
COUNTY \$1650.00 STATE \$3900.00
In consideration of the sum of

in the State aforesaid for and _____
Ten and no/100 (\$10.00) _____ DOLLARS,

and other valuable consideration to it in hand paid at and before the sealing of these presents by
Carolina Center Building Corp., a South Carolina corporation, Attn: Kumar K. Viswanathan,
P.O. Box 7567, Hilton Head Island, SC 29928 in the State aforesaid
for which _____ the receipt whereof is hereby acknowledged, have
granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said
Carolina Center Building Corp., a South Carolina corporation, its Successors and Assigns
the following described property, to-wit: (P.O. Box 7567 HNFV 29928)

SEE ATTACHED EXHIBIT 1 FOR PROPERTY DESCRIPTION

SUBJECT to Permitted Exceptions attached.

THE within Deed was prepared by Jones, Scheider & Patterson, P.A., Post Office
Drawer 7049, Hilton Head Island, South Carolina 29938, by Russell P.
Patterson, Esquire.

BEAUFORT COUNTY TAX MAP REFERENCE: District 550, Map 15, Parcel 198.

BEAUFORT COUNTY TAX MAP REFERENCE

Dist.	Map	Subdist.	Parcel	Block
550	15		198	

EXHIBIT A

000108

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TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said Carolina Center Building Corp., a South Carolina corporation, its Successors and Assigns

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BM

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Exhibit 1

SEA PINES RECEPTION CENTER PROPERTY

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All that certain piece, parcel or tract of land shown as the "Sea Pines Reception Center" on a plat thereof entitled "A Plat of 2.26 Acres Sea Pines Reception Center, "Asbuilt Survey", as Section of Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina," said plat prepared by Jerry L. Richardson, Coastal Surveying Engineering Company, Inc., S.C.R.L.S. #4784, said plat dated November 1, 1989, and recorded in the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina, in Plat book 38 at Page 53.

Said tract more completely described as to metes and bounds as follows:

COMMENCING at a concrete monument at the southeastern-most corner of said tract, at the intersection of the tract corner, the right-of-way of Greenwood Drive and Sea Pines Traffic Circle, said point being the POINT OF BEGINNING; thence S75deg05'43"W for a distance of 399.24 feet to a point; thence N14deg13'07"W for a distance of 190.50 feet to a point; thence N68deg17'05"E for a distance of 438.40 feet to a point; thence S35deg38'35"E for a distance of 157.96 feet to a point; thence along a curve having a delta angle to the left of 39deg04'31", a radius of 200.00 feet, an arc distance along the curve of 136.40 feet, a tangent of 70.97 feet, a chord distance of 133.77 feet and a chord bearing of S29deg53'52"W to a point, said point being the POINT OF BEGINNING.

PROPERTY ADDRESS: Approximately 2.26 Acres. Sea Pines Reception Center, Hilton Head Island, SC

District 550, Map 15, Parcel 198

LESS AND EXCEPTING:

1. All that certain piece, parcel or lot of land, situate, lying and being on Hilton Head Island, Beaufort County, South Carolina, consisting of 195 square feet, more or less, and being shown and described as "Required R/W" on that certain plat of record entitled "A Plat of 2.25 Acres, Sea Pines Reception Center, As Built Survey", prepared by Michael R. Dunnigan, SCRLS 11905, with said plat being dated February 1, 1991, and being recorded in the R.M.C. Office for Beaufort County, South Carolina, in Plat Book 41 at Page 18.
2. Approximately 6/100 of an acre to be used by the South Carolina Department of Transportation for Cross-Island Expressway along Palmetto Bay Road.

This being the same property conveyed to Sea Pines Company, Inc. from Palmetto Savings Bank of South Carolina by deed dated July 21, 1994 and recorded in Deed Book 720 at Page 1192.

000111

1278

EXHIBIT
PERMITTED EXCEPTIONS

- A. Commercial Use Restrictions and Option to Repurchase as shown in instrument recorded in said RMC Office in Deed Book 193 at Page 1652.
- B. Easement Agreement in favor of Plantation Cablevision as shown in instrument recorded in said RMC Office in Deed Book 195 at Page 93, as amended in Deed Book 454 at Page 525.
- C. Relocation of Easement Agreement as shown in instruments recorded in said RMC Office in Deed Book 210 at Page 1065 and Plat Book 20 at Page 192.
- D. Easements as shown on plats recorded in said RMC Office in Plat Book 19 at Page 127, Plat Book 20 at Page 192, Plat Book 21 at Page 173, Plat Book 22 at Page 17, Plat Book 23 at Page 159, Plat Book 28 at Page 12, Plat Book 38 at Page 53 and Plat Book 41 at Page 18.
- E. Easements, Rights and Reservations in favor of Central Electric Power Cooperative, Inc. as shown in instrument recorded in said RMC Office in Deed Book 144 at Page 155.
- F. Easement Agreement in favor of Palmetto Electric as shown in instrument recorded in said RMC Office in Deed Book 105 at Page 101.
- G. Easements, Rights, Restrictions, and Conditions as shown in instruments recorded in said RMC Office in Deed Book 216 at Page 254, Deed Book 216 at Page 258 and Deed Book 212 at Page 920.
- H. Conveyance from Sea Pines Company, Inc. in favor of the South Carolina Department of Transportation dated February 23, 1995 and recorded in ORB 762 at Page 309.

[disk179\ama.ex4]

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JOHN A. SULLIVAN, JR.
R.H.C.
BEAUFORT COUNTY, S.C. 1RB
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FOLDER #

1279

RECORDED THIS 21ST DAY
OF January 1997
IN BOOK PAC PAGE 1535
Marg B. Gray AD
CLERK, BEAUFORT COUNTY, S.C.

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34845
10
JBN

ADD DMP Record 5/26/2009 10:11:26 AM
BEAUFORT COUNTY TAX MAP REFERENCE
Dist Map SMap Parcel Block Week
R552 015 000 0206 0000 00

BEAUFORT COUNTY SC - ROD
BK 02822 PGS 1941-1943
FILE NUM 2008015545
03/20/2009 10:17:27 AM
REC'D BY P BAXLEY RCPT# 578932
RECORDING FEES 10.00
County Tax 1,584.00
State Tax 3,744.00
Transfer Tax 3,600.00

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS, THAT

ASA, INC., a South Carolina Corporation (hereinafter referred to as "GRANTOR")

in the State aforesaid --- for and in --- consideration of the sum of One Million Four Hundred Forty Thousand AND NO/100 (\$1,440,000.00) DOLLARS to it in hand paid at and before the sealing of these presents by ENMARK STATIONS, INC. (hereinafter "Grantee"), of 2112 Rankin Street, Savannah, GA 31415, in the state aforesaid --- for which --- the receipt whereof is hereby acknowledged, SUBJECT TO the matters set forth below, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said GRANTEE, its successors and assigns, forever, in fee simple, the following described property, to-wit:

SEE EXHIBIT "A" ATTACHED HERETO
AND MADE A PART HEREOF

DMP# R552-015-000-0206-0000

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said GRANTEE, its successors and assigns, forever, in fee simple.

AND, SUBJECT TO the matters set forth above, GRANTOR does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the said Premises unto the said GRANTEE, its successors and assigns, against it and its successors and assigns, and all persons whomsoever now and hereafter lawfully claiming, or to claim the same or any part thereof.

WITNESS its Hand and Seal this 19 day of March, 2009.

J:\slafrey\Deeds & Seller A\5davis\asa to enmark deed.wpd

Enmark / 8196.001 23

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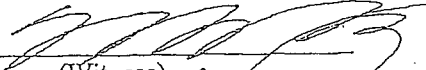
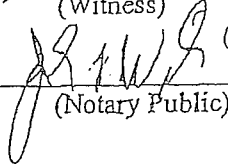
Sharon D. Baxley
BEAUFORT COUNTY AUDITOR

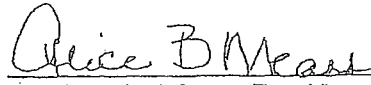
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EXHIBIT

SIGNED AND DELIVERED
IN THE PRESENCE OF:

ASA, INC.


(Witness)

(Notary Public)


By: Alice B. Means, President

STATE OF SOUTH CAROLINA §
§
COUNTY OF BEAUFORT §

ACKNOWLEDGMENT
under S.C. Code § 30-5-30(C)

I, the undersigned notary public, do hereby certify that the duly authorized officer of the within named Grantor, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 19 day of March, 2009.

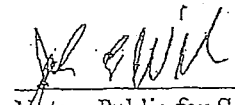

(SEAL)
Notary Public for South Carolina
My Commission expires: 3-16-2016

EXHIBIT "A"

LEGAL DESCRIPTION

ALL that certain piece, parcel or lot of land lying and being on Hilton Head Island, Beaufort County, South Carolina, being shown and described as a 0.65 acre tract as shown on a plat entitled "Chevron Oil Company" prepared by Forrest F. Baughman, RLS, dated February 11, 1974, and recorded in the Office of the Register of Deeds for Beaufort County, SC in Plat Book 22 at Page 47. For a more detailed description as to the courses, metes and bounds of the above mentioned lot, reference is had to said plat of record.

Save and Except that certain out conveyance to the South Carolina Department of Transportation recorded in the Office of the Register of Deeds for Beaufort County, SC in OR Book 745 at Page 1500.

This conveyance is made SUBJECT TO any state of facts that might be shown by an accurate survey of the property, any roads and ways over and across said property, zoning and building regulations applicable to said property; and all easements, covenants, restrictions, limitations, etc. of record in the public records, including all easements as shown on the plat of record and to that certain 20 foot sewage easement along the generally southern portion of the property as shown on the said plat recorded in OR Book 22 at Page 47.

This being substantially the same property conveyed to the within Grantor by deed recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in OR Book 651 at Page 549.

This Deed was prepared in the law offices of Wilson & Bratt, P.A., 3600 Main Street, Suite 100, Hilton Head Island, South Carolina, 29926, by John L. Wilson, Esquire.



A SECTION OF
SEA PINES
PLANTATION

NILTON HEAD ISLAND
BEAUFORT COUNTY
SOUTH CAROLINA

RECORDED IN
THE OFFICE OF THE
CLERK OF COURT
REARFONT CO., S. C.
BOOK 35 PAGE 52
3-9-54
REPLACES PLATE IN
BOOK PAGE



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COUNTRY SURVEY;
EXHIBITING A
NATION WAS MADE.

SCALE: 1/2" = 1'-0"
DATE: 11/01/09
FIELD CR. GP
OFFICE CC
JOB NO. 12,570
PENNSYLVANIA

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WHICH IS THE TERM OF MANY MIND BLOW'S
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CONSOLE OF CONSOLE
THAT: CONSOLE
DOES: CONSOLE

* FOR REFERENCE TO LEGAL
COUNSEL USE DOCUMENT ONLY

REPAIR SCALE

ERGELMUTY PROPERTIE

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EXHIBIT

THE GALLERY SHOWING PARCEL "B" HALL

MARKET PLACE HILTON HEAD
ASSOCIATES, LTD.
1. PLAT DE REPOSE

PARCEL 2

CHEVRON OIL CO.

SEA PINES
RECEPTION CENTER

SEA PINES TRAFFIC
CIRCLE

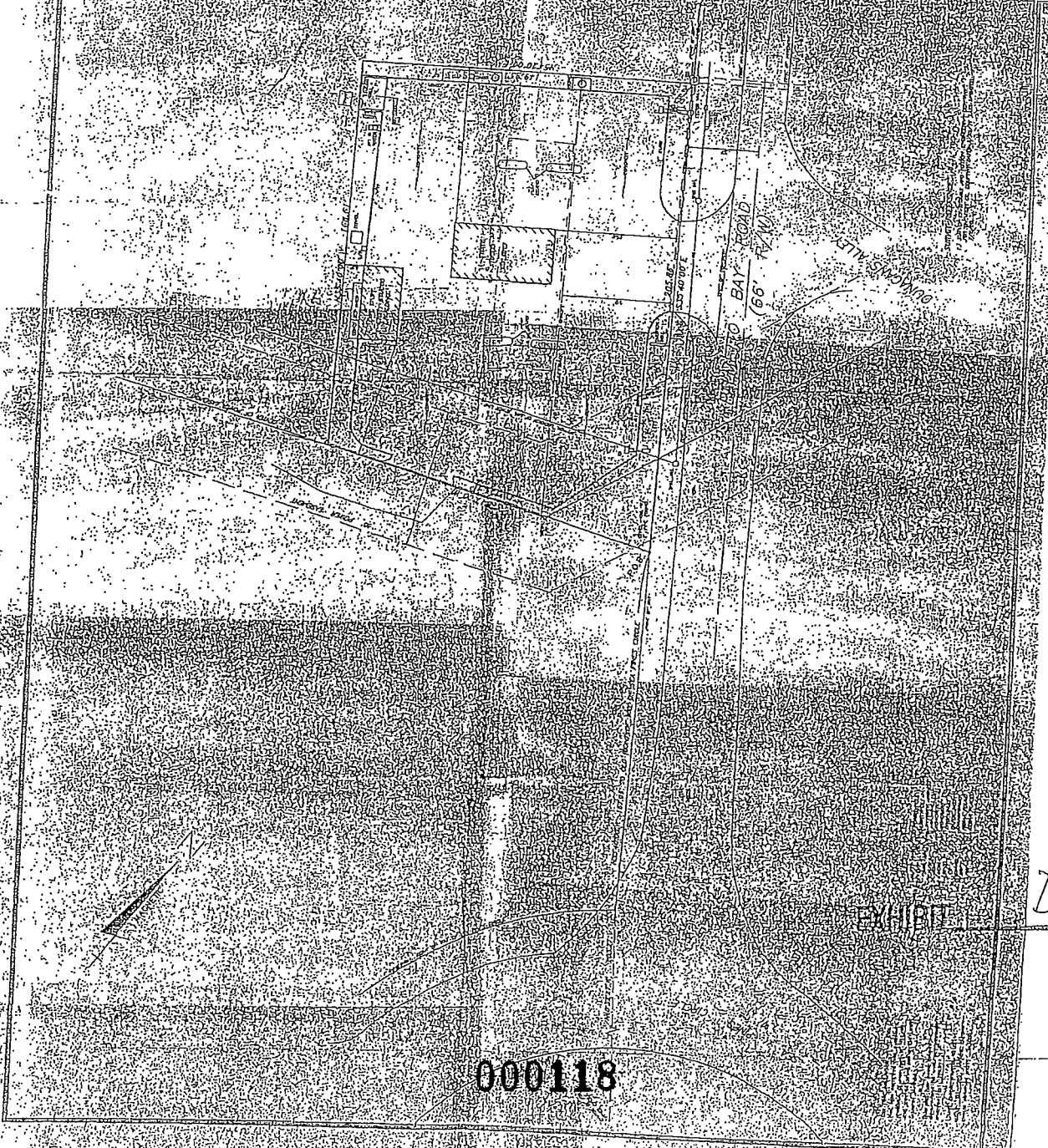
I MUST EMPHATICALLY STATE THE MEASUREMENTS
AS SHOWN ARE CORRECT AND THERE ARE NO
ADJUSTMENTS OR PROJECTIONS OTHER THAN
SHOWN.

AFFIDAVIT THAT

PART OF HER PARTY ENTERED BY FOUR AGENTS
RECEIVED, NO OTHERS; AFFIDAVITS MADE
BY FOREST P. BAYBURN RECEIVED, NO
OTHERS; SAME CONTINUATION INTO THE
MOUNTAIN PLACE AND HEAD ASSOCIATED WITH
CRIMINAL INVESTIGATION, NO OTHERS.
RECEIVED, NO OTHERS.

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D

BETHEA, JORDAN & GRIFFIN, P. A.

JOSEPH R. BARKER
WILLIAM L. BETHEA, JR.
STEPHEN S. BIRD*
STEPHEN E. CARTER***
MICHAEL E. COFIELD
ROBERT M. DEEB, JR.
CARY S. GRIFFIN*
MICHAEL L. M. JORDAN***
KEITH M. PARRELLA**
WILLIAM R. PHIPPS
MARTY D. PROBST**
OF COUNSEL
JOHN C. WEST
DIRECT DIAL 803-785-4100
JOHN C. WEST, JR.

ATTORNEYS AND COUNSELORS AT LAW

SUITE 400

SHELTER COVE EXECUTIVE PARK

23-B SHELTER COVE LANE

P. O. DRAWER 3

HILTON HEAD ISLAND, S. C. 29938-0003

(803) 785-2171

FAX # (803) 686-5991

*ALSO MEMBER OHIO AND GA. BARS.
**ALSO MEMBER VA. AND D. C. AND GA. BARS.
***MEMBER VA. BAR
**ALSO MEMBER N. C. BAR
***ALSO MEMBER OHIO BAR
***CERTIFIED SPECIALIST IN TAXATION LAW
AND ESTATE PLANNING AND PROBATE LAW

June 15, 1994

John L. Wilson, Esquire
Wilson & Coltrane
Post Office Box 21668
Hilton Head Island, S.C. 29925

Re: Chevron Property - Palmetto Bay

Dear John:

I notice, from a review of the title, that you represented ASA, Inc. which acquired the Chevron site adjacent to The Market Place on Palmetto Bay Road. My reason for writing you lies with the fact that I am representing the prospective purchaser of the old Sea Pines Welcome Center which is contiguous property. There is an encroachment of a driveway which is shown on Plat Book 38, Page 53 (portion attached). It is obvious that this area is utilized for access from The Market Place general parking area to the Chevron Station. I could find nothing of record with respect to this roadway. Ultimately, that area would be utilized by the purchaser of the Sea Pines Reception Center property for parking, and would not be able to be utilized for continued access. Can you check your title records and determine whether or not there is any agreement by and between Chevron and Market Place Associates, or some predecessor-in-title? Obviously, this driveway also falls within the power line easement of Central Electric.

I would also point out to you that I represent the owner of Parcel A-1 (the restaurant) which is the parcel that lies between the Chevron tract and The Market Place tract. My records for that file do not show any reference to this roadway.

I would appreciate your attention to this at your earliest convenience.

Very truly yours,

BETHEA, JORDAN & GRIFFIN, P.A.

Cary S. Griffin

CSG11:YI:\CORRES\WILSON.LTR

C: Mr. Kumar K. Viswanathan
Mr. Nicholas J. Costalas
Howard M. Hickey, Esquire

EXHIBIT E

000119

WILSON & COLTRANE, P.A.

ATTORNEYS AT LAW

P. O. BOX 21668

1800 MAIN STREET, SECOND FLOOR

HILTON HEAD ISLAND, SOUTH CAROLINA 29925-1668

(803) 681-6300

FAX # (803) 681-2174

FAX # (803) 689-3914

JOHN L. WILSON
CURTIS L. COLTRANE*
WILLIAM F. BRATT†

*ALSO MEMBER VIRGINIA BAR
†ALSO MEMBER OF NEW JERSEY BAR

June 23, 1994

Cary S. Griffin, Esq.
Bethesda, Jordan & Griffin, P.A.
Post Office Drawer 3
Hilton Head Island, S.C. 29938-0003

In Re: Chevron Property - Old Sea Pines Welcome Center
My File no. 1347-1-10

Dear Cary:

This is intended to respond to your letter of June 15, 1994 regarding an alleged encroachment of a driveway. Your letter also indicates that the purchaser of the Sea Pines Reception Center would not allow continued access over the roadway. You have also properly indicated that the driveway falls within the power line easement of Central Electric.

I have not made an exhaustive search of my file for the acquisition of the Chevron property by ASA, Inc. to answer your inquiry. Further, I have not inquired with either my client or Chevron USA, Inc as to the existence of any agreements concerning the roadway.

However, from reviewing the title abstract it appears by that by virtue of an easement agreement dated May 15, 1973 that my client, as an assignee of Sea Pines Plantation Company has the right of ingress and egress over the entire 60 foot right of way so long as such travel does not interfere with the safe and efficient operation of the lines and facilities operated by Central Electric Power Cooperative, Inc.

I enclose a copy of the easement agreement. After the execution of the easement agreement, Sea Pines conveyed the property to Standard Oil n/k/a Chevron USA, Inc. who conveyed the property to my client.

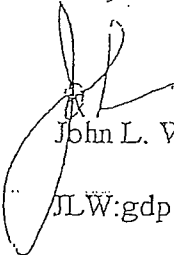
I trust that this documentation sets the record straight with the prospective purchaser of the old Sea Pines Welcome Center with respect to the right of ingress and egress.

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EXHIBIT F

With all best wishes, I remain,

Very truly yours,



John L. Wilson

JLW:gdp

Enclosure:

cc: Ms. Alice B. Means

GAGANARYLET

000121

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

RELOCATION OF EASEMENT AGREEMENT

210/
1165

THIS AGREEMENT, made this 15th day of MAY, 1973, between SEA PINES PLANTATION COMPANY, a corporation existing under the laws of the State of South Carolina, with its principal offices on Hilton Head Island, Beaufort County, South Carolina (hereinafter called "Sea Pines"); CENTRAL ELECTRIC POWER COOPERATIVE, INC., a cooperative corporation existing under the laws of the State of South Carolina, with its principal offices in Cayce, South Carolina (hereinafter called "Central"); and the SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, a body corporate and politic created by the Legislature of the State of South Carolina, with its principal offices in Moncks Corner, South Carolina (hereinafter called the "Authority");

W I T N E S S E T H:

WHEREAS, Charles E. Fraser, by easement dated December 19, 1960, and recorded in Beaufort County Deed Book 105, at page 101, granted unto Palmetto Electric Cooperative, Inc., its successors and assigns, a perpetual easement for the construction and maintenance of certain electric transmission lines, towers, poles, etc., over and upon certain lands situated on Hilton Head Island, Beaufort County, South Carolina, which were conveyed to him by deed of J.B. Fraser, Sr., et al, said conveyance unto the easement grantor recorded in Beaufort County Deed Book 85, at page 343; and

WHEREAS, the said Palmetto Electric Cooperative, Inc., by a document entitled "Deed and Bill of Sale," conveyed unto Central all its "rights, interests, privileges, appurtenances and facilities" as described in said "Deed and Bill of Sale," which document is dated March 31, 1968, and recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 125, at page 131; and

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WHEREAS, Sea Pines has purchased a portion of the property of Charles E. Fraser hereinafter referred to, subject to the electric ~~power line~~ rights of Central; and

WHEREAS, there is at present upon the easement an existing power line and/or other electric power facilities constructed by Central and being operated by the Authority under an agreement between Central and the Authority; and

WHEREAS, Sea Pines wishes a portion of Central's electric power line right-of-way to be relocated as hereinafter set forth;

NOW, THEREFORE, for and in consideration of the aforesaid premises and the covenants contained herein, Sea Pines Plantation Company hereby grants, bargains, sells and releases unto the said Central Electric Power Cooperative, Inc., its successors and assigns, a perpetual right-of-way easement for the construction, operation and maintenance of one or more electrical transmission lines, towers, tower foundations, poles, anchors, guys and necessary fixtures and wires attached thereto, counterpoise underground wires, and all structures and appliances necessary or convenient in connection therewith, together with all rights and privileges incident to the use and enjoyment thereof, the right of ingress and egress to and along said right-of-way, and the right to clear and keep clear all obstructions, fire hazards, buildings, structures, brush, timber and treetops on or along said right-of-way, to wit:

A right-of-way located in the County of Beaufort, State of South Carolina, on or across the lands of Sea Pines Plantation Company, which right-of-way, being 60 feet in width, is more fully shown and delineated on a plat entitled "Plat of Sea Pines Center containing 15.124 acres, being a portion of Sea Pines Plantation Company," dated October 3, 1972, and revised November 6, 1972, and further revised December 5, 1972, which said plat is recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Plat Book 20, at page 192, which drawing is attached hereto and made a part of this description.

The right-of-way herein conveyed is indicated on said attached drawing by the wording "Proposed relocation of power line." Said right-of-way is 60 feet in width and begins at a point on the centerline of Central's existing 100-foot right-of-way where it intersects the northeastern side of the 66-foot right-of-way of Palmetto Bay Road, thence running South 19°16'39" West for a distance of 59.35 feet, thence turning and running South 68°16'39" West for a distance of 550 feet, thence turning and running South 51°47'05" West for a distance of 152.20 feet, thence turning and running South 75°13'45" West for a distance of 102.31 feet, thence connecting with Central's existing 100-foot right-of-way at the western boundary of Sea Pines Center as shown on the aforesaid plat. Said right-of-way extends 30 feet either side of the centerline hereinabove described.

Central Electric Power Cooperative, Inc., its successors and assigns, shall have the perpetual right to clear and keep clear and dispose of all obstructions, fire hazards, buildings, structures, timber, pulpwood, brush, and treetops on the said right-of-way, as well as all danger trees without the right-of-way which in falling might injure or endanger said right-of-way or any facilities now or hereafter constructed thereon. All structures and facilities erected or to be erected on said right-of-way by Central shall remain the property of Central, removable at its option.

Sea Pines expressly reserves the right to use the lands described herein for agricultural or other purposes of such nature as will not interfere with the construction, operation, patrol or maintenance of said right-of-way and electrical lines, and Sea Pines agrees not to construct in the future any obstruction, dwelling, barn, or other building, or create any fire hazard within the right-of-way herein conveyed without first obtaining the written consent of the Authority. The parking of automobiles will be permitted within the right-of-way except for an area 24 feet in width, being 12 feet on either side of the centerline of the said right-of-way.

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TO HAVE AND TO HOLD, all and singular, the rights, privileges and easements aforesaid unto Central Electric Power Cooperative, Inc., its successors and assigns, forever. And the said Sea Pines Plantation Company does hereby bind itself, its successors and assigns, to warrant and forever defend all and singular the said rights, privileges and easements unto the said Central Electric Power Cooperative, Inc., its successors and assigns, against the said Sea Pines Plantation Company, its successors and assigns, and all other persons whomsoever lawfully claiming or to claim the same or any part thereof.

As consideration for the relocation of Central's electrical lines, Sea Pines Plantation Company hereby covenants and agrees:

To pay to the Authority all costs of the relocation of Central's electric lines and right of way. It is understood and agreed that the line upon the new right-of-way will consist of a double circuit 69 KV transmission line on steel poles and that the 69 KV disconnect switch will be relocated next to the Hilton Head substation and replaced with a phase over phase switch. The estimated cost of relocation is \$95,000, but such estimate is in no way a limitation upon Sea Pines' agreement to pay all costs of relocation. Sea Pines agrees to pay such costs as presented from time to time by the Authority, such payment to be made within fifteen (15) days of receipt of such bills. The costs shall be determined by the Authority and its decision shall be final and binding upon all parties. Without limiting the generality of the foregoing, the costs shall include all labor, materials, overhead, and any payments to contractors or third parties reasonably necessary for the performance of the work. The Authority may employ contractors to perform the work and/or may perform the work through its own employees. All materials shall be and remain the property of the Authority/Central.

WHEREAS, it is necessary for the existing transmission line to be temporarily relocated so that Sea Pines can commence construction of certain projects prior to the time that permanent relocation to the new right-of-way can be accomplished, Sea Pines further covenants and agrees to pay to the Authority all costs of temporary relocation of Central's electric lines and right-of-way, upon the same terms and conditions as set forth for payment of the permanent relocation. In

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this connector, Sea Pines hereby grants, bargains, sells and releases unto the said Central Electric Power Cooperative, Inc., its successors and assigns, a right-of-way easement for the temporary construction, operation and maintenance of one or more electrical transmission lines, towers, tower foundations, poles, anchors, guys and necessary fixtures and wires attached thereto, counterpoise underground wires, and all structures and appliances necessary or convenient in connection therewith, together with all rights and privileges incident to the use and enjoyment thereof, ~~the right of ingress and regress to and along said~~ right-of-way, and the right to clear and keep clear all obstructions, fire hazards, buildings, structures, brush, timber and treetops on or along said right-of-way, to wit:

A right-of-way located in the County of Beaufort, State of South Carolina, on and across the lands of Sea Pines Plantation Company, which right-of-way, being 60 feet in width, is more fully shown and delineated on a plat entitled "Site Plan, Sea Pines Center, Sea Pines Plantation Company, Hilton Head Island, South Carolina," prepared by Tereble, Walters and Associates, Architects/Planners, which drawing is attached hereto and made a part of this description.

The temporary right-of-way herein conveyed is indicated on said attached drawing by the wording "Temporary line location as discussed on plan in field 2-22-73." Said right-of-way begins at a point on the centerline of Central's existing 100-foot right-of-way as it intersects the western boundary of Sea Pines Center and extends as shown on the said plat to a point approximately 30 feet north of the centerline of Central's existing 100-foot right-of-way as it intersects the northeastern boundary of the 66-foot right-of-way of Palmetto Bay Road. Guying rights without the right-of-way are also herein conveyed at angle structures and all other locations where guying is required.

The said right-of-way shall be temporary, and the easement granted in connection therewith shall terminate and be wholly null and void upon completion of the relocation of Central's lines to the new perpetual right-of-way hereinabove granted.

In consideration of the foregoing conveyances, and in consideration of the sum of Ten (\$10.00) Dollars paid by Sea Pines to the Authority, receipt of which is hereby acknowledged, and in further consideration

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of Sea Pines' hereinabove contained agreement to pay all costs of relocation, the Authority covenants and agrees:

To proceed with the relocation of the electrical lines and facilities as rapidly as the availability of labor, material, contractors, and good engineering practices reasonably permit.

In consideration of the foregoing conveyance of a new right-of-way, and a temporary new right-of-way, Central covenants and agrees:

To execute and deliver to Sea Pines, a good and sufficient release of its existing right-of-way across the property of Sea Pines Plantation Company shown as Sea Pines Center and Standard Oil Company of Kentucky parcel on the plat hereinabove more fully described in the grant of the new perpetual right-of-way, except such portions of such right-of-way as shall be included in the new right-of-way hereinabove granted.

It is the purpose and intent of this Agreement that Central shall continue to hold and exercise control over its existing right-of-way, and the temporary right-of-way hereinabove granted, only so long as necessary to accomplish relocation of Central's electric lines and facilities to the new perpetual right-of-way, via the temporary right-of-way, and that Central and the Authority shall have the continuous right to an easement across the Sea Pines Center property joining the existing electric lines east and west of such property.

~~It is understood and agreed that Sea Pines, its assigns, licensees, permittees and guests, whether commercial or otherwise, shall have the right to traverse the easement herein granted for purposes of ingress and egress so long as such travel does not interfere with the safe and efficient operation of Central's electric lines and facilities.~~

This Agreement shall be binding upon the successors and assigns of the parties hereto and all persons claiming by, through or under them or either of them.

IN WITNESS WHEREOF, the parties have caused the Agreement to be executed in triplicate original in their respective corporate names and their corporate seals to be affixed hereto, all by their proper

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officers duly authorized thereunto on the date above first written.

Witness:

Susan Marks

Gary Atkinson

Witness:

Sam E. Blacking

Barbara L. Hallman

Witness:

Terrill D. Hargis

Carl Link

SEA PINES PLANTATION COMPANY

(SEAL)

By Harold D. Depp
Its Vice President

Attest: Richard Worth
Its Asst. Secretary

CENTRAL ELECTRIC POWER COOPERATIVE, INC. (SEAL)

By Paul M. Smith
Its President

Attest: W. Lee Jr.
Its Secretary

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY (SEAL)

By G. B. Johnson
Its General Manager

Attest: L. P. Reiman
Its Secretary

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

PERSONALLY appeared before me Susan Marks and made oath that she saw the within named SEA PINES PLANTATION COMPANY, by Harold D. Depp its Vice President, sign the within instrument, and Richard Worth its Asst. Secretary attest the same, and the said SEA PINES PLANTATION COMPANY, by said officers, seal said instrument, and as its act and deed deliver the same, and that she with Gary Atkinson witnessed the execution thereof.

SWORN to before me this 10th day of May, 1973.

Gary Atkinson (L.S.)
Notary Public for South Carolina
My Commission expires: February 23, 1983

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission expires February 23, 1983

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CAROLINA CENTER BUILDING CORP.

Post Office Box 7567
Hilton Head Island, SC 29938

August 30, 2007

Mr. David Oliver
Stafford Properties
80 West Wieuca Road
Suite 302
Atlanta, GA 30342

RE: ACCESS EASEMENT
ISLAND CROSSING / CAROLINA CENTER

Dear David:

Per our meeting and discussion, attached is the proposed site plan.

As you know, we have a cross easement (attached) between our two properties. The proposed site plan envisions additional parking on our property and drive through on your parking lot.

Currently, cars are cutting through both our properties to the Chevron Station through an unauthorized dirt road on our property.

We feel the proposed site plan would make it better for all parties concerned from a visual and traffic perspective.

As discussed, the trash dumpster will need to be relocated.

I will be contacting the owners of the Chevron Gas Station and the Japanese Restaurant soon.

I would appreciate your acknowledgement and agreement to the proposed site plan so we could move forward.

Thanking you again for your time.

Yours truly,



Kumar K. Viswanathan

KKV / Imp

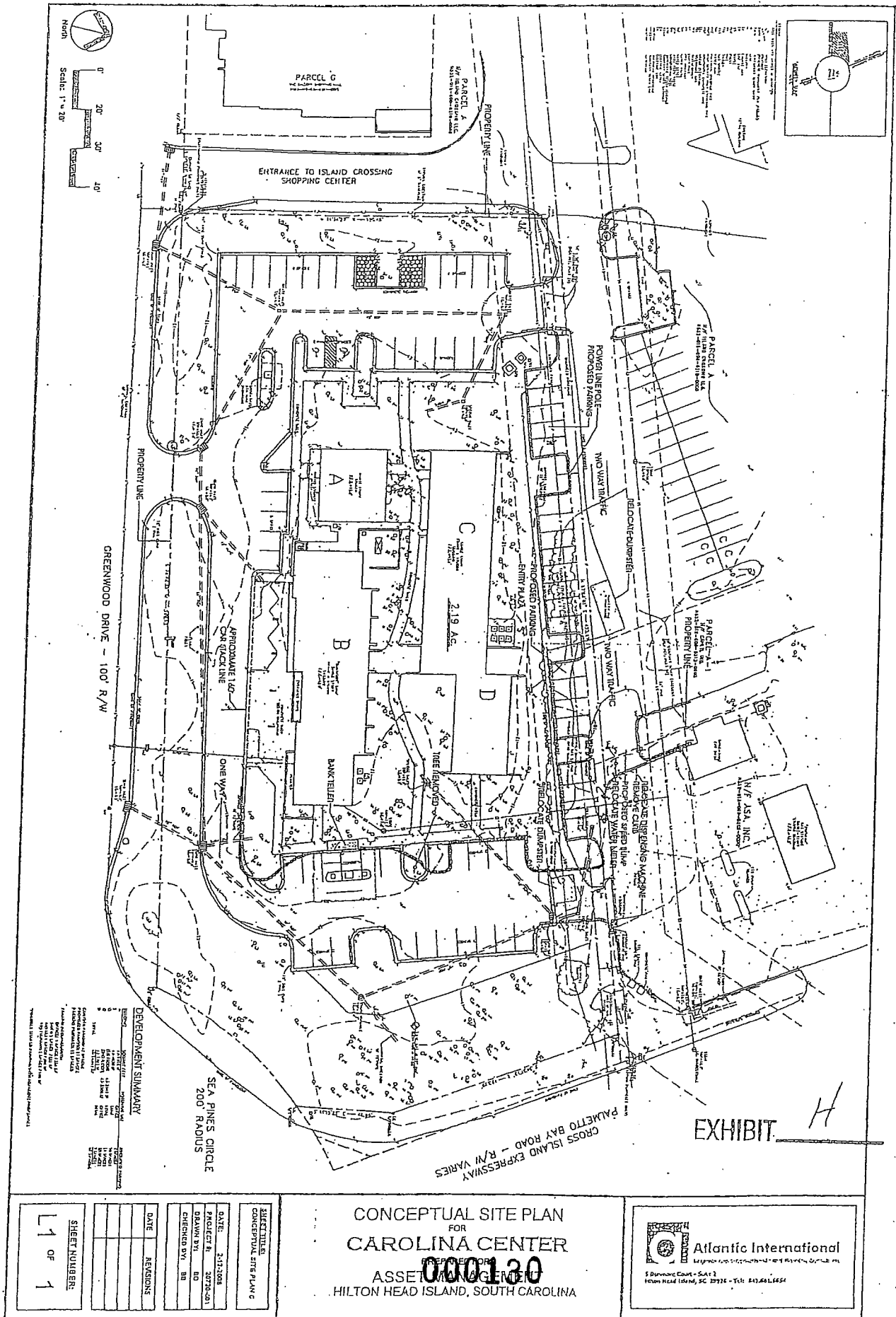
ENC:

cc: Robert J. Arundell, Esq.

EXHIBIT 6

000129

Exhibit C



EXHIBIT

CONCEPTUAL SITE PLAN FOR CAROLINA CENTER ASSET MANAGEMENT HILTON HEAD ISLAND, SOUTH CAROLINA



Atlantic International
5 RUNNING CREEK - SUITE 2
HILTON HEAD ISLAND, SC 29926 - TEL: 843.661.6664

DEVELOPMENT SUMMARY
TOTAL SITE AREA: 219 AC
TOTAL BUILDING AREA: 1,100,000 SQ FT
TOTAL PARKING: 1,100 SPACES
TOTAL TRAFFIC: 1,100 VEHICLES
TOTAL UTILITIES: 1,100 FEET
TOTAL LANDSCAPE: 1,100 FEET
TOTAL LIGHTING: 1,100 FEET
TOTAL FENCE: 1,100 FEET
TOTAL SIGNAGE: 1,100 FEET
TOTAL SECURITY: 1,100 FEET
TOTAL MAINTENANCE: 1,100 FEET
TOTAL STORAGE: 1,100 FEET
TOTAL WAREHOUSE: 1,100 FEET
TOTAL OFFICE: 1,100 FEET
TOTAL RESIDENTIAL: 1,100 FEET
TOTAL COMMERCIAL: 1,100 FEET
TOTAL INDUSTRIAL: 1,100 FEET
TOTAL AGRICULTURAL: 1,100 FEET
TOTAL RECREATIONAL: 1,100 FEET
TOTAL CULTURAL: 1,100 FEET
TOTAL RELIGIOUS: 1,100 FEET
TOTAL EDUCATIONAL: 1,100 FEET
TOTAL HEALTHCARE: 1,100 FEET
TOTAL GOVERNMENT: 1,100 FEET
TOTAL OTHER: 1,100 FEET

SHEET NUMBER	11 OF 1
DATE	2-13-2008
PROJECT	PROJECT B
DRAWN BY	DO
CHECKED BY	BM
REVISIONS	

- Hk, HCCBC,
Easements

MINOR, HAIGHT & ARUNDELL, P.C.

ATTORNEYS and COUNSELORS AT LAW

JOHN W. MINOR, JR. (1940-2003)
EHRICK K. HAIGHT, JR.
ROBERT J. ARUNDELL*

THE CLARENDON BUILDING
VILLAGE AT WEXFORD
POST OFFICE DRAWER 6067

TELEPHONE (843) 785-8040
FACSIMILE (843) 785-3506
MHALAWFIRM.COM

PHILIP JOHN RIOS

HILTON HEAD ISLAND, SOUTH CAROLINA 29938

* ALSO A MEMBER OF THE NORTH CAROLINA BAR
MEMBER, HILTON HEAD ISLAND BAR ASSOCIATION

MEMBER, AMERICAN BAR ASSOCIATION
MEMBER, HHI CHAMBER OF COMMERCE

September 15, 2008

John L. Wilson, Esquire
Wilson & Bratt, P.A.
P.O. Box 21668
Hilton Head Island, SC 29925

Also via FAX to 681-2174

Re: Encroachment on to property owned by Carolina Center Building Corporation

Dear John:

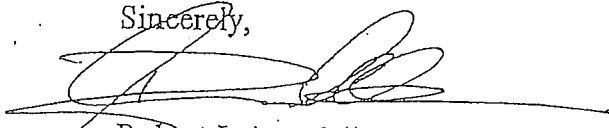
Thank you for taking my telephone call last week. As we discussed on the telephone, the Staples shopping center owner has decided not to give the easement that would accommodate the original plans shown to you and your client by Kumar Viswanathan in his effort help all the neighbors and improve overall traffic circulation in and around the shopping center area.

As a result, a new plan had to be developed so that my client could proceed with the reconfiguration of the parking lot and drive through on its property. This will necessitate the removal of the encroachment onto my client's property.

Kumar wishes to be a good neighbor, however, just as your client was reluctant to give the easement he was requesting because it might have been detrimental to best future use of her property, so too, that he may make good and safe use of his property, he must now cut-off the encroachment onto his property so that he may make good and safe use of his property. Kumar is willing to meet with your client to discuss the plans if she has any desire to do so.

If you have any questions, please do not hesitate to contact me.

Sincerely,


Robert J. Arundell

RJA/bno

cc: Mr. Kumar K. Viswanathan

000131

EX-101 I

MINOR, HAIGHT & ARUNDELL, P.C.

ATTORNEYS and COUNSELORS AT LAW

JOHN W. MINOR, JR. (1940-2003)
EHRICK K. HAIGHT, JR.
ROBERT J. ARUNDELL*

THE CLARENDON BUILDING
VILLAGE AT WEXFORD
POST OFFICE DRAWER 6067

TELEPHONE (843) 785-8040
FACSIMILE (843) 785-3506
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September 15, 2008

John L. Wilson, Esquire
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P.O. Box 21668
Hilton Head Island, SC 29925

Also via FAX to 681-2174

Re: Encroachment on to property owned by Carolina Center Building Corporation

Dear John:

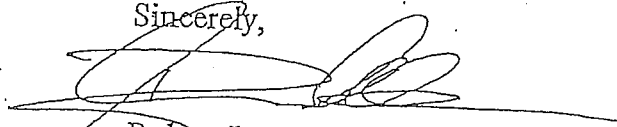
Thank you for taking my telephone call last week. As we discussed on the telephone, the Staples shopping center owner has decided not to give the easement that would accommodate the original plans shown to you and your client by Kumar Viswanathan in his effort help all the neighbors and improve overall traffic circulation in and around the shopping center area.

As a result, a new plan had to be developed so that my client could proceed with the reconfiguration of the parking lot and drive through on its property. This will necessitate the removal of the encroachment onto my client's property.

Kumar wishes to be a good neighbor, however, just as your client was reluctant to give the easement he was requesting because it might have been detrimental to best future use of her property, so too, that he may make good and safe use of his property, he must now cut-off the encroachment onto his property so that he may make good and safe use of his property. Kumar is willing to meet with your client to discuss the plans if she has any desire to do so.

If you have any questions, please do not hesitate to contact me.

Sincerely,


Robert J. Arundell

RJA/bno

cc: Mr. Kumar K. Viswanathan

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EXHIBIT J

MINOR, HAIGHT & ARUNDELL, P.C.

ATTORNEYS and COUNSELORS AT LAW

JOHN W. MINOR, JR. (1940-2003)
EHRICK K. HAIGHT, JR.
ROBERT J. ARUNDELL*

1000 WILLIAM HILTON PARKWAY, SUITE 203
CLARENDON BUILDING - VILLAGE AT WEXFORD
POST OFFICE DRAWER 6067

TELEPHONE (843) 785-8040
FACSIMILE (843) 785-3506
MHALAWFIRM.COM

STACEY S. COLLINS**

HILTON HEAD ISLAND, SOUTH CAROLINA 29938

* ALSO A MEMBER OF THE NORTH CAROLINA BAR
** ALSO A MEMBER OF THE GEORGIA BAR

MEMBER, AMERICAN BAR ASSOCIATION
MEMBER, HHI CHAMBER OF COMMERCE

October 29, 2012

Enmark Stations, Inc.
2112 Rankin Street
Savannah, GA 31415

Via Certified Mail

Re: Encroachment on Land

Dear Sir:

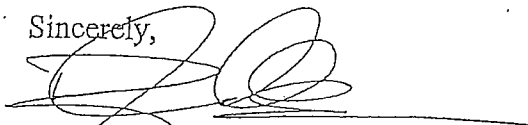
I am writing to you on behalf of Carolina Center Building Corporation which owns a parcel of land adjoining the parcel of land you purchased from ASA, Inc. on March 19, 2009. There is an encroachment in the form of an asphalt driveway that projects onto my client's property. I have attached two maps which more clearly identify the subject properties and the encroachment.

In 2008, in anticipation of prospective redevelopment plans, we notified ASA, Inc. that the encroachments would have to be closed. However, when those re-development plans were put on hold, my client decided to allow the encroachment to remain open. As my client now anticipates the possible transfer of the property, the encroachment will have to be closed.

The purpose of this letter is to inform you that the encroachment, the informal driveway at the back of the property, is going to have to be closed. This closure will prevent those who have been using my client's property as a 'short-cut' from doing so in the future. We will give you a more precise date as to when this encroachment will be closed as plans become finalized.

In the meantime, if you have any questions, please do not hesitate to contact me.

Sincerely,



Robert J. Arundell

RJA/bno
Enclosures

000133

SENT K

TOWN OF HILTON HEAD ISLAND

One Town Center Court, Hilton Head Island, SC 29928

(843) 341-4600 Fax (843) 842-7228

<http://www.hiltonheadislandsc.gov>

Via E-mail to bob@mhlawfirm.com

August 8, 2013

Robert J. Arundell, Esquire
Minor, Haight & Arundell, P.C.
P.O. Box 6067
Hilton Head Island, SC 29938-6067

Re: 2 Greenwood Drive

Dear Mr. Arundell:

This letter is in response to property your client owns at 2 Greenwood Drive [Beaufort County Tax Map 15, Parcel 198]. A recent review of the adjacent-use buffer on the north side of the subject property indicates that asphalt has been placed in this buffer to create an informal access between two adjoining properties. Please be advised that this asphalt access is in violation of the Town's Land Management Ordinance (LMO). The Town requires a 20' adjacent-use buffer between commercial properties through which there can be only perpendicular access. Additionally this informal accessway does not meet Town standards for access. Since the disturbance of the adjacent use buffer was never approved, nor could be approved the situation must be rectified.

Please have the asphalt removed and a vegetated buffer reestablished. A copy of a native plant list, all of which are appropriate for buffer plantings is enclosed. Should the adjacent property owners who may be using this access have concerns about the lack of connection between their properties, they may contact me and I will review their options with them.

To resolve this violation please ensure that the asphalt is removed and the vegetated buffer reestablished no later than September 8, 2013.

Please contact me at (843) 341-4698 or teri@hiltonheadislandsc.gov if you have any questions.

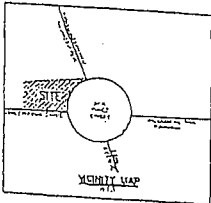
Sincerely,



Teri B. Lewis
LMO Official

EXHIBIT

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DATE	USER	DATE	DATE	DATE	DATE	DATE
07/26/13	11/17/12	11/14/12	11/14/12	11/14/12	11/14/12	11/14/12

CAROLINA CENTER
PROPERTY EXHIBIT
JULY 26, 2013

NOTES:
1. ALL DIMENSIONS ARE IN FEET AND INCHES.
2. CENTERLINE OF ROAD IS SHOWN.
3. PROPERTY LINE IS SHOWN.
4. EXISTING PAVEMENT IS SHOWN.
5. EXISTING ENCROACHMENT IS SHOWN.
6. EXISTING PARKING LOT IS SHOWN.
7. EXISTING BUILDING IS SHOWN.
8. EXISTING DRIVEWAY IS SHOWN.
9. EXISTING UTILITY LINES ARE SHOWN.
10. EXISTING ELEVATION IS SHOWN.
11. EXISTING DRAINAGE IS SHOWN.
12. EXISTING FENCE LINE IS SHOWN.
13. EXISTING MATERIAL IS SHOWN.

PARCEL A
1/2 ACRES
11/14/12

EXISTING PARKING LOT

EXISTING GAS STATION

PROPERTY LINE
PAVEMENT
ENCROACHMENT
EXISTING PARKING LOT

CAROLINA CENTER

PARCEL A
1/2 ACRES
11/14/12

PARCEL C
1/2 ACRES
11/14/12

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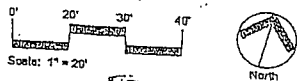
PALETTES BAY ROAD

SEA PINE CIRCLE

GREENWOOD DRIVE

THOMAS & HUTTON
50 PARK OF COMMERCE WAY • PO BOX 3727
SAVANNAH, GA 31403-2727 • 912.234.5300
www.thomasandhutton.com

This report is prepared by the Surveyor, which is for the use of the client only. It is not to be used for any other purpose without the written consent of the Surveyor. The Surveyor is not responsible for any errors or omissions in this report. The client is responsible for the accuracy of the information provided to the Surveyor. The Surveyor is not responsible for any errors or omissions in this report. The client is responsible for the accuracy of the information provided to the Surveyor.



NOTE:
1) SURVEY DATA TAKEN FROM: SURVEY OF 2.19 ACRE PARCEL AT GREENWOOD DRIVE, A SECTION OF SEA PINES PLANTATION 7/23/2007.

2) DETAILED AND PREPARED BY:
SC SURVEYING CONSULTANTS
11111 Highway 17 North • Suite 100 • Savannah, GA 31411
912.434.1111 • Fax 912.434.1112
www.sc-surveying.com

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
CAROLINA CENTER BUILDING CORP.,)
Plaintiff,)
vs.)
ENMARK STATIONS, INC.; TOWN OF)
HILTON HEAD ISLAND,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL COURT
CIVIL ACTION NO.: 2013-CP-07-2066

**DEFENDANT'S ANSWER AND
COUNTERCLAIMS TO PLAINTIFF'S
AMENDED COMPLAINT**

**TO: THE PLAINTIFF, CAROLINA CENTER BUILDING CORP., AND ITS
ATTORNEY, H. FRED KUHN, JR., ESQUIRE:**

The Defendant, Enmark Stations, Inc. ("Enmark" or "Defendant"), hereby responds to the Plaintiff's Amended Complaint, filed November 19, 2014 ("Complaint") and asserts the Counterclaims listed below, as follows:

FOR A FIRST DEFENSE
(General Denial)

1. That the Defendant, Enmark, denies each and every allegation contained in the Plaintiff's Complaint not hereinafter admitted, qualified or explained.

2. That the Defendant, Enmark, lacks sufficient information upon which to form an opinion as to the truth or falsity of the allegations of Paragraphs 1 and 3 of the Plaintiff's Complaint, and therefore denies same.

3. That the Defendant, Enmark, admits the allegations of Paragraphs 2 and 22 of the Plaintiff's Complaint.

4. That the Defendant, Enmark, denies the allegations of Paragraphs 7, 11, 13, 14, 16, 17, 18, 19, 20, 23, 24, 27, 29, 30, 31, 32, 34 - 37, 39 - 44, 46, 47, and 49 - 51.

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5. That the Defendant Enmark is informed no response is necessary to the allegations of Paragraphs 15, 25, 33, 38, 45, 48, and 52 through 59 of the Complaint. If a response is necessary, said allegations are denied.

6. That as to the allegations of Paragraph 4, Enmark would admit it acquired title by the deed from ASA recorded in Book 2822 at Page 1941, but would deny the remaining allegations of said paragraph.

7. That as to the allegation of Paragraph 5, the Defendant would admit that the general public, and others, have used the subject roadway, as delineated on Ex. M to the Plaintiff's Complaint ("Roadway") for a substantial period of time. Any allegation of paragraph 5 inconsistent with said assertion is denied.

8. That as to the allegation of Paragraph 6, the Defendant would admit that the 1989 as-built survey is recorded at Plat Book 38 at Page 53, but would deny that this is the first survey to show the Encroachment or the Roadway.

9. That as to the allegation of Paragraph 8, the Defendant would deny that Chevron USA is a party in the chain of title. The Defendant further lacks sufficient information upon which to form an opinion as to the truth or falsity of the allegations of paragraph 8 which state that Exhibit B is a survey prepared by Chevron USA. Further, the Defendant would deny that said survey does not show the Encroachment or the subject Roadway.

10. That as to the allegation of Paragraph 9, the Defendant would admit upon information and belief that Exhibit E appears to be a letter from Cary S. Griffin to John Wilson dated June 15, 1995. As to the statements contained in said letter, the Defendant would direct the parties' and the Court's attention to the express terms thereof. Any allegation inconsistent with the above is denied.

11. That as to the allegation of Paragraph 10, the Defendant, Enmark, upon information and belief, would admit that attached as Exhibit F appears to be a letter from John Wilson to Cary Griffin dated June 23, 1994. That as to the statements contained in said letter, the Defendant, Enmark, would direct the parties' and the Court's attention to the express terms and provisions of said letter. Any allegation inconsistent with same is denied.

12. That as to the allegation of Paragraph 12, the Defendant would admit that recorded at Deed Book 210 at Page 1065 is the document which is attached as Exhibit F to the Plaintiff's Complaint. All other allegations contained in paragraph 12 are denied.

13. That as to the allegations of Paragraph 21 of the Plaintiff's Complaint, the Defendant, Enmark, upon information and belief, would admit that attached as Exhibit K appears to be a copy of a letter dated October 29, 2012 from Robert J. Arundell. As to the statements contained in said letter, the Defendant, Enmark, would direct the parties' and the Court's attention to the express terms thereof. Any allegation inconsistent with the above is denied.

14. That as to the allegations of Paragraph 28, the Defendant would admit that attached as Exhibit L, upon information and belief, is a letter dated August 8, 2013 from the Town of Hilton Head. As to the statements contained in said letter, the Defendant, Enmark, would direct the parties' and the Court's attention to the express terms and provisions thereof. Further, the Defendant is informed and believes the Town is no longer seeking the removal of said Encroachment or Roadway and has decided to let the Court resolve this dispute between two (2) private parties. Any allegation inconsistent with the above is denied.

FOR A SECOND DEFENSE
(Failure to State a Cause of Action)

15. That the Defendant, Enmark, repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 14 above.

16. That the various claims and allegations asserted by the Plaintiff fail or insufficiently state valid causes of action under South Carolina law and should therefore be dismissed.

FOR A THIRD DEFENSE
(Waiver, Estoppel, Laches, Acquiescence)

17. That the Defendant, Enmark, repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 16 above.

18. That the Plaintiff, prior to and after the time of its purchase of the Carolina Center on October 31, 1996 (Deed Book 911 at Page 1274), had knowledge of and was aware of the existence of the Roadway providing ingress and egress to the Defendant's service station.

19. That since prior to 1996, the Plaintiff has not taken any substantive steps to remove, block or prevent the use of said Roadway by the guests, invitees and patrons of the Defendant's service station.

20. That as a result of said actions or inactions over the course of over seventeen (17) years of continuous ownership, the Plaintiff is barred by the equitable doctrine of estoppel, laches, acquiescence, and waiver from asserting the claims asserted in the Complaint.

FOR A FOURTH DEFENSE
(Statute of Limitations)

21. That the Defendant, Enmark, repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 20 above.

22. That the Plaintiff's claims are barred by the applicable South Carolina Statute of Limitations.

FOR A FIFTH DEFENSE
(Privileged Communication)

23. That the Defendant, Enmark, repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 22 above.

24. That as to the Slander of Title Cause of Action, the Defendant denies it made any false representations to any third party.

25. Any representations or declarations made by the Defendant were made in the course of legal proceedings, in settlement discussions or in an effort to resolve disputed title claims and are thus subject to an absolute or qualified privilege.

**FOR A SIXTH DEFENSE
AND AS A FIRST COUNTERCLAIM
(Declaratory Judgment – Prescriptive Easement)**

26. That the Defendant, Enmark, repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 25 above.

27. That this counterclaim is filed pursuant to the South Carolina Declaratory Judgment Action (§ 15-53-10, et. seq. of the SC Code of Laws (1976)) and Rule 57, SCRPC.

28. That there is a justifiable dispute or controversy between the Plaintiff and the Defendant Enmark as to the rights, title, and interest of the two parties as to the Roadway, as depicted on Exhibit M to the Plaintiff's Complaint.

29. That the Defendant, Enmark, is informed and believes that it has the right to continue to use, maintain and have free, unfettered access to said Roadway for ingress and egress in perpetuity, for both itself and its guests, invitees and patrons, based upon a prescriptive easement, based upon the following:

- (a) That the Defendant, Enmark, as well as other parties in privity with same and in the chain of title, have continued an uninterrupted use of the Roadway for ingress and egress for a period in excess of twenty (20) years;

- (b) That the Roadway has been used for such purposes in excess of twenty (20) years, in the general location as depicted on Exhibit M to the Plaintiff's Complaint, providing ingress and egress to the rear, or southern portion of the Plaintiff's service station;
- (c) Said use is either adverse, or pursuant to a claim of right;
- (d) That said use of the Roadway has been open, notorious, continuous, and uninterrupted for a period in excess of twenty (20) years.

30. That the Defendant, Enmark, is entitled to an Order of the Court that it holds the perpetual right to continue to use and maintain the Roadway under a prescriptive easement.

**FOR A SEVENTH DEFENSE
AND AS A SECOND COUNTERCLAIM
(Declaratory Judgment – Easement by Express Grant)**

31. That the Defendant, Enmark, repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 30 above.

32. That if it is determined that the Defendant, Enmark, does not have easement rights under a prescriptive easement, that it is entitled to continue to use and maintain the Roadway in perpetuity under an express easement pursuant to the rights granted to it, and other parties in its chain of title, under that certain Easement dated December 19, 1960, recorded at Book 105 at Page 101 at the Beaufort County Register of Deeds ("ROD"), that certain Relocation of Easement Agreement, dated May 15, 1973, recorded at Book 210 at Page 1065, as well as other documents in the chain of title to the Plaintiff's and Defendant's respective properties.

33. That the Defendant, Enmark, is entitled to an Order of the Court that it held the perpetual right to continue to use and maintain the Roadway under an express easement.

AND AS A THIRD COUNTERCLAIM
**(Declaratory Judgment – Easement by Estoppel,
Acquiescence, Implied Reservation)**

34. That the Defendant, Enmark, repeats, realleges and incorporates herein by reference the allegations of Paragraphs 1 through 33 above.

35. That the Defendant, Enmark, as a result of the actions and inactions of the Plaintiff, and parties in its chain of title, is entitled to an Order from this Court finding it has a perpetual right to continue to use and maintain the Roadway based upon Estoppel, Acquiescence or implied reservation.

WHEREFORE, the Defendant, Enmark, prays for an Order as follows:

1. To dismiss the Plaintiff's Causes of Action.
2. For an Order confirming the rights of the Defendant, Enmark, to use and maintain in perpetuity the Roadway, to provide ingress and egress to the rear or southern portion of its property, either under a prescriptive easement, express easement, estoppel, acquiescence and/or implied reservation.
3. For such other and further relief as this Court deems just and proper.

RUSSELL P. PATTERSON, P.A.



Russell P. Patterson
P.O. Drawer 8047
Hilton Head Island, SC 29938
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Attorney for the Defendant,
Enmark Stations, Inc.

Hilton Head Island, South Carolina
December 17, 2014

) IN THE COURT OF COMMON PLEAS
) FOR THE 14TH JUDICIAL CIRCUIT
) CIVIL CASE NO.: 2013-CP-07-02066

ANSWER OF THE DEFENDANT
TOWN OF HILTON HEAD ISLAND TO
PLAINTIFF'S AMENDED
COMPLAINT

COMES NOW the Defendant Town of Hilton Head Island ("Town" or "Defendant")
reserving all rights to amend this Answer within thirty (30) days pursuant to Rule 15(a) *SCRCP*,
reserving all rights to include in said amended answer any defenses and/or objections under
Rules 8(c) and 12 *SCRCP*, and reserving all rights to make any motions under Rule 12 *SCRCP*,
does hereby file this, the Answer to the Plaintiff's Amended Complaint ("Complaint") as
follows:

1. Any allegation(s), paragraph(s), or statement(s) not hereinafter expressly admitted, qualified, or explained is/are deemed to be denied, and Defendant demands strict proof thereof at time of trial.

2. That the Defendant is not required to respond to any administrative paragraph(s) that re-allege(s) foregoing paragraphs or allegations, but, in the event Defendant is required to

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make such a response, Defendant hereby denies the same and demands strict proof thereof at time of trial.

3. That the Defendant is not required to respond to any administrative paragraph(s) that does not set out facts or demand relief but, in the event Defendant is required to make such a response, Defendant hereby denies the same and demands strict proof thereof at time of trial.

4. That the Defendant is not required to respond to any paragraph(s) that state(s) a legal conclusion but, in the event Defendant is required to make such a response, Defendant hereby denies the same and demands strict proof thereof at time of trial.

5. Defendant hereby denies each allegation(s), paragraph(s), or statement(s) in the Complaint that state(s) any legal conclusion(s) and, to the extent an answer is required to the same, Defendant hereby denies said allegation(s), paragraph(s), or statement(s) and demands strict proof thereof at time of trial.

6. Paragraphs 1 through 52 of the Complaint contain no allegations against the Defendant, Town of Hilton Head Island, and therefore no answer is required. To the extent an allegation of fact is alleged, the Defendant denies the same and demands strict proof thereof.

7. The Defendant admits paragraph 53.

8. That as to the allegation contained in paragraph 54, the Defendant admits that the Town passed a Land Management Ordinance ("LMO") for the benefit of the general public. Any allegation inconsistent with the above is denied.

9. The Defendant admits paragraph 55.

10. The allegation of paragraph 56 is denied.

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11. The allegation contained in paragraph 57 is admitted to the extent that Defendant has been asked to enforce the LMO regarding the subject roadway. Any allegation inconsistent with the above is denied.

12. The allegation of paragraph 58 is denied

13. The allegation of paragraph 59 is denied.

FOR A SECOND DEFENSE
Statute of Limitations

14. Defendant does hereby re-allege, reiterate, and restate each and every admission, qualification, denial and allegation of the foregoing paragraph(s) as if fully set forth herein verbatim.

15. Some or all of the Plaintiff's claims are or may be barred by the Statute of Limitations.

FOR A THIRD DEFENSE
Laches/Estoppel

16. Defendant does hereby re-allege, reiterate, and restate each and every admission, qualification, denial and allegation of the foregoing paragraph(s) as if fully set forth herein verbatim.

17. Some or all of the Plaintiff's claims are or may be barred by the doctrines of laches and/or estoppel.

FOR A FOURTH DEFENSE
Lack of Subject Matter Jurisdiction

18. Defendant does hereby re-allege, reiterate, and restate each and every admission, qualification, denial and allegation of the foregoing paragraph(s) as if fully set forth herein verbatim.

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19. The Complaint must be dismissed for lack of subject matter jurisdiction. The Plaintiff has not established standing under SCRCF Rule 12(b)(1), lack of jurisdiction over the subject matter, because Plaintiff has failed to exhaust its administrative remedies by not filing a timely appeal of a determination made by the Town Administrator pursuant to Section 16-3-205 of the LMO, and accordingly, this Court does not have jurisdiction.

FOR A FIFTH DEFENSE
Improper Venue

20. Defendant does hereby re-allege, reiterate, and restate each and every admission, qualification, denial and allegation of the foregoing paragraph(s) as if fully set forth herein verbatim.

21. The Complaint must be dismissed for lack of proper venue according to SCRCF 12(b)(3). The proper venue for the Plaintiff's Complaint should have been the Board of Zoning Appeals in an appeal of the determination made by the Administrator pursuant to Section 16-3-205 of the LMO.

FOR A SIXTH DEFENSE
Failure to State a Claim

22. Defendant does hereby re-allege, reiterate, and restate each and every admission, qualification, denial and allegation of the foregoing paragraph(s) as if fully set forth herein verbatim.

23. The Complaint must be dismissed for failure to state sufficient facts or cause of action upon which a Court may grant relief, and in accordance with SCRCF 12(b)(6).

24. Plaintiff alleges that the Defendant failed to enforce the LMO. However, the Plaintiff only disagrees with the decision reached by the Administrator regarding enforcement of the LMO, which is appealable pursuant to the Town Municipal Code, more specifically the LMO.

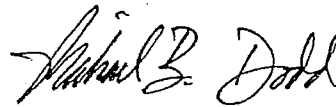
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25. The writ of mandamus is the highest judicial writ; one issued as a last resort, and should only be issued when there "is no other legal remedy."¹ Plaintiff has not stated any facts suggesting that it has exhausted its administrative or other remedies as set forth in the Town LMO, and therefore the Complaint must be dismissed.

WHEREFORE, having answered the Complaint, Defendant prays that this Court inquire into these matters and issue an Order dismissing the Plaintiff's Complaint and for any such further relief as this Court deems just and proper.

ALFORD & THORESON, LLC

By: _____



Gregory M. Alford
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gregg@alfordlawsc.com
*Attorneys for Defendant, Town of Hilton
Head Island*

This 20th day of January, 2015.
Hilton Head Island, Beaufort County, South Carolina.

¹ *Willimon v. Greenville*, 243 S.C. 82, 86-87, 132 S.E.2d 169, 170-171 (S.C. 1963). See also *Miller v. State*, 377 S.C. 99, 659 S.E.2d 492 (S.C. 2008).

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	
CAROLINA CENTER BUILDING CORP.,	)	
	)	
Plaintiff,	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT
ENMARK STATIONS, INC.,	)	
	)	
Defendant.	)	

2014 OCT -1 PM 3:44
 ANN ROSENEAU
 BEAUFORT COUNTY, S.C.
 CLERK OF COURT

CASE NO.: 2013-CP-07-02066

TO: RUSSELL P. PATTERSON, ESQUIRE, ATTORNEY FOR THE DEFENDANT:

PLEASE TAKE NOTICE that the Plaintiff, Carolina Center Building Corporation, through its undersigned counsel, hereby moves before the Presiding Judge of the Beaufort County Court of Common Pleas at such date, time and place as may be set by the Clerk thereof, but no sooner than ten (10) days from the date of filing of this motion, for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting to the Plaintiff, Carolina Center Building Corporation, summary judgment in its favor. This motion is made upon the ground that there does not exist any genuine issue of material fact and this Plaintiff is entitled to a judgment in its favor as a matter of law.

More specifically, this motion is made upon the following grounds:

1. There is no express access easement for ingress and egress over the property of this Plaintiff in favor of the Defendant;
2. There is no prescriptive easement over the property of this Plaintiff in favor of the Defendant;

3. The Defendant's claim of a prescriptive easement is fatally defective for several reasons, including:

- a. The claimed prescriptive easement was not used in a manner which was hostile;
- b. The claimed prescriptive easement was not used in a manner which was exclusive;
- c. The claimed prescriptive easement was not used in a manner which was continuous and uninterrupted;
- d. The claimed prescriptive easement has not persisted for the period of time necessary to establish prescriptive rights;
- e. The claimed prescriptive easement is not reasonably definite in its location and dimensions;
- f. The claimed prescriptive easement was not reasonably definite in its nature and purpose.

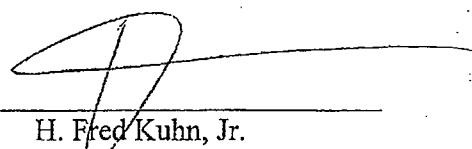
Additionally, the Defendant's causes of action for either an express easement or a prescriptive easement for purposes of ingress and egress must fail in as much as an easement over this Plaintiff's property does not provide ingress and egress, but rather, dead ends on to the private property of other individuals. These other property owners are necessary parties to this action.

Finally, the easement claimed by the Defendant was established illegally, in violation of the applicable governing ordinances for the Town of Hilton Head Island, South Carolina.

This motion is based upon the depositions and discovery taken in this case.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

By: 

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373
(843)524-1302 – facsimile

Beaufort, South Carolina
October 1, 2014

Attorneys for the Plaintiff

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CASE NO.: 2013-CP-07-02066
	)	
CAROLINA CENTER BUILDING	)	
CORP.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	MOTION TO ALTER, AMEND
	)	OR RECONSIDER (RULE 59, SCRCP)
	)	
ENMARK STATIONS, INC. and THE	)	
TOWN OF HILTON HEAD ISLAND,	)	
	)	
Defendant.	)	
	)	

PLEASE TAKE NOTICE that the Plaintiff, through its undersigned attorney, hereby moves before the Honorable Marvin H. Dukes, III, Special Circuit Court Judge and Beaufort County Master in Equity, pursuant to Rule 59 of the South Carolina Rules of Procedure for an Order altering, amending, and reconsidering that Order and Decree filed on March 30, 2017 on the following grounds:

1. The Court erred in finding as a matter of fact and concluding as a matter of law that there is clear and convincing evidence as to each of the elements of a prescriptive easement and that Enmark is entitled to a prescriptive easement over the roadway.

2. The Court erred in finding as a matter of fact and concluding as a matter of law that Enmark can rely not only on its use of the roadway since its purchase of its property from ASA, Inc. on March 18, 2009, but also the use of the two (2) prior owners dating back when the station was first built by Chevron Oil Company.

3. The Court erred in finding as a matter of fact and concluding as a matter of law that Enmark is entitled to tack the period of use of owners in order to reach the twenty (20) year requirement for a prescriptive easement.

4. The Court erred in finding as a matter of fact and concluding as a matter of law that the roadway was in existence and used by patrons of the Chevron Station and others at the time of the opening of the Chevron Station, or very shortly thereafter.

5. The Court erred in finding as a matter of fact and concluding as a matter of law that the roadway provided easy access to the Winn Dixie, located to the southwest of the Chevron Station.

6. The Court erred in finding as a matter of fact and concluding as a matter of law that during the period of time that the Chevron Station was operated or owned by Mr. Ballenger, Mrs. Means, or ASA, Inc. that the roadway during that entire time period was in use and existence in the same location as marked in red on Exhibit 74 attached to the Order.

7. The Court erred in finding as a matter of fact and concluding as a matter of law that from 1989 to 2009 the roadway was in use and in existence in the same location as marked in red on Exhibit 74.

8. The Court erred in finding as a matter of fact and concluding as a matter of law that the 1986 aerial photographs confirm and support the conclusion that the roadway was in use and in existence at that time in the same location as marked in red on Exhibit 74.

9. The Court erred in finding as a matter of fact and concluding as a matter of law that various aerial photographs and recorded plats confirm that in 1988 the roadway was in use and in existence in the same location as marked in red on Exhibit 74.

10. The Court erred in finding as a matter of fact and concluding as a matter of law that various aerial photographs and recorded plats confirm that in 1995 the roadway was in use and in existence in the same location as marked in red on Exhibit 74.

11. The Court erred in finding as a matter of fact and concluding as a matter of law that various aerial photographs and recorded plats confirm that in 2002 the roadway was in use and in existence in the same location as marked in red on Exhibit 74.

12. The Court erred in finding as a matter of fact and concluding as a matter of law that various aerial photographs and recorded plats confirm that in 2012 the roadway was in use and in existence in the same location as marked in red on Exhibit 74.

13. The Court erred in finding as a matter of fact and concluding as a matter of law that various aerial photographs and recorded plats confirm that in 2013 the roadway was in use and in existence in the same location as marked in red on Exhibit 74.

14. The Court erred in finding as a matter of fact and concluding as a matter of law that the legend on the 1989 plat, recorded in Plat Book 38 at Page 53 prepared on November 1, 1989 indicates that the roadway is comprised of "asphalt paving."

15. The Court erred in finding as a matter of fact and concluding as a matter of law that the roadway was paved with asphalt prior to 1989.

16. The Court erred in finding as a matter of fact and concluding as a matter of law that after Enmark purchased the property on March 19, 2009 the roadway continued in use by patrons of the station and by members of the public in the same location as it existed since 1984.

17. The Court erred in finding as a matter of fact and concluding as a matter of law that from 1989 until Mrs. Means purchased the Chevron Station that the asphalt roadway was patched and repaired and two (2) speed bumps were added.

18. The Court erred in finding as a matter of fact and concluding as a matter of law that after Mrs. Means, through ASA, Inc., acquired the Chevron Station on August 23, 1993 that in 1994 she repaved the roadway with asphalt, reinstalling and repairing the two (2) speed bumps.

19. The Court erred in finding as a matter of fact and concluding as a matter of law that the ASA depreciation schedule shows new repaving of the roadway in 1994.

20. The Court erred in finding as a matter of fact and concluding as a matter of law that photographic evidence introduced at trial showing two (2) layers of asphalt paving supports a finding that the roadway was paved prior to the acquisition of the property by ASA, Inc.

21. The Court erred in finding as a matter of fact and concluding as a matter of law that the existence of a drainage catch basin in the middle of the roadway supports a finding that the roadway was paved prior to the acquisition of the property by ASA, Inc.

22. The Court erred in finding as a matter of fact and concluding as a matter of law that the roadway has been in continuous and uninterrupted use or enjoyment by Enmark, ASA, Mrs. Means, Mrs. Ballenger, and Chevron for twenty-nine (29) years, from 1984 until July 24, 2013.

23. The Court erred in finding as a matter of fact and concluding as a matter of law that use of the roadway was open for twenty (20) years or more prior to July 24, 2013.

24. The Court erred in finding as a matter of fact and concluding as matter of law that the use of the roadway was notorious for twenty (20) years or more prior to July 24, 2013.

25. The Court erred in finding as a matter of fact and concluding as a matter of law that the use of the roadway was continuous for more twenty (20) years or more prior to July 24, 2013.

26. The Court erred in finding as a matter of fact and concluding as a matter of law that the use of the roadway was uninterrupted for twenty (20) years or more prior to July 24, 2013.

27. The Court erred in concluding as a matter of law that mere “verbal threats” are insufficient as a matter of law to interrupt the continuous use period for a prescriptive easement.

28. The Court erred in failing to find as a matter of fact or conclude as a matter of law that the Plaintiff asserted its rights to the Defendant by an overt act which, if the easement existed, would be a cause of action.

29. The Court erred in failing to find as a matter of fact or conclude as a matter of law that the Plaintiff asserted its rights to the Defendant in such a manner that interrupted the Defendant’s impression of the Plaintiff’s acquiescence in the Defendant’s use of the roadway.

30. The Court erred in failing to find as a matter fact or conclude as a matter of law that the acquiescence of the Plaintiff to the Defendant’s use of the roadway was not a fact.

31. The Court erred in concluding as a matter of law that verbal warnings or written demands are insufficient as a matter of law to interrupt the continuous use.

32. The Court erred in finding as a matter of fact and concluding as a matter of law that the actions undertaken by the Plaintiff in this case were not sufficient to interrupt the usage of the roadway during the prescriptive period.

33. The Court erred in finding as a matter of fact and concluding as a matter of law that the June 15, 1994 letter written by Cary S. Griffin to John L. Wilson was not sufficient to interrupt the prescriptive period.

34. The Court erred in finding as a matter of fact and concluding as matter of law that the letter written on September 15, 2008 by Robert J. Arundell was insufficient to interrupt the prescriptive period.

35. The Court erred in finding as a matter of fact and concluding as a matter of law that the requisite twenty (20) year continuous use period for a prescriptive easement had already been met by the time of the September 15, 2008 letter by Robert J. Arundell.

36. The Court erred in finding as a matter of fact and concluding as a matter of law that no action was ever taken to limit, restrain, or prevent the use of the roadway until posts were placed by Carolina adjacent to the roadway in 2013.

37. The Court erred in failing to find as a matter of fact and conclude as a matter of law that Mr. Arundell's letter dated October 29, 2012 interrupted the prescriptive use.

38. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the use by the Defendant of the roadway was permissive or with the permission of the Plaintiff.

39. The Court erred in failing to find as a matter of fact or conclude as a matter of law that the use of the roadway by Mrs. Means and ASA, Inc. was permissive.

40. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the use of the roadway by Mrs. Means and ASA, Inc. was not adverse.

41. The Court erred in finding as a matter of fact and concluding as a matter of law that at the time of the October 29, 2012 letter written by Mr. Arundell the paved roadway had been in continuous use for over twenty-eight (28) years, from 1984 to 2012.

42. The Court erred in finding as a matter of fact that, other than the letters of June 15, 1994, September 15, 2008, and October 9, 2012 there was no other credible evidence of any other action by Plaintiff sufficient to interrupt the continuous use of the roadway by the Defendant.

43. The Court erred in finding as a matter of fact that the roadway had been used by Mrs. Means, her employees, and patrons of the Chevron Station in the same location for at least 1984 through the date of the hearing.

44. The Court erred in finding as a matter of fact that the placement of a trash dumpster on the southeastern terminus of the roadway did not materially change its location.

45. The Court erred in failing to find as a matter of fact that the placement of a trash dumpster on the southeastern terminus of the roadway constituted an interruption in the use of the roadway.

46. The Court erred in failing to find that the placement of a trash dumpster on the southeastern terminus of the roadway constituted an overt act sufficient to interrupt the continuous use of the claimed prescriptive easement.

47. The Court erred in finding as a matter of fact that there is no credible evidence that the placement of this dumpster on the roadway was an effort to close or materially alter the roadway.

48. The Court erred in failing to find as a matter of fact that the placement of the dumpster on the roadway blocked the roadway and the roadway was altered as users of the roadway were forced to detour around the dumpster.

49. The Court erred in finding as a matter of fact and concluding as a matter of law that the burden of proof shifted to the Plaintiff to rebut a presumption that the of the roadway was adverse for the prescriptive period.

50. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Plaintiff granted permission to the Defendant for the use of the roadway during the alleged prescriptive period.

51. The Court erred in finding as a matter of fact and concluding as a matter of law that the testimony of Mr. Viswanathan that he gave oral permission to ASA, Inc. and Alice Means to use the roadway is neither credible nor supported by the evidence.

52. The Court erred in finding as a matter of fact that the testimony of Mr. Viswanathan that he gave permission to ASA, Inc. and Mrs. Means to use the roadway is inconsistent with the testimony of Mrs. Means and Mr. Middleton.

53. The Court erred in finding as a matter of fact that Mrs. Means never obtained consent from anyone to use the roadway or sought to obtain consent.

54. The Court erred in finding as a matter of fact that Mr. Middleton never obtained or sought permission from Plaintiff to utilize the roadway.

55. The Court erred in finding as a matter of fact that there is not in existence a single document referencing any grant of permission by Plaintiff to use the roadway.

56. The Court erred in finding as a matter of fact that the February 8, 2008 easement proposal sent by Plaintiff to Mr. Middleton and ASA constituted a recognition by Plaintiff of the legal right of ASA to utilize the roadway.

57. The Court erred in concluding as a matter of law that the fact that the roadway was established illegally does not prevent a prescriptive easement.

58. The Court erred in finding as a matter of fact and concluding as matter of law that the creation of a curb-cut by removing the 6" concrete curbing around the Chevron Station in the area of the roadway in order to allow access to the roadway was completed in compliance with existing rules and regulations.

59. The Court erred in concluding as a matter of law that even if the curb-cut which was created in order to allow access to the roadway from the Chevron Station was completed in violation of existing rules and regulations that this would not be fatal to the establishment of a prescriptive easement.

60. The Court incorrectly stated that Plaintiff did not cite to the Court any specific legal authority for the proposition that a lawful prescriptive easement may be created as the result of an unlawful act.

61. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Order of the Honorable Luke N. Brown, Jr. allowing the construction of the gas station established that the Defendant was not entitled to a second easement or access point to the rear of its property and its only access point was directly onto the public road which it adjoins.

62. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the litigation entered into by the Defendant's predecessor in title, pursuant to which it was allowed to construct a gas station on Defendant's property, precluded the Defendant, as well as its predecessors in title, from lawfully establishing an access point or easement for purposes of ingress and egress to the rear of Defendant's property over the properties of its adjoining landowners.

63. The Court erred in finding as a matter of fact and concluding as a matter of law that no resulting inequity to Plaintiff arises in allowing a prescriptive easement to be established as a result of an unlawful act.

64. The Court erred in finding as a matter of fact that the roadway is listed as a specific title exception in the Contract of Sale and Deed of Conveyance into Plaintiff.

65. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the title exception to an easement referenced in the Plaintiff's purchase of its property refers to the powerline easement.

66. The Court erred in finding as a matter of fact that Plaintiff's purchase of its property took into consideration the existence of the roadway.

67. The Court erred in failing to find as a matter of fact or conclude as a matter of law that Defendant's prescriptive easement claim must fail since it is an "easement to nowhere", i.e., it has no terminus at a public road.

68. The Court erred in finding as a matter of fact and concluding as a matter of law that a prescriptive easement for purposes of ingress and egress can exist where the easement terminates on private property owned by a third party over which no easement rights exist.

69. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the claimed prescriptive easement for purposes of ingress and egress cannot exist since it necessarily involves traversing over the properties of third parties who have expressly denied access to their properties for this purpose.

70. The Court erred in finding as a matter of fact and concluding as a matter of law that a prescriptive easement for purposes of ingress and egress can exist where said easement necessarily requires trespassing over the private property of third parties.

71. The Court erred in finding as a matter of fact and concluding as a matter of law that a prescriptive easement for purposes of ingress and egress exists and accordingly giving Court permission and approval to trespassing over the private property of third parties.

72. The Court erred in failing to find as a matter of fact or conclude as a matter of law that the owners of the properties upon which users of the roadway must traverse in order to gain ingress or egress to Defendant's property are not necessary parties.

73. The Court erred in finding as a matter of fact and concluding as a matter of law that the adjoining landowners over whose property users of the roadway must traverse in order to gain ingress or egress to Defendant's property should have been named as parties by the Plaintiff, as opposed to the Defendant, where the Plaintiff has no complaint or claims against these adjoining

landowners and these adjoining landowners are necessary parties as to Enmark's claim of a prescriptive easement for purposes of ingress and egress.

74. The Court erred in failing to find as a matter of fact and conclude as a matter of law that Ms. Lewis, the LMO Official, made a final determination that the roadway violated the LMO.

75. The Court erred in finding as a matter of fact and concluding as a matter of law that the LMO Official did not make a final determination that the roadway violated the LMO.

76. The Court erred in finding as a matter of fact and concluding as a matter of law that the Defendant's violation of the LMO was doubtful or uncertain.

77. The Court erred in finding as a matter of fact and concluding as a matter of law that there was no violation of the LMO as to the construction and maintenance of the roadway.

78. The Court erred in concluding as a matter of law that there was a burden of proof upon the Plaintiff to show by a preponderance of the evidence that the roadway was constructed, improved or maintained in violation of the LMO.

79. The Court erred in failing to conclude as a matter of law that the determination by the LMO Official that the roadway was constructed, improved or maintained in violation of the LMO, was an unappealed and binding decision upon the Defendant.

80. The Court erred in finding as a matter fact and concluding as a matter of law that there was no evidence that the construction of the roadway or curb cut violated any applicable ordinance.

81. The Court erred in finding as a matter of fact and concluding as a matter of law that at the time of the Town of Hilton Head Island's adoption of the LMO no Town permit or approval was required for the continued existence of the original roadway since it was a valid nonconforming use.

82. The Court erred in finding as a matter of fact and concluding as a matter of law that there is no evidence that the original roadway was not a legally established activity under the Beaufort County Development Standards Ordinance, the predecessor to the 1987 LMO.

83. The Court erred in finding as a matter of fact and concluding as a matter of law that there is no evidence that under the DSO a permit or governmental approval for the roadway was required.

84. The Court erred in finding as a matter of fact and concluding as a matter of law that the original paving of the roadway did not require a permit under the applicable LMO.

85. The Court erred in finding as a matter of fact and concluding as a matter of law that the roadway was originally paved sometime shortly after the station opened in 1984.

86. The Court erred in finding as a matter of fact and concluding as a matter of law that the paving of an existing dirt roadway does not constitute development within the meaning of the LMO requiring a permit.

87. The Court erred in finding as a matter of fact and concluding as a matter of law that the subsequent repaving and construction of two (2) speed bumps on the roadway did not constitute a violation of the LMO.

88. The Court erred in finding as a matter of fact and concluding as a matter of law that the installation of two (2) speed bumps on the roadway was not a violation of the LMO.

89. The Court erred in failing to find as a matter of fact and conclude as a matter of law that no permit by either Beaufort County or the Town of Hilton Head Island has been issued regarding the roadway.

90. The Court erred in finding as a matter of fact and concluding as a matter of law that development of the roadway without a permit in violation of the LMO is a violation that the LMO Official may waive in her discretion.

91. The Court erred in failing to find as a matter of fact or conclude as a matter of law that the LMO Official made a final determination that the roadway violated the LMO, that the Defendant received a copy of this final determination, that the Defendant elected not to appeal this determination in accordance with the appeal provisions of the LMO and that said decision is final and binding.

92. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the actions by Defendant's attorney and the Town of Hilton Head Island's attorney subsequent to the final decision of the LMO Official did not constitute an appeal of said determination and had no effect upon the finality of said determination.

93. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Town attorney does not have the authority to reverse a decision of the LMO Official.

94. The Court erred in finding as a matter of fact and concluding as a matter of law that even if there is a clear, absolute violation of the LMO as to the original roadway construction, its original paving or its subsequent repaving, and that Plaintiff has properly exhausted its administrative remedies, the Town has absolute discretion as to what is the appropriate remedy, and this discretionary ability therefore negates the unlawfulness of the roadway and is not an impediment to the establishment of a prescriptive easement.

95. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the fact that a violation of the LMO has existed for a long period of time does not constitute any type of waiver or implied approval by the Town of the violation.

96. The Court erred in finding as a matter of fact and concluding as a matter of law that the Plaintiff failed to exhaust its administrative remedies regarding the Roadway's violation of the LMO.

97. The Court erred in finding as a matter of fact and concluding as a matter of law that the August 8, 2013 letter from the LMO Official was not a final determination under the LMO.

98. The Court erred in finding as a matter of fact and concluding as a matter of law that the LMO Official rescinded or corrected her August 8, 2013 decision.

99. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Defendant had the right, as well as the ability, to appeal the final determination of the LMO Official dated August 8, 2013, and failed to do so, rendering said decision final.

100. The Court erred in failing to find as a matter of fact that the Defendant failed to file an appeal of the August 8, 2013 decision of the LMO Official.

101. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the LMO Official cannot delegate her authority to render determinations to the Town attorney.

102. The Court erred in failing to recognize the distinction between the LMO Official consulting with the Town attorney prior to issuing a decision, which is proper, and the LMO Official delegating her duty to render a decision to the Town attorney, which is not authorized under the LMO.

103. The Court erred in confusing the advice and conclusions of the Town attorney with an official determination made on behalf of the Town by LMO Official in accordance with the LMO.

104. The Court erred in finding as a matter of fact that the August 8, 2013 letter from the LMO Official was never sent to Defendant.

105. The Court erred in finding that Defendant was never sent the August 8, 2013 LMO Official's decision where the Defendant's counsel in an email dated August 28, 2013 acknowledged receipt of the decision.

106. The Court erred in finding as a matter of fact and concluding as a matter of law that §16-8-105(C)(1)(3) of the LMO requires delivery of a written notice of an LMO violation directly from the Town to the Defendant without passing through any intermediaries.

107. The Court erred in finding as a matter of fact that the requirement of §16-8-305 of the LMO that written notice of a violation shall be delivered to the Defendant was admittedly not met by the Town.

108. The Court erred in finding as a matter of fact and concluding as a matter of law that the Defendant could not have appealed the August 8, 2013 decision by the LMO Official because it was received sixteen (16) days later on August 26, 2013, where the Defendant's fourteen (14) day appeal period begins on the date of receipt, not the date of issuance of the decision.

109. The Court erred in finding as a matter of fact and concluding as a matter of law that the Plaintiff is not entitled to an issuance of a mandamus compelling the Town to honor the August 8, 2013 determination by its LMO Official.

110. The Court erred in finding as a matter of fact and concluding as a matter of law that the Defendant did not slander the Plaintiff's title.

111. The Court erred in finding as a matter of fact and concluding as a matter of law that Defendant did not falsely claim easement rights over the roadway.

112. The Court erred in finding as a matter of fact and concluding as matter of law that the Defendant did not publish the false claim of easement rights over Plaintiff's property to a third party.

113. The Court erred in failing to find as a matter of fact or conclude as a matter of law that approval for the construction of the roadway was required from the Sea Pines Architectural Review Board, and said approval was never obtained.

114. The Court erred in finding as a matter of fact and concluding as a matter of law that the Defendant did not act maliciously in asserting its rights over the roadway or in its representations concerning the existence of the roadway.

115. The Court erred in finding as a matter of fact and concluding as a matter of law that the Plaintiff provided no competent, compelling evidence that it had suffered any damages as a result of the Defendant's slander of its title.

116. The Court erred in finding as a matter of fact and concluding as a matter of law that the Defendant is not entitled to the recovery of any of its attorney's fees incurred in defending its title.

117. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Defendant, while negotiating the purchase of its property, was aware that no easement rights over the roadway existed.

118. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Defendant, upon discovering that its Grantor possessed no easement rights over the roadway, renegotiated its purchase of its property and obtained a reduction in the purchase price due to the lack of easement rights over the roadway.

119. The Court erred in finding as a matter of fact and concluding as matter of law that the Defendant's use of the roadway did not constitute a nuisance.

120. The Court erred in finding as a matter of fact and concluding as a matter of law that the roadway did not constitute a substantial and unreasonable interference with the Plaintiff's use and enjoyment of its property.

121. The Court erred in finding as a matter of fact and concluding as matter of law that the Plaintiff purchased its property with the full knowledge of the existence and use of the roadway and the price paid for the property took into consideration the roadway.

122. The Court erred in finding as a matter of fact and concluding as a matter of law that the Defendant has not trespassed upon the property of the Plaintiff.

123. The Court erred in finding as a matter of fact and concluding as a matter of law that that Defendant, its successors and assigns, has a prescriptive easement for ingress and egress over the roadway.

124. The Court erred in finding as a matter of fact and concluding as a matter of law that the Plaintiff cannot close said roadway, or take any action to obstruct or divert the Defendant, its guests or invitees, from using the roadway.

125. The Court erred in finding as a matter of fact and concluding as matter of law that public use of the roadway vests prescriptive easement rights in the Defendant.

126. The Court erred in failing to find as a matter of fact or conclude as a matter of law that there was no intent on the part of ASA, Inc., or Alice Means, to adversely possess, take or acquire any property or easement rights away from its adjoining landowners.

127. The Court erred in failing to find as a matter of fact that the September 15, 2008 letter from Arundell to Wilson, stating that since Staples was not willing to give an easement for all neighbors under the proposed compromised plan, the encroachment by Enmark had to be

removed, was evidence of the fact that the use by Enmark of the encroachment for the time frame shortly prior to the letter was permissive.

128. The Court erred in failing to find as a matter of fact that the Order by the Honorable Luke N. Brown, Jr. granting a variance request to Defendant's predecessor in title, thereby enabling the construction of the gas station, was granted pursuant to the express conditions and representations by the Defendant's predecessor in title that it could not access its property over the property of its adjoining landowners and it could not construct any improvements in the powerline easement area.

129. The Court erred in failing to consider the fact that its Order not only allows, but requires, the Defendant and the public to trespass over the properties of the adjoining landowners who are not parties to this action in order for the easement to grant rights of ingress and egress.

130. The Court erred in failing to consider the fact that the adjoining landowners who are not parties to this action have expressly denied permission to the Defendant and Defendant's predecessors in title to access Defendant's property over their properties, with one such express denial of access occurring on July 3, 1981.

131. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Defendant's predecessor in title committed an illegal and wrongful act in destroying the 6" concrete curb and creating a curb-cut in violation of the building permit, the Beaufort County Development Standards Ordinance, and the Town's Land Management Ordinance, said curb-cut being necessary to the creation and existence of the alleged easement.

132. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Defendant and the Defendant's predecessors in title required the permission of the Plaintiff

and the Plaintiff's predecessors in title to either pave or repave the roadway, to install speed bumps, or a drainage catch basin.

133. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Defendant and the Defendant's predecessors in title required a permit under both the County's Development Standards Ordinance as well as the Town's Land Management Ordinance in order to create the roadway, pave the roadway, repave the roadway, or install speed bumps.

134. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the Town attorney relied on the false representation by the Defendant that the roadway was in existence since 1974 in concluding that the roadway was grandfathered or a legal nonconformity.

135. The Court erred in failing to find as a matter of fact and conclude as a matter of law that a nonconformity in order to be grandfathered must be a legal nonconformity, that is, the nonconformity must have come into existence legally at the time it was created.

136. The Court erred in finding as a matter of fact and concluding as a matter of law that the LMO Official had the right to grant variances from the twenty (20') foot setback under the revisions to the LMO, inasmuch as the approval and permission of the property owner would be required.

137. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the roadway is not a private means of ingress and egress reserved solely for the use of Defendant and Defendant's customers, but has become a public roadway, utilized by the public as a cut through by members of the public.

138. The Court erred in failing to find as a matter of fact and conclude as matter of law that the roadway does not meet safety standards and LMO requirements for a public two-way roadway which includes truck traffic.

139. The Court erred finding as a matter of fact and concluding as a matter of law that a violation of the DSO or the LMO can be cured or waived by the mere passage of time.

140. The Court erred in failing to define the scope of the easement rights granted to the Defendant, that is, whether the said private easement limited to Defendant and Defendant's customers or the roadway is now a public road with public easement rights being granted to the public at large.

141. The Court erred in finding as a matter of fact that the Plaintiff's efforts to put a proposed master plan or solution in place by creating an easement recognized by all adjoining landowners which served the properties of all adjoining landowners to their mutual benefit, pursuant to which the Plaintiff offered to pay for said improvements, was undertaken by the Plaintiff because the Plaintiff recognized the Defendant had a legal right to the roadway.

142. The Court erred in failing to find as a matter of fact and conclude as a matter of law that the roadway does not meet the setback and Town of Hilton Head Island requirements for a roadway, including approval of the property owner, at the time it was installed or the time it was paved or repaved.

143. The Court erred in failing to find as a matter of fact that the 20-year time frame for the establishment of a prescriptive easement began to run in 1994, not 1984.

144. The Court erred in failing to find as a matter of fact that Enmark's title objections on or around January 30, 2009 recognized the landowners existing demand that the roadway be closed.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

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Attorneys for Plaintiff

Beaufort, South Carolina
April 7, 2017

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

2016 JUL 21

PM 4:03

CASE NO.: 2013-CP-07-02066

CAROLINA CENTER BUILDING
CORP.,

JERRI ANN ROSENEAU
CLERK OF COURT

Plaintiff,

POST-TRIAL BRIEF OF PLAINTIFF
CAROLINA CENTER BUILDING CORP.

vs.

ENMARK STATIONS, INC. and THE
TOWN OF HILTON HEAD ISLAND,

Defendant.

In this action, the Defendant Enmark Stations, Inc. seeks a declaration from this Court that it is entitled to use property belonging to its adjoining neighbor, the Plaintiff Carolina Center Building Corporation, for means of ingress and egress to its property. Both properties are located within the jurisdiction of the Defendant Town of Hilton Head.

This case was tried before the Honorable Marvin H. Dukes, III, Beaufort County Master in Equity on June 7, 2016. Appearing on behalf of the Plaintiff Carolina Center Building Corporation ("Carolina Center") was H. Fred Kuhn, Jr., Esquire. Appearing on behalf of the Defendant Enmark Stations, Inc. ("Enmark") was Russell P. Patterson, Esquire, and appearing on behalf of the Defendant Town of Hilton Head ("Town") was Gregory M. Alford, Esquire. At the conclusion of the testimony, the parties were invited to submit post-trial briefs outlining their respective positions. The Plaintiff hereby respectfully submits its Post-Trial Brief.

I. The Issues

In its Amended Complaint filed November 19, 2014 the Plaintiff asserts seven (7) causes of action against the Defendant Enmark and one (1) cause of action against the Defendant Town.

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The first cause of action seeks a declaration that the Defendant Enmark does not possess an express easement over the Plaintiff's property. This issue was resolved in favor of the Plaintiff by the granting of Plaintiff's Motion for Summary Judgment prior to trial.

The second cause of action seeks a declaration that the Defendant Enmark does not possess a prescriptive easement over the Plaintiff's property. This cause of action was the focus of the June 7, 2016 trial.

The third cause of action seeks removal of the illegal encroachment, the fourth cause of action seeks an Order compelling the Defendant Enmark to bring the encroachment in compliance with the Ordinances of the Town existing at that time the encroachment was illegally paved by the Defendant. The fifth cause of action is for slander of title. The sixth cause of action is for trespass. The seventh cause of action is for nuisance. The fourth, fifth, sixth and seventh causes of action each seek, in addition to removal of the encroachment, an award of actual and punitive damages against the Defendant Enmark.

The eighth cause of action, which is the sole cause of action against the Town, seeks a Writ of Mandamus compelling the Town to enforce its Ordinance against the Defendant Enmark with respect to the encroachment.

In its Answer, the Defendant Enmark denies the material allegations of the Complaint and affirmatively alleges that it has either an express or implied easement over the Plaintiff's property.

In its Answer, the Defendant Town denies the material allegations of the Complaint and affirmatively denies that the Plaintiff is entitled to a Writ of Mandamus.

The fundamental issue before the Court, accordingly, is whether the Defendant Enmark has the right to utilize property belonging to the Plaintiff Carolina Center for purposes of ingress and egress.

More precisely stated, the issue is whether the Defendant Enmark has met its burden of proving by *clear and convincing* evidence that it possesses a prescriptive easement over the Plaintiff's property for purposes of ingress and egress, and if not, to what damages is the Plaintiff Carolina Center entitled recover from the Defendant Enmark?

II. Factual Background

The encroachment is utilized by vehicles to enter or exit property owned by Enmark located at 3 Palmetto Bay Road on which a gas station with an ancillary convenience store and car wash is located. It is also now being utilized by the general public. Those wishing to use the encroachment must traverse over property owned by the Plaintiff Carolina Center, which is located at 2 Greenwood Drive. In order to reach a public road, after traversing over Carolina Center's property, those using the encroachment must then trespass over property owned by Cahetti, Inc., on which a restaurant is located, and finally trespass across property currently owned by Publix Super Markets, Inc. The Publix Super Markets, Inc. property is a large parcel (previously owned by Market Place Shopping Center as a predecessor in Title) on which a shopping center is located and it provides access points to both Greenwood Drive and Palmetto Bay Road, both of which are public roads. Use of the encroachment is a matter of convenience, not necessity, as the Enmark service station has direct frontage on and access to Palmetto Bay Road.

On March 12, 1974 Sea Pines Plantation Company sold the property on which the Enmark gas station is now located to Chevron Oil Company (Exhibit 2). At that time, the

property was unimproved. The plat referenced in the deed from Sea Pines to Chevron, recorded in Plat Book 22 at Page 47, shows no improvement on the Enmark tract. Exhibit 18. A later plat, recorded in Plat Book 22 at Page 85, likewise shows no improvements on the Enmark tract. Exhibit 19.

These properties are located within Beaufort County, South Carolina, and a 1979 aerial photographs maintained by Beaufort County's Geographical Information Service (GIS) shows no improvements on the Enmark tract.

In 1983, Chevron began building its gas station on the Enmark tract. The Development Permit was issued on August 1, 1983, construction was commenced on February 20, 1984, and the Certificate of Occupancy was issued on June 1, 1984. Exhibit 78, pp. 1460, 1470, and 1475.

A 1986 aerial photograph maintained by Beaufort County's GIS shows the service station and car wash buildings located on the Enmark tract, and although the photograph is of poor resolution, the encroachment does not yet exist. Exhibits 44 and 31.

The encroachment is shown for the first time on a plat dated November 1, 1989 and recorded on March 9, 1990 in Plat Book 38 at Page 53. Exhibit 21. As shown on this plat, the encroachment splits or separates around an "island" as it exits off of the property of Carolina Center. One segment travels eastwardly around this island onto the property belonging to Cahetti Inc. on which a restaurant is located and from there onto the property belonging to Publix. The other segment of the encroachment travels to the western side of the island and exits directly onto the property of Publix Super Markets.

A plat recorded on April 19, 1991 in Plat Book 41 at Page 18 depicts the encroachment in the same location as the earlier plat. Exhibit 22.

On August 23, 1993, Chevron sold the Enmark tract to ASA, Inc., which was owned and operated by Alice Means.

On March 19, 2009, ASA, Inc. sold the Enmark tract to Enmark, which has owned it since that time. Exhibit 5. With this sale, the Chevron Station became an Enmark Station.

At some point in time prior to February 17, 2004 Publix placed a large dumpster on the encroachment, effectively blocking that portion of the encroachment which traversed to the western side of the "island." Exhibit 49. Thereafter, only that portion of the encroachment which traversed to the eastern side of the island was utilized, forcing users to travel over the properties of both Cahetti and Publix Super Markets before reaching a public road.

III. Burden of Proof

The party claiming a prescriptive easement has the burden of proof. *Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct.App. 1997).

Not only does the party seeking a prescriptive easement bear the burden of proof, but the proof required to establish a prescriptive easement is a *stricter and higher burden of proof* than exists in a typical civil case. *Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015).

As early as 1917 the South Carolina Supreme Court alluded to this heightened standard of proof when it stated, "A private way is an easement in favor of another, in derogation of the rights of the owner, and hence is not to arise without **clear, unequivocal proof** of such facts as will give the right from the owner to the claimant." *Williamson v. Abbott*, 107 S.C. 397, 401, 93 S.E. 15, 16 (1917) (emphasis added) (citation omitted).

The "fundamental reason for applying a heightened standard of proof" is that "by claiming a prescriptive easement, a claimant seeks for a property owner to forfeit rights to the subject property." *Bundy v. Shirley*, *supra*, 412 S.C. at 305, 772 S.E.2d at 170. "This stricter

standard of proof may be a result of the general opinion expressed by Courts and commentators that **prescriptive rights are not favored** in the law since they result in corresponding losses or forfeitures of rights of other persons.” *Id.* 412 S.C. at 305-06, 772 S.E.2d at 170, quoting with approval Daniel J. Smith, Establishment of Private Prescriptive Easement, 2 Am.Jur. Proof of Facts 3rd 125 § 3 (1988 & Supp. 2015) (emphasis added). Accordingly, the South Carolina Supreme Court has held as follows:

“Given that a prescriptive easement results in diminished rights of the property owner, we find that a claimant seeking a prescriptive easement must be held to a **strict standard of proof**. Accordingly, we join the majority of state jurisdictions and hold that a party claiming a prescriptive easement has the burden of proving all elements by **clear and convincing evidence**.”

Bundy v. Shirley, 412 S.C. 292, 306, 772 S.E.2d 163, 170 (2015) (emphasis added).

IV. Wrongful Conduct Bars Prescriptive Easement

Enmark is barred from being awarded a prescriptive easement, inasmuch as the encroachment exists only by virtue of the *illegal, wrongful, and criminal acts* and conduct of Enmark and its predecessors in title.

The equity maxim: He who seeks equity must do equity.” is well established in South Carolina Jurisprudence. See, e.g., *Ingram v. Kasey's Assoc.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000). “In order for justice to be done between parties, a party is required to do equity when asking the Court to invoke the aid of equity.” *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 259, 715 S.E.2d 348, 358 (Ct.App. 2011).

This is a corollary of the equally well-established principle that a party with unclean hands is precluded from recovering in equity. The Doctrine of Unclean Hands precludes a party from recovering in equity if it acted unfairly in a manner that is the subject of the litigation to the

prejudice of the other party. See, e.g., *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct.App. 2010).

In short, a Court will not grant relief to a party, where the party seeking relief bases its claim upon wrongful conduct. In the instant case, the conduct was not only inequitable, it was illegal. The encroachment came into existence only as a result of the *deliberate, wrongful and illegal* acts and conduct of Enmark and its predecessors in title.

V. Illegal Creation of Encroachment

When Chevron purchased the property from Sea Pines in 1974 (Exhibit 2) the property was undeveloped (Exhibits 18 and 19).

Chevron obtained a Development Permit to develop the property and construct its gas station many years later, only after filing a lawsuit which culminated in the issuance of an Order by the Honorable Luke N. Brown, Jr., Judge of the Fourteenth Judicial Circuit on February 11, 1983. During pendency of this lawsuit, the Town of Hilton Head Island was not yet in existence, and the property was part of the unincorporated area of Beaufort County. Development of the property was controlled by Beaufort County's Development Standards Ordinance ("DSO"). The DSO was administered by the Beaufort County Joint Planning Commission.

Judge Brown's Order recites that in December, 1981 Chevron submitted site plans to the Beaufort County Joint Planning Commission requesting a Development Permit for the development of a service station on its property. Accompanying its site plans, among other things, was a request for a variance from Section 4.2.3 of the DSO which required a distance of 500' between access points to major thoroughfares. Chevron desired an access point onto Palmetto Bay Road closer than the aforesaid 500'. The Joint Planning Commission denied this

variance request and Chevron appealed, contending that Beaufort County abused its discretion in failing to grant to Chevron the requested variance.

In its appeal before Judge Brown, Chevron argued that the variance should have been granted because Chevron had proven a "unique hardship in order to justify the requested variance." Exhibit 77, pg. 1364. Judge Brown agreed, finding that this "particular property suffers a singular disadvantage through the operation of the Ordinance." *Id.*

In ordering the variance to be issued Judge Brown relied upon several facts advocated by Chevron in support of its variance request. In addition to the general layout and function of the property, these facts included:

- (1) There is a power line easement, which runs generally along the southern boundary of the property, which *prohibits* the placement of any structures within this easement. *Id.*, pg. 1366.
- (2) The development must be approved by the Sea Pines Plantation Architectural Review Board. *Id.*, pp. 1366-67.
- (3) Without the requested variance, the property would have only one curb cut, which would be problematic for the maneuvering of tanker trucks. *Id.*, pg. 1366.
- (4) In support of the latter factor, Chevron had argued to Judge Brown that it had made "numerous efforts" to obtain alternate access to its property, and had "contacted the owner of the property behind it in order to obtain a rear access point into the Market Place Shopping Center, however this proposal was rejected by the shopping center owners."

This is confirmed by a letter dated July 3, 1981 to Chevron, which states in pertinent part as follows:

"As agent for the owner of the Market Place Shopping Center Complex, I have been instructed to advise you that your request for access to your property, other than directly from Palmetto Bay Road, would create unreasonable traffic flow problems to our existing facilities. Further, such access, if granted, would interfere with our future development plans for the expansion of the shopping area."

Based on the above, we do not feel that we can grant access through or over the existing Center property as the sole access to your station." Id., pg. 1397.

This letter closes with the observation that access to the Chevron property *"was intended to be from Palmetto Bay Road."* *Id.*

In sum, Chevron obtained its Development Permit by representing that no structure could be built within the power line easement area, its development was subject to approval by the Sea Pines Architectural Review Board ("ARB"), and it could not access its property from the rear over the shopping center property.

In reliance upon the aforesaid representations by Chevron, Judge Brown ordered Beaufort County to issue the Development Permit. The Development Permit was issued in compliance with his Order on August 1, 1983. Exhibit 78, pg. 1475. In accordance with the Development Permit, the Building Permit was issued on January 27, 1984. *Id.*, pg. 1473. In accordance with the Development Standards Ordinance, the permit expressly recites that no alterations from the application can be made without further approval from the permitting authority. *Id.*

As required by the Restrictive Covenants applicable to the property (Exhibit 26), the Sea Pines Plantation Architectural Review Board approved Chevron's plans. Exhibit 78, pg. 1477. This approval expressly recites that *"any changes thereto must be submitted for approval"* to the ARB. *Id.*

The aforesaid plan submitted by Enmark to Beaufort County and the Sea Pines Plantation ARB clearly and plainly show a 6" concrete curb running the entire length of the boundary between the Chevron/Enmark parcel and the property now belonging to the Plaintiff Carolina Center. Exhibit 77, pp. 1313-14.

The encroachment now at issue exists only because sometime after the Certificate of Occupancy was issued on June 1, 1984 (Exhibit 77, pg. 1460) and prior to the making of the plat on November 1, 1989 (Exhibit 21) Chevron illegally removed the 6" raised concrete curb between its property and the property of Carolina Center and unilaterally created a curb cut. This was done without the approval of either Beaufort County or the Town of Hilton Head, and without the approval of the Sea Pines ARB. *This was a conscious, willful and deliberate violation of the Development Permit.* If done prior to the enactment of the Town of Hilton Head Island's Land Management Ordinance ("LMO") in 1987, then it violated the Town's Development Standards Ordinance¹ which was the Ordinance in effect for, and on behalf of, the Town of Hilton Head since incorporation in 1983. If it was done after 1987, then it violated the LMO. In either case making it not only an *unlawful and illegal act, but also a criminal act.*

Additionally, constructing the encroachment within the power line easement was not only wrongful in and of itself, but also directly contradicted the representation Chevron had made to Judge Brown that it could not disturb the power line easement.

Finally, this encroachment created a rear access point, the very thing that Chevron represented to Judge Brown it could not acquire, thus necessitating a variance. Having been expressly told by the owners of the shopping center property that it could not traverse over the shopping center property, Chevron willfully and intentionally began to do so.

Illegally obtained "rights" confer no legal status. A Court will not, and should not, hear a claim when a party seeking relief bases his claim upon acts undertaken in open defiance of the law. Violations of the DSO and the LMO are not only unlawful and illegal, but criminal. Criminal conduct cannot be the basis of a lawful claim. Having obtained a variance in the development of its property by representing that it could not construct anything within the power

¹ The Town's Development Standards Ordinance (DSO) was patterned after Beaufort County's DSO.

line easement and could not obtain rear access, Enmark is now estopped from claiming the exact opposite. This Court cannot simply look the other way, as Enmark now asks, and condone such illegal and wrongful conduct.

Over one hundred years ago, the United States Supreme recognized that a legal right cannot be founded on a legal wrong, and quoted Lord Mansfield, who perhaps said it best, as follows:

"And Lord MANSFIELD, in *Holman v. Johnson*, Cowp. 343, stated the ground on which, in such cases, courts proceed. He said: 'The principle of public policy is this: *ex dolo mala non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.'"

Ewell v. Daggs, 108 U.S. 143, 149, 2 S. Ct. 408, 412, 27 L. Ed. 682 (1883)(*emphasis added*). In this case, the Court should not lend its aid to Enmark, who founds its cause of action for a prescriptive easement upon numerous prior wrongful and illegal acts.

VI. LMO Violation

At some point in time, the encroachment was paved, perhaps more than once, and speed bumps installed. It is certain that this was done after the passage of the LMO.

It is clear that the initial paving took place sometime during the ownership of ASA, Inc. ASA purchased the property from Chevron on August 23, 1993 (Exhibit 3) and sold the property to Enmark on March 19, 2009 (Exhibit 5).

The testimony of Alice Means, ASA's principal, as to when the initial paving took place is vague, indefinite, and conflicting.

The best, unequivocal and most credible testimony as to when the paving occurred comes from Jim Scott Middleton, Alice Means' son-in-law, who was the manager of the gas station for ASA until it was sold to Enmark. At trial, Mr. Middleton testified via deposition:

- In either 2000 or 2002, Mr. Middleton moved from Tennessee to Hilton Head Island at the request of his mother-in-law Alice Means to become the general manager of the Chevron Service Station located on Enmark tract. Deposition of Jim Scott Middleton, pg. 9, line 20 to pg. 10, line 24, pg. 30, lines 18-23.
- At that time, the encroachment was dirt and gravel. *Id.*, pg. 20, lines 7-9, pg. 22, lines 8-10.
- The encroachment was in such bad shape that customers of the service station would complain to Mr. Middleton and demand that he be responsible for the cost of repairs to their vehicles for damages sustained by striking potholes the customers encountered while using the encroachment. *Id.*, pg. 19, line 22 to pg. 20, line 6.
- Mr. Middleton recalled that Mrs. Means' husband on a couple occasions would try to fix the potholes by hand by filling with Quickrete or gravel. *Id.*, pg. 38, lines 12-22.
- As a result, Mr. Middleton decided to pave the encroachment. *Id.*, pg. 19, lines 16-17.
- Mr. Middleton recalled that he hired JS Construction Company to do the work at a cost of approximately \$2,500.00, and the project took less than a day. *Id.*, pg. 21, line 10 to pg. 22, line 7.
- This changed the encroachment surface from dirt and gravel to asphalt, and two speed bumps were also installed. *Id.*, pg. 22, lines 14-19.
- Mr. Middleton did not get a permit from the Town of Hilton Head for this work, nor did he obtain permission from the Sea Pines ARB. *Id.*, pg. 23, line 22 to pg. 24, line 2.

This work was performed sometime between 2000 or 2002 when Mr. Middleton began working at the Chevron Service Station, and 2008 when he stopped working at the Chevron Service Station.

Accordingly, per the testimony of Mr. Jim Scott Middleton, manager of the Gas Station for ASA Inc., it is clear that the initial paving of the encroachment was done after the enactment of the Town of Hilton Head Island's Land Management Ordinance (LMO) in 1987.

The paving of the encroachment, as well as the installation of the two (2) speed bumps, without a permit, violated the LMO. The work was "development," under Section 16-1-105, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended) of the LMO (the LMO was entered into evidence as Exhibit 83), and required a permit, see Section 16-3-301, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended), 16-8-101, *Code of the Town of Hilton Head Island, South Carolina* (1983, as amended), and 16-8-102, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended).

A permit would have been required because the paving of a vehicular access was "development" under the LMO. See Section 16-10-201, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended) and Section 16-5-809, *Code of the Town of Hilton Head Island, South Carolina* (1983, as amended).

Even if an application for a permit had been submitted, *the permit would have been denied, inasmuch as permission of the owner of the property on which the improvement was made would have been required and the Plaintiff, Carolina Center, did not and does not consent to the encroachment.*

The permit would also have been denied because the LMO required a 20' adjacent use buffer between commercial properties through which only perpendicular access can be allowed, and the encroachment violates this requirement. See Section 17-5-806, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended); Section 16-5-809, *Code of the Town of Hilton Head Island, South Carolina* (1983, as amended).

Accordingly, the encroachment was not only illegally created, it has been illegally maintained and improved.

VII. Final Decision of LMO Official

Pursuant to the LMO, the decision making authority regarding the administration, interpretation, and enforcement of the LMO is vested in an individual who, prior to the amendment of the LMO on October 7, 2014 was known as the LMO "Administrator" and who is now known as the LMO "Official." See Section 16-2-101, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended) and Section 16-10-105, *Code of the Town of Hilton Head Island, South Carolina* (2014, as amended); and Appendix A: Advisory and Decision Making Bodies and Persons (2014, as amended). Since 2008 the LMO Administrator or Official has been Teresa "Teri" B. Lewis.

On August 8, 2013, Mrs. Lewis, in her capacity as the LMO Official, issued a decision finding that the encroachment violated the Town's LMO, and directed that the encroachment be removed and that a vegetative buffer be established by the property owner. Exhibit 63. In her decision, Mrs. Lewis states as follows:

"A recent review of the adjacent use buffer on the north side of the subject property indicates that asphalt has been placed in this buffer to create an informal access between 2 adjoining properties. Please be advised that this asphalt access is in violation the Town's Land Management Ordinance (LMO). The Town requires a 20' adjacent use buffer between commercial properties through which there can only be perpendicular access. Additionally, this informal access way does not meet Town standards for access. *Since the disturbance of the adjacent use buffer was never approved, nor could it be approved, the situation must be rectified*".

Mrs. Lewis directed that the encroachment be removed and the vegetative buffer planted. Exhibit 63.

This decision by the LMO Official was received by Enmark on August 26, 2013. Exhibit 64. The LMO, in accordance with state law, includes an appellate procedure by which decisions by the LMO Official can be appealed to the Zoning Board of Appeals by any person aggrieved

by the decision. S.C. Code Ann. § 6-29-800 (Supp.2015); §16-2-103, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended); §16-2-305, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended); § 16-3-2001 and 2002, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended). Enmark had 14 days from the date of receipt of the decision of the LMO Official, i.e. August 26, 2013, to appeal the decision. Enmark chose not to appeal this decision by the LMO Official, and that decision is now final.

Rather than appeal, Enmark chose to complain directly to the Town attorney. The LMO, however, does not vest the Town attorney with the authority to make any decision regarding the administration, interpretation, and enforcement of the LMO. The LMO does not vest the Town attorney with the authority to overrule the final decision of the LMO Official. This can only be done by appealing any such decision to the Board of Zoning Appeals. See, § 16-2-103, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended); § 16-2-305, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended), and 16-3-2001 and 2002, *Code of the Town of Hilton Head Island, South Carolina* (1998, as amended). To assert that the Town attorney can overrule a decision by the LMO Official is analogous to arguing that the County Attorney can overrule a decision by the Master in Equity, or that a staff attorney with the Court of Appeals in Columbia could overrule a decision rendered by the South Carolina Court of Appeals. There is simply no authority to support such a proposition.

As noted, rather than appeal, Enmark chose to complain to the Town attorney. In an email to the Town Attorney dated August 26, 2013 Enmark's attorney requested that the decision by the LMO Official not be enforced, noting that this lawsuit, which had just been filed, would resolve the legal rights of the parties as to the encroachment. In support of his request, Enmark's attorney stated:

"As we discussed, my client believes this driveway was built prior to the incorporation of the Town in 1983, and certainly prior to the passage of the LMO in 1987. I have attached Plat Book 38, Page 53, dated February 11, 1974 which shows the existence of this driveway".

Exhibit 64 (emphasis added). The plat attached to the email is a copy of the plat recorded in Plat Book 38 at Page 53, and bears the *handwritten* date of February 11, 1974. Exhibit 64. *In truth and fact, the plat recorded in Plat Book 38 at Page 53 is dated November 1, 1989, and was recorded on March 9, 1990.* Exhibit 81. This, of course, is well after the passage of the LMO in 1987.

On January 16, 2014 the Town attorney, (some 5 months after the decision by the LMO Official) and instead of verifying the true date of the preparation and recording of the Plat, and in negligent reliance upon the false aforesaid representations made by Enmark's attorney, wrote a letter to the Plaintiff's then attorney in which he concluded that the driveway was "grandfathered". In his letter, the Town attorney expressly states that "upon reviewing the plat forwarded to us by Mr. Patterson (Enmark's attorney) (copy enclosed), it is clear that the driveway existed prior to 1987 Since the driveway has been "grandfathered" in, the Town will not be doing anything as it relates to the enforcement of the LMO or to require the removal of what appears to be a "legal nonconformity." Exhibit 66.

Accordingly, as a result of the patently false representation that the 1989 plat showing the encroachment was a 1974 plat, the Town took no action to enforce the decision of its LMO Official.

Unfortunately, even though the true facts have now been revealed to the Town (See, e.g., Exhibit 67), and would have been known to the Town at the time had any effort to investigate the claim of Enmark been made, the Town has taken the unauthorized and blatantly irresponsible position that it will not move to enforce the final decision of its LMO Official. In fact the Town

had in its possession files and various approvals from the Beaufort County, the Order by Judge Brown and the site plan approved by Beaufort County clearly showing the 6" curb between the Enmark property and the Plaintiff's property. It must be noted that the Town is not a party to the Tolling Agreement between the Plaintiff and the Defendant and the Town has a "mandatory legal duty" to enforce its ordinances and laws on a speedy basis, without bias, for the Health, Safety and Welfare of its citizens.

VIII. No Prescriptive Easement

Assuming Enmark can overcome all of the foregoing obstacles which, it is respectfully submitted are insurmountable, Enmark has failed to carry its burden of proving by *clear and convincing* evidence the existence of a prescriptive easement.

An easement is a right given to a person to use the land of another for a specific purpose. *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct.App. 2008). "A prescriptive easement is not implied by law, but is established by the conduct of the dominant tenement owner." *Boyd v. BellSouth Telephone and Telegraph Co*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006).

"To establish a prescriptive easement, one must show:

- (1) Continued and uninterrupted use or enjoyment of the right for a period of 20 years;
- (2) The identity of the thing enjoyed; and
- (3) Use or enjoyment which is either adverse or under claim of right."

Pittman v. Lowther, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005).

In this case, Enmark has failed to satisfy its burden of proof as to any of the three (3) essential elements of a prescriptive easement.

A. Twenty (20) Years

Enmark has failed to establish continued and uninterrupted use or enjoyment of the right for a period of 20 years.

1. Twenty (20) Years Did Not Elapse

The earliest credible evidence as to the existence of the encroachment is the plat dated November 1, 1989 (Exhibit 21). At the other end of the spectrum, this lawsuit was filed on August 15, 2013, and prior to that, the parties entered into a tolling agreement on July 24, 2013.

The earliest assertion of adverse use or a claim of right made on behalf of Enmark or any of its predecessors in title was a letter dated June 23, 1994 from Attorney John Wilson on behalf of ASA, Inc. to Mr. Cary Griffin. Exhibit 48. This is the earliest point in time at which the 20-year prescriptive time frame could have commenced. This lawsuit, of course, was commenced prior to the expiration of the 20-year time frame.

2. Use Was Not "Uninterrupted"

Even if this lawsuit were commenced outside the 20-year prescriptive time frame, the use of the encroachment by Enmark and its predecessor in title during this time frame was not "uninterrupted."

Enmark asserts that use of the encroachment during this period of time was "uninterrupted." The facts in this case, however, show numerous interruptions. Enmark appears to be relying upon the erroneous premise that an interruption, when referencing a prescriptive easement, requires a physical barrier of some sort and a resulting discontinuance of use. It is true that "numerous Courts have held when the potential servient owner, by either by threats or physical barriers, succeeds in causing a discontinuance of the use, no matter how brief, the running of the prescriptive period is stopped." 4 Powell on Real Property, Section 34.10(3)(b)

(2000). South Carolina, however, is not one of these Courts that requires threat or physical barrier. In *Pittman v. Lowther*, 363 S.C. 47, 610 S.E.2d 479 (2005) the South Carolina Supreme Court expressly declined to adopt the analysis adopted by North Carolina and other Courts which required an actual physical discontinuance, no matter how brief, of the use. Instead, the South Carolina Supreme Court "embraced" the opinion of Justice Oliver Wendell Holmes, Jr., who stated the following in determining what a landowner must do to interrupt prescriptive use:

"A landowner . . . is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an assertion interrupts the would-be dominant owner's impression of acquiescence and the growth in his mind of a fixed association of ideas; or, if the principle prescription be attributed solely to the acquiescence of the servient owner, it shows that acquiescence was not a fact".

Pittman v. Lowther, supra, 363 S.C. at 51, 610 S.E.2d at 481, quoting *Brayden v. New York, N.H. & H.R. Co.*, 172 Mass. 225, 51 N.E. 1081, 1081-82 (1898) (emphasis added). The South Carolina Supreme Court held as follows:

"We conclude actions are sufficient to interrupt the prescriptive period when the servient owner engages in overt acts, such as erecting physical barriers, which cause a discontinuance of the dominant owner's use of the land, no matter how brief. In addition to physical barriers, verbal threats which convey to the dominant landowner the impression the servient owner does not acquiesce in the use of the land, are also sufficient to interrupt the prescriptive period. To adopt an interpretation of "effective interruption" which requires a servient landowner to take actions in addition to erecting barriers like fences and cables, would encourage wrongful or potentially violent behavior that is contrary to sound public policy considerations and the peaceful resolution of disputes".

Pittman v. Lowther, supra, 363 S.C. at 52, 610 S.E.2d at 481 (emphasis added).

(1) In the instant case, as previously noted, the owner of the Market Place Shopping Center Complex attempted to block the encroachment by placing a dumpster on the encroachment. While this effectively blocked direct access to the shopping center property, users of the encroachment simply bypassed the dumpster and continued to trespass over the

property belonging to Cahetti on which a restaurant is now located, before trespassing over the shopping center property and then onto a public road.

(2) On June 15, 1994, attorney Carey S. Griffin, Esquire, representing Carolina Center, wrote attorney John L. Wilson, Esquire, the attorney for ASA, Inc., informing Mr. Wilson that his client was a prospective purchaser of the Sea Pines Welcome Center property, and that the encroachment would ultimately have to be closed and therefore "would not be able to be utilized for continued access." Exhibit 47. Having an attorney write another attorney and telling him that the encroachment cannot be used for continued access, is certainly sufficient to "convey the impression that the servient landowner does not acquiesce in the use of the land."

(3) Additionally, Attorney Wilson received another letter, on September 15, 2008, sent on behalf of Carolina Center Building indicating that it had now purchased the old Sea Pines Welcome Center and that its development plans required the closure and removal of the encroachment. Exhibit 55. In his letter, Mr. Arundell states that "Kumar (the owner of Carolina Center Building) wishes to be a good neighbor, however . . . he must now cut off the encroachment onto his property . . ." *Id.* Again, this is certainly sufficient to convey the impression that the landowner does not acquiesce in the use of his land.

ASA responded to the aforesaid September 15, 2008 letter from Mr. Arundell by selling the Enmark tract to Enmark. This closing took place on March 19, 2009. Exhibit 5.

(4) Once again, on October 29, 2012, Carolina Center's attorney wrote, this time to Enmark's attorney stating that the encroachment will have to be closed. Exhibit 61.

In sum, on no less than 3 different occasions, i.e., June 15, 1994, September 15, 2008 and October 29, 2012, there is undisputed written correspondence from attorneys, which clearly "convey the impression the servient landowner does not acquiesce in the use of the land." ASA

responded to the 2008 letter by selling the property, and Enmark's refusal to comply with the 2012 letter is what led to the bringing of this lawsuit.

Finally, and perhaps more telling, is the testimony of Alice Means, the Defendant Enmark's primary witness. Mrs. Means was the owner of the ASA, Inc., and she owned the Enmark property from August 23, 1993 (Exhibit 3) through March 19, 2009 (Exhibit 5). She testified that shortly after she purchased the property, she became aware that the adjoining landowner objected to her use of the encroachment and that ever since that time the owner of the Welcome Center property had always objected to her use of the encroachment. In other words, from 1994 through 2009 Enmark's predecessor in title confirmed that not only did she have "the impression" that the landowner did not acquiesce in her use of the land, but she knew for a fact that the landowner did not acquiesce in her use of the land. This constitutes a "effective interruption" of the prescriptive use period of time under the holding of the South Carolina Supreme Court in *Pittman v. Lowther*, supra.

B. Identity of the Thing Enjoyed

The second essential element which the Defendant Enmark must prove by clear and convincing evidence in order to establish a prescriptive easement is the "identity of the thing enjoyed."

In this case, Enmark seeks a prescriptive easement for purposes of ingress and egress. Stated simply, Enmark desires to use the prescriptive easement in order to lawfully get onto and get off of its property. Enmark has failed to meet its burden of proving that this can be accomplished.

As previously noted, anyone exiting Enmark's property over the encroachment must first traverse over property belonging to the Plaintiff Carolina Center Building, and then onto

property belonging to Cahetti on which a restaurant is located, and then onto property now belonging to Publix Super Markets, Inc., on which the large shopping center (originally Market Place Shopping Center Complex) is located, and from there on to one of two public roads, Greenwood Drive or Palmetto Bay Road.

The *fatal* flaw in Enmark's attempt to establish this element of a prescriptive easement is that it has failed to carry its burden that it has any right to travel over the properties of Cahetti or Publix Super Markets. Granting Enmark a prescriptive easement over the property of Carolina Center Building fails to provide rights of ingress and egress, inasmuch as Enmark has failed to prove any easement rights over the properties of the landowners who must subsequently be traversed in order to gain ingress or egress. Enmark has been given ample opportunity to bring these adjoining and necessary landowners into this action, but has intentionally refused to do so. "The general rule as to parties is that, when a bill is brought for relief all persons materially interested in the subject of the suit ought to be made parties, either as Plaintiffs or Defendants, in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all the parties interested." *Graham v. Alliance Ins. Co.*, 192 S.C. 370, 6 S.E.2d. 754, 755 (1940).

As it stands now, if the Court were to grant a prescriptive easement over Plaintiff's property to the Defendant for purposes of ingress and egress, the Court is necessarily affecting the rights of nonparties inasmuch as ingress and egress can only be accomplished by trespassing over the properties of nonparties.

It is respectfully submitted that this Court lacks the power to grant to the Defendant Enmark the right to traverse over the properties of Cahetti or Publix Supermarkets in this case, a

right which must be granted in order to give the Defendant Enmark an easement for purposes of ingress and egress.

There is no such thing as "an easement to nowhere," yet that is the bizarre result which would be obtained if the Court were to grant to Enmark a prescriptive easement over Plaintiff's property, without also granting easement rights over the properties of the nonparties which the Defendant currently does not possess and which was expressly denied to the Defendant by the Market Place Shopping Center Complex. Id., Page 1397.

The burden is on Enmark to bring these nonparties into this lawsuit. The Defendant Enmark has the burden of proof. The Defendant Enmark is the one claiming the prescriptive easement. The Defendant Enmark is the one asserting rights of ingress and egress over the properties of nonparties. The Plaintiff has no complaint with, and no causes of action against, these nonparties.

The Defendant Enmark has failed to meet its burden of proving by *clear and convincing* evidence that granting it a prescriptive easement over the property of the Plaintiff will grant to it the sought rights of ingress and egress. Indeed, the relief sought by Enmark results only in a bizarre easement to nowhere.

C. Adverse Use or Claim of Right

The third essential element which Enmark must prove by clear and convincing evidence is that the use was either adverse or under a claim of right. Since these are alternative theories, each is addressed separately below.

1. Adverse Use

"When the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse. Then, the burden shifts to the

title owner of the servient tenement to rebut the presumption that the use was adverse. An intent to claim adversely may be inferred from the acts and conduct of the dominant users.” *Kelley v. Snyder*, 396 S.C. 564, 575-76, 722 S.E.2d 813, 819 (Ct.App. 2012) (emphasis added).

As previously noted, Enmark has failed to prove that the use of the encroachment was “uninterrupted.” Enmark, accordingly, is not entitled to the benefit of the presumption of adverse use.

Additionally, the prior use was permissive. In the case now before the Court, the Defendant Enmark must necessarily “tack” the periods of use by its predecessors in title. “A claimant cannot tack adverse use with prior adverse use when intervening parties use land with permission. Nor is tacking permissible when it is unclear of that use by claimant’s predecessor was adverse.” *Bundy v. Shirley*, 412 S.C. 292, 314, 772 S.E.2d 163, 175 (2015).

In the instant case, it is clear that the use by ASA, Inc., Enmark’s immediate predecessor in title, towards the end of ASA’s ownership was permissive. Mr. Middleton, the general manager of ASA, testified that after he paved the encroachment he was contacted by Kumar Viswanathan, the owner of the adjoining property and they began discussing closing and relocating the encroachment. Mr. Viswanathan confirmed that after the encroachment was paved he contacted Mr. Middleton and they began discussing closing and relocating the encroachment to everyone’s mutual benefit. While these discussions were occurring he gave ASA permission to continue using the encroachment. This is confirmed and corroborated by several items of correspondence exchanged during this period of time. For example, on February 8, 2008 Mr. Viswanathan wrote Mr. Middleton enclosing a copy of a proposed easement agreement. It is clear from this letter and the proposed easement agreement that this is a culmination of a long series of discussions over a significant period of time. Exhibit 51. It is clear from the ensuing

exchange of correspondence that Mr. Viswanathan is permissively allowing the encroachment to continue in use pending the parties' discussions. Exhibits 53, 54 and 55. When the parties were unable to reach an agreement, this culminated in the September 15, 2008 letter from Mr. Viswanathan's attorney to Enmark's attorney stating that the encroachment must now be cut off and removed. Exhibit 55. The October 29, 2012 letter from Mr. Arundell to the Defendant Enmark confirms that the use of the encroachment by Enmark's predecessor ASA in 2008 was permissive while those parties were discussing relocating the encroachment. Exhibit 61.

As noted above, a claimant cannot tack adverse use with prior adverse use when intervening parties used the land with permission. *Bundy v. Shirley*, supra, 412 S.C. at 314, 772 S.E.2d at 175. The permissive use by ASA defeats Enmark's claim of adverse use.

Finally, Alice Means testified point blank that her use of the encroachment was not adverse. Quoting her deposition:

Q. And were you attempting to take that property (the encroachment) in any way?

A. No.

Alice Means Deposition, pg. 36, lines 4-6.

The Defendant Enmark would be entitled to the presumption of adverse use only if use of the encroachment during the entire prescriptive period was not interrupted. As shown above, the use was interrupted on numerous occasions, at least once by the placement of a physical barrier and at least three (3) times by correspondence from attorneys. Additionally, even if Enmark was entitled to the presumption of adverse use, the presumption has been overcome by the affirmative showing that the use was not adverse inasmuch as for the bulk of the period of time during which the prescriptive easement would necessarily have run, i.e., the time during which it was used by ASA, the use was admittedly either not adverse, or alternatively, was permissive.

2. Claim of Right

"A party claiming a prescriptive easement under a claim of right must demonstrate a **substantial** belief that he had the right to use the parcel or road based upon the totality of the circumstances surrounding his use." *Kelley v. Snyder*, 396 S.C. 564, 574, 722 S.E.2d 813, 818 (Ct.App. 2012) (emphasis added). If tacking is used, the use by the previous owners must also have been under a claim of right. *Id.*, 396 S.C. at 575, 722 S.E.2d at 819 (emphasis added).

The requirement of a "substantial belief" that a party had the right to use the road has been equated to a party being "**justifiably** under the impression" that he had a right to use the road." *Id.*, quoting *Revis v. Barrett*, 321 S.C. 206, 467 S.E.2d 460 (Ct.App. 1996) (emphasis added).

In this case, the "claim of right" asserted by Enmark is the power line easement given by Charles E. Frasier to Palmetto Electric Cooperative in 1960 (Exhibit 24) and then relocated pursuant to an agreement between Sea Pines Plantation Company and Central Electric Power Corporation in 1973 (Exhibit 25).

It is apparent on its face that the idea that a power line easement granted to a utility company could equate to an easement for ingress and egress to an adjoining property owner who is not even a party to the power line easement is ludicrous. As noted, the "claim of right" must be "substantial" and "justifiable." It is respectfully submitted that Enmark's reliance on the power line easement in this case is neither substantial nor justified, but simply a ruse. It is, accordingly, not a "claim of right" sufficient to satisfy this essential element of a prescriptive easement claim.

Even if the power line easement were sufficient, it was asserted for the first (and only) time in a letter written on June 23, 1994 from John Wilson to Carey Griffin, less than 20 years prior to the commencement of this lawsuit and the tolling agreement. Exhibit 48.

IX. Mandamus

The Plaintiff's sole cause of action against the Town of Hilton Head Island is for a Writ of Mandamus compelling the Town to enforce the decision of its LMO Official regarding the encroachment.

Mandamus is the highest judicial writ and is issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy. A Writ of Mandamus is a coercive writ that orders a public official to perform a ministerial duty. Mandamus will issue only to compel a public official to perform a mandatory legal duty. The primary purpose of Writ of Mandamus is to enforce an established right in a corresponding imperative duty created or imposed by law. When the legal right is doubtful, or the performance of duty rest in discretion, or when there is another adequate remedy, a Writ of Mandamus cannot rightfully be issued. *City of Rock Hill v. Thompson*, 349 S.C. 197, 199-200, 563 S.E.2d 101, 102 (2002).

In the case *sub judice*, the LMO Official, Mrs. Lewis, has issued a decision. Exhibit 63. The decision is plain and unambiguous. All interested parties received or were served with the decision, and there was no appeal.

The only thing that remains to be done is enforcement of the decision. The Writ of Mandamus requested by the Plaintiff simply requests that the Town of Hilton Head perform its "mandatory legal duty." This is a purely ministerial duty. *The enforcement of the LMO Official's decision is not discretionary.* There is no other adequate remedy.

At trial, the Defendant Enmark noted that the LMO authorizes the LMO Official to order various forms of relief. None of the alternative forms of relief referenced by the Defendant Enmark, however, are applicable to this case. Bluntly put, ignoring or condoning the violation is not one of the alternatives authorized by the LMO.

The Town's cavalier attitude towards the enforcement of its Ordinance is mystifying. The Town's abrogation of its duty to enforce its own Ordinance is inexcusable. The Town was repeatedly on notice that the encroachment came into existence sometime after 1983, the date of incorporation of the Town and its ordinances. The Town was aware the initial paving occurred after 1987 (the date of the LMO) through the deposition of Mr. Jim Scott Middleton. The Town's own records demonstrate that the encroachment has not only been illegally paved and improved, but was illegally and surreptitiously created in the first place. The encroachment exists only as a result of *repeated* willful violations of the Town's Ordinances.

It should be noted that the existence, or non-existence, of a prescriptive easement has no bearing on the enforcement of the Town Ordinances by the town - as the illegal encroachment and its subsequent paving was done after 1983 and 1987 thereby violating the Town's ordinances. The Plaintiff's previous attorney brought this to the attention of the Town as early as January of 2014. It is also worth emphasizing that the encroachment is not simply a technical violation, but poses a serious risk to safety, health and welfare. In her August 8, 2013 decision mandating the closure of the encroachment, the LMO Official noted that not only did the encroachment violate the LMO, but "additionally this informal access way does not meet Town standards for access." Exhibit 63. At trial, both Mrs. Lewis and Mr. Viswanathan testified concerning the danger posed by the continued existence of the encroachment. In sum, the encroachment is inadequate to handle the two-way traffic for which it is being utilized. It is

itemized billings and invoices which had been provided and to prepare for cross examination or defense of this claim. Upon motion of the Plaintiff and without objection the Plaintiff's claim for attorney's fees and costs was bifurcated from the rest of the trial, upon condition that if the prescriptive easement claim fails, the Court will reconvene to hear and try the Plaintiff's claim for attorney's fees and costs.

E. Punitive Damages

The Plaintiff's causes of action for slander of title, nuisance, and trespass each supports a claim for punitive damages see, e.g., *Pond Place Partners, Inc. v. Pool*, 351 S.C. 1, 567 S.E.2d 881 (Ct.App. 2002) (Slander of Title); *Hunt v. Jordan*, 286 S.C. 340, 333 S.E.2d 569 (Ct.App. 1985) (Trespass); and *Hollis v. Stonington Development, LLC*, 394 S.C. 383, 714 S.E.2d 904 (Ct.App. 2011) (Nuisance).

Under each of the foregoing causes of action, punitive damages are allowable:

- “not only as a punishment for wrong, but as a vindication of private rights when it is proved that such had wantonly, willfully, or maliciously violated.” *Harris v. Burnside*, 261 S.C. 190, 196, 199 S.E.2d 65, 68 (1973).
- “Reckless disregard for the property rights of others can be sufficient misconduct to support an award of punitive damages.” *Hollis v. Stonington Development, LLC*, 394 S.C. 363, 398, 714 S.E.2d 904, 912 (Ct.App. 2011) (nuisance case).
- “Punitive damages can be recovered for trespass when a Defendant's acts have been willful, wanton or in reckless disregard of the rights of another.” *Hunt v. Jordan*, 286 S.C. 340, 342, 333 S.E.2d 569, 571 (Ct.App. 1985).

In the instant case, the actions of the Defendant have clearly been in willful, wanton and reckless disregard of the rights of the Plaintiff.

As previously noted, the conduct of the Defendant Enmark, as well as its predecessors in title, has not only been in reckless disregards of the rights of the Plaintiff, but have repeatedly been illegal, wrongful, and even criminal:

- In order to obtain the variance needed to build the gas station, it was presented not only to Beaufort County, but a Court of law, that no structure could be built within the power line easement, yet upon obtaining the variance this is exactly what was done.
- It was further represented that a rear access could not be obtained, yet once the variance was granted, this is exactly what was surreptitiously put in place. This rear access was put in place even after having been expressly refused permission from the shopping center owner to utilize the rear as an access point.
- Sometime after the gas station was constructed, the 6" concrete curb between the Enmark Station and Plaintiff's property was *illegally* removed and a curb cut installed. Not only did this violate the development permit, it violated the then existing Development Standards Ordinance as well as the Land Management Ordinance, as well as the Sea Pines Covenants. No permit was obtained for any of this work.
- Years later, the encroachment was paved and, again, no permit was obtained. It is clear that the permit requirement was known, inasmuch as permits had been sought and obtained for relatively minor things such as rearranging a sign. Exhibit 79. The only logical explanation is that a permit was not sought by Enmark and its predecessor was because it was known that a permit could not be issued, inasmuch as there is a mandatory 20' vegetative buffer required for this area, and the approval of the Owner, the Plaintiff,

would have to be obtained which would not have been given, and seeking a permit would have brought the clearly illegal encroachment to the attention of Town officials.

- Finally, once the illegal encroachment was brought to the attention of Town Officials, and the LMO Official issued a decision mandating the removal of the encroachment and establishing a vegetative buffer, this directive of the LMO Official was ignored.

The foregoing acts and conduct of the Defendant Enmark and its predecessors in title upon whom it relies constitute a clear and continuing pattern of *wrongful, illegal and criminal conduct* designed to deprive the Plaintiff of its property rights. This case cries out for an award of punitive damages, not only to punish the conduct of Enmark, but to deter similar conduct in the future.

It is worth pointing out that this Court should have no sympathy for the Defendant Enmark and the Town of Hilton Head. All of the foregoing matters are matters of public record and matters of which Enmark and the Town of Hilton Head not only should have known by virtue of constructive notice, but are matters about which Enmark and the Town of Hilton Head had **actual** knowledge. Enmark purchased this property with **open eyes**, well aware of the fact that an easement did not exist and that this encroachment was illegal. Enmark initially contracted to purchase this property from ASA for \$1,475,000.00. After checking the title, however, Enmark's attorney wrote ASA raising an objection to the title based upon the fact that the encroachment was not supported by any easement. Exhibit 58. ASA offered to remove the encroachment, but instead, Enmark convinced ASA to reduce the purchase price by \$35,000.00. Exhibit 59. Enmark, accordingly purchased this property with open eyes, very aware of the fact that the encroachment was not supported by any easement rights and utilized that fact to leverage

a \$35,000.00 reduction in its purchase price. In other words, Enmark took the position with ASA that there was no easement and leveraged that into a \$35,000.00 reduction in the price it paid for the property. Having acquired the property at a reduced price, Enmark now takes the opposite position, asserting that it possesses an easement. Enmark has gone so far as even to fraudulently misrepresent facts to the Town attorney attempting to gain grandfathered status for the easement by falsely representing that a 1989 plat was actually drawn in 1974.

It is, accordingly, respectfully requested that an appropriate award of punitive damages be awarded.

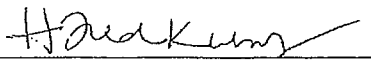
Conclusion

It is respectfully requested that the Court conclude that the Defendant Enmark has failed to carry its burden of proving by *clear and convincing* evidence each of the essential elements necessary to acquire a prescriptive easement, and grant judgment in favor of the Plaintiff against the Defendant Enmark for a fair and reasonable amount of both actual and punitive damages.

It is further respectfully requested that the Court issue its Writ of Mandamus ordering the Defendant Town to enforce the decision of LMO Official Lewis issued on August 8, 2013.

Respectfully submitted,

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July 21, 2016

Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CASE NO.: 2013-CP-07-02066
	)	
CAROLINA CENTER BUILDING	)	
CORP.,	)	
	)	
Plaintiff,	)	REPLY BRIEF OF PLAINTIFF
	)	CAROLINA CENTER BUILDING CORP.
vs.	)	
	)	
ENMARK STATIONS, INC. and THE	)	
TOWN OF HILTON HEAD ISLAND,	)	
	)	
Defendant.	)	
	)	

The Plaintiff, Carolina Center Building Corp., hereby respectfully submits its Reply Brief to the Post-Trial Briefs of the Defendants. For a thorough discussion of the issues, the Court's attention is directed to the Plaintiff's Post-Trial Brief. There are certain mischaracterizations of the testimony set forth in the Defendants' Post-Trial Briefs, and this Reply is limited to the following pertinent points.

I. When Was the Encroachment Paved?

The Defendant Enmark points to the testimony of Alice Means as establishing that the roadway was paved sometime prior to 1994. Enmark's Brief, pg. 4. Although it is true that Alice Means testified that she believed that the encroachment was already paved when she had it repaved in 1994, her testimony was based upon the fact that she had a depreciation schedule showing that the encroachment was "paved" (not "repaved") in 1994. On cross examination, she completely recanted her testimony, as follows:

"Q. . . . How certain are you that - - it sounds like you're pretty certain that you paved the roadway in 1994. Is that a fair statement?

A. Yes.

Q. How certain are you that the roadway was paved by anybody before that?

Let me rephrase this. Can you swear that it's absolutely God's honest truth that it was paved before you did that?

A. No.

Transcript, pg. 204, lines 4 – 13 (emphasis added). Alice Means went on to testify that prior to her repaving the road, it was dirt and gravel.

In short, Alice Means completely recanted her testimony as to the road being paved prior to 1994. It is worth emphasizing that the burden is on Enmark to prove its case by clear and convincing evidence. The testimony of a witness who cannot swear to the truth of her testimony is neither clear, nor convincing.

Additionally, the testimony of Alice Means is contradicted by the testimony of her own son-in-law, who was her General Manager and ran the day-to-day operations of the gas station. The manager, Jim Scott Middleton, testified that he moved to Hilton Head somewhere between 2000 and 2002. (Deposition of Jim Scott Middleton, pg. 9, line 5; pg. 9, line 22; and pg. 10, line 9). He moved to Hilton Head to help his mother-in-law, Alice Means, run the gas station. (*Id.*, pg. 10, lines 11 – 20). While he was the manager, he was the one who had the encroachment paved. (*Id.*, pg. 19, lines 12 – 20). He had it paved because people were hitting potholes with their cars and coming to him requesting payment for the resulting repairs. (*Id.*, pg. 19, line 21 to pg. 20, line 6). Before Mr. Middleton paved it, it was dirt and gravel. (*Id.*, pg. 20, lines 7 – 9). Mr. Middleton remembered the name of the contractor that he hired (*Id.*, pg. 21, lines 10 – 12), that the project took no more than a day (*Id.*, pg. 22, lines 2 – 4), that it was paved with asphalt (*Id.*, pg. 22, lines 5 – 7), that the asphalt was put in the same footprint that had been occupied by the dirt and gravel (*Id.*, pg. 22, lines 8 – 10), that two (2) speed bumps were installed at the same time (*Id.*, pg. 22,

lines 4 – 19), and that it cost about \$2,500.00 (*Id.*, pg. 21, lines 19 – 22). In short, Mr. Middleton has a very clear recollection that he was the one responsible for paving the dirt and gravel encroachment with asphalt.

In short, whether you go with the testimony of Alice Means or Jim Scott Middleton, it is clear that the encroachment was paved after the enactment of the Land Management Ordinance (LMO) in 1987. Paving a roadway, of course, constitutes development and, since it was done without a permit, it was done in violation of the LMO.

II. The Town's Development Standards Ordinance

In its Brief, the Defendant Enmark appears to be operating under the mistaken belief that if the encroachment was paved prior to the enactment of the LMO in 1987, then there could not be a violation. This is simply not true.

The Town of Hilton Head was created in 1983 and the Land Management Ordinance was adopted in 1987. Between 1983 when the Town was incorporated and 1987 when the Town enacted the Land Management Ordinance, development within the Town of Hilton Head Island was controlled by the Town's Development Standards Ordinance, which was largely the same as Beaufort County's Development Standards Ordinance. Transcript, pg. 44, lines 19 to pg. 45, line 3. For all intents and purposes, the Town's DSO defined development just as broadly as the subsequent LMO and under both of these Ordinance, paving was something that would have required a permit. (*Id.*, pg. 70, line 15 to pg. 71, line 8 and pg. 71, line 2 to pg. 72, line 8).

In other words, if the encroachment was paved between 1983 and 1987, then it was done in violation of the DSO, and if it was paved after 1987 it was done in violation of the LMO. In either event, the paving was an illegal, wrongful, and criminal act.

III. Illegally Constructed Encroachment

In its Brief, Enmark falsely states that there is no evidence that the encroachment was constructed illegally. Enmark's Post-Trial Brief, pg. 15. In support of this bold assertion, Enmark argues that common sense dictates that such a heavily used, very visible roadway at a service station where Town Officials purchased gasoline on account on a daily basis was illegal, someone with the Town would have noticed and taken some sort of action.

This argument, that illegal conduct somehow becomes legal simply because the perpetrator is either clever enough, or lucky enough, to get away with it for a period of time is certainly novel. In any event, it is contrary to the law and contrary to the express terms of the Ordinances. A violation of the Ordinance, through the passage of time, does not magically become valid. (Transcript, pg. 73, lines 21 – 23). Under the express terms of the Ordinance, a violation continues until it is eliminated. (*Id.*, pg. 74, lines 10 – 14). Section 16-8-110 of the LMO expressly states:

“The lack of prior enforcement shall not constitute any degree of recognition, approval, or waiver of enforcement.”

Id., pg. 129, line 23 to pg. 130, line 7. There is no provision in the Ordinances that forgives a violation just because the Town doesn't catch it or enforce it in a timely fashion. *Id.*, pg. 130, line 8 to pg. 133, line 15.

IV. A Legal Right Cannot be Founded on a Legal Wrong

In its Brief, the Defendant Enmark glosses over the illegal nature of the encroachment.

It is axiomatic that a legal right cannot be founded on a legal wrong. See generally cases cited in Plaintiff's Post-Trial Brief, pp. 6 – 7 and 11.

It is incontrovertible that the encroachment in this case was created illegally.

The Development Permit for the gas station was issued to Chevron, Enmark's predecessor in title, only after a lengthy Court battle. The Town of Hilton Head was willing to give Chevron only one curb cut onto Palmetto Bay Road, and Chevron desired two curb cuts onto Palmetto Bay Road in order to accommodate its large gasoline tanker trucks. In order to obtain two curb cuts, Chevron needed a variance. Following a contested trial, the Honorable Luke Brown, Jr. granted Chevron's request for a variance over the Town's objection relying, in part, upon Chevron's representations that it could not place anything within the powerline easement and it could not obtain a rear access point onto the shopping center behind the proposed gas station property.

The Development Permit which was issued in accordance with Judge Brown's Order mandated a six (6") inch raised concrete curb between the property of the Chevron Gas Station and the property now belonging to the Plaintiff. The Development Permit expressly provided that no changes to this plan could be made without the Town's permission. Any changes to this plan would also have required permission from the Sea Pines Architectural Review Board in accordance with the covenants to which the Chevron property was subject.

The encroachment, of course, could never have come into existence if the six (6") inch raised concrete curb remained in place between the gas station and the property now belonging to the Plaintiff. Sometime after the gas station was constructed, the six (6") inch raised concrete curb was removed and a gap or curb cut created, in direct violation of the Development Permit. No permit for this additional work was obtained from the Town of Hilton Head Island, nor was any permission obtained from the Sea Pines Architectural Review Board. Contrary to the representations made to the Court in obtaining the variance, the encroachment was then constructed within the power line easement and a rear access point onto the shopping center property was created.

In other words, the encroachment exists only because of the illegal, wrongful, and criminal violation of the Town's Ordinances (either the DSO if prior to 1987 or the LMO if after 1987). Since the founding of this Country, it has been the law that a legal right cannot be founded on a legal wrong. "No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." *Ewell v. Daggs*, 108 U.S. 143, 149, 2 S.Ct. 408, 412, 27 L.Ed. 682 (1883).

It should be noted that Enmark deserves no sympathy, inasmuch as it purchased this property with its eyes wide open, with full knowledge that the encroachment was problematic, and utilized this fact to its advantage in negotiating a reduced purchase price.

V. Road to Nowhere

The Defendant Enmark summarily argues that the fact that the easement which it seeks, if granted, leads to nowhere is irrelevant. Defendant Enmark's Post-Trial Brief, pg. 15.

An easement must have a purpose, whether that purpose be for utilities such as power lines or for activities such as hunting. In the case now before this Court, the easement sought by Enmark is for purposes of ingress and egress. If granted, however, the easement sought by Enmark does not provide ingress and egress, but rather, dead ends and leads to nowhere. The easement sought by Enmark does not have a terminus on a public road and it is, accordingly, impossible for this easement to provide ingress and egress. In order to reach a public road, anyone utilizing the encroachment must not only pass over the Plaintiff's property, but the properties of two (2) adjacent landowners who are not parties to this suit. The Defendant Enmark has made absolutely no showing that it has a right to traverse over the properties of these other adjoining landowners, and even if it had, this Court does not have the ability to effect the rights of nonparties.

The easement sought by Enmark provides neither ingress nor egress. It is literally an easement to nowhere.

VI. Interrupted Use

In order to establish a prescriptive easement, the Defendant Eninark must prove by clear and convincing evidence that its use of the encroachment for the prescriptive period was "uninterrupted." This issue has already been fully briefed by the Plaintiff in its Post-Trial Brief, pp. 18 – 20. One portion of Alice Means' testimony, however, deserves emphasizing.

Alice Means, through ASA, Inc., purchased the gas station property in 1993. As a result of Mr. Griffin's June 15, 1994 letter (Exhibit 15) Mrs. Means testified that she became aware that the adjoining landowner objected to the use of the encroachment. Transcript, pg. 213, line 17 to pg. 214, line 3. From that time forward, until she sold the gas station, Alice Means testified that the adjoining owner of the Welcome Center property **always** objected to the use of the encroachment. *Id.*, pg. 214, lines 4 – 13 (emphasis added).

In *Pittman v. Lowther*, 363 S.C. 47, 610 S.E.2d 479 (2005) the South Carolina Supreme Court expressly adopted the rule that, in addition to physical barriers, verbal threats which convey to the dominant landowner the impression the servient owner does not acquiesce in the use of the land, are also sufficient to interrupt the prescriptive period. *Pittman v. Lowther*, supra, 363 S.C. at 52, 610 S.E.2d at 481. According to Alice Means' own admission she was aware for almost the entire time she owned the gas station that the adjoining owner of the Welcome Center objected to and did not acquiesce in the use of the encroachment. As a matter of law, this constitutes an interruption of the prescriptive period.

VII. Not Adverse

Both Alice Means, the owner of the gas station property, and Jim Scott Middleton, the General Manager of the gas station, testified that the use of the encroachment was not adverse.

Alice Means testified as follows:

“Q. During your period of time that you were involved in the gas station, were you attempting to take that property, that **easement**, that roadway in **any way**?”

A. No.

Transcript, pg. 214, lines 15 – 19 (emphasis added). Similarly, Jim Scott Middleton testified as follows:

“Q. Okay. Very good. Was it ever your intent to take property on behalf of the station away from anybody to whom it belonged?”

A. No sir.”

Deposition of Jim Scott Middleton, pg. 24, lines 2 – 4.

VIII. Slander of Title

In its Brief, Enmark asserts that there can be no slander of title because there is no publication of a false statement to a third party by Enmark.

On August 8, 2013 the Town’s LMO Official issued a decision finding that the encroachment violated the Town’s LMO and directed that the encroachment be removed and that a vegetative buffer be established in its place. Exhibit 63. This decision by the LMO Official was received by Enmark on August 26, 2013. Exhibit 64. Rather than appeal, Enmark chose to complain to the Town attorney. In an email to the Town attorney dated August 26, 2013 Enmark’s attorney stated:

“As we discussed, my client believes this driveway was built prior to the incorporation of the Town in 1983, and certainly prior to the passage of the LMO in 1987. I have attached Plat Book 38, Page 53, dated **February 11, 1974** which shows the existence of this driveway.”

Exhibit 64 (emphasis added). The plat attached to the email is a copy of the plat recorded in Plat Book 38 at Page 53, and bears the handwritten date of February 11, 1974. Exhibit 64. In truth and fact, the plat recorded in Plat Book 38 at Page 53 is dated November 1, 1989 and was recorded on March 9, 1990. Exhibit 81. The aforesaid representation by Enmark that the plat showing the existence of the driveway was dated 1974 is blatantly false and slanderous.

Accordingly, as a result of the blatantly false representation that the 1989 plat showing the encroachment was a 1974 plat, the Town attorney concluded that the encroachment predated the incorporation of the Town and was "grandfathered," and the Town took no action to enforce the decision of its LMO Official. But for this false publication to the Town, the decision would have been enforced and this lawsuit would have been totally unnecessary.

IX. Attorney's Fees and Costs

One of the elements of actual damages sought by the Plaintiff under its causes of action for slander of title, trespass and nuisance, is reimbursement for the attorney's fees and costs incurred in connection with this lawsuit and defending its title. In its Brief, the Defendant Enmark mistakenly states that the Court ruled at trial that this element of damages had already been ruled upon by the Court at trial and denied. Enmark's Post-Trial Brief, pg. 25.

At trial, the Defendant Enmark objected to the Plaintiff's claim for attorney's fees and costs, asserting that it had not been given adequate notice of this claim because it had not been pled, and accordingly the Defendant Enmark needed more time in which to examine the itemized billings and invoices which had been provided and to prepare for cross examination or defense of this claim. Upon motion of the Plaintiff, and without objection, the Plaintiff's claim for attorney's fees and costs was bifurcated from the rest of the trial, upon condition that if the prescriptive easement claim fails, the Court would reconvene to hear and try the Plaintiff's claim for attorney's

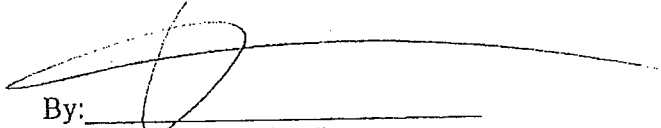
fees and costs. (Transcript Vol. II, pg. 156, line 18 to pg. 158, line 25; and pg. 303, lines 8 – 12. See also Exhibits 80 and 95).

Conclusion

It is accordingly respectfully requested that the Court grant judgment in favor of the Plaintiff, barring and prohibiting the Defendant Enmark from utilizing the encroachment, issue a mandamus to the Town of Hilton Head Island confirming the decision of its LMO Official dated August 8, 2013, and grant judgment in favor of the Plaintiff against the Defendant Enmark for a fair and reasonable amount of both actual and punitive damages.

Respectfully submitted,

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August 24, 2016

06-20-16

1

1 IN THE COURT OF COMMON PLEAS
2 STATE OF SOUTH CAROLINA
3 COUNTY OF BEAUFORT
4 CASE NO.: 2013-CP-07-2066

5 Carolina Center
6 Building Corp.,

7 Plaintiff,

8 vs.

9 Enmark Stations, Inc.,
10 and The Town of
11 Hilton Head Island,

12 Defendant.
13 -----/

14 FINAL HEARING
15 Volume I of II

16 Before The Honorable Marvin H. Dukes, III
17 Master-in-Equity's Hearing Room
18 Beaufort County Courthouse
19 102 Ribaut Road
20 Beaufort, South Carolina

21 DATE: June 20, 2016
22 TIME: 1:00 p.m.
23
24
25

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1 APPEARANCES OF COUNSEL

Page 1

000214

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Opening Statement

Mr. Kuhn	8
Mr. Patterson	11
Mr. Alford	21

06-20-16

Witness: Kumar Viswanathan

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EXHIBITS

2

STIPULATED EXHIBIT LIST

3

A. Chain of Title to Enmark Station

3

1 Deed Fraser to Chevron Oil BD 218 PG 1962
(3/12/74)

4

2 Deed from Sea Pines to Chevron Oil BK 218 PG
1959 (03/12/74)

5

3 Deed from Chevron Oil to aka BK 651 PG 594
(08/23/93)

6

4 Deed from ASA to SCDOT BK 745 PG 1500
(03/02/94)

Page 3

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06-20-16

- 7 5 Deed from ASA to Enmark BK 2822 PG 1941
(03/19/09)
- 8 6 Absolute Assignment from ASA to Enmark BK
2822 PG 2944 (03/19/09)
- 9
- B. Chain of Title to Carolina Center
- 10 7 Deed from JB Fraser to Charles Fraser BK 85
PG 343 (4/15/57)
- 11 8 Deed from Fraser to Palmetto Electric BK 104
PG 273 (11/8/60)
- 12 9 Deed Palmetto Electric to Sea Pines BK 174
PG 218 (12/21/69)
- 13 10 Deed from Sea Pines to State Service BK 216
PG 254 (1/29/73)
- 14 11 Deed from State Service to Fogelman BK 464
PG 1930 (11/26/86)
- 15 12 Deed from Fogelman to SeP Limited Partnership
BK 547 PG 1605 (3/7/09)
- 16 13 Deed from Kemmerlin to Palmetto Federal BK
670 PG 2118 (01/20/94)
- 17 14 Deed from Palmetto Federal to Sea Pines BK
720 PG 1192 (07/21/94)
- 18 14 Deed from Sea Pines to Carolina Center BK
911 PG 1274 (10/31/96)
- 19
- C. Plats
- 20 16 Plat BK 12 PG 83 (rec. 11/15/60)
- 21 17 Plat BK 20 PG 192 (rec. 10/05/72)
- 22 18 Plat BK 22 PG 47 (rec. 03/14/72)
- 23 19 Plat BK 22 PG 85 (rec. 05/01/74)
- 24 20 Plat BK 23 PG 159 (rec. 07/25/75)
- 25 21 Plat BK 38 PG 53 (dated 11/1/89; rec.
03/09/90)
- 22 Plat PB 41 PG 18 (rec. 04/19/91)
- 23 Plat PB 52 PG 32 (rec. 02/27/95)

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- 1 D. Easements, Restrictions
- 2 24 Easement Fraser to Palmetto Electric BK 105
PG 101 (12/19/60)
- 3 25 Relocation of Easement Agreement BK 210 PG
1065 (05/10/73)
- 4 26 Sea Pines Covenants - Gasoline Station BK
218 PG 1954 (03/12/74)
- 5 27 Cross Easements - Sea Pines and Amelia Beach
BK 230 PG 137 - Market Place (05/01/75)
- 6 28 Amendment to Cross easements - Sea Pines and
Amelia BK 275 PG 906 (03/16/79)
- 7 29 Easement ASA to Enmark BK 651 PG 556
(08/26/93)
- 8 E. Photograph)
- 9 30 Aerial Photo 02/25/86
- 31 Aerial Photo 03/86

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- 10 32 Aerial Photo 1988
- 33 Aerial Photo 03/95
- 11 34 Aerial Photo 1995
- 35 Aerial Photo 1999
- 12 36 Aerial Photo 2002
- 37 Aerial Photo 2006
- 38 Aerial Photo County Tax Office 2009
- 13 49 Aerial Photo 2011
- 40 Aerial Photo 2012
- 14 41 Aerial Photo 2013
- 42 Plaintiff's Photographs of Subject Area
- 15 43 Current Overhead Photograph
- 44 Aerial GIS Photograph
- 16
- 44A Four Photographs taken by Mr. Patterson
- 17
- F. Correspondence and Emails
- 18 45 10/20/92 Metro Engineering As-Built Chevron Station
- 19 46 10/31/96 Contract of Sale - Sea Pines - Carolina Center
- 20 47 06/15/94 Letter from Cary Griffin to John Wilson with Plat 38/58
- 21 48 06/23/94 Letter from John Wilson to Cary Griffin with Relocation Agreement
- 22 49 03/17/04 Carolina Center Conceptual Site Plan
- 23 50 08/30/07 Letter from Kumar Viswanathan to Oliver with Conceptual Plan
- 24 51 02/08/08 Letter from Kumar Viswanathan to Jim Scott Middleton
- 25 52 06/02/08 Letter from John Wilson to Kumar Viswanathan

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- 1 53 06/02/08 Email Viswanathan to Wilson
- 54 06/05/08 Letter from Robert Arundell to John Wilson
- 2 55 09/15/08 Letter from Robert Arundell to John Wilson
- 3 56 11/20/08 Purchase Agreement ASA - Enmark
- 4 57 11/20/08 Addendum to Purchase Agreement Enmark - ASA
- 5 58 01/30/09 Letter from James Austin, Esquire, to Alice Means
- 6 59 02/18/09 Amendment to Purchase Agreement - ASA - Enmark
- 7 60 03/19/09 HUD-1 for Enmark Purchase - Sale - ASA
- 8 61 10/29/12 Letter from Robert Arundell to Russell Patterson
- 9 62 07/24/13 Tolling Agreement - Enmark - Carolina Center
- 10 63 08/08/13 Letter from Teri Lewis to Robert Arundell
- 11 64 08/26/13 Email from Russell Patterson, counsel for Enmark, to Teri Lewis

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- 06-20-16
- 12 65 09/26/13 Email from Teri Lewis, Town, to Bob
Arundell
- 13 66 01/16/14 Letter from Greg Alford to Robert
Arundell
- 14 67 01/24/14 Letter from Robert Arundell to Greg
Alford
- 15 68 02/04/14 Letter from Greg Alford to Robert
Arundell
- 16 69 04/30/14 Letter from Russell Patterson to
Teri Lewis
- 17
- 18 G. Miscellaneous
- 19 70 08/23/98 - ASA Secretary of State Record
- 20 71 11/25/02 Deed from DR Horton to scott
Middleton - Residence BK 1670 pg 1222
- 21 72 2007 asa Inc. Depreciation Schedule
- 22 73 05/07/14 Records from Office of the
Treasurer
- 23 74 07/26/13 Colored Plat prepared by Plaintiff
- 24 75 12/17/15 Greenery Estimate - Plaintiff
- 25 76 05/18/16 Beaufort County Incident Report -
Palmetto Bay Road
- 77 Records from the town of Hilton head Island
- 78 Records from Beaufort
- 79 Summary of all Town Approvals/Inspections -
Service Station

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- 1 80 Plaintiff's Attorney's Fees and Costs
- 81 Stipulation of Facts as to PB 38 P 53
- 2 82 Deposition of Scott Middleton dated 04/28/15
EVD. Pg. 156, Vol. II
- 3 83 Town of Hilton Head Land Management
Ordinance *
- 4
- E X H I B I T S
(marked during trial)
- 5
- 6 84 Photographs (three)
I.D. Pg. 63, Vol. I; EVD. Pg. 65, Vol. I
- 7
- 8 85 Estimate
I.D. Pg. 73, Vol. I
- 9 86 Plaintiff's Attorney's up-to-date bill with
trial time estimated
- 10 I.D. 87, Vol. I; Proffer Pg. 87, Vol. I
- 11 87 Aerial Photograph dated 1972
I.D. Pg. 52, Vol. II
- 12 88 Aerial Photograph dated 1979
I.D. Pg. 52, Vol. II
- 13 89 Aerial Photograph dated 1986
I.D. Pg. 52, Vol. II
- 14 90 Aerial Photograph

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15 91 I.D. Pg. 52, Vol. II
Aerial Photograph
I.D. Pg. 52, Vol. II
16 92 Aerial Photograph dated 2009
I.D. Pg. 52, Vol. II
17 93 Aerial Photograph dated 2011
I.D. Pg. 52, Vol. II
18 94 Aerial Photograph dated 2013
I.D. Pg. 52, Vol. II
19
20 95 Transaction Detail by Account (Supporting
documentation for Plaintiff's Attorneys fees and
costs)
21 Proffer. Pg. 157, Vol. II; I.D. Pg. 158,
Vol. II
22
23 * Exhibit 83 was supplemented with Section
16-7-102. See Pg. 132 and Pg. 303, Vol. II.
24 * Exhibit 83 was supplemented with Section
16-8-103.B. See Pg. 141 and Pg. 303, Vol. II.
25

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8

1 MR. KUHN - OPENING STATEMENT
2 THE COURT: Good afternoon. We're here
3 in 2013-CP-07-2066, Carolina Center Building
4 Corporation versus Enmark Stations,
5 Incorporated, and The Town of Hilton Head.
6 I have heard several motions in this
7 matter but would probably benefit from a
8 brief opening statement from counsel as to
9 what it is we're doing today, which I think
10 is the final hearing, but I'm happy to hear
11 from you, sir.
12 MR. KUHN: May it please the court,
13 Your Honor, I'm Fred Kuhn. I'm here
14 representing Carolina Center Building
15 Corporation.
16 Seated beside me is Mr. Kumar

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17 Viswanathan, who is the shareholder,
18 president and CEO of the Carolina Center
19 Building Corporation.

20 It owns a parcel of real estate on
21 Hilton Head Island, which is where the old
22 Sea Pines Welcome Center used to be, near
23 the Sea Pines Traffic Circle.

24 An adjoining landowner is the Enmark
25 station, which is represented by

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9

1 MR. KUHN - OPENING STATEMENT

2 Mr. Patterson. And these two properties are
3 located within the Town of Hilton Head
4 Island, which is represented by Mr. Greg
5 Alford.

6 My client brought this action to
7 declare that Enmark Stations, Inc., does not
8 have an easement over its property, that the
9 roadway that is in use there is an
10 encroachment and should be closed.

11 Since the property is in the Town of
12 Hilton Head Island, the Town has ordinances
13 that impact on this issue. And our position
14 and I believe the evidence will show that in
15 addition to not having an easement, the
16 roadway encroachment, whatever you want to
17 call it, violates the Town's Land Management
18 Ordinance, as well as earlier Beaufort
19 County's Development Standards Ordinance.

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20 We're asking you to declare that there
21 is no easement, that it is an encroachment,
22 allow us to close it and award to us
23 damages, both actual and punitive, for the
24 existence of this encroachment and the
25 actions by Enmark Stations.

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10

1 MR. KUHN - OPENING STATEMENT

2 We contend that there is no
3 prescriptive easement, which is the
4 remaining issue.

5 Your Honor has already ruled on our
6 Summary Judgment Motion that there is no
7 express easement. If you recall, they
8 had -- there was a power line easement that
9 they were purportedly relying on to say they
10 had an express easement, and you ruled that
11 as we're entitled to summary judgment on
12 that issue.

13 As far as the prescriptive easement
14 issue goes, that they could not show that
15 there has been adverse and hostile use for
16 the prescriptive period of 20 years, nor can
17 they show a justified claim of right for the
18 prescriptive period of 20 years.

19 If they could declare an easement, if
20 they could satisfy all of the elements of a
21 prescriptive easement, their claim must also

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22 fail, because it's an illegal easement and
23 that it violates Town's Land Management
24 Ordinance.

25 And even if it were a prescriptive

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11

1 MR. PATTERSON - OPENING STATEMENT
2 easement, and even if it did not violate the
3 Town's Land Management Ordinance, that
4 necessary parties are missing, inasmuch as
5 this easement would be an easement to
6 nowhere, so to speak. It would dead-end on
7 somebody else's property. You have to cross
8 over two other landowners to get to a public
9 roadway. So even if it were an easement, if
10 it did not violate the Town's Land
11 Management Ordinance, the necessary and
12 proper parties are missing. It would be an
13 easement to nowhere.

14 So we're asking that you declare that
15 they do not have an easement and award to my
16 client reasonable and actual punitive
17 damages.

18 THE COURT: Thank you so much.

19 Mr. Patterson.

20 MR. PATTERSON: Your Honor, I represent
21 the owner of the service station, Enmark.
22 It used to be a Chevron.

23 Mr. Houstoun is here today, who is the
24 CEO of Enmark.

25 Just briefly about the station, if you

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12

1 MR. PATTERSON - OPENING STATEMENT

2 look at Tab 42 to my pretrial brief, that is
3 Exhibit 42, or you can look in the notebook,
4 Exhibit 42, that is the colored photos of
5 the roadway that's in dispute.

6 And we'll present testimony from
7 Ms. Alice Means, who ran this station for
8 over 20 years, and from other parties.

9 The station was built in 1984 in June,
10 prior to the Town adopting any land
11 management ordinance. And there is going to
12 be testimony that the roadway was in
13 existence right after it was built, so the
14 roadway has been in existence for 32 years,
15 way past the 20 years required for a
16 prescriptive easement.

17 The Town, as I mentioned, did not pass
18 a land management ordinance until 1987.

19 Ms. Means shortly, in 1989, took over
20 the operation of the station. She is going
21 to testify that the roadway was paved with
22 asphalt by Chevron prior to her taking it
23 over in 1989.

24 Subsequently, she ran it for the next
25 20 years, and she repaved it, so there's two

1 MR. PATTERSON - OPENING STATEMENT

2 layers of asphalt over this. And there will
3 be photographs and testimony to confirm that
4 there are two layers of asphalt over this
5 roadway. The first, as I mentioned, was
6 done by Chevron prior to 1989.

7 we believe we have met all the elements
8 for a prescriptive easement for a roadway, I
9 think Your Honor is pretty familiar with
10 those, continued and uninterrupted use or
11 enjoyment for a full 20 years. We clearly
12 are going to have testimony that we can meet
13 that, starting from 1984 up until the
14 present. It's still being used. It is used
15 as a cut-through by not only patrons of the
16 Enmark station but by members of the public
17 to bypass Sea Pines Circle.

18 The next element that has to be met for
19 a prescriptive easement is the identity of
20 the thing enjoyed. That's not really in
21 dispute. The roadway has never changed
22 boundaries from 1984 until the present.

23 And the third element is the use or
24 enjoyment was adverse or under a claim of
25 right. And we only have to meet either one

1 MR. PATTERSON - OPENING STATEMENT

2 of those.

3 My brief discusses in detail the
4 elements to meet those. For a claim of
5 right, all we have to show is Enmark or its
6 predecessors in title had a substantial
7 belief that they had a right to use the
8 roadway, based on the totality of the
9 circumstances.

10 There's going to be documents that are
11 in the stipulated exhibits where Mr. John
12 Wilson, who was representing Ms. Means when
13 she owned the station, corresponded with
14 various parties and identified an easement
15 agreement that he believed and she believed
16 gave them rights to use it. They also based
17 their right of usage on over 25 years of
18 using it with nobody complaining, from the
19 day she took over the station until she sold
20 it 20 years later.

21 We don't have to show that we hold
22 actual title. And the use under claim of
23 right can be based on historical use as well
24 as, even if it's an erroneous assumption, of
25 legal rights.

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1 MR. PATTERSON - OPENING STATEMENT

2 The second element, which is an

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3 alternative element, we can either meet a
4 claim of right or adverse use, is open,
5 notorious, continuous and uninterrupted use.
6 And we'll be able to show that for over --
7 almost 30 years, that roadway has met those
8 elements.

9 Once that evidence is presented under
10 the case law, the burden then shifts to the
11 plaintiff to rebut the presumption that the
12 use was adverse. And so we believe we'll be
13 able to meet that initial burden, transfer
14 the burden of proof over to them, and we
15 don't think they can show that our use was
16 not adverse.

17 They've also mentioned that even if we
18 have a prescriptive easement, we didn't name
19 the necessary parties, because it's an
20 easement to nowhere. There is no case law,
21 and as far as I know they've cited no case
22 law that says that's an element for a
23 prescriptive easement, that your easement
24 has to go from one public road to another.
25 That's number one.

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1 MR. PATTERSON - OPENING STATEMENT

2 Number two, the plaintiffs, Mr. Kuhn's
3 office, brought this lawsuit. If there were
4 supposed to be other parties in the lawsuit,
5 he's the only one to blame himself. He

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6 could have named those other parties. He
7 can't say, "You didn't name all the
8 parties." They're the ones that filed the
9 lawsuit, so it's not our job to name whoever
10 they wanted to, and they certainly can do
11 that.

12 The third element involving the Town,
13 first of all, we don't believe -- they're
14 asking for a mandamus to require the Town to
15 either close the roadway or to remove the
16 pavement because they've said the roadway
17 was paved in violation of the LMO.

18 We believe the evidence will be that
19 before the LMO was adopted in 1987, this
20 roadway was already paved. And there is
21 nothing in the LMO that prevents someone
22 from repaving an existing roadway.

23 The other issue is that they were
24 advised of the position of the Town, and the
25 Town has taken that position, that they're

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17

1 MR. PATTERSON - OPENING STATEMENT
2 not going to force Enmark to do anything.
3 And by a letter from Mr. Alford, the
4 plaintiff was notified that was the position
5 of the Town. They did not file the appeal
6 to the Board of Zoning Appeals, as required
7 under the LMO. We don't think they have

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8 standing to bring that action.

9 The other issue is that even if the --
10 under the LMO, it was grandfathered in as a
11 nonconforming use. And again, that ties in
12 to the fact that they -- it's a
13 grandfathered use, and there are certain
14 things you can do, and the Town has
15 discretion, as long as the footprint of the
16 nonconforming use does not increase. And
17 simply repaving a roadway, not enlarging it,
18 would fit within the grandfathered use.

19 Finally, what are the actions or the
20 options for the Town if there was a
21 violation, if everything the plaintiff said
22 is true and whenever the roadway was repaved
23 the second time there was a violation of the
24 LMO, what are the options to the Town? And
25 they're telling you, judge, that you should

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18

1 MR. PATTERSON - OPENING STATEMENT

2 override the discretion afforded under the
3 LMO that the Town has, and they want you to
4 pick one option, and that is to remove the
5 roadway or the pavement.

6 In actuality, the LMO provides eight
7 different options when there's a violation.
8 They use their discretion. Several of the
9 options include that they can ask for an
10 abatement, they can impose a fine, they can

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11 ask that some landscaping or a buffer be
12 installed. There are many options that can
13 be done separate from that.

14 And under a mandamus, when there is --
15 a mandamus is not proper when there is a
16 discretionary relief afforded by a
17 governmental official. And that's what
18 they're asking you for, is to override the
19 discretion exercised by the Town and pick
20 the remedy they want.

21 Mr. Kuhn did not mention several other
22 claims, and I don't know if he's still
23 pursuing those, but they pursued a slander
24 of title claim.

25 We think we have a right to a

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1 MR. PATTERSON - OPENING STATEMENT
2 prescriptive easement and so there's no
3 slander of the title.
4 In addition, for a slander of title
5 there must be a representation of a false
6 statement to a third party. And there is no
7 representation. Enmark has never
8 represented to any party that they have a
9 prescriptive easement. The communications
10 with the Town, which are into evidence,
11 simply state that they believe they have one
12 and that there is a dispute and that we're

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13 going to court and let the judge decide, and
14 that's exactly what we did.

15 Also, there was a tolling agreement in
16 place that is into evidence. Mr. Kuhn, as
17 counsel, agreed that he would not make any
18 efforts to close the roadway after the
19 tolling agreement was entered into. That's
20 Exhibit 26. On July 24th, 2013, in
21 violation of that tolling agreement, the
22 plaintiff and his attorneys repeatedly
23 contacted and, in effect, as you'll see,
24 harassed the Town to try to get them to
25 close the roadway, and they were not

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20

1 MR. PATTERSON - OPENING STATEMENT

2 successful.

3 There's also no evidence of the malice.
4 The same arguments are true for the claims
5 for a nuisance.

6 Again, we believe we have a valid
7 easement across that property and it's been
8 in use for over 30 years.

9 They've also claimed a trespass, and we
10 don't believe there's any merit for that.

11 Finally, they apparently are seeking
12 attorney's fees. There is no cause of
13 action that I'm aware of that they can seek
14 attorney's fees.

15 The only possible claim, there is a
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16 case under a slander of title where
 17 attorney's fees can be awarded as special
 18 damages for the cost to fix the slander of
 19 title. We don't believe that claim is
 20 applicable because they can't meet the
 21 elements, and, more importantly, nowhere in
 22 their Amended Complaint did they ever ask
 23 for attorney's fees and costs. And special
 24 damages, if they're going to ask for
 25 attorney's fees, have to be specially pled,

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21

1 MR. ALFORD - OPENING STATEMENT
 2 and they weren't pled, so we don't believe
 3 they're entitled to any attorney's fees even
 4 if they were successful with the slander of
 5 title. Thank you.
 6 MR. ALFORD: May it please the court,
 7 Your Honor, Greg Alford on behalf of the
 8 Town of Hilton Head Island.
 9 Respectively, I think most of it has
 10 been covered. The court's aware that a
 11 mandamus is the highest judicial writ and is
 12 issued only when there is a specific right
 13 to be enforced. I would cite the case In
 14 the Interest of Lyde, L-Y-D-E, 284 S.C. 419,
 15 327 S.E.2d 70, a 1985 case, "when the legal
 16 right is doubtful, or the performance of
 17 duty rests in discretion, or when there is

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18 another adequate remedy, a writ of mandamus
19 can not rightfully issued."

20 With all of that in mind, Your Honor,
21 the Land Management Ordinance, as I'm sure
22 the court will hear testimony later in the
23 matter, does contain certain appeal rights
24 within it. When the Administrator makes a
25 decision and advises a party of that, it is

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1 MR. ALFORD - OPENING STATEMENT
2 called a determination. It's usually a
3 determination and advises the party the
4 party has a statutory period under the LMO
5 to appeal, thus putting themselves in, if
6 you will, the Board of Zoning Appeals or the
7 administrative review process set up within
8 the Town government. That did not take
9 place here despite the notice of the
10 determination. I think that and the age of
11 this encroachment are probably fatal to any
12 claims against the Town requiring them to
13 issue a writ of mandamus.

14 Having said all that, as a very wise
15 man who I think once sat in a chair similar
16 to yours downstairs said, "The Town has no
17 friends to award or enemies to punish in
18 this matter." And, as we've stated to the
19 parties from the beginning, we view this as
20 a private dispute between landowners, and

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21 the Town will, of course, abide by any
22 ruling that the court would issue.
23 THE COURT: All right. Thank you very
24 much.
25 Mr. Kuhn, call your first witness,

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23

1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 please.
3 MR. KUHN: May it please the court,
4 Your Honor, I call Mr. Viswanathan.
5 Kumar Viswanathan
6 having been produced and first duly sworn as a
7 witness, testified as follows:
8 MR. KUHN: May it please the court.
9 THE COURT: Yes, sir.
10 DIRECT EXAMINATION
11 BY MR. KUHN:
12 Q Would you state your full name, please,
13 sir.
14 A My name is Kumar Viswanathan.
15 Q And I'll call you Kumar, if that's all
16 right. It's a lot easier to pronounce. What is
17 your date of birth?
18 A My date of birth is May 28th, 1950.
19 Q What is your address?
20 A I live on 23 Spanish Point Drive,
21 Hilton Head Island.
22 Q That's in Beaufort County?

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23 A In Beaufort County, yes.
24 Q Are you married?
25 A Yes.

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24

1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 Q To whom are you married?
3 A I'm married to Penny Viswanathan.
4 Q And for how long have you been married?
5 A Almost 35 years.
6 Q Do you have any children?
7 A I have two children.
8 Q And where are they?
9 A I have one a son who lives in Colorado,
10 Boulder, Colorado and I have a daughter who
11 lives in Charleston, South Carolina.
12 Q And are they employed or in school,
13 or . . .
14 A My son is in school and employed also,
15 at the same time.
16 Q Good for him. And your daughter?
17 A My daughter is employed in Charleston.
18 Q And what do they do?
19 A My son is going to business school, and
20 he's working with a private wealth management
21 company. And my daughter is working with
22 National Home Builder.
23 Q What is your educational background?
24 A I have an undergraduate degree in civil
25 engineering and then a graduate degree in civil

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25

- 1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 engineering from Purdue University and then an
3 M.B.A. from Purdue University.
4 Q How long have you lived in the Beaufort
5 County area?
6 A I've lived on Hilton Head since 1977.
7 Q And where did you come from?
8 A Originally, from Indiana. I'm
9 obviously from India originally, moved to
10 Indiana to go to school. And from Indiana, I
11 came to Hilton Head.
12 Q And what was approximately when?
13 A In 1977.
14 Q Have you been involved in any
15 developments on Hilton Head Island?
16 A I've been involved in several
17 developments on Hilton Head.
18 Q Can you give the judge just an idea of
19 what you do, what you have done.
20 A I've developed condominiums. I've
21 developed commercial property, both on and off
22 Hilton Head Island.
23 Q Can you name some of them?
24 A I've developed Ocean walk condominiums,
25 the Yacht Club villas in Shelter Cove, Turtle

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 Lane Villas. Developed the Auto Mall in

3 Beaufort County -- or Jasper County, I should

4 say, across from Sun City. Developed the

5 Medical Pavilion Building on Hilton Head.

6 Q Very good. The property that we're

7 here about today, how did you become involved in

8 that?

9 A Can I ask a question, should I look at

10 you or the judge?

11 Q It's kind of awkward.

12 THE COURT: However you're comfortable,

13 I can hear you just fine.

14 BY MR. KUHN:

15 Q How did you become interested in this

16 property?

17 A Back in the mid 1990s, I think a bank

18 owned this property, and I was interested in

19 this property because it was in a good location

20 and tried to buy it from the bank.

21 Q Describe the location generally. It's

22 in a good location, what do you mean by that?

23 A The property is located right at the

24 entrance to Sea Pines Plantation, and there was

25 originally a Sea Pines Welcome Center right at

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

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2 the Sea Pines Circle, so all the traffic to Sea
3 Pines would have to go through to -- or pass
4 this -- pass this building, so it was a good
5 office location.

6 Q Very good. And if you would look at
7 Exhibit 74, please, in the notebook in front of
8 you.

9 A Exhibit 70 . . .

10 Q Exhibit 74. Do you recognize what that
11 depicts?

12 A Yes. It's a survey and an as-built
13 drawing of the Carolina Center.

14 MR. KUHN: And, Your Honor, the
15 exhibit, for practical reasons, is regular
16 letter size. I've got two larger copies,
17 if I could show these to you. It might be
18 easier to reference these. These are just
19 larger copies of that exhibit. We're used
20 to looking at it, you're not, so I figured
21 if you had something bigger, it might make
22 more sense.

23 THE COURT: Any objection?

24 MR. PATTERSON: No objection.

25 MR. ALFORD: No objection.

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 BY MR. KUHN:

3 Q I'll show you this.

4 MR. KUHN: And if there's no objection,
5 if he could maybe, using this larger plat,
6 just show you where things are, to get you
7 oriented.

8 MR. ALFORD: No objection.

9 BY MR. KUHN:

10 Q If you'll just come up here.

11 Describe to Your Honor what this
12 depicts, what's on these properties. Where is
13 the encroachment that we're talking about, where
14 is your property, where is Enmark's property and
15 so forth?

16 A Your Honor, this is the Sea Pines
17 Circle right here, and this is Palmetto Bay
18 Road. You come off the Cross Island Parkway to
19 Palmetto Bay Road and go around Sea Pines Circle
20 and turn right on Greenwood Drive to enter Sea
21 Pines.

22 This is what was called the Sea Pines
23 Welcome Center at one time. Now it's called the
24 Carolina Center. It has three buildings - the
25 main building here, which is now the SunTrust

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29

1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 bank, this is a real estate office, and in the
3 back there is -- a medical office space is in
4 the back.

5 And as you go across Greenwood Drive,
6 you can turn right to what's called the

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7 MarketPlace. It's been in existence for quite
8 awhile. If you move forward, you'll go to the
9 Sea Pines -- the new Sea Pines office building
10 and the Sea Pines Gate.

11 This building at one time used to be
12 the Winn-Dixie, but now it's the Staples.
13 shopping center.

14 The Chevron station, which is now the
15 Enmark gas station, is located on Palmetto Bay
16 Road, and they have encroached on this property,
17 which is the subject of this lawsuit, to come
18 and access into MarketPlace, and then maybe head
19 on to Sea Pines or the other way around.

20 In between the Chevron or Enmark gas
21 station and the Staples parking lot, there is
22 another piece of parcel called A-1 Parcel, which
23 is owned by the Japanese steakhouse, Japanese
24 restaurant. So there's really one, two -- three
25 parcels between the Enmark gas station and the

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 Staples. And the subject of this litigation is
3 this encroachment over here.

4 Q The dark black lines on here, these are
5 the boundary lines of the properties?

6 A Yes. These depict the boundary lines
7 of the Carolina Center. This depicts the
8 boundary line of the Chevron station. This

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9 depicts the boundary line of the restaurant.
10 And this depicts the boundary line of the
11 MarketPlace.
12 THE COURT: This measurement here, the
13 MarketPlace is the property that I've got my
14 hand on that you've described as having the
15 Staples center; is that right?
16 THE WITNESS: Yes, sir.
17 THE COURT: And I don't know what that
18 measurement is there, but I would assume the
19 vehicular traffic is -- I mean, this is just
20 a line. Cars can't see this line, I assume.
21 THE WITNESS: No.
22 THE COURT: But does anyone know how
23 far it goes onto this -- it's not called the
24 Staples center, what did you call the
25 center?

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 THE WITNESS: MarketPlace.
3 THE COURT: The MarketPlace.
4 THE WITNESS: It has different names,
5 but it used to be called MarketPlace.
6 THE COURT: Okay. Maybe there will be
7 some testimony about that later. I mean,
8 this -- this is not a large area?
9 THE WITNESS: No, that's not. That's
10 the age of the pavement, Your Honor. And
11 this is all dirt road.

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12 Right now, cars are and trucks are
13 going through here, making a right and then
14 coming out of this parking lot.

15 There's a trash dumpster that's over
16 here.

17 So I believe this is the edge of the
18 property line and -- this dark line. And so
19 this is the portion that belongs to a
20 restaurant that's -- it's located here.
21 It's kind of L-shaped.

22 THE COURT: Okay. Is that still -- it
23 says "Now or formerly of Kuhetti,
24 Incorporated. (Phonetic.) I wonder if
25 that's still the -- I guess we'll just call

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 it the restaurant property.

3 THE WITNESS: The name of the
4 restaurant has changed, it's gone from a
5 Japanese steakhouse to something else, so I
6 don't know.

7 MR. ALFORD: It still is. It's called
8 Seafire now, and Tommy Shimada still owns
9 it, his outfit.

10 THE WITNESS: So I don't know, the
11 ownership has changed.

12 BY MR. KUHN:

13 Q The traffic to go from one public road

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14 to another comes onto the Chevron gas station
15 property, onto the encroachment, onto the
16 Kuhetti property, onto the MarketPlace and then
17 exits to a public road, Greenwood Drive, or is
18 there another exit that the MarketPlace has onto
19 Palmetto Bay?

20 A The MarketPlace, which loops around and
21 comes to a traffic light where the Publix market
22 is, the Publix store is. So this road comes all
23 the way around, loops around here, and there's a
24 traffic light on Palmetto Bay Road. And then
25 Palmetto Bay Road joins right through here.

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 THE COURT: I'm somewhat familiar with
3 it. Starbucks is right there.

4 THE WITNESS: Right, Starbucks is right
5 there.

6 MR. KUHN: Very good. If you'd just
7 resume your seat, please.

8 THE COURT: Thank you..

9 BY MR. KUHN:

10 Q If you would turn to Exhibit 47,
11 please. This is a letter written by Cary
12 Griffin, and Mr. Griffin is an attorney on
13 Hilton Head Island; is that correct?

14 A Yes, that's correct.

15 Q And it's written to John Wilson, who is
16 another attorney on Hilton Head Island?

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17 A Yes.
18 Q Okay. What was Mr. Griffin's -- do you
19 know why Mr. Griffin wrote this letter?
20 A My recollection is I had signed a
21 contract or entered into an agreement to buy the
22 property from the bank. And I notice Howard
23 Hickey, who represented the bank, he's copied on
24 this letter. So Mr. Griffin was doing the
25 necessary due diligence for me to acquire the

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 property.
3 Q So he was working on your behalf at the
4 time?
5 A Yes, he was working on my behalf.
6 Q Okay. In this letter -- and was this
7 written on or about June 15th, 1994, to the best
8 of your recollection?
9 A Yes. That's what it states on the top
10 of the letter.
11 Q He recites, "There is an encroachment
12 of a driveway, which is shown on Plat Book 38,
13 Page 53, portion attached." The encroachment
14 that he's talking about, is that what we were
15 just talking about on Exhibit 74?
16 A Yes, sir, it was.
17 Q Okay. And he also states, "It is
18 obvious this area is used for access from the

06-20-16

19 MarketPlace general parking area to the Chevron
20 station." He's talking about this Chevron
21 station shown on that same exhibit in the
22 MarketPlace subdivision or MarketPlace shopping
23 center?
24 A That's correct. It used to be a
25 Chevron station before it became an Enmark.

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 Q Okay. And he further states,

3 "Ultimately, that area would be utilized by the
4 purchaser of the Sea Pines Reception Center
5 property for parking and would not be able to be
6 utilized for continued access." Did he have
7 your permission to tell Mr. Wilson that this
8 could not be used for continued access?

9 A Yes, he did.

10 Q Do you know on whose behalf Mr. Wilson
11 was acting?

12 A Mr. Wilson was acting on behalf of the
13 previous owner, ASA, Inc.

14 Q If you would look at the enclosure, it
15 has handwritten on it, "P Book 38 53." This
16 shows -- what does this show? Do you recognize
17 it?

18 A It shows part of the Carolina Center or
19 old Sea Pines Welcome Center building. It
20 doesn't show the entire parking lot. And it
21 shows the power line easement and some of the

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22 encroachment on the power line easement. It
23 doesn't have a date on it, that I can tell.
24 MR. KUHN: Your Honor, again, if he can
25 approach.

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 THE COURT: Yes.
3 BY MR. KUHN:
4 Q The second page of Exhibit 47, if you
5 would sort of point out apples and apples so His
6 Honor can see if the encroachment as shown on
7 the second page of Exhibit 47 is the same on
8 what's shown on Exhibit 74 or if it's somewhat
9 different. Just point out where the
10 encroachment is shown.
11 A Yes. This is the Chevron gas station,
12 and this is Palmetto Bay Road. And here is the
13 encroachment that's shown, and this is the
14 parcel A-1 that we referred to earlier, Your
15 Honor. And this is the point that you were
16 asking about on what side of the property it
17 was. And it shows the encroachment, and it
18 shows it doing -- going both ways, here and
19 here.
20 Q It's almost an island in the
21 encroachment, almost, isn't it?
22 A It's almost an island here. And that's
23 where the trash dumpster is located. That's

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24 this one right here.

25 THE COURT: Does that plat have a date

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 on it?

3 THE WITNESS: It does.

4 MR. PATTERSON: We've got a better copy
5 of it, if you want to look at it.

6 MR. KUHN: The whole plat is in another
7 exhibit?

8 MR. PATTERSON: 21. 21 is a better
9 copy of it.

10 MR. KUHN: For the record, Your Honor,
11 it's dated November 1st, 1989, and recorded
12 March 9th, 1990.

13 THE COURT: Okay.

14 MR. KUHN: Unless you blow it up 50
15 times, it's hard to read that.

16 THE COURT: All right. Thank you.

17 MR. KUHN: And, judge, just for
18 reference, Your Honor, the list of exhibits
19 has the dates of the exhibits written beside
20 them. That sometimes helps.

21 MR. PATTERSON: And, Your Honor, before
22 I forget, can we put on the record that all
23 parties have agreed that all 84 exhibits in
24 these notebooks are stipulated exhibits and
25 admissible for all purposes at trial.

1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 THE COURT: Thank you for putting that
3 on the record. But especially thank y'all
4 for doing that because I know that takes a
5 lot of pretrial work, and I appreciate that.
6 And it makes things go much smoother, so
7 thank you.

8 Let's see, when is the date on this
9 plat?

10 MR. KUHN: It's up in the upper
11 right-hand corner.

12 THE COURT: Yeah, let's see. This
13 says, "Survey of the data taken from."
14 There it is, 13. Thanks.

15 THE WITNESS: Sometimes it's clearer on
16 this color picture.

17 THE COURT: Yes. Thank you. All
18 right.

19 BY MR. KUHN:

20 Q At this point in time that this letter,
21 Exhibit 47, was written by Mr. Griffin, in June
22 of 1994, you were not yet the owner of this
23 property; is that correct?

24 A No, I was not.

25 Q And did Mr. Griffin receive a response

1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 to this letter saying that there is an
3 encroachment that will ultimately have to be
4 closed?

5 A Yes, he did, from Mr. Wilson.

6 Q And if you would, turn to Exhibit 48.
7 Is that the response?

8 A Yes. It's dated June 23rd, 1994, from
9 Mr. Wilson to Mr. Griffin. Yes, it is.

10 MR. KUHN: And, Your Honor, this is
11 pretty self explanatory.

12 BY MR. KUHN:

13 Q Did you ultimately purchase this
14 property?

15 A Yes, sir, I did.

16 Q If we look at Exhibit 15, is that a
17 deed conveying the property from Sea Pines
18 Company to Carolina Center Building Corporation?

19 A Yes, sir, it is.

20 Q Now, this is 1996, almost two
21 and-a-half years later. Was there a reason for
22 that delay?

23 A In the intervening time between '94 and
24 '96, Sea Pines asserted that they had a first
25 right of refusal on the purchase of the

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 property, and it was ultimately determined that
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3 they did not. And so they ended up selling the
4 property to me in 1996.

5 Q And was -- did that determination they
6 did not have the first right of refusal, did
7 that take that long to resolve?

8 A Yes, it did.

9 Q Because you got lawyers involved and
10 they had to do research and that type of thing?

11 A Right. It took two years.

12 Q Now, after you purchased the property,
13 the encroachment, was the encroachment still
14 there?

15 A Yes, it was.

16 Q Okay. And what did you do concerning
17 the encroachment?

18 A After I acquired the property --

19 Q Yes, sir.

20 A -- I acquired the property, I got title
21 to the property in late 1996, almost -- almost,
22 December, October/December. And in 1997, I was
23 focused on re-leasing the buildings and managing
24 the buildings that were in to make sure they
25 complied with all the Town ordinances. And

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 since Mr. Griffin had already notified Chevron
3 that they were encroaching on the property, I
4 kind of decided to address it afterwards.

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5 And between 1997 and some point
6 thereafter, I focused on the encroachment and
7 tried to bring all the different parties and
8 adjacent property owners together to see if we
9 could work out a common and mutually beneficial
10 access easement agreement to all the parties
11 involved.

12 Q And approximately when did you start
13 that process?

14 A I couldn't tell you the exact date. It
15 was probably in the mid -- in the late 1990s to
16 early 2000s.

17 Q And you say you started contacting the
18 adjoining property owners. Who would that have
19 been?

20 A The adjoining property owners were
21 obviously the Chevron gas station at that time
22 and then the restaurant, the Japanese restaurant
23 owner, whose property also abutted the Carolina
24 Center, and the owners of the MarketPlace
25 property. They were called -- the owners were

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 called Stafford Properties, I believe.

3 Q Do you recall who you would have spoken
4 to personally on behalf of the gas station?

5 A At that time, the gas station owner was
6 one Mrs. Alice Means and a gentleman by the
7 named of John Scott Middleton, who was running

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8 the gas station for her, as far as -- that was
9 related to the Chevron gas station.

10 Q Is that who you would have dealt with
11 on behalf of the gas station, Mr. Middleton?

12 A Mr. Middleton and Ms. Alice Means.

13 Q And did you personally deal with them?

14 A I personally dealt with both of them.

15 Q Did you meet with them?

16 A Yes, I met with them.

17 Q Did you ever meet on the encroachment?

18 A Yes, I did meet with them on the
19 encroachment.

20 Q And what did y'all discuss?

21 A I specifically remember meeting with
22 John Scott Middleton and saying that they were
23 encroaching on my property and that the
24 encroachment had to be moved.

25 And I was trying to come up with an

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 agreement, not only with ASA, Inc., but also the
3 Japanese restaurant owner, the MarketPlace
4 owner, and also the Town of Hilton Head, so that
5 we could work out a common and mutually
6 acceptable access easement which would benefit
7 everybody and make it safer for the people
8 involved.

9 Q When you told Mr. Middleton that the

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10 encroachment had to be moved, what was his
11 reaction?
12 A There was no reaction specifically.
13 He -- he waited for the documentation.
14 Q Did he ever say, "I've got an
15 easement." I don't need to move anything."
16 A No, he did not say that.
17 Q Did he ever assert a right to be able
18 to use that encroachment?
19 A No, he did not.
20 Q Did you thereafter give him permission
21 to use it while you were trying to work this
22 out?
23 MR. PATTERSON: Objection, Your Honor.
24 It's a leading question.
25 THE COURT: See if you can rephrase the

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 question.
3 BY MR. KUHN:
4 Q while you were trying to work out
5 moving the encroachment off your property, what
6 did you do with respect to Mr. Middleton
7 continuing to use the encroachment?
8 A Allowed him to continue to use it
9 because we were trying to work out a mutually
10 acceptable agreement for all parties, and in the
11 interest of being a good neighbor, we allowed
12 him to continue to use the encroachment.

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13 Q And this would have involved not just
14 the Chevron station folks but the restaurant
15 people and the shopping center folks; correct?

16 A That's correct. And also the Town of
17 Hilton Head.

18 Q Okay. And did you go back and forth
19 trying to come up with some sort of conceptual
20 site plan that would work?

21 A Yes. Actually, it took me several
22 months to work with the land planner to come up
23 with a site plan. I had meetings with the Town
24 to see if the Town would approve it, then met
25 with the property owners one at a time.

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 Then I had to meet with the owner of
3 the restaurant because there was no easement
4 agreement over the restaurant property, and he
5 gave us an easement agreement -- or he gave me
6 an easement agreement to access over his
7 property, with the hopes of this entire
8 agreement being done.

9 Q So jumped the gun, so to speak?

10 A Say that again..

11 Q He jumped the gun a little bit, so to
12 speak?

13 A Well, we had to talk to one owner at a
14 time. It's hard to talk to all of them

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15 simultaneously.

16 Q Thank you. My 49 is missing. If you'd
17 turn to Exhibit 49.

18 THE COURT: I don't have one either.

19 THE WITNESS: I don't have one either.

20 BY MR. KUHN:

21 Q I've got a copy of it. Conceptual site
22 plan?

23 MR. PATTERSON: I've got it right here.

24 Hold on, I'll have her make copies. Hold on

25 a second, I may have copies.

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 If you want to take half a second.

3 THE COURT: Sure. Let's do that. Go
4 off the record for a second.

5 (Off the record.)

6 THE COURT: Back on, please.

7 BY MR. KUHN:

8 Q Mr. Viswanathan, do you recognize what
9 Exhibit 49 depicts?

10 A Yes. It's a conceptual site plan
11 prepared by Atlantic International on my behalf
12 to try to work out the easement agreement for
13 all the parties concerned.

14 MR. KUHN: Again, Your Honor, with your
15 permission, if he could approach. And I've
16 got a larger version so he can sort of
17 compare again, apples to apples.

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18 MR. PATTERSON: 49 at the top
19 right-hand corner.

20 BY MR. KUHN:

21 Q If you could, Mr. Viswanathan, if you
22 would explain to His Honor what is shown on
23 Exhibit 49, please.

24 A Again, Your Honor, this is Palmetto Bay
25 Road. There's Sea Pines Circle. Greenwood

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 Drive to Sea Pines Circle is here. Here is the
3 Chevron station at that time.

4 And I was working with them. The
5 encroachment at that time was going onto my
6 property and coming out this way.

7 So what the proposal was, we had gone
8 through several master plans with the land
9 planners and tried to work with the Town, and
10 finally, this was the one that made sense.

11 But we approached the Chevron gas
12 station and said, instead of making this more or
13 less a U-turn, it's to come directly across from
14 their property to the restaurant property to the
15 MarketPlace property, and that we would put
16 additional parking on our side of the property,
17 on the power line easement, so that everybody
18 could use it in a nonexclusive basis.

19 So the proposal was that Chevron would

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20 give up this encroachment and come directly
21 across and cross these two other pieces of
22 property.

23 And of course this gentleman, the
24 restaurant gentleman, he gave his approval. He
25 gave us the easement for this master plan.

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 Q And this is dated?

3 MR. PATTERSON: August 10th of 2007.

4 MR. KUHN: Thank you.

5 BY MR. KUHN:

6 Q And would it be fair to say a lot of
7 time and effort and work went into coming up
8 with this proposal?

9 A A lot of time and several months of
10 work, not only in meeting with the land
11 planners, but also the different property owners
12 and the Town of Hilton Head.

13 Q If you would turn to Exhibit 50,
14 please, and what is Exhibit 50?

15 A Exhibit 50 is a letter from me to the
16 owner of the MarketPlace, Stafford Properties,
17 asking to -- giving him the proposed site plan
18 that we just saw and suggesting that we meet,
19 since the proposed site plan would make it
20 better for all parties concerned, both from a
21 visual and from a traffic perspective.

22 Q And at this time, it appears that there

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23 was no finalized agreement in place; is that
24 correct?

25 A There was no finalized agreement.

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49

1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 Q And the several pages after that, these
3 are just piecemealing the same plan we just
4 looked at that is Exhibit 49; is that correct?

5 A Yes, sir. They were an attachment to
6 this letter that I sent to Stafford Properties.

7 MR. PATTERSON: Mr. Kuhn, up in the
8 exhibit notebook, there is an enlarged copy
9 of that same plan that is included in
10 everybody's notebook.

11 MR. KUHN: What number is that?

12 MR. PATTERSON: It should be part of
13 Exhibit 50. Do you not have a large plan in
14 Exhibit 50?

15 MR. KUHN: Mine is cut up in pieces.
16 See how it is?

17 MR. PATTERSON: Right.

18 MR. KUHN: But that's the same exhibit,
19 49?

20 MR. PATTERSON: Yeah.

21 MR. KUHN: It's the attachment, in
22 essence, to Exhibit 50; is that correct?

23 MR. PATTERSON: That's my
24 understanding, yes.

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25 BY MR. KUHN:

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 Q And, Mr. Viswanathan, if you would look
3 at Exhibit 52. This is a few months later, a
4 letter you wrote to Jim Scott Middleton; is that
5 correct?

6 MR. PATTERSON: 51.

7 BY MR. KUHN:

8 Q Excuse me, 51.

9 A Yes.

10 Q And is this discussing the same
11 proposed easement agreement?

12 A Yes.

13 Q At this time, you've enclosed what
14 you've called a proposed easement agreement.
15 Had that been agreed to by anybody yet?

16 A Other than Mr. Kuhetti from the -- or
17 the owner of the Kuhetti parcel, nobody else had
18 agreed to it.

19 Q You and Mr. Middleton were still in
20 negotiations at this time; is that fair to say?

21 A Yes, we were still in negotiations.

22 Q And Exhibit 52, do you recognize what
23 this is?

24 A Exhibit 52 is a letter from a Mr. John
25 Wilson, who represented ASA, to me.

1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 Q And for clarification, ASA, Inc., was
3 the owner at this time of the gas station
4 property?

5 A Yes, sir.

6 Q And Mr. Middleton, the person you had
7 written to a few months earlier, he was the
8 general manager there that you had been talking
9 to?

10 A He was a representative, general
11 manager, yes.

12 Q So apparently, by this time in June, he
13 had turned it over to his attorney to handle?

14 A Yes, sir, that's correct.

15 Q And is this a true and accurate copy of
16 the response you got back from Mr. Wilson on
17 behalf of ASA?

18 A Yes, it is.

19 Q Okay. At this point in time, I don't
20 see in here ASA saying, "We already have an
21 easement." Had they taken that position that
22 they had an easement already and he just forgot
23 to put it in here?

24 A I don't know if he took the position
25 that they had an easement. If that was his

1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 position, he wouldn't be willing to negotiate
3 it.

4 Q But he certainly doesn't say it in
5 here, does he?

6 A No, he does not.

7 Q And at this point in time, were people
8 still using the easement?

9 A Yes. We had allowed them to use it.

10 Q And why is it that you were letting
11 them use it while you were trying to negotiate
12 this new realignment or whatever you want to
13 call it, this conceptual site plan?

14 A First of all, in the interest of being
15 a good neighbor, you want to work with all the
16 parties concerned. And while we are trying to
17 work an acceptable -- mutually acceptable
18 easement agreement, it does not make sense to
19 take an adversarial position and not allow them
20 to use the encroachment.

21 Q That sort of ties right in to the next
22 exhibit. If you would look at Exhibit 53,
23 please.

24 A Okay, hold on. Exhibit 53, oh, here it
25 is. Okay.

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53

1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 Q This appears to be an email from you to
3 John Wilson; is that correct?

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4 A Yes.

5 Q And you say in there, "Hopefully we can
6 resolve this without going to court." What did
7 you mean by that?

8 A Well, if you go back to Exhibit 52, he
9 said he's not willing to execute the proposed
10 access easement as it burdens the entire ASA
11 parcel, and since Mr. Griffin had already
12 advised them that they do not have an easement
13 on this encroachment, that I'd like to resolve
14 all of these issues in a friendly matter without
15 having to go to court to determine that they did
16 not have an easement.

17 Q So you're -- it's a pretty clear
18 message that you -- well, I'll leave it at that.

19 If you will turn to Exhibit 54, please.
20 This appears to be a letter written from Robert
21 Arundell to John Wilson on June 5th, 2008; is
22 that correct?

23 A On June 5th, yes, 2008, from Robert
24 Arundell to Mr. Wilson.

25 Q And was John Wilson at that time still

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54

1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 representing ASA?

3 A Yes, sir, he did.

4 Q And Mr. Arundell is acting on your
5 behalf now; is that correct?

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6 A Yes, sir, he was.

7 Q And at this point in time, y'all are
8 still trying to negotiate the conceptual site
9 plan?

10 A Yes, it is.

11 Q If you would turn to Exhibit 55,
12 please. This appears to be a letter from
13 Mr. Arundell to Mr. Wilson a few months later,
14 September 15th, 2000; is that correct?

15 A That's correct.

16 Q And what is the status now of this
17 conceptual site plan?

18 A It goes on to say that the Staples
19 shopping center owner has decided not to give
20 the easement that would accommodate the revised
21 plan, easement plan, and as a result, that
22 the -- it would necessitate the removal of the
23 encroachment of the property.

24 Q And when Mr. Arundell says, "This will
25 necessitate the removal of the encroachment onto

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55

1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 my client's property," was he saying that with
3 your approval?

4 A Yes, he was.

5 Q And was he acting on your behalf at
6 that time?

7 A Yes, he was.

8 Q And when he says you wish to be a good
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9 neighbor, however, then he goes on to say, you
10 must now cut off the encroachment onto this
11 property, was he acting on your behalf at that
12 time?

13 A Yes, he was.

14 Q Now, this is September 2008. Were you
15 aware at that -- were you aware at that time
16 that ASA was considering selling this property?

17 A I was not aware that there were
18 negotiations going on between ASA and Enmark at
19 that time.

20 Q Did you later learn that shortly after
21 this letter was written stating that the
22 encroachment needs to be removed, ASA decided to
23 sell the property to someone else?

24 A Yes. I found out that they had sold
25 the property to someone else.

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 MR. KUHN: And, Your Honor, just
3 referencing some of the exhibits, you'll see
4 a Purchase Agreement was signed by ASA to
5 sell to Enmark on November 20th, 2008, which
6 is Exhibit 56, and then the sale was closed
7 and the property actual transferred on
8 March 19th, 2009, which is Exhibit 5, the
9 Deed from ASA to Enmark.

10 So just to keep the chronology in

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11 order, the letter saying close the
12 encroachment in September, the purchase
13 agreement in November and the closing in
14 March.

15 BY MR. KUHN:

16 Q Is the encroachment paved?

17 A The encroachment is paved.

18 Q And are there speed bumps on the
19 encroachment?

20 A Yes, there are speed bumps on the
21 encroachment.

22 Q Is there a curb-cut between the gas
23 station property and your property?

24 A There is a curb-cut.

25 MR. KUHN: Russell, these got changed

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 in order.

3 MR. PATTERSON: what are you looking
4 for?

5 MR. KUHN: The photographs.

6 MR. PATTERSON: Your photographs, the
7 ones y'all took are Exhibit 42.

8 BY MR. KUHN:

9 Q If you would turn to Exhibit 42 then,
10 please.

11 MR. KUHN: Again, Your Honor, if the
12 witness could approach.

13 THE COURT: Yes, please.
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14 BY MR. KUHN:

15 Q Mr. Viswanathan, if you would go
16 through the photographs that are Exhibit 42 and
17 perhaps utilizing Exhibit 74, if you could, let
18 him know how these are ordered.

19 A This photograph, Your Honor, is taken
20 from this direction, so it shows the
21 encroachment. And here is the curb that has
22 been either broken through or cut through up
23 there. That's this curb right here.

24 THE COURT: All right.

25 THE WITNESS: That's that picture.

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 It's looking at it that way. You can see
3 the two speed bumps, and it's been paved.

4 BY MR. KUHN:

5 Q And the building that's in the
6 background of that photograph, that is your
7 building on your property?

8 A This is my building, and that's this
9 one over here. So we're looking at it from this
10 angle. You're seeing this encroachment and that
11 building.

12 Q Exhibit 42 is the approach to the
13 encroachment from the gas station property?

14 A Yes, it is. So that's the angle at
15 which this picture is taken.

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16 Q How about the second page?

17 A The second page is a picture taken from
18 this position. It shows the exit for the car
19 wash, and it looks over into the parking lot of
20 the Staples, the cars parked over here.

21 Q The cars in the background, those are
22 in the Staples shopping center property?

23 A The cars in the background are on the
24 Staples shopping center property.

25 Q The building on the right is the car

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 wash on the Chevron or Enmark property?

3 A Yes, this is the car wash, and that's
4 reflected here.

5 Q And if you could show His Honor where
6 the easement or encroachment is shown on that
7 property.

8 A On this photograph?

9 Q Yes, sir.

10 A This is the encroachment, Your Honor.

11 THE COURT: All right.

12 BY MR. KUHN:

13 Q And the raised concrete curb that's
14 shown on the far left of the second page of that
15 exhibit, does that tie in to the raised concrete
16 curb that we saw in the first page?

17 A Yes, it does. And it ties in to the
18 car wash.

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19 So this curb has been broken to
20 encroach on the property. And I think that's
21 evident from here, that the curb has been
22 broken.

23 Q If you could turn to the third page
24 then.

25 A This photograph is taken right over

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 here, Your Honor, looking in this direction.
3 That's my building over here, which is the
4 medical office building and physical rehab
5 building. And this is the encroachment that's
6 going in this direction.
7 And this photograph of building, Your
8 Honor, is taken right in here, because that's
9 the trash dumpster, so it's taken at this angle.
10 So this pavement is -- must be this one right
11 here.

12 Now, this photograph is taken from this
13 angle. That's the building here, and it shows
14 the paved encroachment and the speed bumps, and
15 that's taken from this angle.

16 And this picture, Your Honor, is taken
17 from this angle, looking this way. That's the
18 building here, physical rehab building, and the
19 encroachment is here. This, again, is a
20 close-up shot taken here, it shows the car wash,

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21 the existing car wash, the cars in the staples
22 parking lot, so it's taken from this view.
23 These are recent pictures, Your Honor.
24 MR. PATTERSON: Your Honor, I would
25 object to these. I told Mr. Kuhn I did not

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 agree to these next photos because they
3 don't have anything to do with the roadway.
4 Somehow, they still got left in.
5 MR. KUHN: That's correct. When we
6 said we stipulated to all the exhibits
7 earlier, that's --
8 MR. PATTERSON: You could certainly
9 take them off, and if you want to try to put
10 them into evidence, you can. Remove them?
11 MR. KUHN: Yes.
12 And, for the record, some photographs
13 have been removed from that exhibit that
14 we'll address later.
15 THE COURT: Thank you.
16 BY MR. KUHN:
17 Q And then the last page of this exhibit?
18 A Your Honor, this photograph is taken
19 from this view, and it shows a Budweiser truck,
20 I don't know if it's a 16- or 18-wheeler,
21 aligned to use the encroachment this way. And
22 that's a picture, I was probably standing here
23 taking this picture, and at that time there was
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24 a lady on a bicycle coming this way, but by the
25 time I took the picture, she had already passed

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 through the Enmark station.

3 MR. PATTERSON: Your Honor, can I
4 remove those photos for you, too?

5 THE COURT: Yes, please.

6 MR. PATTERSON: Kumar -- if I can
7 remove those from that set, if you don't
8 mind, for the witness.

9 MR. KUHN: Three of them; is that
10 right?

11 MR. PATTERSON: Yes.

12 BY MR. KUHN:

13 Q Mr. Viswanathan, if someone is leaving
14 the Enmark property and goes onto the
15 encroachment on your property, is it possible
16 for them to have ingress or egress to another
17 public roadway without traveling over somebody
18 else's private property?

19 A No, it's not possible.

20 Q Is there any sort of safety issue posed
21 by the existence of this encroachment?

22 A Yes, there is. As I showed in the
23 earlier picture, 16- and 18-wheeler trucks are
24 going through this easement, and I have noticed
25 on several occasions bicyclists, cyclists using

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 this encroachment in the opposite direction.

3 Q Is it possible, physically possible,
4 for two cars approaching from opposite
5 directions to use the encroachment at the same
6 time?

7 A No, it's not. It's too narrow.

8 Q And I can show you, address that now.

9 MR. KUHN: If we can these three
10 photographs, I guess for I.D. purposes, as
11 Exhibit 84.

12 (Whereupon, Plaintiff's Exhibit
13 Number 84 was marked for
14 identification.)

15 BY MR. KUHN:

16 Q Looking at Exhibit 84, what do these
17 photographs depict?

18 A These photographs were taken very
19 recently. And what had happened is that
20 apparently there had been a wreck, and the cars
21 crossed the Enmark parking lot and crashed into
22 our trash dumpster, which was located on our
23 property, and destroyed the enclosure to the
24 trash dumpster.

25 Q If there had been a vegetative buffer

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 of 20 feet established, would that damage have
3 taken place?

4 MR. PATTERSON: Objection, Your Honor,
5 he's not qualified to give that kind of
6 opinion. He didn't -- not only that, he had
7 no idea, he didn't testify he observed the
8 accident, he has no idea how fast the car
9 was going when it left Palmetto Bay Road,
10 crossed all the way -- crossed the ditch,
11 all the way across the Enmark service
12 station, knocked out a vacuum cleaner in the
13 dispenser, jumped the curb and hit his
14 dumpster.

15 THE COURT: That's quite an objection.
16 I think Mr. Patterson is probably right.

17 BY MR. KUHN:

18 Q I think you'd testify as to common
19 sense that if there had been a 20-foot
20 vegetative buffer, the damage wouldn't have been
21 as severe, the impact wouldn't have been as
22 hard, as opposed to an open, clear shot at it?

23 THE COURT: I think we can probably all
24 agree that the more there is between the
25 thing hit and the thing doing the hitting,

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

06-20-16

2 it's probably of benefit, I suppose, if
3 that's the point.

4 MR. KUHN: That's the point.

5 THE COURT: Okay. I bet Mr. Patterson
6 won't even object to that.

7 MR. PATTERSON: No, Your Honor.

8 MR. KUHN: With that understood, I
9 would move to introduce Exhibit 84.

10 THE COURT: Any objection to that?

11 MR. PATTERSON: I just object to the
12 relevance, Your Honor. It doesn't have
13 anything to do with the roadway. The
14 accident didn't have anything to do with the
15 roadway, and the damage doesn't have
16 anything to do with the roadway.

17 THE COURT: I'll allow it. Maybe it
18 will all become clear somehow at some point.
19 If not, I'll not give it a whole lot of
20 weight.

21 BY MR. KUHN:

22 Q Mr. Viswanathan, while you have owned
23 this property, has anybody made any claim of
24 right to use this to you?

25 A Can you say that question again,

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66

1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 please.

3 Q While you have owned this property, has
4 anybody come up to you and said as matter of
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5 right that they have the right to use this
6 encroachment?

7 A No.

8 Q The only claim you're aware of would be
9 two and-a-half years before you bought the
10 property, the letter written between the
11 lawyers?

12 A Yes, that's correct.

13 Q Are you aware of any decision or
14 determination issued by the Land Management
15 Ordinance Official regarding this encroachment?

16 A I'm sorry, Mr. Kuhn, can you repeat
17 that question again.

18 Q Are you aware of any determination ever
19 made by the Land Management Official regarding
20 this encroachment?

21 A Yes, I'm aware.

22 Q If you would turn to Exhibit 63,
23 please.

24 MR. KUHN: Your Honor, this exhibit is
25 difficult to read. What I'd propose doing

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 is having someone re-type it so it's easier
3 to read.

4 THE COURT: All right. Any objection
5 to that, anyone?

6 MR. KUHN: It's the best copy we could

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7 come up with.

8 MR. PATTERSON: No objection.

9 THE COURT: And you'll just substitute
10 after the fact, is that the plan?

11 MR. KUHN: I'll bring it in tomorrow
12 morning.

13 MR. ALFORD: No objection.

14 THE COURT: All right.

15 BY MR. KUHN:

16 Q And this letter, this is written by
17 Teri Lewis. She titles herself LMO official.
18 Have you read this letter before?

19 A Yes.

20 Q And you're familiar with what it says?

21 A Yes, I am familiar.

22 Q And in essence, I know you'll have to
23 paraphrase, what is she saying here?

24 A Basically, they're saying that the
25 paved road is in violation of the Land

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 Management Ordinance, which we refer to as LMO,
3 and that the road has to be removed and a
4 20-foot buffer needs to be re-established
5 between the two properties.

6 Q And if I recall right, she enclosed in
7 her letter a list of appropriate vegetation that
8 could be planted in the 20-foot buffer?

9 A Yes, she did. And that's not attached
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10 to this exhibit here.

11 MR. PATTERSON: I don't know why it
12 isn't, but I've got a copy. I'll put it in.
13 Judge, is your copy of the exhibit --

14 MR. KUHN: Do you have the plant list
15 attached to her letter, Your Honor?

16 MR. PATTERSON: It's Exhibit 63.

17 THE COURT: No. It's just the one
18 page.

19 MR. PATTERSON: I'll put it in the
20 witness set, and when we have a break, we'll
21 make a copy.

22 MR. KUHN: As long as it's in the
23 judge's set.

24 THE COURT: Is my set going to be the
25 official set?

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 MR. KUHN: Yes, sir. Well, I assumed
3 it was. Are you writing on yours? If so we
4 can make the witness's the official set.

5 THE COURT: So far, nothing that will
6 cause a problem.

7 MR. PATTERSON: Why don't we make this
8 the official set.

9 THE COURT: No. It's unmarked.

10 BY MR. KUHN:

11 Q Mr. Viswanathan, if you'd turn to

12 Exhibit 67, please. And do you recognize what
13 Exhibit 67 is?

14 A Yes. It's a letter from Mr. Bob
15 Arundell, my attorney, to the Town Attorney,
16 Mr. Alford.

17 Q And the LMO decision he's referencing
18 in here is the decision we just --
19 determination, rather, I guess is the official
20 language, the determination made by Terry Lewis
21 in Exhibit 63?

22 A Yes, it refers to the determination of
23 the LMO official.

24 MR. KUHN: Your Honor, I think this
25 speaks for itself.

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 MR. ALFORD: I'm sorry, what exhibit
3 were you --

4 MR. PATTERSON: 67.

5 MR. ALFORD: 67. Hold on, then, I've
6 got to back up and object, because your
7 question to him was, was that letter
8 referencing the LMO official's
9 determination. What exhibit is the
10 determination that you're referring to?

11 MR. KUHN: It's exhibit --

12 MR. ALFORD: It's not 63.

13 MR. KUHN: -- 63. He says that the
14 violations documented in Ms. Lewis' letter

06-20-16

15 can not be ignored, and her letter is the --
16 Exhibit 63.

17 MR. ALFORD: Okay.

18 BY MR. KUHN:

19 Q Mr. Viswanathan, as a result of the
20 existence of the encroachment, have you suffered
21 any damages?

22 A Yes, I have.

23 Q What?

24 A Well, they've encroached on my property
25 and illegally trespassed onto my property with

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 no easement. It's affected the use of my
3 property, which is a medical office right next
4 door to this encroachment, and it's become a
5 nuisance with trash being dumped by people
6 passing through the encroachment. And I have
7 had to go through three years or more worth of
8 litigation to have this encroachment closed, at
9 a considerable expense.

10 Q Is it noisy? Can you hear the traffic
11 going by when you're inside the building?

12 A Yes. When you have 18-wheelers going
13 through, the building shakes.

14 Q And ballpark, how far away is the
15 traveled area of the encroachment from the
16 building? Talking feet, yards?

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17 A I'm talking maybe, at the most 7 to
18 10 feet.

19 Q Do you know what it would cost to
20 remove the encroachment and re-plant it in
21 accordance with Terry Lewis' letter?

22 A I contacted The Greenery, which is a
23 landscaping firm on the island. And they came
24 up with an estimate and a proposal.

25 Q If you would turn to Exhibit 75. Is

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 this the estimate?

3 A Yes, that is the estimate.

4 Q So the cost of doing that would be how
5 much?

6 A \$18,130.

7 Q And for the damage from the wreck into
8 the enclosure, did you --

9 MR. PATTERSON: Your Honor, I would
10 object again, on relevance grounds. The
11 vehicles in question weren't even using the
12 roadway. They were on Palmetto Bay Road, a
13 state highway.

14 THE COURT: Well, I'll let him make a
15 record about it. Overruled.

16 You can go ahead.

17 BY MR. KUHN:

18 Q Did you get an estimate for that?

19 A Yes. We got an estimate for repairing
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20 the trash enclosure that was destroyed by the
21 accident that crossed over the Enmark parking
22 lot onto my property through the encroachment.
23 And that estimate was \$3,200.

24 MR. KUHN: Your Honor, if I could make
25 that Exhibit 85.

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 MR. PATTERSON: I don't have any
3 objection.

4 Greg, do you have any objection?

5 MR. ALFORD: No objection.

6 (Whereupon, Plaintiff's Exhibit
7 Number 85 was marked for
8 identification.)

9 BY MR. KUHN:

10 Q Who has been using this encroachment?

11 A Not only the customers of the Enmark
12 gas station, but the general public and the
13 tourists have been using this encroachment.

14 Q And do you have an opinion -- now,
15 they've been using it now for -- at least under
16 your watch since 1996; is that correct?

17 A That's correct.

18 Q And do you have an opinion to what the
19 reasonable rental value of that encroachment
20 would be?

21 A According to testimony given by Enmark,

06-20-16
22. this encroachment is pretty valuable to them.
23 And I put a reasonable value of around \$900 a
24 month for the use of this encroachment.

25 MR. PATTERSON: If I could make an

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 objection, please. I don't believe in their
3 Answers to Interrogatories when we asked for
4 damages did they ever list rental damages
5 for the value of the property. I know it
6 did not cover it in this witness's
7 deposition. So I would object that they did
8 not notify us they were claiming rental
9 value of the easement, and they should not
10 be allowed to present testimony on it. Bear
11 with me and I'll get their Answers to
12 Interrogatories.

13 THE COURT: Well, while you're looking,
14 I'll let Mr. Kuhn respond. He may remember
15 what they answered. I don't know.

16 MR. KUHN: I do not know. That was
17 before my watch, actually, I think.

18 MR. PATTERSON: And I don't think it's
19 in their Amended Complaint that they asked
20 for that type of damage, Your Honor.

21 THE COURT: We'll give Mr. Kuhn a
22 second to look and see.

23 MR. PATTERSON: I'll hand up to the
24 court their November 15th, 2013 Answers to
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25 Interrogatories where I had the standard

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 request for damages. It just said, they
3 didn't know what their damages were. They
4 would supplement their responses.
5 If you'll bear with me, let make sure
6 they did not supplement their responses.
7 MR. KUHN: In our Complaint, we
8 pointblank said that's one of our damages:
9 As a direct and proximate result of
10 Defendant Enmark's slander of the
11 Plaintiff's title, the Plaintiff has
12 suffered injuries and damages in that the
13 value of his property has been diminished,
14 the fair rental value of his property has
15 been diminished, the marketability of his
16 property has been impaired, he's had to deal
17 with tenants' complaints regarding noise
18 vibrations, and he'll incur costs for
19 removing the encroachment and restoring his
20 property to its original condition.
21 MR. PATTERSON: Right, Your Honor. But
22 the question wasn't did we suffer loss of
23 rents. He's saying what is the rental value
24 of that property we used. He didn't list
25 that in the interrogatories, and it's not in

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 the Complaint.

3 THE COURT: That sounds pretty true,
4 Mr. Kuhn. It sounds like what he plead was
5 -- and I understand this is before your
6 watch, but what he pled was, for instance,
7 the medical building, maybe you could have
8 gotten \$12,000 a month and you can only get
9 ten because of the road and a diminishment
10 of rental value as a result.

11 But that's not an actual use as though
12 he were to take control of and lease the
13 disputed area back to Enmark. I think that
14 was sort of your question to him, right.

15 MR. KUHN: well, I think that's parsing
16 words. I think we're approaching it -- the
17 same thing from different angles.

18 THE COURT: well, read your Complaint
19 again. What was the part about . . .

20 MR. KUHN: "The fair rental value of
21 his property has been diminished."

22 THE COURT: Okay.

23 MR. KUHN: It has been diminished by
24 \$900 a month.

25 THE COURT: well, I misunderstood his

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 testimony. I thought his testimony, and
3 maybe Mr. Patterson did, too, but I'll find
4 out in a second. I thought his testimony
5 had to do with, if he were to say, "Okay,
6 guys, you can use this piece of paved road.
7 It's worth \$900 a month."

8 That's something entirely different
9 than saying the medical building can not be
10 rented for 12,000 a month, it has to be
11 rented for, you know, 11,100 a month, and
12 that's \$900. That sounds like two different
13 things to me. And maybe -- maybe I
14 misunderstood the question and/or the
15 answer.

16 MR. KUHN: No, I think you understand
17 it right. Maybe I'm not explaining it
18 right. He's got the building that he's
19 renting.

20 THE COURT: Right.

21 MR. KUHN: He could, if I understand
22 his testimony, rent the encroachment for a
23 certain amount of money.

24 He can't rent the encroachment. If you
25 look at his whole property --

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 THE COURT: Oh, you mean as something

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3 other than the encroachment?

4 MR. KUHN: NO. No, sir. He's got this
5 whole piece of property.

6 THE COURT: Right.

7 MR. KUHN: He's renting out little bits
8 and pieces here and there. The overall
9 rental value of his property has been
10 diminished because they've just taken this,
11 and if he had rented it to them, he would
12 have made an extra \$900 a month on this
13 overall piece of property.

14 It's not that the rental value of the
15 building has been diminished, or maybe,
16 maybe not, but that the overall rental value
17 of the property is diminished because he
18 could believe he could rent this out for x
19 amount of dollars a month.

20 THE COURT: Not as a paved access
21 between two other properties, you mean?

22 MR. PATTERSON: That's exactly what the
23 question was.

24 MR. KUHN: Yes.

25 THE COURT: Well, that's what the

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 question was.

3 MR. KUHN: Yes. It's the fair rental
4 value of his property is diminished. If
5 this is a encroachment and they want to use

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6 it, he could charge them \$900 a month, and
7 he believes that would be fair.

8 THE COURT: Okay.

9 MR. KUHN: So the overall rental value
10 of his property has been diminished by that
11 amount.

12 THE COURT: I mean, I'm not going to
13 ask the question, but I can -- I suppose I
14 could. But I can see how the question could
15 be asked in a different way that would
16 probably not be objectionable to
17 Mr. Patterson and would fall within the
18 pleadings.

19 MR. KUHN: Well, let me try.

20 BY MR. KUHN:

21 Q what do you use this property for,
22 referring to the whole piece of property, the
23 whole thing?

24 A Use it for?

25 Q Do you use it personally? Is it your

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 residence?

3 A No.

4 Q what do you do?

5 A I use it to rent to a bank and a
6 medical office space and a real estate office.
7 I use it to lease to other owners.

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8 Q Okay. If you wanted to rent out this
9 piece of property that the encroachment takes
10 up, what do you think you could get for rent for
11 that piece of property?

12 MR. PATTERSON: And that's where my
13 objection is, Your Honor.

14 THE COURT: All right. Now, that's a
15 little bit different, because he sort of set
16 it up with, "well, Enmark said it's really
17 valuable and it's worth this amount to
18 them." And so now he's talking about if the
19 encroachment didn't exist, I think, if I
20 understood the question.

21 MR. PATTERSON: No. He said if he
22 wanted to rent out the encroachment. The
23 encroachment exists, he wants to rent it
24 out.

25 MR. ALFORD: If it conformed. I'm

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 sorry.

3 THE COURT: Do something other than an
4 encroachment, I think.

5 MR. PATTERSON: No.

6 THE COURT: well, I don't know, maybe
7 you can be more specific in what the use
8 would be, I mean, one way or the other, I
9 don't -- I don't care.

10 BY MR. KUHN:

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11 Q Has the overall rental value of your
12 property been diminished by this being tied up
13 as an encroachment?

14 A Yes.

15 Q And can you put a monetary figure on
16 that, and if so, what do you base it on and how
17 do you arrive at that?

18 MR. PATTERSON: Your Honor, I still
19 object. The Answers to Interrogatories,
20 they didn't put anything down there that
21 they were claiming this information.

22 THE COURT: Well, I know he's got it in
23 the pleadings, they probably should have put
24 it in the interrogatories, but I'll let him
25 answer. But that's a three-part question, I

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 guess, that --

3 MR. KUHN: It is. I'm trying to make
4 it as non-leading as possible.

5 THE COURT: You can answer it. Go
6 ahead.

7 THE WITNESS: Go ahead and ask that
8 question again.

9 BY MR. KUHN:

10 Q I hope I can remember. Did you put a
11 monetary value on that, and if so, what value,
12 and explain how you arrive at that value.

13 A Yes, sir. Enmark has testified that
14 this encroachment is very valuable to them and
15 it's important for their business. And they --
16 if -- and I take their statement as fair value,
17 at face value, they would have paid \$900 a month
18 rent to use this encroachment so their customers
19 could access their property.

20 MR. PATTERSON: Your Honor, note my
21 objection. And he's also testified that the
22 encroachment is illegal, so how could he be
23 renting it out to us?

24 THE COURT: Well, we've sort of looped
25 back around into what Enmark thought it was

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 worth.

3 I mean, I thought the question had to
4 do with if this area were not an
5 encroachment, what the parking would be
6 worth on the plaintiff side of the fence or
7 something, I was thinking that was where we
8 were going with that, but anyway, we've got
9 what we've got.

10 Anything else on that one, Mr. Kuhn.

11 MR. KUHN: Not on that particular
12 element, Your Honor.

13 THE COURT: All right.

14 BY MR. KUHN:

15 Q Have you incurred costs and attorney's
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16 fees in connection with this issue?

17 A Yes, sir, I have.

18 Q And if you would turn to Exhibit 80.

19 MR. PATTERSON: And, Your Honor, can I
20 make an objection on the record before we
21 get into attorney's fees, just very briefly?

22 THE COURT: All right.

23 MR. PATTERSON: They have no cause of
24 action that allows for attorney's fees.

25 Number two, they never asked for

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 attorney's fees in the Amended Complaint,
3 much less put them in the interrogatories.

4 And number three, there is -- and in my
5 pretrial brief, there is a case law,
6 one case, slander of title, that says you
7 can cover the cost of litigation to address
8 the slander of title as special damages.

9 Under Rule I think it's 8, South
10 Carolina Rules of Civil Procedure in a bunch
11 of cases, you have to specifically plead
12 special damages. And they have not pled
13 them. They never said a word about
14 attorney's fees until I got this exhibit
15 list on Thursday, I believe it is. So we
16 would object on all those grounds of any
17 discussion of attorney's fees.

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18 THE COURT: Mr. Kuhn, how about that?

19 MR. KUHN: We've been talking about

20 attorney's fees. I sent this to him in

21 advance. It's putting form over substance.

22 I asked for damages in my Complaint, "such

23 other and good damages as may be awarded by

24 the court."

25 THE COURT: But I mean there's no

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 statute, there's no contracts, there's --

3 MR. KUHN: It's under the Slander of

4 Title Cause of Action as costs incurred

5 defending his title.

6 THE COURT: That case was what, two

7 years ago? What's the name of that case?

8 MR. PATTERSON: The Solomon case, Your

9 Honor. It's in my brief.

10 THE COURT: What about the got to plead

11 the special damages thing?

12 MR. KUHN: I think when we sent him the

13 itemized bill, we're doing better than

14 pleading it. We're saying, "Here it is,

15 here are the numbers, here are the figures."

16 Obviously, we're looking for them.

17 MR. PATTERSON: We got that Thursday of

18 last week, Your Honor. This is not a

19 document that was produced in discovery.

20 When we were provided a list of proposed

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21 stipulated exhibits is when the first time
22 attorney's fees was referenced, when I saw
23 that list.

24 MR. KUHN: My memory is we sent it
25 before that. I might be wrong, though, so

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)

2 I'd like to double check.

3 MR. PATTERSON: Well, I know it was
4 sometime last week. Maybe it was Wednesday
5 or Tuesday, but it wasn't like -- this
6 litigation has been going on for three
7 years, hundreds of pages of documents have
8 been produced, and there was nothing about
9 attorney's fees until last week. And Rule
10 9(g) in the Solomon case specifically states
11 you've got to plead special damages.

12 THE COURT: Solomon, okay. I think
13 what I'm going to do is this. I think I
14 agree with Mr. Patterson on this; but what
15 I'm going to get you to do is just proffer
16 the amount of the attorney's fees in case --
17 and we can do that after the fact. In case
18 I'm wrong, somebody in Columbia can fix it
19 for me. So we can either take that
20 testimony or -- I guess if I'm going to --
21 y'all may still want to -- well, maybe y'all
22 can look at it during the break and see

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23 whether it can simply be proffered without
24 challenging the specifics of it.
25 MR. ALFORD: Would the court object to

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1 KUHN - VISWANATHAN (DIRECT EXAMINATION)
2 like a one- or two-minute break?
3 THE COURT: No. We can do a
4 five-minute break. All right. We'll go off
5 the record.
6 Don't discuss your testimony with
7 anybody during the break. Thanks.
8 (Whereupon, a break was
9 taken.)
10 THE COURT: Back on the record. You're
11 still under oath, sir.
12 (Whereupon, Plaintiff's Exhibit
13 Number 86 was marked for
14 identification.)
15 BY MR. KUHN:
16 Q Exhibit 80, is this a fair and accurate
17 summary of the costs and attorney's fees you
18 have incurred in connection with this matter,
19 except for my bill?
20 A It is, through today, except your bill
21 and Mr. Coltrane's bill.
22 MR. KUHN: And, Your Honor, I guess
23 I'll proffer Plaintiff's 86, which is my
24 bill up to date with the trial time
25 estimated.

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 THE COURT: All right.

3 MR. PATTERSON: Your Honor, as an
4 initial objection, we have never seen this
5 bill, and it goes back all the way from
6 June 2014.

7 MR. KUHN: It's current.

8 THE COURT: Okay. Your objection is
9 noted. And of course these are offered by
10 way of proffer anyway.

11 MR. PATTERSON: And that's proffered
12 what, Number 86?

13 MR. KUHN: 86, yes.

14 MR. KUHN: That is all the questions I
15 have. Please answer any that Mr. Patterson
16 and Mr. Alford may have.

17 CROSS EXAMINATION

18 BY MR. PATTERSON:

19 Q Mr. Viswanathan, you've lived on Hilton
20 Head since the mid 1970s?

21 A Since 1977.

22 Q And that was before the Chevron station
23 was built?

24 A Yes, that was before.

25 Q And where did you live back in the

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 seventies? Or, excuse me, let's go to 1984 when
3 the Chevron station was built.

4 A To the best of my recollection, in Sea
5 Pines Plantation.

6 Q Okay. And where did you work?

7 A I worked with the Delta Group.

8 Q Excuse me?

9 A I worked with the Delta Group. I had
10 two partners. We were in real estate
11 development.

12 Q And where was y'all's business?

13 A In the Jade -- I'm sorry, in the
14 Professional Building, right beside Sea Pines
15 Circle.

16 Q So you lived in Sea Pines where you had
17 to pass by the Chevron station every day; right?

18 A No. I went from Sea Pines to the
19 Circle, turned right and went to the
20 Professional Building.

21 Q Okay. But the Delta Group at the
22 Executive Center is right across the Circle from
23 where the Chevron station is?

24 A Say that again.

25 Q Let me say it this way. From your

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2 office, you could see where the Chevron station
3 was across the Sea Pines Circle?

4 A No.

5 Q Could not?

6 A Could not. The Professional Building
7 was located on Corpus Christi Circle, right off
8 of New Orleans Road.

9 Q Okay. But they're both -- your office
10 and the Chevron station are very close together
11 on the south end of Hilton Head?

12 A Yes, that's true.

13 Q And before the Chevron station was
14 built, how many gas stations were there on the
15 south end of Hilton Head?

16 A I don't recall.

17 Q Okay. Is it fair to say that you would
18 have used the Chevron station often, since you
19 lived on the south end and worked on the south
20 end?

21 A No, because I think there was also the
22 BP Station, what is now the BP Station. If I
23 remember correctly, that was also open at that
24 time.

25 Q Where is that located?

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 A Across from the Chevron station.

3 Q It's where Island Tire is located?

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4 A Yes.

5 Q Okay. In your recollection, did you
6 ever use the Chevron gas station?

7 A On occasion.

8 Q Okay. Did you ever use what I'll call
9 the roadway or you call the encroachment?

10 A I don't recall ever using it, no, not
11 back then.

12 Q Even up until today, have you ever used
13 the roadway?

14 A Yes, I have, after this encroachment
15 issue came up.

16 Q And on what occasions did you
17 personally use the roadway?

18 A Primarily after this whole encroachment
19 issue came up.

20 Q Prior to that, did you ever use the
21 roadway?

22 A Not to my recollection, no.

23 Q When did you first become aware that
24 the roadway was in existence?

25 A To tell you the truth, I really became

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 aware of it, it was an encroachment, when
3 Mr. Griffin wrote the letter.

4 Q Now, I'm not talking about whether --
5 any legal status of whether it encroached on
6 property; the fact that there was a roadway that

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7 existed from the back of Enmark or back from
8 Chevron to the MarketPlace shopping center.

9 A I don't recall when it -- if it ever
10 existed, to tell you the truth.

11 Q Would you agree with me that the
12 roadway has been there a long time?

13 A Depending on how you define a long
14 time, yes.

15 Q Since 1985?

16 A Since 1985, yes.

17 Q Okay.

18 A Or maybe thereafter. I don't know if
19 it existed in 1985.

20 Q But somewhere around that time period,
21 the roadway has been in existence?

22 A Probably afterwards, yes.

23 Q All right. And if you look at
24 Exhibit 21 that we referenced --

25 A Yes, sir.

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 Q -- that's the same Plat Book 38 at 53
3 your attorney wrote a letter about that you've
4 already testified about. Do you see that?

5 A Is that the same letter or same
6 attachment to the letter?

7 Q As Plat Book 38 at 53, yes.

8 A Okay. If you say so, yes.

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9 Q Okay. And do you see the date of that
10 plat is November 1st, 1989?

11 A I can not see it from this. Where do
12 you see that? Where do you show it? I can't
13 read it, the print is so fine.

14 Q Hold on a minute, I'll show it to you.
15 Do you see where it's approved by the
16 Town of Hilton Head on March 8th, 1990, with a
17 stamp?

18 A I see the stamp. I can barely read the
19 dates.

20 Q Okay.

21 A Is there a larger copy that you could
22 show me?

23 Q Well, this is the one y'all produced,
24 and it's from the courthouse, and I think --

25 MR. PATTERSON: Counsel, did you not

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 stipulate that it was dated November 1st, 1989,
3 and recorded on March 9th, 1990?

4 MR. KUHN: I did.

5 BY MR. PATTERSON:

6 Q Okay. So we've stipulated that it's
7 dated November 1st, 1989.

8 A Okay.

9 Q Would you agree with me that the
10 roadway was in existence at least prior to
11 November 1st, 1989?

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12 A Yes. Or as of 1989.

13 Q Okay. And in your Amended Complaint
14 that you filed, and I'll show you a copy of it,
15 you attached as Exhibit D -- I'll come over next
16 to you. This is the Complaint you filed,
17 Amended Complaint, this is Exhibit D, which is a
18 Metro Engineering plan. If you'll look at
19 Exhibit 45.

20 A Is it 45?

21 Q Exhibit 45, if you'll pull that out.
22 Do you agree with me that is a clear or a
23 legible copy of the document you attached to
24 your Complaint?

25 MR. ALFORD: Which one is that Russell?

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 MR. PATTERSON: Exhibit 45.

3 THE WITNESS: Okay.

4 BY MR. PATTERSON:

5 Q Would you agree that's the same plan
6 you attached to your Complaint as Exhibit D?

7 A I think it looks like it is, because
8 the copy is very small, but it appears to be so.

9 Q All right. And this plan, Exhibit 45,
10 if you look at the bottom right, it's dated
11 October 20th, 1992?

12 A Yes, sir.

13 Q All right. And if you look over to the

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14 left where the roadway is, do you see where the
15 as-built shows the curb-cut wraps around for the
16 roadway to cross?

17 A Yes, sir.

18 Q And does it also show a line that
19 appears in the general location of where the
20 asphalt is paved?

21 A Yes, sir.

22 Q Okay. So you'd agree with me that the
23 roadway -- the curb-cut had been modified, and
24 there was an existing roadway as of
25 October 20th, 1992?

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 A Yes.

3 Q You touched base -- I want to talk a
4 little bit about your experience as a developer.
5 Since you've come to the area in the mid 1970s,
6 you've developed many, many residential and
7 commercial projects, haven't you?

8 A I've developed some. I don't know if
9 it's many, many.

10 Q Okay. You mentioned the New River Auto
11 Mall out in Jasper County?

12 A Yes, sir.

13 Q You also said Yacht Club villas at
14 Shelter Cove?

15 A Yes, sir.

16 Q Coligny Villas?

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17 A No, sir.
18 Q Ocean walk?
19 A Yes, sir.
20 Q Turtle Lane?
21 A Yes, sir.
22 Q Many more other developments?
23 A Yes, sir, some more.
24 Q So would you say you're an experienced
25 developer of real estate?

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 A I would say I'm a real estate
3 developer. I don't know I'd say experienced.
4 Q Well, that sounds like you don't
5 believe that's an awful lot of projects for you
6 to build, start to finish.
7 A After the recession of 2007, I wouldn't
8 call myself experienced.
9 Q Let's talk about your first involvement
10 with the Welcome Center. You were seeking to
11 purchase that from Palmetto Federal in 1994,
12 somewhere around there?
13 A Somewhere around there, yes.
14 Q As part of your due diligence, did you
15 have Mr. Cary Griffin, an attorney, review the
16 title?
17 A Yes, sir.
18 Q And you are aware at that time that you

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19 had inspected the property and went and looked
20 at it, I assume, as an experienced developer?

21 A Yes, I drove around it.

22 Q All right. And you had been to the
23 welcome Center before that time, had you not?

24 A I probably had. I don't recall
25 specifically before that.

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 Q And if you lived down in Sea Pines and
3 worked next to the Circle, you probably had
4 driven by the welcome Center thousands of times,
5 had you not?

6 A Yes, that's true.

7 Q So you were very, very familiar with
8 that property?

9 A Yes.

10 Q And as part of your due diligence, you
11 noticed that there was the roadway that we've
12 talked about?

13 A As notified by Cary Griffin, yes.

14 Q But prior to going to talk to
15 Mr. Griffin, you knew there was a roadway on
16 that property?

17 A I don't recall going ever to the back
18 and driving to the Chevron station on the
19 roadway.

20 Q So you as an experienced developer
21 never looked at the back side of the property

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22 that you were hiring an attorney to make an
23 offer to purchase?
24 A No, no, not really.
25 Q All right. So you just think that it's

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 okay as an experienced developer just to look at
3 the front side of the property? You don't care
4 what the back side looks like?
5 A Not really, because that's what
6 attorneys do. They get a survey, they get
7 recorded documents, and they see the title is
8 okay. You rely on the attorney to do that.
9 Q The attorney doesn't go out and walk
10 the property and see what the back of the
11 property does, does he?
12 A Even if you go to the back of the
13 property and walk the property, it's hard to
14 tell where the property ends and starts because
15 there's no concrete monuments, and if there are,
16 they're hidden, so you can not tell where the
17 property starts and ends.
18 Q Well, certainly you had the plats for
19 the Welcome Center as part of your due diligence
20 when you were looking at it, didn't you?
21 A In 1994 when Mr. Griffin wrote to John
22 Wilson and attached the plat.
23 Q Okay. All right. Exhibit 47, let's

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24 turn to that letter. If you'll look at
25 Exhibit 47, that's your attorney's letter to

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 Mr. Wilson, who represents the Chevron station?
3 A Yes, it is.
4 Q Okay. And at this time, it's clear you
5 didn't own the property?
6 A No, I did not.
7 Q And in fact, you didn't end up buying
8 it for at least two more years?
9 A That is correct.
10 Q And in his letter, it says, "It is
11 obvious this area is utilized for access to the
12 MarketPlace parking area through the Chevron
13 station." Do you see where he said it was
14 obvious?
15 A Yes.
16 Q Okay. Would you agree with me it was
17 obvious to you also when you were doing your due
18 diligence?
19 A Yes.
20 Q Okay. In fact, it's obvious to anybody
21 that goes and looks at the property that there's
22 a roadway there; right?
23 A Well, I think Mr. Griffin was talking
24 with respect to the plat. And he goes on to
25 say, "I could find nothing of record with

1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 respect to this roadway. Ultimately, this area
3 will be utilized by the purchaser of the Sea
4 Pines Reception Center property for parking and
5 would not be able to be utilized for continued
6 access."

7 Q But at this point you weren't the
8 owner, and all you were is a perspective
9 purchaser?

10 A Yes.

11 Q So you couldn't tell -- let me finish
12 my question. You couldn't tell anybody to quit
13 using that roadway because you didn't have any
14 interest in the property, could you?

15 A No, I couldn't. But to answer your
16 question previously, you can not tell where the
17 property starts and ends unless you had a
18 property metes and bounds on the ground.

19 Q Well. You had available to you plenty
20 of surveys of the Welcome Center before you went
21 to Cary Griffin, didn't you?

22 A No, I did not.

23 Q The bank never provided a plat?

24 A No, they did not.

25 Q Okay. And Mr. Wilson, in Exhibit 48,

1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 responds to your attorney, does he not?

3 A Yes, he does.

4 Q And he says, "We have legal rights to
5 use that roadway. Here's a copy of the legal
6 easement, and we're going to continue to use
7 it." Is that fair to say?

8 A Well, he says, "I have not made an
9 exhaustive search of the file or acquisition of
10 the Chevron property, to answer your question,
11 further, have not inquired with my client,
12 Chevron, as to the existence of any agreements
13 concerning the roadway."

14 Q At the end of the next paragraph, he
15 says, "However, here is a copy of an easement
16 agreement that gives us the right of ingress and
17 egress over that roadway."

18 A That's what he states, but he never
19 does produce any document to that effect.

20 Q How about the -- Mr. Viswanathan, how
21 about the recorded Easement he attached to his
22 letter, is that not a good enough document?

23 A No, sir, because that's a Relocation of
24 Easement Agreement between Sea Pines and
25 Palmetto Electric. It's not between Chevron and

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 Sea Pines Plantation.

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3 Q But at that time, that is the claim of
4 right or basis of use by Chevron in 1994
5 according to their attorney, Exhibit 48; you
6 would agree with that?

7 A That's what he's alleging, yes.

8 Q That's what they thought, they had the
9 right to use it.

10 A Incorrectly so.

11 Q After this exchange of letters in 1994,
12 there was a very long gap where there is no
13 documentation whatsoever regarding this roadway,
14 is there?

15 A Yes, sir. As I've testified before,
16 after '96 and '97, I was trying to work out a
17 mutual agreement between all the property
18 owners.

19 Q Before we get there, let's go to
20 Exhibit 47. You signed a contract of sale with
21 Sea Pines to buy the property, didn't you?

22 A You mean contract to purchase?

23 Q Yes. It's Exhibit -- sorry, that's the
24 wrong exhibit number -- Exhibit 46. Is that the
25 contract agreement for sale of improved land

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 between your company, Carolina Center, and Sea
3 Pines dated October 31st, 1996?

4 A Let me take a look at it for a second.

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5 Yes, it is.

6 Q Okay. And the purchase price was a
7 million and-a-half dollars?

8 A Yes, sir.

9 Q And there were extensive negotiations
10 leading up to this purchase and sale agreement?

11 A Yes, sir.

12 Q And you did extensive due diligence
13 before you signed this contract and agreed to
14 pay a million and-a-half dollars?

15 A My attorneys would have done, yes.

16 Q And you also did due diligence, did you
17 not?

18 A To the best of my recollection, I'd
19 done some, yes.

20 Q And you went and walked the property?

21 A I don't know if I walked the property.
22 I'd driven by the property.

23 Q So you're telling me as an experienced
24 developer, is this where you just looked at the
25 front of the property again before you signed

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 the contract?

3 A Well, as you remember, Mr. Patterson,
4 at that time it was subject to litigation, which
5 you represented Sea Pines and falsely said that
6 it had the first right of refusal, so it was
7 subject to extensive litigation, and I did not

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8 know that I had access to the property.

9 Q Well, during the time period before you
10 signed this contract, did you not have access to
11 the property before you signed a million
12 and-a-half dollar contract?

13 A I don't remember. I might have had
14 access.

15 Q Did your representatives and agents and
16 inspectors have access?

17 A We didn't have any agents or inspectors
18 other than the attorney.

19 Q All right. I think your memory is a
20 little cloudy on that. Look at Paragraph 15,
21 Mr. Viswanathan.

22 MR. KUHN: I object to the
23 editorializing.

24 BY MR. PATTERSON:

25 Q Look at Paragraph 15.

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 A Did you say my memory was weak?

3 BY MR. PATTERSON:

4 Q Look at Paragraph 15, please.

5 A Well, I just wanted to ask you a
6 question, if you said my memory was weak?

7 Q No, you don't get to ask any
8 questions --

9 THE WITNESS: He is making a statement

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10 my memory is weak, Your Honor. He's
11 insulting me.

12 THE COURT: Hold on. Let's tone it
13 down all the way around for just a second.
14 So why don't we do this, why don't we just
15 move on to the next question.

16 The question had to do with Paragraph
17 15?

18 BY MR. PATTERSON:

19 Q If you would review Paragraph 15 to
20 Exhibit 46.

21 THE COURT: Wait. Paragraph 15 of 46?

22 MR. PATTERSON: Excuse me, Exhibit 47,
23 which is a contract of sale, Paragraph 15.

24 THE COURT: Okay. And Exhibit 47 I've
25 got as a letter.

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 MR. PATTERSON: Excuse me, Exhibit 46.
3 I've got the wrong exhibit number written on
4 here.

5 THE COURT: Paragraph 15, Exhibit 46,
6 which is the agreement for sale; right?

7 MR. PATTERSON: Yes, Your Honor.

8 THE COURT: Have you found that, sir?
9 Paragraph 15, which is on the fourth
10 page; right?

11 MR. PATTERSON: Yes, Your Honor.

12 THE WITNESS: Okay.

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13 BY MR. PATTERSON:

14 Q All right. Does that refresh your
15 recollection?

16 A Yes, that refreshes my recollection,
17 now.

18 Q And that you had very detailed
19 inspections of the property and had various
20 conditions for Sea Pines to meet before closing,
21 does that refresh your recollection?

22 A Yes, it refreshes my recollection.

23 Q And is the Miller report, attached to
24 the contract for sale, consisting of three pages
25 of very detailed items concerning the property?

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 A Yes, it does.

3 Q And in addition to Sea Pines being
4 obligated to fix all of the items in the Miller
5 inspection report under Paragraph 16 -- I mean
6 15, under Paragraph 15A, did you also require
7 Sea Pines to pay for certain road improvements
8 required by CSA and the Town of Hilton Head?

9 A Paragraph 15A?

10 Q Yes.

11 A Yes, it states that.

12 Q Okay. And was that part of your due
13 diligence, that you discovered that CSA and the
14 Town of Hilton Head had certain road

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15 improvements that needed to be made?

16 A Yes. I don't know what they are, but
17 per this contract, it says that. I don't know
18 what the road improvements are. I don't recall.

19 Q And at this time, because we've already
20 talked at length about Mr. Cary Griffin's letter
21 in 1994, two years prior, you already were very
22 much aware of the roadway or "encroachment," as
23 you call it?

24 A Yes.

25 Q Okay. And in fact, the roadway was or

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 encroachment was a specific exception to the
3 title you agreed to take from Sea Pines for a
4 million and-a-half dollars, wasn't it?

5 A I don't know if it was an exception.
6 Can you point that out to me, please.

7 Q Yes, I can. Look at the exhibit
8 Permitted Exceptions to the contract, please.

9 A Okay.

10 THE COURT: What exhibit number is
11 that?

12 MR. PATTERSON: I'm still on the
13 contract of sale, Your Honor, Exhibit 46.

14 THE COURT: All right.

15 MR. PATTERSON: And I'm on the exhibit
16 to that contract, which says "Permitted
17 Exceptions." It's about three pages after

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18 the signature page. Yes, the third page
19 after the signature page.

20 THE COURT: All right.

21 BY MR. PATTERSON:

22 Q And on Item D, do you see where Plat
23 Book 38 at 53 is listed as a permitted title
24 exception?

25 A I see where it's permitted exception,

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 Plat Book 38, Page 53, yes.

3 Q And that's the same plat we just looked
4 at a minute ago that clearly shows the
5 encroachment or roadway, does it not?

6 A Yes, it does.

7 Q Okay. So you knew the price you agreed
8 to pay of a million five was negotiated based on
9 the fact that there was an existing roadway that
10 we're in dispute about today for a million five,
11 you knew that was part of the deal when you
12 negotiated that transaction?

13 A If it is part of this Permitted
14 Exceptions, yes.

15 Q Okay. And the price you paid of a
16 million five took into consideration the fact
17 that there was an existing roadway from the
18 Chevron station to MarketPlace?

19 A I don't think so. You know, I don't

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20 say that.

21 Q I understand. It's an exception to
22 the -- it's a permitted exception under the
23 contract that you signed, Exhibit 46.

24 A Okay.

25 Q And that's the same roadway when you

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 bought the property, and you knew it was in
3 existence and it was a permitted exception, it's
4 the same roadway you're now trying to close 20
5 years later?

6 A Yes.

7 Q Okay. And if you look at Exhibit 15,
8 which is the Deed from Sea Pines into you --

9 A Exhibit 15?

10 Q Yes, sir. All right. If you'll turn
11 to the same -- Page 5 of that exhibit. You're
12 on a different page than I'm looking at.

13 Permitted Exceptions. Okay.

14 A Okay.

15 Q Do you see the same list of permitted
16 exceptions that were in the contract of sale,
17 Exhibit D, 38 to 53 is still a permitted
18 exception in your Deed?

19 A Yes. And I want to read that Permitted
20 Exception, if I might. It says, "Easements as
21 shown on plats recorded in the said RMC
22 offices," and it lists the various plat books

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23 and page numbers. The easement it refers to is
24 the Palmetto Electric easement.

25 Q Yes, sir.

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 A And it's not about the roadway or the
3 encroachment. It talks about a permitted
4 exception to Palmetto Electric. So I think your
5 line of questioning is misleading.

6 Q Would you agree with me that you're a
7 very detailed business person?

8 A It's a subjective opinion. I would say
9 I'm fairly thorough.

10 Q And you like to document things and
11 keep very organized?

12 A To the extent possible. Not always.

13 Q And you have different sub files for a
14 transaction, and you break everything up into
15 various issues?

16 A Yes, I do.

17 Q For example, if you look at
18 Exhibit 50 --

19 A Are we clear on this that we've just
20 passed, the permitted exception, that it applies
21 to Palmetto Electric?

22 MR. PATTERSON: Your Honor, could you
23 ask the witness to answer the question.

24 THE COURT: Yes. Your attorney will

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25 certainly have the opportunity to ask you

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 questions if you want to clear something up.
3 THE WITNESS: Okay. Thank you, Your
4 Honor.
5 BY MR. PATTERSON:
6 Q Turn to Exhibit 50. Is that your
7 handwriting at the top of that?
8 A Yes, sir.
9 Q And is that four different categories
10 where you want this memo filed?
11 A Yes, it is.
12 Q Okay. And the same kind of notation is
13 shown on Exhibit 53?
14 A Yes, it is.
15 Q All right. That's your handwriting?
16 A Yes.
17 Q Okay. So you keep very detailed
18 records and like to document things?
19 A For the most part, yes.
20 Q Okay. But you would agree with me
21 there's nothing in writing as to the roadway or
22 anything else about the Chevron station from
23 your purchase in October 1996 until August 30th,
24 2007, when you wrote the letter to Mr. Oliver,
25 which is Exhibit 50; we don't have anything in

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 writing?

3 A Well, during that time, if you'll
4 remember what I testified, there were a lot of
5 negotiations and discussions going on, including
6 preparations of master plans, which took several
7 months and talking to different properties
8 owners. All that led up to the conclusion of
9 writing that letter to Mr. Oliver. So a lot of
10 the events took place in the meantime to work
11 out a mutually acceptable agreement on a
12 friendly basis, on a neighborly basis.

13 Q Okay. But you would agree with me
14 there's nothing in writing about the roadway,
15 the encroachment or the Chevron station from
16 1996 until August 30th, 2007?

17 A That's correct.

18 Q All right. That's 11 years.

19 A That's okay.

20 Q And if you look at Exhibit 50, your
21 second paragraph references that cars are still
22 using the -- you call it the unauthorized dirt
23 road on the property. That's the roadway,
24 they're still using the roadway 11 years after
25 you bought the property; correct?

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 A Yes.

3 Q And the plan that's attached to there
4 that you sent to Mr. Oliver, which we have the
5 enlargement of, if you wouldn't mind coming up
6 to Judge Dukes, I guess it's already right here,
7 if you'll come to look at this Exhibit 49.

8 This is your plan, your conceptual
9 plan, Exhibit 49, which you paid to have
10 prepared?

11 A Yes.

12 Q All right. And your plan shows the
13 edge of the pavement where the roadway is?

14 A Yes.

15 Q Okay. And then it shows it moving
16 around by an existing dumpster?

17 A Yes.

18 Q And your plan also shows a drainage
19 plan for your property?

20 A Well, let me -- this is an as-built
21 survey of the property as existed at that time.
22 And they superimposed the proposed conceptual
23 layout of the property, so it is an as-built
24 survey. Do you see the topo and the tree survey
25 on it?

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 Q Yes, sir.

3 A So it's an as-built. On an as-built,
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4 the land planners have come to propose a revised
5 layout.

6 Q And on the as-built, does it show a
7 drainage culvert in the roadway?

8 A Yes, it does.

9 Q And does that drainage culvert actually
10 connect to your drainage system, and it has
11 nothing to do with the Chevron drainage system?

12 A Yes, because it's on my property.

13 Q That's right. So either you -- did you
14 put the drainage culvert there?

15 A No. It was there before. It was as
16 built at that time.

17 Q So somebody, whenever they put the
18 culvert in, they decided that it needed to have
19 a culvert right where that roadway is, didn't
20 they?

21 A A catch basin.

22 Q A catch basin?

23 A Yes. It was always there.

24 Q And you don't know if it was there
25 before the roadway or after the roadway?

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 A well, we'd have to look at an earlier
3 as-built. But the as-built of this survey was
4 there.

5 Q Okay. All right. Let's go back to

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6 some other documents.

7 Q So after you wrote Mr. Oliver in
8 Exhibit 50, this is in 2007, 11 years after you
9 bought the property, the first communication
10 about anything to do with the roadway, written
11 communication, then you wrote Mr. Middleton,
12 which is Exhibit 51. If you'll look at that.

13 A Yes.

14 Q Okay. At that time in 2008, the
15 roadway was still being used by the patrons of
16 Chevron, which is now 12 years after you bought
17 the property?

18 A Yes, roughly, yes.

19 Q All right. And up until this point, we
20 don't have anything in writing where you ever
21 told Chevron or Mr. Middleton or Alice Means to
22 stop using the roadway; right?

23 A Nothing in writing other than meeting
24 with them personally.

25 Q Okay. And Exhibit 51 doesn't tell them

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 to stop using the roadway, does it?

3 A No, because at that time we were
4 talking about a mutually acceptable easement
5 agreement. So I had permitted them to use that
6 encroachment.

7 Q Isn't the reason you didn't tell them
8 to quit using it is because when you paid a
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9 million and-a-half dollars, part of the deal was
10 you knew you had a roadway going through your
11 property?

12 A No. Part of the reason was, we allowed
13 them to use it while we were trying to work out
14 a mutually acceptable agreement.

15 Q And your Easement Agreement attached to
16 Exhibit 51 is part of the development plan, the
17 conceptual plan we just looked at?

18 A Yes. It was a draft for all the
19 parties to accept, agree and accept if they
20 accepted it.

21 Q And under Paragraph 1 of the Proposed
22 Access Easement Agreement you've sent to
23 Mr. Middleton, you were going to pay 100 percent
24 of all the engineering, the cost to design and
25 permitting of the proposed improvements, weren't

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 you?

3 A That's correct.

4 Q Okay. And that included a new curb and
5 gutter, new roadway paving for Enmark -- I mean
6 for Chevron --

7 A Where does it say that?

8 Q Well, let's go look at your plan.
9 Well, Paragraph 1 says, let me read it to you,
10 and tell me if I'm right, "The design,

11 construction, improvement and utilization of the
12 parking area shall be grantee's sole cost and
13 expense."

14 A That's correct.

15 Q All right. So you're paying for all of
16 the costs associated with this project?

17 A That is correct.

18 Q And that cost would include, let's go
19 look at this plan, what we're talking about,
20 Exhibit 49, you're talking about putting in a
21 new access from your property into Chevron;
22 correct?

23 A That's correct. Yes.

24 Q Go ahead.

25 A That's correct.

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 Q And one of the things you wanted was
3 then easement rights to ingress and egress over
4 Chevron's property; correct?

5 A That's right.

6 Q You also were going to pay for the
7 design and engineering of a new roadway for new
8 rear entrance, were you not --

9 A That's correct.

10 Q -- and all the permitting and drainage
11 design and approvals to the Town; correct?

12 A That's correct.

13 Q And the reason you were willing to pay

14 100 percent of all the costs from Chevron is
15 because you knew at that time they had legal
16 rights to use that roadway, didn't they?

17 A No, sir.

18 Q Well, if you thought they had no legal
19 rights to use the roadway, like you're saying
20 today, why didn't you make them pay for some of
21 it?

22 A Well, at that time, we were trying -- I
23 was trying to be a good neighbor to all the
24 property owners and work out an arrangement
25 which was mutually beneficial. That's why.

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 Q Well, if they had no legal right to use
3 the roadway, why wouldn't be it fair and be
4 good-neighborly to say, "Wait a minute, Chevron,
5 you don't have any right to be on my property.
6 Here's the plan I came up with. How about pay a
7 little bit of the money to fix the problem"?

8 A Well, you could have said that -- I
9 could have said that. I'm trying to be a good
10 neighbor and work for everybody's benefit.

11 Q Yes. And Exhibit 52 is the second
12 letter from Mr. Wilson, where they reject --
13 they reject your proposal; is that fair to say?

14 A Yes.

15 Q All right. And you testified on direct

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16 that they didn't reference any legal rights they
17 had to it. Could you read out loud to me
18 Paragraph 2, if you'll read out loud.

19 A "The access easement is relocatable" --

20 Q No. Paragraph 2 of Exhibit 52, we are
21 not willing.

22 A "We are not willing to execute the
23 proposed access easement presented, as it
24 burdens the entire ASA parcel. Further, we are
25 not willing to concede that the ASA parcel is

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 encroaching into your parcel, as we believe we
3 have rights over the asphalt drive, which has
4 existed for 30 plus years."

5 Q Okay. So he ties back into his same
6 position, that we have legal rights to use that
7 property; correct?

8 A That's his alleged position, yes.

9 Q All right. So did he assert legal
10 rights to use the property and has done so;
11 every time you raised the issue, the owner of
12 that property has asserted they had a legal
13 right to use it?

14 A Yes.

15 Q Okay. And then from the time -- from
16 1996 until 2008, we still don't have anything in
17 writing where you say you no longer can use that
18 roadway, have you?

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19 A No. I have given them permission to
20 use it.

21 Q But we don't have anything in writing
22 that said permission?

23 A It doesn't have to be in writing. I've
24 talked to them and allowed them to use the
25 encroachment.

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 Q Okay. Now we move to the Exhibit 55
3 September 15th, 2008 letter. And I think you
4 had testified that stated your intent, that you
5 wanted them to remove the encroachment and you
6 were going to cut it off.

7 A Can you let me read it again?

8 Q Sure.

9 A It talks about the shopping center
10 owner not giving the easement to accommodate the
11 original plans and so a new plan has to be
12 developed, and this will necessitate the removal
13 of encroachment onto my client's property. Yes.

14 Q Okay. But in fact, the new plan you
15 were talking about that would require the
16 removal of the encroachment, those plans were
17 put on hold after 2008, weren't they?

18 A Well, they were not. I had been
19 working with my land planner at that time.

20 But if you go to the last sentence,

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21 "that Kumar is willing to meet with your client
22 to discuss plans if she has any desire to do
23 so." So I continued to offer to meet with them
24 and work with them on any possible solutions.
25 Q Okay. But my question is, after

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 Exhibit 55 was written, September 15th, 2008,
3 your new plans that you were talking about that
4 would necessitate the cutting off of the
5 encroachment were put on hold?

6 A Okay, I misunderstood you. The new
7 plan referring to the one that was submitted to
8 all the parties concerned; is that right? Is
9 that what you're referring to?

10 Q Let me back up. The second paragraph
11 of Exhibit 55 states, "As a result, a new plan
12 has been developed by your client." Do you see
13 that?

14 A A new plan had to be developed.

15 Q All right. And my question is, after
16 you wrote this letter, the new plan that had to
17 be developed was put on hold, and you did not
18 proceed with that new plan?

19 A Yes, that's correct.

20 Q And in fact, that was put on hold at
21 least for four years, until you wrote Exhibit --
22 until your attorney wrote Exhibit 61. If you'll
23 turn to that.

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24 A Right. In the meantime I was --

25 Q I haven't asked you a question.

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 A Okay.

3 Q Doesn't Exhibit 61 in the second
4 paragraph refer to the 2008 letter, which says,
5 "In 2008 in anticipation of perspective
6 redevelopment plans, we notified ASA the
7 encroachment is going to have to be closed.
8 However, when those redevelopment plans were put
9 on hold, my client decided to allow the
10 encroachment to remain open." Do you see that?

11 A I see that.

12 Q Is it fair to say that after Exhibit 55
13 was written, that you changed your plans and put
14 your development plans on hold at least for four
15 years?

16 A Well, during that time, unbeknownst to
17 me, ASA sold the property to Enmark, so we had
18 to wait and see what Enmark's plans were to work
19 out a development plan. And only afterwards did
20 I find out. When Enmark had closed the
21 property, we entered into a dialogue with Enmark
22 and with you, Mr. Patterson, representing
23 Enmark. So during that time, there was dialogue
24 going back and forth on what the new development
25 plan should be.

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 Q Well, Enmark bought the station, if you
3 look at Exhibit 4, on March 19th, 2009, didn't
4 it?

5 A That's correct.

6 Q And what's the first thing Enmark does
7 when they buy a station?

8 A I don't know.

9 Q They put a nice -- don't you remember,
10 the nice, brand new Enmark sign?

11 A No. I never noticed the sign. Because
12 I don't notice the sign, I just pull into a gas
13 station on that, because I don't know if it's BP
14 or Exxon or Enmark.

15 Q Okay. So you never noticed the service
16 station that's right next to your property on
17 Sea Pines Circle, that it was now an Enmark
18 station, it wasn't Chevron?

19 A I never noticed the sign.

20 Q Okay. And you never took any legal
21 action or any action at all to shut down or to
22 restrict the roadway from being used from
23 Exhibit 55, which is September 15th, 2008, until
24 the letter Exhibit 61, October 29, 2012?

25 A Okay, can you repeat that question

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 again?

3 Q Yes, I can. You never took any action
4 to shut down or restrict the roadway that was
5 being used from Exhibit 55, which is the
6 September 15th, 2008 Arundell letter until the
7 October 29th Arundell letter, Exhibit 61?

8 A Yes. As I testified before, I gave
9 them permission to use the encroachment. I
10 allowed them to use it while we were trying to
11 work out a solution.

12 Q Other than your testimony that you
13 verbally gave permission, you didn't do anything
14 else to stop or restrict access, did you?

15 A No, I did not.

16 Q After Mr. Arundell's letter of
17 October 29th, 2012, Exhibit 61, were there
18 various meetings of the parties which
19 unfortunately didn't reach an agreement to
20 resolve the roadway?

21 A After which exhibit now?

22 Q Exhibit 61, that was October 29th,
23 2012.

24 A Right.

25 Q There were various meetings of the

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

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2 parties but no agreement was reached on the
3 roadway?

4 A Right. You were actually very involved
5 in those discussions going back and forth,
6 trying to work out an agreement between Enmark
7 and Carolina Center as far as a mutually
8 accessible easement.

9 Q Okay. Have you finished?

10 A Yes.

11 Q Look at Exhibit 62.

12 A Right.

13 Q Did the parties reach a letter
14 agreement that would provide basically a tolling
15 agreement that would allow the roadway to remain
16 open, and Enmark would be indemnified for any
17 accidents and repair the damage? Do you recall
18 that?

19 A Yes, I recall it.

20 Q And do you see in Paragraph 2 where it
21 says, C -- the second paragraph, "CCB" -- that's
22 your company?

23 A Right.

24 Q -- "agrees not to take any action to
25 close or impede the traffic on the roadway"?

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 A ... Right. That's a continuation of us
3 allowing them to use the roadway, the
4 encroachment.

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5 Q Okay. And that was prompted as a
6 result of your plans to build a fence to block
7 the roadway?

8 A No. That was prompted before because
9 our desire to work out an agreement with Enmark
10 did not materialize.

11 Q Look at Exhibit 42, which is the
12 photographs.

13 A Right -- 42, I don't have 42.

14 Q I think there's an extra set of 42.
15 Here, you can look on mine. See Exhibit 42, the
16 photographs?

17 A Yes.

18 Q See these 4X4 posts?

19 A Yes.

20 Q Did you authorize those posts to be
21 built?

22 A Yes, I did.

23 Q And were you planning to build a fence
24 to connect those?

25 A When was it done, do you know?

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 Q These are your photographs. I can tell
3 you it was prior to that tolling agreement
4 letter.

5 A If you say so, because I don't see a
6 date, and I can't say that that was done before

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7 the tolling agreement. My recollection is the
8 tolling agreement was done before this.

9 Q What was the purpose of the post?

10 A Well, the post is to mark our property
11 line. And --

12 Q Where do you -- go ahead.

13 A -- also to demark our property line.

14 Q And were you planning to build a fence?

15 A At some point in time after the
16 decision was made that y'all didn't have an
17 easement agreement and you were encroaching on
18 the property. But that has no relations to the
19 tolling agreement.

20 Q I hear what you say. All right. In
21 the tolling agreement --

22 A Now, which exhibit are we at?

23 Q Exhibit 62. All right. And we read in
24 Paragraph 2, where it says, "Carolina Center
25 Building Corporation agrees not to take any

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 action to close or impede the traffic on the
3 roadway." Do you see that?

4 A Which sentence are you reading? You're
5 way ahead of me.

6 Q All right. Paragraph 2.

7 A Right.

8 Q Second sentence. Actually, it's the
9 first sentence after trial court, comma. "CCB
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10 agrees not to take any action to close or impede
11 traffic on the roadway."

12 A Yes.

13 Q Okay. In fact, after this tolling
14 agreement, you did spend a great deal of time
15 trying to close or impede the roadway, didn't
16 you?

17 A No.

18 Q All right. Did you in fact contact the
19 Town and ask them to require that the roadway be
20 closed and the asphalt removed?

21 A Yes, because we were trying to meet
22 with you and Mr. Alford and the Town to
23 determine what the facts were on when the paving
24 was done and how it violated the Land Management
25 Ordinance.

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 Q And you directed your attorney to write
3 or meet with the Town on numerous occasions to
4 try to get the Town to close the roadway?

5 A Yes. And you did too.

6 Q And that was after you entered into an
7 agreement, Exhibit 62, where you said you would
8 not take any action to close or impede traffic
9 on the roadway?

10 A We were not trying to close or impede
11 the roadway. We were trying to get a ruling on

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12 the LMO, and you were very much a part of that,
13 Mr. Patterson.

14 Q And the ruling on the LMO was you were
15 trying to get the Town to close the roadway, the
16 very thing you agreed you weren't going to do,
17 you turned around and did it, didn't you?

18 MR. KUHN: I object.

19 THE WITNESS: Objection.

20 THE COURT: Hold on a second.

21 Mr. Kuhn, what's the objection?

22 MR. KUHN: It's argumentative.

23 THE COURT: Yeah. What's the relevance
24 of this, just out of curiosity? That's not
25 the objection, I know, but I guess I'm --

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 maybe you're going to tie it in somewhere.
3 Is there some cause of action having to do
4 with violation of the tolling agreement?

5 MR. PATTERSON: No. There probably
6 should be, because it was clearly violated.

7 The relevance is, Mr. Viswanathan has
8 come in here and put his halo wings on and
9 said, "I'm a great neighbor and I'm doing a
10 good thing and I'm not bothering anybody and
11 I'm trying to be the good guy to do it all;"
12 when we think that the evidence is quite
13 inconsistent with that. He's not trying to
14 be a good neighbor, he's going out of his

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15 way to try to pester and badger the Town to
16 do something the Town doesn't want to do,
17 and that's why the Town is sitting here
18 today.

19 THE COURT: Is that a part of an
20 equitable defense somewhere?

21 MR. PATTERSON: No, but it's evidence,
22 because he has put into evidence how good of
23 a neighbor he is. He's mentioned that 20
24 times. And I can refute that impression.

25 THE COURT: Well, I don't know if

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 that's relevant either, really.
3 But anyway, go ahead, Mr. Kuhn.
4 MR. KUHN: Your Honor, this is clear
5 English. He's not to take any action to
6 close or impede traffic on the roadway in
7 this tolling agreement, obviously that means
8 I'm not going to erect a fence, I'm not
9 going to dig a hole, I'm not going to put up
10 a barrier, but it does not mean that I can't
11 take legal action to try to close or impede
12 it. I mean, otherwise, we wouldn't be in
13 court here today.

14 So if he's trying to get the Town to
15 say it violates the LMO and he's trying to
16 get this court to shut it down, that's way

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17 beyond any interpretation of this tolling
18 agreement. Clearly, on its face, it just
19 means I'm not going to close the road down
20 and shut it down and erect a fence while
21 we've got this dispute going on as to the
22 legality of this.

23 MR. PATTERSON: Your Honor, I'll move
24 on. I won't ask him any more questions.

25 THE COURT: The whole angel wings

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 thing, I don't know if that's necessary.

3 MR. PATTERSON: Okay.

4 THE COURT: why don't we just move on.

5 BY MR. PATTERSON:

6 Q Let's talk about the paving of the
7 roadway. You would agree that the roadway has
8 been paved and then repaved over its lifetime?

9 A I don't know if I said it's been paved
10 and repaved. I know it's been paved.

11 Q Do you remember your deposition I took
12 back on April 3rd, 2014?

13 A I don't remember. If you could,
14 refresh my memory.

15 MR. PATTERSON: Your Honor, do I have
16 permission to open his deposition?

17 THE COURT: You do.

18 BY MR. PATTERSON:

19 Q If you will turn to Page 73, I'll help
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20 you, I'm on Page 73, Line 3.

21 Question: "Do you know when the road
22 was -- the encroachment was paved?" And read
23 your answer, please.

24 A Okay. "I don't know. All I know is,
25 it's subsequently been repaved and speed bumps

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 have been installed, because you can tell by the
3 color of the pavement. Yes."

4 Q Question: "All right. When was it
5 subsequently repaved and speed bumps installed?"

6 Answer?

7 A "I have no idea. I don't know who did
8 it."

9 Q You would agree me that in your
10 deposition, you previously said the road had
11 been repaved?

12 A Yes.

13 Q Okay. Have you gone out and looked at
14 it? Can you see two different layers of
15 pavement?

16 A Yes, I have.

17 Q And you don't know when the first layer
18 of pavement was or the second?

19 A No.

20 Q You don't know if the original paving
21 was prior to the adoption of the Town LMO, do

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22 you?

23 A No, I don't -- no, I do know, actually,
24 because you have said in a letter to the Town
25 that it was a gravel road in 1988 and that it

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 was gravel road -- the Town LMO was passed in
3 1987, and you have in written documentation said
4 it was a gravel road in 1988, so it was after
5 that date.

6 Q Do you agree with the representations I
7 made?

8 A I agree with your representation in
9 that case, because you obviously had been to the
10 property.

11 Q And I also represented that you didn't
12 have any rights to stop our roadway. Do you
13 agree with that?

14 A I didn't try to stop you. I gave you
15 permission.

16 MR. PATTERSON: Just a couple more
17 questions, Your Honor.

18 BY MR. PATTERSON:

19 Q Turn to Exhibit 53, which was your
20 email to Mr. Wilson. You've testified on direct
21 as to a reference to going to court in the
22 second sentence?

23 A Yes.

24 Q Wasn't that in response to Mr. Wilson,
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25 the paragraph you read of his letter,

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 Exhibit 52, where he said they believed they had
3 legal rights to use that asphalt driveway, which
4 had existed for 30 plus years?

5 A I don't know if it's in reference to
6 that. I just said we'd like to meet to address
7 the issues.

8 Q Let's talk a little bit about the
9 safety of the roadway. In the time period that
10 you've owned the property, you're not aware of a
11 single accident that's happened on that roadway,
12 are you?

13 A Yes, I was. We just entered some
14 pictures into evidence.

15 Q Okay. Other than that one accident
16 where you had the photographs that hit your
17 dumpster, are you aware of any other accidents?

18 A No, I'm not aware.

19 Q Okay. So we have one accident since
20 1996 since you've owned it?

21 A Yes.

22 Q You're not aware of any accidents prior
23 to that time, are you?

24 A No.

25 Q Let's look at Exhibit Number 76, and

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- 1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 this is a stipulated exhibit, which is the
3 accident report related to the car that hit your
4 trash dumpster enclosure.
5 A Okay.
6 Q And you've seen this document before,
7 haven't you?
8 A No, I have not.
9 Q When the accident occurred, you're
10 aware that the car that hit your dumpster was
11 driving on Palmetto Bay Road, that it was not
12 using the roadway?
13 A I was not aware at that time.
14 Afterwards, I was.
15 Q But before today, you knew that car was
16 not on the roadway?
17 A Yes. And it was not -- it was on the
18 roadway, and then it crossed the Enmark parking
19 station -- I mean parking lot, crossed the
20 buffer area and hit the dumpster on my property.
21 Q Let me be clear. You're aware that the
22 car that hit your enclosure was driving on
23 Palmetto Bay Road --
24 A Yes.
25 Q -- and was struck by another car --

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 A Yes.
3 Q -- and was not using the roadway or
4 encroachment at any time, period?
5 A Yes.
6 Q Okay. And you've made a claim for the
7 damage that you're seeking in this action
8 against the driver of this car, have you not?
9 A Made a claim against the driver --
10 Q Yes.
11 A -- of this car?
12 Q Yes.
13 A Yes. Okay.
14 Q Okay. So you're also claiming the same
15 damages in this case from Enmark, aren't you?
16 A No. I'm saying that if the buffer had
17 been in place, that it would not have damaged
18 the dumpster.
19 Q It's a simple question. You're
20 claiming \$4,300 in this case for damage to your
21 dumpster there?
22 A I'm believe it's \$3,200.
23 Q \$3,200; correct?
24 A I have not made a claim against the
25 insurance company yet.

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 Q But you've notified them that you're

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3 going to make a claim?

4 A I've notified them, yes.

5 Q Were you notified, getting back to
6 Exhibit 63, I believe you said this was a notice
7 of determination or a decision by the Town?

8 A Yes.

9 Q All right. Were you aware that they
10 amended or changed their mind after Exhibit 63?

11 A I'm aware of some correspondence from
12 the Town Attorney after this.

13 Q All right. So, yes, they did change
14 their mind, did they not?

15 A I don't know if the Town changed their
16 mind. There was not an official ruling by the
17 LMO official. There were memos going back and
18 forth or emails. I have not received any
19 official notification from the Town that they've
20 changed their mind.

21 Q Look at Exhibit 66.

22 A Can you say, "Please look at
23 Exhibit 66."

24 Q Please look at Exhibit 66.

25 A Thank you. Thank you. That makes it a

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 lot more courteous. What about 66?

3 Q You can see in the last paragraph where
4 Mr., Alford on behalf of the Town, said the Town
5 reached a decision and they will not be doing

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6 anything that relates to the LMO encroachment?

7 A Is Mr. Alford a Town official?

8 Q You can explain. You can't ask any
9 questions.

10 A Okay. No, to answer your question, I
11 did not receive anything from a Town official.

12 Q No, sir. I'm asking if your attorney
13 received this notification from the Town
14 Attorney, representing the Town?

15 A Yes, he did.

16 Q Okay. And did you or anybody on your
17 behalf make any appeal to the Board of Zoning
18 Appeals from this determination, Exhibit 66?

19 A No.

20 MR. KUHN: I object to that being
21 characterized as a determination. It would
22 be more accurate to say a letter.
23 Determination is a term of art under the
24 LMO.

25 MR. PATTERSON: The same is true when

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 Mr. Viswanathan called the letter to
3 Ms. Lewis a determination.

4 THE COURT: All right. Well, if
5 everyone agrees, the determination is
6 something different than the letter and the
7 letter from Ms. Lewis.

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8 MR. KUHN: I believe the letter from
9 Mr. Lewis is a determination.

10 MR. PATTERSON: That's a legal
11 statement.

12 MR. KUHN: That's a term of art that
13 Your Honor will have to interpret later on
14 in the case.

15 THE COURT: All right. Well, at some
16 point, someone will -- perhaps even the Town
17 Attorney will enlighten us as to what is --

18 MR. ALFORD: Your Honor, I regret to
19 inform you that I think that you'll have to
20 make the determination about what is a
21 determination.

22 THE COURT: well, maybe y'all will give
23 me the tools to do so in the form of the
24 Ordinance itself or at least the pertinent
25 parts at some point between now and the

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)

2 conclusion of the case. All right.

3 BY MR. PATTERSON:

4 Q One of the things you claim the roadway
5 is causing is trash and debris on your property?

6 A Yes.

7 Q And is there not a dumpster that's been
8 in existence for a long period of time for
9 staples right next to your property?

10 A Yes, on the Staples property.

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11 Q If you'll look at Exhibit 42, which is
12 the photographs. Here, you can look. Here's
13 your Exhibit 42. Look at the fourth page. Is
14 there not a dumpster 20 to 25 feet from your
15 property line?

16 A Yes, there is.

17 Q And that's an authorized dumpster. It
18 doesn't have anything to do with Enmark, does
19 it?

20 A Yes. It says, "No public dumping."

21 Q Right.

22 A The dumping that I'm talking about is
23 people throwing trash when they drive out of
24 Enmark gas station onto the encroachment.

25 Q Will you agree with me that it's very

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1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
2 common that there's trash around most every
3 dumpster in every part of Beaufort County that
4 has either spilled out or been not placed in the
5 dumpster properly?

6 A If you say so.

7 Q No, sir. I'm asking you if you ever --

8 A I don't think so. I've been to several
9 dumpsters where there's not trash around the
10 dumpster.

11 Q But would you agree with me most
12 dumpsters have trash around them?

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- 13 A If you say so.
- 14 Q No, sir, not my opinion --
- 15 A I don't agree.
- 16 Q Okay. And how do you know whose trash
- 17 is there from the dumpster versus somebody
- 18 throwing it?
- 19 A I don't. But the nature of the trash
- 20 shows that it's bottles, coke cans, other trash
- 21 that seems to be dropped out of a car, of a
- 22 passing car.
- 23 Q And after Beaufort County changed their
- 24 hours for the dump, did a lot of people start
- 25 using dumpsters wherever they could find them to

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- 1 PATTERSON - VISWANATHAN (CROSS EXAMINATION)
- 2 put their personal garbage?
- 3 A I don't know.
- 4 Q And this has -- this dumpster has no
- 5 lock, so anybody could go up and use it despite
- 6 what the sign says, couldn't they?
- 7 A I don't know.
- 8 MR. PATTERSON: Okay. If you'll give
- 9 me one second, I'll check with my client, I
- 10 think I'm done here.
- 11 I don't have any other questions, Your
- 12 Honor. Thank you.
- 13 THE COURT: All right. Do you want to
- 14 take a break before you start or launch
- 15 right into it?

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16 MR. ALFORD: Please, yes, sir.

17 THE COURT: Don't discuss your
18 testimony with anyone during the break.

19 (Off the record.)

20 THE COURT: You're still under oath
21 sir.

22 Just whenever you're ready.

23 MR. ALFORD: Thank you, sir.

24 CROSS EXAMINATION

25 BY MR. ALFORD:

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1 ALFORD - VISWANATHAN (CROSS EXAMINATION)

2 Q My name is Greg Alford. We've had the
3 pleasure of meeting many times; right?

4 A Yes.

5 Q Just to make sure I understand, when
6 you bought the property, Mr. Griffin was your
7 counsel?

8 A Yes.

9 Q And there's no question that in your
10 contract documents at least, there was an
11 awareness of this encroachment on the property?

12 A Yes.

13 Q All right, sir. And there's no
14 question that in the Deed that you took from Sea
15 Pines Company, I guess, that there was an
16 exception made for this encroachment?

17 A There was an exception made for

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18 Palmetto Electric, yes.
19 Q All right, sir. And so I take it that
20 the distinction that you're making is the
21 distinction between the power line easement and
22 the encroachment that existed as shown on the
23 plat that you and Mr. Patterson discussed?
24 A Yes.
25 Q Do you agree with me that survey, while

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1 ALFORD - VISWANATHAN (CROSS EXAMINATION)
2 it shows the power line existent easement, it
3 also shows where the cut-through, I'll call it
4 the cut-through, is also shown on that plat?
5 A It does.
6 Q All right, sir. Would you agree with
7 me that it could be logical for one to assume
8 that it took -- that your title, the title you
9 obtained, took exception to not only the power
10 easement but also everything that was shown on
11 that plat?
12 A I don't know the answer to that.
13 Q Question for the judge?
14 A Yes, or attorneys.
15 Q Around here, only one person decides.
16 A Sure. The judge.
17 Q All right, sir. If you could, would
18 you mind looking at Exhibit 54, please, sir.
19 Well, let me ask you this before you do that.
20 Sir, you testified earlier that you got this

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21 property in I want to say '96; is that right?
22 A Late '96.
23 Q All right, sir. You got it in '96, and
24 I remember you said, if I remember right, that
25 you kind of focused on getting the tenants

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1 ALFORD - VISWANATHAN (CROSS EXAMINATION)
2 sorted out and the buildings right and those
3 type of things --
4 A Yes.
5 Q -- and then subsequently, you began to
6 try to deal with this traffic flow or easement
7 issue or encroachment issue in the back?
8 A The encroachment, yes, sir.
9 Q When do you recall kind of trying to
10 start dealing with that?
11 A It's, to the best of my recollection,
12 somewhere in the late nineties.
13 Q Okay... And would you have involved your
14 counsel at the time in that, or would this just
15 have been your efforts?
16 A At some point in time, the counsel got
17 involved. But mostly it's my efforts.
18 Q Okay. And as Mr. Patterson noted,
19 you're a pretty detailed guy, I mean,
20 you're . . .
21 A Again, it's a matter of opinion.
22 Q Yes, sir. And I appreciate your

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23 humility, but you're obviously a very successful
24 developer, and you've enjoyed success?
25 A Again, a matter of opinion.

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1 ALFORD - VISWANATHAN (CROSS EXAMINATION)
2 Q But come on, sir, I mean, you're a
3 respected member of the community, you've been
4 around a long time, you're a good developer.
5 A Thank you.
6 Q Would you agree with that?
7 A I can't say that. It depends on other
8 people who have to say if I'm good or bad.
9 Q Fair enough. And so after '98, you're
10 working on or you're trying to resolve these
11 issues and you're talking with these people. Do
12 you have any documentation of anything that you
13 might have done with the Town during that period
14 of time?
15 A No, I don't have any documentation, but
16 I did meet with the Town.
17 Q Okay. And that was in your attempt to
18 kind of get an overall solution?
19 A Right.
20 Q Okay. And do you recall when you first
21 started talking to Mr. Arundell?
22 A I don't recall the exact date, but it's
23 somewhere in that time frame.
24 Q Early then, you would have been talking
25 to him?

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1 ALFORD - VISWANATHAN (CROSS EXAMINATION)
2 A Yes.
3 Q Late nineties?
4 A Yeah. He started representing me after
5 a while.
6 Q All right. If you don't mind, would
7 you look at -- and there was a little bit of
8 question about -- I want to look at Exhibit 54,
9 but before we start talking about that, would
10 you agree with me that Mr. Arundell was your
11 attorney?
12 A Yes.
13 Q Okay. And communications from him
14 represented communications from your
15 corporation?
16 A Yes.
17 Q And therefore, communications to him
18 would represent -- in the scope of his
19 representation, would equate to communications
20 to your corporation?
21 A Yes.
22 Q I mean, there were never communications
23 that Mr. Arundell received on behalf of your
24 corporation that he didn't pass on to you in a
25 timely manner?

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1 ALFORD - VISWANATHAN (CROSS EXAMINATION)

2 A Not that I know of.

3 Q Right. I mean, you're comfortable that
4 he communicated with you . . .

5 A Most of the time.

6 Q All right, sir. Thank you. Let's look
7 then at this letter, Exhibit 54. And it's a
8 letter from Mr. Arundell to John Wilson, who
9 was, I guess, the Chevron attorney; is that
10 correct?

11 A Yes.

12 Q Okay. And Paragraph 1 talks about he's
13 working with you. And then the next paragraph,
14 could you read the first sentence of that.

15 A "For several months, my client has been
16 working with other property owners and the
17 Town."

18 Q Okay. Now, this is written in '08.

19 A Yes.

20 Q And I'm just wondering, was it months
21 or years? I mean, because you seem to feel like
22 it was years, and Mr. Arundell seems to feel it
23 was months.

24 A I mean, several months. You know, I
25 would say when I said "years," you know, I was

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1 ALFORD - VISWANATHAN (CROSS EXAMINATION)
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2 talking to the tenant, the bank at that time and
3 what their requirements are, so it could have
4 transpired over several years -- not several
5 years, years before it formulated into a game
6 plan.

7 Q Okay. But as far as Mr. Arundell, are
8 you aware that he sent this letter on your
9 behalf?

10 A Yes. And he said for several months.

11 Q Is that accurate?

12 A Yes, I would say that's accurate.

13 Q And there was some question about this
14 communication back from myself to Mr. Arundell.
15 Were you aware of that letter that I wrote to
16 Mr. Arundell? I think that was Exhibit -- help
17 me out, Russell, 64?

18 MR. PATTERSON: Hold on a minute. 66..

19 BY MR. ALFORD:

20 Q If you look at Exhibit 66, have you
21 seen that before?

22 A Yes.

23 Q All right. Did you see it in close
24 proximity to the time in which it was written?

25 A It was written on January 16th, 2014.

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1 ALFORD - VISWANATHAN (CROSS EXAMINATION)

2 Q Yes, sir. Did you see it around that
3 time? I mean, it was timely conveyed to you,

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4 the content of it?

5 A Oh, you mean from Mr. Arundell to me?

6 Q Yes, sir.

7 A I would say so, yes.

8 Q Thank you. And so you were aware at
9 that time of what the Town's position was; is
10 that correct?

11 A Yes.

12 Q Okay. And then, if I remember
13 correctly -- yes, I do, if you would look at
14 Exhibit -- the next exhibit, 67. That was
15 Mr. Arundell's letter to me; right?

16 A Right.

17 Q And, as it seems so often unfortunately
18 it happens, when I write letter to people, they
19 write back angry and frustrated with me and they
20 put big letters in so I can really figure out
21 what's going on, but I'm used to that. But were
22 you aware of this letter being written?

23 A Yes.

24 Q All right. So were you aware then that
25 I had stated a position to Mr. Arundell and he

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1 ALFORD - VISWANATHAN (CROSS EXAMINATION)

2 disagreed with it?

3 A Yes.

4 Q Okay. On behalf of your corporation,
5 he disagreed with it?

6 A Yes.

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7 Q Okay. And then if you would, sir, if
8 you'd go to Exhibit 68. And this would be all
9 happening pretty quickly here, I mean, for
10 lawyers --

11 A Right.

12 Q -- we're at February 4th, and I'm
13 explaining to Mr. Arundell that I'm sorry that
14 he doesn't like the way that we're looking at
15 it.

16 And then if you read the last two
17 paragraphs, do you feel like that this would
18 have adequately informed both you and
19 Mr. Arundell of the Town's position?

20 A Of your position, yes.

21 Q Okay. You don't think that -- but
22 would you agree that at least with respect to
23 this communication, I'm representing the Town?

24 A All right, you're representing the
25 Town, but it's not the Town's position as far as

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1 ALFORD - VISWANATHAN (CROSS EXAMINATION)

2 an LMO Official is concerned.

3 Q Okay. And that's -- that's --

4 A That's the difference.

5 Q That's your position.

6 A Yes.

7 Q Okay. Have you made any efforts to
8 sell this property?

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9 A No, sir.

10 Q When you found out that I was writing
11 on behalf of the Town to your attorney, did you
12 ask your attorney -- I can't ask you that. Let
13 me rephrase that. Did your corporation file an
14 appeal with the Town?

15 A No, we did not.

16 Q And you've been involved in development
17 in and around Hilton Head for a long time?

18 A Yes.

19 Q And you're aware of how the appeals
20 process works?

21 A Yes.

22 Q And you're aware of the Board of Zoning
23 Appeals and all that stuff?

24 A Yes, sir.

25 MR. ALFORD: That's all I have. Thank

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1 KUHN - VISWANATHAN (REDIRECT EXAMINATION)

2 you.

3 THE COURT: All right. Mr. Kuhn,
4 anything else?

5 MR. KUHN: Yes, Your Honor, just a few
6 minutes.

7 REDIRECT EXAMINATION

8 BY MR. KUHN:

9 Q From your knowledge of the Land
10 Management Ordinance for the Town of Hilton Head
11 Island, is there a procedure to appeal a

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12 decision by the Town Attorney?

13 A No.

14 Q The appeals to the Zoning Board of
15 Appeals are from decisions by the LMO Official
16 that are determinations; is that your
17 understanding?

18 A Yes, that's my understanding.

19 Q The only determination by the Land
20 Management Ordinance Official of which you aware
21 in this case is Teri Lewis' letter saying the
22 encroachment had to be removed?

23 A Yes, sir.

24 Q And you had no desire to appeal that
25 because you agree with it?

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1 KUHN - VISWANATHAN (REDIRECT EXAMINATION)

2 A Yes.

3 Q You were not aggrieved by that
4 decision, in other words?

5 A No.

6 Q If you would look at Exhibit 53, this
7 is the letter, memo, fax from John Wilson to you
8 dated June 2nd, 2008, in which Mr. Wilson is
9 still negotiating with you on behalf of his
10 client as to the conceptual plan. But in there,
11 he says, "We believe we have rights over the
12 asphalt drive."

13 A What exhibit is that?

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14 Q Exhibit 53.

15 MR. PATTERSON: I think that's Exhibit
16 52.

17 MR. KUHN: Oh, excuse me, Exhibit 52.
18 I have the re-constructed notebook, which is
19 a little out of order.

20 THE WITNESS: So Exhibit 52.

21 BY MR. KUHN:

22 Q Exhibit 52, do you see that in there?
23 In the second full paragraph, it says, "We
24 believe we have rights over the asphalt drive."

25 A Yes.

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1 KUHN - VISWANATHAN (REDIRECT EXAMINATION)

2 Q And then, after having said that, he
3 says, "We're willing to consider an access
4 easement," and he outlines the different
5 conditions?

6 A Yes. He was negotiating, trying to.

7 Q Continuing to negotiate?

8 A Continuing to negotiate, right.

9 Q All right. Looking at these, basically
10 he's agreeable to relocate as long as some
11 fairly easy things are taken care of?

12 A That's correct.

13 Q Is this the very first time on which
14 anyone asserted to you while you were the owner
15 of this property that they believed they had any
16 right over the asphalt drive?

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17 A To me, you mean?
18 Q Yes, sir.
19 A Yes. To me, yes, sir.
20 Q So here we are in June 2008.
21 And a few months later, your lawyer
22 writes in Exhibit 55 to ASA's attorney, saying,
23 "Remove the encroachment"; is that correct?
24 A That's correct.
25 Q He says, "This will necessitate

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1 KUHN - VISWANATHAN (REDIRECT EXAMINATION)
2 removal, and you must now cut off the
3 encroachment"?
4 A Yes.
5 Q Okay. And after that, unbeknownst to
6 you, within a few months later -- actually, they
7 stopped using it because they sold the property?
8 A After they sold the property, yes.
9 Q So they stopped using it, but somebody
10 else starts to use it?
11 A Yes, sir.
12 Q And you start the whole process over
13 again trying to say, "Hey, you're on my
14 property, let's try to work something out"?
15 A That is correct.
16 Q And did you continue to give them
17 permission to use it, the new owners, while you
18 were trying to work it out?

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19 A Yes.

20 Q If you'd look now at Exhibit 21.

21 A Yes.

22 MR. KUHN: May I approach? I'd like
23 him to point out something on this exhibit.

24 THE COURT: And which exhibit was it,
25 I'm sorry?

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1 KUHN - VISWANATHAN (REDIRECT EXAMINATION)

2 MR. KUHN: Exhibit 21.

3 THE COURT: Yes, come on up, please.

4 BY MR. KUHN:

5 Q The encroachment on Exhibit 21 is
6 where.

7 A The encroachment on Exhibit 21?

8 Q It's this document. Where is the
9 encroachment?

10 A It's right there.

11 Q So this is the gas station property?

12 A This is the gas station property.

13 Q It starts -- goes onto your property --

14 A Right.

15 Q -- it comes over, and then it
16 bifurcates around a little island to go onto the
17 restaurant property --

18 A And the Staples property.

19 Q -- and extends further onto the Staples
20 property.

21 Looking at Exhibit 74, there is a
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- 22 dumpster placed right here; is that correct?
23 A That's correct.
24 Q Whose property is this?
25 A That is the Staples property.

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- 1 KUHN - VISWANATHAN (REDIRECT EXAMINATION)
2 Q And who placed this dumpster, do you
3 know?
4 A Staples.
5 Q Okay. Exhibit 21 was done in 1990,
6 Exhibit 74 in 2013; is that correct?
7 A That's correct.
8 Q So at some point in time, Staples
9 placed a dumpster on what the encroachment had
10 been back in 1990 and at least partially
11 succeeded in obstructing it, is that correct --
12 A It appears that way, yes, sir.
13 Q -- because this line here is this line
14 here?
15 A Right. This line in Exhibit 21 shows
16 the encroachment going the other way.
17 Q The dumpster would be about right where
18 my pen is?
19 A Yes.
20 Q It stopped this part of the
21 encroachment, but people kept coming here;
22 right?
23 A Right.

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24 Q I think you answered this, but when you
25 agreed in the tolling agreement not to close or

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1 PATTERSON - VISWANATHAN (RE CROSS EXAMINATION)
2 impede the road during the tolling agreement,
3 were you agreeing that you wouldn't even be
4 taking legal action to try to close it?

5 A No.

6 Q In other words, you didn't agree you
7 will not bring this lawsuit --

8 A No.

9 Q -- or go to the Town?

10 A No.

11 Q You were just agreeing you wouldn't put
12 up a fence or boulders or rocks or logs or
13 anything like that?

14 A That is correct.

15 MR. KUHN: That's all the questions I
16 have.

17 THE COURT: All right. Any other
18 questions of this witness?

19 RE CROSS EXAMINATION

20 BY MR. PATTERSON:

21 Q Very quickly, Mr. Viswanathan, you were
22 again asked the first time anybody claimed
23 rights under a legal document was Mr. Wilson's
24 letter in Exhibit 52 of June 2nd, 2008. Do you
25 remember you just said that?

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1 PATTERSON - VISWANATHAN (RECROSS EXAMINATION)
2 A On exhibit what?
3 Q Look at Exhibit 52.
4 A Yes.
5 Q So you're saying that's the first time
6 anybody asserted legal rights to that property?
7 A To me. That's the question that --
8 MR. KUHN: The question was while he
9 owned the property.
10 BY MR. PATTERSON:
11 Q But in actuality, 14 years earlier, if
12 you look at Exhibit 48, if you'll turn to
13 Exhibit 48, Cary Griffin was your lawyer on June
14 23rd, 1994, wasn't he?
15 A The question was --
16 Q Is that a yes?
17 A Yes.
18 Q All right. And so your lawyer,
19 Mr. Griffin, he's a very good lawyer, he passed
20 along communications he received to you in a
21 timely manner?
22 A Yes. But the question was, when I
23 owned the property.
24 Q And my question is, prior to the time
25 you owned it, 14 years prior to your 2008

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1 PATTERSON - VISWANATHAN (RE CROSS EXAMINATION)
2 letter, Mr. Wilson notified you that his client,
3 the owner of the Chevron station, claimed legal
4 rights to that roadway, did he not?

5 A Yes.

6 Q And you also testified just a minute
7 ago, I think for the first time, that when
8 Enmark took over the service station, you also
9 gave them permission to use the roadway?

10 A Yes.

11 Q All right. Do you have anything in
12 writing where you gave them permission to use
13 the roadway?

14 A No.

15 Q So again, who did you -- I guess you're
16 talking then it would be verbal that you gave
17 them permission?

18 A Now, during that time Mr. Arundell was
19 talking to you, and there was communication
20 between the two of you trying to work out
21 easement agreements and proposals.

22 Q Right. And there were lots of letters
23 going back and forth with different proposals;
24 fair enough?

25 A Yes.

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♀

1 PATTERSON - VISWANATHAN (RE CROSS EXAMINATION)

2 Q Are you aware of anything in writing
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3 from you or your attorney where you ever gave
4 Enmark permission to use the roadway?

5 A I don't recall at the moment, no.

6 Q Okay. And is it possible that you
7 never gave permission because there's nothing in
8 writing with the attorneys that you hired to
9 handle those negotiations?

10 A It's possible there was something in
11 writing, but I don't see it right now. I
12 haven't seen anything in any of this.

13 Q And, this litigation has been pending
14 for three years, you've had plenty of time to
15 find anything in writing that would reference
16 this roadway; right?

17 A Yes.

18 Q And you don't have anything today while
19 you're testifying that indicates that you ever
20 gave Enmark permission to use the roadway?

21 A In writing?

22 Q Yes, sir.

23 A No.

24 Q And you don't have anything in writing
25 that confirms a telephone conversation or a

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1 ALFORD - VISWANATHAN (RECROSS EXAMINATION)

2 meeting where you gave permission in writing?

3 A No.

4 MR. PATTERSON: I don't have anything

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5 else, Your Honor.

6 THE COURT: Anything else of this
7 witness?

8 MR. PATTERSON: Greg, do you have
9 anything else?

10 MR. ALFORD: One second.

11 Your Honor, I do have one thing.

12 THE COURT: All right, go ahead.

13 RE CROSS EXAMINATION

14 BY MR. ALFORD:

15 Q Sir, if you wouldn't mind looking at
16 Exhibit 65.

17 A Yes.

18 Q And what is that, sir?

19 A It's an email from Teri Lewis to Bob
20 Arundell.

21 Q And I'm going read it, if you don't
22 mind. It says, "Bob, I am still working on my
23 response, which then has to be approved by Greg.
24 Basically, though, Greg said that I was
25 premature in sending that letter to you and that

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1 ALFORD - VISWANATHAN (RE CROSS EXAMINATION)
2 I should have advised that the issue of whether
3 the access gets to stay or not needs to be
4 settled by a court first before. Then the
5 Town" -- oh, thank you, I appreciate that. Let
6 me start over.

7 "Bob, I am still working on my
Page 154

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06-20-16

8 response, which then has to be approved by Greg.
9 Basically, though, Greg said that I was
10 premature in sending that letter to you and that
11 I should have advised that the issue of whether
12 access gets to stay or not needs to be settled
13 by a court first before the Town takes a
14 position. I apologize for any inconvenience
15 this may have caused your client. I should have
16 discussed this issue with Greg prior to sending
17 you the initial letter. Once I have formalized
18 a new response and reviewed it to Greg, I will
19 send you a copy and to Russell Patterson. I am
20 not sure if this is something that can be
21 appealed to the Board of Zoning Appeals. I will
22 find out as well."

23 Did you know that that was out there,
24 sir?
25 A Yes.

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1 KUHN - VISWANATHAN (FURTHER REDIRECT EXAMINATION)

2 Q Okay. So this question of whether or
3 not you really knew where the Town stood, you
4 understood that?

5 A Yes.

6 MR. ALFORD: All right. Thank you.

7 MR. PATTERSON: Nothing further.

8 THE COURT: All right. Yes, sir.

9 FURTHER REDIRECT EXAMINATION

06-20-16

10 BY MR. KUHN:

11 Q Just to follow up very quickly on that,
12 did you ever get a new response from Teri Lewis?

13 A No.

14 Q I had one question in follow-up to
15 Russell. Mr. Alford distracted me. Hang on
16 JUST one second.

17 THE COURT: would you like to reserve
18 the right to recall your witness?

19 MR. KUHN: Your Honor, I think I
20 remember what it is now.

21 BY MR. KUHN:

22 Q Mr. Patterson asked you if you had ever
23 put anything in writing granting permission to
24 his client, Enmark, respecting your -- the fact
25 that they were using this with your permission.

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1 KUHN - VISWANATHAN (FURTHER REDIRECT EXAMINATION)
2 If you would turn to Exhibit 62, please. Isn't
3 that what this is, your permission for them to
4 continue using the roadway?

5 A Yes, it is.

6 Q Okay. So the lawyers finally got
7 around to putting it in writing; is that fair to
8 say?

9 A Yes. Yes.

10 MR. KUHN: That's all I have.

11 THE COURT: All right. Anything else
12 of this witness?

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06-20-16

13 MR. PATTERSON: Nothing further, Your
14 Honor.

15 THE COURT: All right. Thank you very
16 much, sir. That will conclude this
17 testimony.

18 Now, I think we might have discussed
19 this a little off the record earlier, it is
20 4:19, probably too late to start a new
21 witness. I understand your next witness is
22 Curtis, and he's going to be a long one, so
23 we'll just start at 9 o'clock in the
24 morning. Does that work for everybody.

25 MR. PATTERSON: Yes.

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171

1 KUHN - VISWANATHAN (FURTHER REDIRECT EXAMINATION)

2 THE COURT: That will conclude today's
3 record.

4 (Whereupon, the hearing
5 was adjourned at
6 4:19 p.m.)

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06-20-16

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA:
BEAUFORT COUNTY:

I, Theresa D. Saxon, Court Reporter and
Notary Public in and for the above county and
state, do hereby certify that this is a true and
correct transcript of the proceedings in this
matter at the time and place herein-before set
forth.

06-20-16

18 I am not of counsel to any of the
19 parties, nor interested in the event of this
20 cause.

21

22

23

Theresa D. Saxon

24

25

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06-21-16

1

1 IN THE COURT OF COMMON PLEAS
2 STATE OF SOUTH CAROLINA
3 COUNTY OF BEAUFORT
4 CASE NO.: 2013-CP-07-2066

5 Carolina Center
6 Building Corp.,

7 Plaintiff,

8 vs.

9 Enmark Stations, Inc.;
10 and The Town of
11 Hilton Head Island,

12 Defendant.

13 -----/

14 FINAL HEARING
15 Volume II of II

16 Before The Honorable Marvin H. Dukes, III
17 Master-in-Equity's Hearing Room
18 Beaufort County Courthouse
102 Ribaut Road
Beaufort, South Carolina

19 DATE: June 21, 2016
20 TIME: 9:11 p.m.

21

22

23

24

25

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1

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Page 1

000373

06-21-16

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3

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4	By Mr. Patterson -----	15

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6	Witness: Curtis L. Coltrane	
7	Direct Examination By Mr. Kuhn -----	22
8	Cross Examination By Mr. Patterson -----	84
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11	Recross Examination By Mr. Patterson -----	135
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4

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9	By Mr. Patterson -----	288
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EXHIBITS

STIPULATED EXHIBIT LIST

- A. Chain of Title to Enmark Station
 - 1 Deed Fraser to Chevron Oil BD 218 PG 1962 (3/12/74)
 - 2 Deed from Sea Pines to Chevron Oil BK 218 PG 1959 (03/12/74)
 - 3 Deed from Chevron Oil to aka BK 651 PG 594 (08/23/93)
 - 4 Deed from ASA to SCDOT BK 745 PG 1500 (03/02/94)
 - 5 Deed from ASA to Enmark BK 2822 PG 1941 (03/19/09)
 - 6 Absolute Assignment from ASA to Enmark BK 2822 PG 2944 (03/19/09)

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- B. Chain of Title to Carolina Center
7 Deed from JB Fraser to Charles Fraser BK 85
PG 343 (4/15/57)
11 8 Deed from Fraser to Palmetto Electric BK 104
PG 273 (11/8/60)
12 9 Deed Palmetto Electric to Sea Pines BK 174
PG 218 (12/21/69)
13 10 Deed from Sea Pines to State Service BK 216
PG 254 (1/29/73)
14 11 Deed from State Service to Fogelman BK 464
PG 1930 (11/26/86)
15 12 Deed from Fogelman to SeP Limited Partnership
BK 547 PG 1605 (3/7/09)
16 13 Deed from Kemmerlin to Palmetto Federal BK
670 PG 2118 (01/20/94)
17 14 Deed from Palmetto Federal to Sea Pines BK
720 PG 1192 (07/21/94)
18 14 Deed from Sea Pines to Carolina Center BK
911 PG 1274 (10/31/96)

- C. Plats
20 16 Plat BK 12 PG 83 (rec. 11/15/60)
17 Plat BK 20 PG 192 (rec. 10/05/72)
21 18 Plat BK 22 PG 47 (rec. 03/14/72)
19 Plat BK 22 PG 85 (rec. 05/01/74)
22 20 Plat BK 23 PG 159 (rec. 07/25/75)
21 Plat BK 38 PG 53 (dated 11/1/89; rec.
23 03/09/90)
22 Plat PB 41 PG 18 (rec. 04/19/91)
24 23 Plat PB 52 PG 32 (rec. 02/27/95)

25

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- D. Easements, Restrictions
24 Easement Fraser to Palmetto Electric BK 105
2 PG 101 (12/19/60)
25 Relocation of Easement Agreement BK 210 PG
3 1065 (05/10/73)
26 Sea Pines Covenants - Gasoline Station BK
4 218 PG 1954 (03/12/74)
27 Cross Easements - Sea Pines and Amelia Beach
5 BK 230 PG 137 - Market Place (05/01/75)
28 Amendment to Cross easements - Sea Pines and
6 Amelia BK 275 PG 906 (03/16/79)
29 Easement ASA to Enmark BK 651 PG 556
7 (08/26/93)
8 E. Photograph)
30 Aerial Photo 02/25/86
9 31 Aerial Photo 03/86
32 Aerial Photo 1988
10 33 Aerial Photo 03/95
34 Aerial Photo 1995
11 35 Aerial Photo 1999
36 Aerial Photo 2002

06-21-16

12 37 Aerial Photo 2006
 13 38 Aerial Photo County Tax Office 2009
 14 49 Aerial Photo 2011
 15 40 Aerial Photo 2012
 16 41 Aerial Photo 2013
 17 42 Plaintiff's Photographs of Subject Area
 18 43 Current Overhead Photograph
 19 44 Aerial GIS Photograph
 20 44A Four Photographs taken by Mr. Patterson
 21 F. Correspondence and Emails
 22 45 10/20/92 Metro Engineering As-Built Chevron
 23 Station
 24 46 10/31/96 Contract of Sale - Sea Pines -
 25 Carolina Center
 26 47 06/15/94 Letter from Cary Griffin to John
 27 Wilson with Plat 38/58
 28 48 06/23/94 Letter from John Wilson to Cary
 29 Griffin with Relocation Agreement
 30 49 03/17/04 Carolina Center Conceptual Site
 31 Plan
 32 50 08/30/07 Letter from Kumar Viswanathan to
 33 Oliver with Conceptual Plan
 34 51 02/08/08 Letter from Kumar Viswanathan to
 35 Jim Scott Middleton
 36 52 06/02/08 Letter from John Wilson to Kumar
 37 Viswanathan

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7

1 53 06/02/08 Email Viswanathan to Wilson
 2 54 06/05/08 Letter from Robert Arundell to John
 3 Wilson
 4 55 09/15/08 Letter from Robert Arundell to John
 5 Wilson
 6 56 11/20/08 Purchase Agreement ASA - Enmark
 7 57 11/20/08 Addendum to Purchase Agreement
 8 Enmark - ASA
 9 58 01/30/09 Letter from James Austin, Esquire,
 10 to Alice Means
 11 59 02/18/09 Amendment to Purchase Agreement -
 12 ASA - Enmark
 13 60 03/19/09 HUD-1 for Enmark Purchase - Sale -
 14 ASA
 15 61 10/29/12 Letter from Robert Arundell to
 16 Russell Patterson
 17 62 07/24/13 Tolling Agreement - Enmark -
 18 Carolina Center
 19 63 08/08/13 Letter from Teri Lewis to Robert
 20 Arundell
 21 64 08/26/13 Email from Russell Patterson,
 22 counsel for Enmark, to Teri Lewis
 23 65 09/26/13 Email from Teri Lewis, Town, to Bob
 24 Arundell
 25 66 01/16/14 Letter from Greg Alford to Robert
 26 Arundell
 27 67 01/24/14 Letter from Robert Arundell to Greg

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- Alford
- 15 68 02/04/14 Letter from Greg Alford to Robert Arundell
- 16 69 04/30/14 Letter from Russell Patterson to Teri Lewis
- 17
- G. Miscellaneous
- 18 70 08/23/98 - ASA Secretary of State Record
- 19 71 11/25/02 Deed from DR Horton to Scott Middleton - Residence BK 1670 pg 1222
- 20 72 2007 asa Inc. Depreciation Schedule
- 21 73 05/07/14 Records from Office of the Treasurer
- 22 74 07/26/13 Colored Plat prepared by Plaintiff
- 23 75 12/17/15 Greenery Estimate - Plaintiff
- 24 76 05/18/16 Beaufort County Incident Report - Palmetto Bay Road
- 25 77 Records from the town of Hilton Head Island
- 78 Records from Beaufort
- 79 Summary of all Town Approvals/Inspections - Service Station

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8

- 1 80 Plaintiff's Attorney's Fees and Costs
- 81 Stipulation of Facts as to PB 38 P 53
- 2 82 Deposition of Scott Middleton dated 04/28/15
- EVD. Pg. 156, Vol. II
- 3 83 Town of Hilton Head Land Management Ordinance *

E X H I B I T S
(marked during trial)

- 4
- 5
- 6 84 Photographs (three)
- I.D. Pg. 63, Vol. I; EVD. Pg. 65, Vol. I
- 7
- 8 85 Estimate
- I.D. Pg. 73, Vol. I
- 9
- 86 Plaintiff's Attorney's up-to-date bill with trial time estimated
- 10 I.D. 87, Vol. I; Proffer Pg. 87, Vol. I
- 11 87 Aerial Photograph dated 1972
- I.D. Pg. 52, Vol. II
- 12 88 Aerial Photograph dated 1979
- I.D. Pg. 52, Vol. II
- 13 89 Aerial Photograph dated 1986
- I.D. Pg. 52, Vol. II
- 14 90 Aerial Photograph
- I.D. Pg. 52, Vol. II
- 15 91 Aerial Photograph
- I.D. Pg. 52, Vol. II
- 16 92 Aerial Photograph dated 2009
- I.D. Pg. 52, Vol. II

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06-21-16
17 93 Aerial Photograph dated 2011
I.D. Pg. 52, Vol. II
18 94 Aerial Photograph dated 2013
I.D. Pg. 52, Vol. II
19
20 95 Transaction Detail by Account (Supporting
documentation for Plaintiff's Attorneys fees and
costs)
21 Proffer. Pg. 157, Vol. II; I.D. Pg. 158,
Vol. II
22
23 * Exhibit 83 was supplemented with Section
16-7-102. See Pg. 132 and Pg. 303, Vol. II.
24 * Exhibit 83 was supplemented with Section
16-8-103.B. See Pg. 141 and Pg. 303, Vol. II.
25

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9

1 KUHN - DRAKE (DIRECT EXAMINATION)
2 THE COURT: Good morning. We're back
3 in 13-CP-07-2066, and, Mr. Kuhn, I think
4 it's still your case.
5 MR. KUHN: May it please the court,
6 Your Honor, I'd call Tim Drake.
7 TIMOTHY M. DRAKE,
8 having been produced and first duly sworn as a
9 witness, testified as follows:
10 DIRECT EXAMINATION
11 BY MR. KUHN:
12 Q Could you state your full name, please,
13 sir.
14 A Timothy Maxwell Drake.
15 Q Mr. Drake, are you employed?
16 A I am.
17 Q By whom are you employed?
18 A By The Greenery, Incorporated.
19 Q What is the business of The Greenery,
Page 8

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06-21-16

20 Incorporated?

21 A Landscape.

22 Q And for how long have you been employed
23 by The Greenery?

24 A About a year and-a-half, a little more.

25 Q What is your position there?

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10

1 KUHN - DRAKE (DIRECT EXAMINATION)

2 A I am the enhancement designer and a --
3 what we call a business developer. I respond to
4 maintenance quotes and enhancement requests.

5 Q Okay. Do you, as part of that, give
6 estimates for projects?

7 A Of course.

8 Q And for how long have you been employed
9 in that business?

10 A In -- in Hilton Head, I've been here
11 since '92, and I've been doing the same thing.

12 Q In the course of your employment, have
13 you come to know Kumar Viswanathan?

14 A I have.

15 Q And how do you know him?

16 A He's a -- the owner of a commercial
17 property that we maintain, and we also do his
18 residential landscape at his home.

19 Q Did he ask you to meet with him at his
20 business, the old Sea Pines Welcome Center by
21 the Sea Pines Traffic Circle?

06-21-16

- 22 A He did.
23 Q And did you meet him there?
24 A I did.
25 Q And what was the purpose of that

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11

- 1 KUHN - DRAKE (DIRECT EXAMINATION)
2 meeting? What transpired?
3 A He had sent me an email describing an
4 issue that he was having with the Town of Hilton
5 Head, and he'd sent me a little site plan and
6 said that he would like to talk to me about
7 taking some hard surface and turning it into
8 some buffer landscaping that the Town was
9 requesting.
10 Q You have a notebook there in front of
11 you, and the notebook has tabs on it. Do you
12 see the tabs on the side?
13 A Yes.
14 Q If you would turn to Tab 74, please.
15 A 74.
16 Q Yes, sir.
17 A I got it.
18 Q Mine are numbered differently,
19 apparently.
20 MR. PATTERSON: It's number 74.
21 MR. KUHN: 74, that's correct.
22 BY MR. KUHN:
23 Q I'll just represent to you, this is a
24 plat of the property owned by Mr. Viswanathan,

06-21-16

25 just to get you oriented.

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12

1 KUHN - DRAKE (DIRECT EXAMINATION)

2 A Yes.

3 Q The Sea Pines Traffic Circle is here,
4 Palmetto Bay here, Greenwood Drive here. Here
5 is Mr. Viswanathan's building, here is the
6 Chevron gas station, back here is the shopping
7 center.

8 what is in red here is what we've
9 called an encroachment. Is that what he asked
10 you to look at?

11 A That's actually -- this is the same
12 document that he had emailed me.

13 Q And what did he ask you to do, to give
14 him or to do with respect to that area?

15 A Well, we met over there. He said that
16 the Town was asking him to take out the asphalt
17 in the noted area there and that we were going
18 to have to turn it into buffer vegetation, which
19 is something that, you know, we do all the time.

20 Q And if you would turn to the very next
21 exhibit, to 75. And do you recognize that
22 document?

23 A I do.

24 Q And what is that?

25 A That is the pricing for the work that

Theresa D. Saxon
Page 11

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1 KUHN - DRAKE (DIRECT EXAMINATION)
2 we discussed that would get him to, you know,
3 where he needed to be with the -- you know, what
4 the Town was requiring.

5 Q And in general, describe what that
6 covers, what you'd be doing.

7 A well, the labor portion, we would be
8 pulling up -- we would be cutting a line
9 basically on the property line of the existing
10 asphalt in the area that is the encroachment.

11 we would be removing the asphalt and
12 anything underneath the asphalt, you know, you
13 know, crush and run or, you know, any kind of
14 gravel. we would be disposing of that, putting
15 down topsoil, because we don't know what's under
16 there -- you need something to, you know,
17 promote plant growth -- and then planting the
18 area, basically like, you know, the Town is
19 asking, to put in some vegetation that, you
20 know, would be a -- what they call buffer, and
21 that's, you know, what the plant list is here,
22 irrigating those plants, obviously we can't put
23 in that many plants without providing water, and
24 then putting some kind of mulch down.

25 Q And the cost to do that would be how

1 KUHN - DRAKE (DIRECT EXAMINATION)

2 much?

3 A \$18,130.

4 Q And is that a liberal estimate,
5 conservative estimate, ballpark estimate?

6 A No. That's a -- we gave him a firm
7 estimate. You know, in our business, there's --
8 you know, it might take a little longer to pull
9 up the asphalt, and, you know, we might have to
10 put in a couple more plants. But we try to, you
11 know, get it pretty close. That's what I would
12 charge him for doing the work.

13 Q And has he received any sort of
14 discount because he's a customer, or do you ever
15 use existing structures on the site?

16 A There's a slight discount on the plant
17 materials because he is an existing customer. I
18 did include -- I gave you a document this
19 morning that sort of explained my pricing on the
20 job, a little bit of a discount on the
21 irrigation, because if someone else would be
22 doing this work, they would have to put in a
23 clock and find a water source and put in a back
24 flow and so on and so forth to irrigate the
25 plant materials. But we would be able to do

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15

1 PATTERSON - DRAKE (CROSS EXAMINATION)

2 this for him off his existing irrigation system

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3 at the Carolina Center, so we -- because he is
4 an existing customer, you know, there is a, you
5 know, slight discount on everything.

6 MR. KUHN: Very good. That's all the
7 questions I have. Please answer any
8 Mr. Patterson and Mr. Alford may have or His
9 Honor.

10 CROSS EXAMINATION

11 BY MR. PATTERSON:

12 Q Mr. Drake, my name is Russell
13 Patterson. I represent the Enmark Service
14 Station. How long have you lived on Hilton
15 Head?

16 A Since 1992.

17 Q Okay. So when you first came here, you
18 started working with The Greenery?

19 A No, sir. I worked for Ocean Woods
20 Landscape.

21 Q Okay. And where did you live when you
22 came to Hilton Head in '92?

23 A 60 Pope Avenue. I had an apartment.

24 Q All right. And did you ever use the
25 service station that was right next to this

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16

1 PATTERSON - DRAKE (CROSS EXAMINATION)

2 property that used to be Chevron, since you
3 lived on the south end?

4 A Oh, sure.

5 Q And did you have the occasion to -- do

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6 you know that there's a roadway that is in
7 existence, which this litigation is about?

8 A Yes, sir.

9 Q And had you occasion to use that?

10 A I've used it before, yes.

11 Q Right. And is it fair to say that
12 large number of other people on Hilton Head have
13 used that roadway over the years?

14 A I would assume so.

15 Q Okay. And the roadway is currently
16 paved?

17 A Yes, sir.

18 Q Asphalt?

19 A It's asphalt, yes.

20 Q If you'd look at Exhibit 44A.

21 A Yes.

22 Q And if you'll look at those four
23 photos. And I'll represent, I took those photos
24 on this Saturday.

25 A Okay.

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17

1 PATTERSON - DRAKE (CROSS EXAMINATION)

2 Q Are those accurate depictions of the
3 existing roadway where you were talking about
4 doing work?

5 A Yes, sir.

6 Q And looking at the first page, would
7 you agree with me that there are actually two

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8 layers of asphalt in that area?

9 A It appears so.

10 Q All right. And do you know when the
11 first layer of asphalt was placed?

12 A I have no idea.

13 Q Do you know what the second layer of
14 asphalt was placed?

15 A No, sir.

16 Q The times that you've used it since
17 1992, was it always paved?

18 A Yes, sir.

19 Q And the type of material, looking at
20 your estimate, which is Exhibit Number 75, let's
21 look at that for just a second. I want to
22 understand what you're anticipating planting.

23 As I read, that's 30 15-gallon wax leaf
24 Ligustrums?

25 A Yes, sir.

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18

1 PATTERSON - DRAKE (CROSS EXAMINATION)

2 Q And those are just small, little
3 bushes?

4 A Well, they're actually 6 to 7-foot
5 shrubs, yeah.

6 Q All right. And then you've got 15
7 15-gallon wax myrtles?

8 A Yes.

9 Q Three 15-gallon crepe myrtles?

10 A Yes.

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- 11 Q 21 seven-gallon azaleas?
12 A Yes.
13 Q 14 different types of 7-gallon
14 Ligustrum?
15 A Correct.
16 Q And nine of variegated 3-gallon
17 ginger --
18 A Yes, sir.
19 Q -- which are very small?
20 A Yes, sir.
21 Q Would it be your opinion that any of
22 those materials would be able to stop a vehicle
23 traveling at a high rate of speed?
24 MR. KUHN: I object. That's not in his
25 qualifications, unless he feels he's

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19

- 1 ALFORD - DRAKE (CROSS EXAMINATION)
2 qualified to answer that.
3 THE COURT: Sustained.
4 BY MR. PATTERSON:
5 Q You weren't planting any large oak
6 trees or anything of a substantial character?
7 A No. Honestly, there are power lines in
8 that area, and we wouldn't be -- I don't believe
9 the Town would let us put any trees underneath
10 the power lines.
11 MR. PATTERSON: Okay. I don't have any
12 other questions. Mr. Alford may have some.

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CROSS EXAMINATION

13

14 BY MR. ALFORD:

15 Q Good morning, sir. I'm back here. How
16 are you doing?

17 A Good morning.

18 Q My name is Greg Alford. I represent
19 the Town Hilton Head Island. Good morning.
20 Obviously, you deal with the Town a lot; is that
21 fair?

22 A Yes, sir.

23 Q Did you consult with anyone at the Town
24 about this particular plan?

25 A I did not. I did read an email that

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1 ALFORD - DRAKE (CROSS EXAMINATION)

2 was forwarded to me regarding the requirements,
3 you know, the standard buffer vegetation, you
4 know.

5 Q In other words, in your job, you do the
6 -- I mean, you kind of know what the
7 requirements are and what's right and what's
8 not?

9 A That's correct. And generally, you
10 know, we'll put something together, get approval
11 from the Town before plant materials are ordered
12 and installed.

13 Q Yes, sir. In this particular case,
14 though, when you said you reviewed an email, was
15 it old, new, recent? Was it in response to a

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16 request that you made?
17 A I don't remember.
18 Q Okay.
19 A It was something that Kumar had
20 forwarded to me and said, you know, "This is
21 kind of what they're asking me to do."
22 And it was basically the standard list
23 that I get every time, you know,
24 "These are the acceptable --"
25 Q And, sir, is it fair to say you deal

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21

1 ALFORD - DRAKE (CROSS EXAMINATION)
2 with the Town quite a bit in your job?
3 A Sure.
4 Q Because you know what the requirements
5 are --
6 A Yeah.
7 Q -- dealing with buffers and all that
8 stuff?
9 A Correct. Yeah. And it wasn't just my
10 job with The Greenery, but in other landscape
11 capacities and companies, I -- you know, I had
12 dealt with buffer issues.
13 Q So in your experience, would you say
14 that the Town is fairly diligent in enforcing
15 its requirements?
16 A Absolutely. Yeah.
17 Q In fact, can you think of a time

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18 when -- I need to be careful since they're my
19 client and I don't want to make them mad at me,
20 but they're not always so easy to deal with in
21 making sure that you meet their requirements?
22 Answer it if you can. It was a bad question.

23 A Yeah. Oh, no, no.

24 Let me put it to you this way. In the
25 last three or four years, it's been much easier

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22

1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 to deal with the Town.

3 Q Okay. Having said that, they don't --
4 I mean, if there's a requirement, they enforce
5 it on you?

6 A Correct.

7 MR. ALFORD: Okay. Thank you, sir, I
8 have nothing further.

9 THE COURT: Mr. Kuhn?

10 MR. KUHN: No further questions, Your
11 Honor. I'm sorry.

12 May this witness be excused.

13 THE COURT: Yes. Thank you so much,
14 sir.

15 MR. KUHN: My next witness,
16 Mr. Coltrane, Your Honor, he's waiting
17 outside.

18 CURTIS L. COLTRANE,
19 having been produced and first duly sworn as a
20 witness, testified as follows:

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21 DIRECT EXAMINATION

22 BY MR. KUHN:

23 Q Would you state your name, please, sir.

24 A Curtis Lee Coltrane.

25 Q And are you employed?

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 A Yes.

3 Q By whom are you employed?

4 A I'm self-employed. I've always
5 considered that to be unemployed, but, yes, I
6 rent a law firm.

7 Q Very good. And are you a lawyer?

8 A Yes, sir.

9 Q And when were you admitted to the bar?

10 A In Virginia in 1981, South Carolina in
11 1982.

12 Q And have you been continuously involved
13 in the practice of law since that time?

14 A No.

15 Q And with what hiatuses?

16 A In 2003 I left the practice of law to
17 become the Master-in-Equity for Beaufort County,
18 South Carolina. In 2007 I left the office of
19 the Master-in-Equity and became the Assistant
20 Town Manager for Community Development for the
21 Town of Hilton Head Island, South Carolina. And
22 in September of 2010, I returned to the

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23 full-time practice of law.
24 Q And let's back up a little bit. When
25 did you arrive on Hilton Head Island?

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 A June of 1981.
3 Q And you've been in -- when did you
4 start practicing law on Hilton Head Island?
5 A In April of 1982. I served as a law
6 clerk in the office of Herring and Meyer from
7 June of 1981 to April of 1982, when I was
8 admitted to the South Carolina Bar.
9 Q Okay, very good. And did you return to
10 work with Mr. Herring?
11 A Yes.
12 Q If you'd just take us through the
13 scenario chronologically.
14 A From 1981 to 1989, I was involved with
15 a law firm variously known as Herring, Meyer and
16 Palmer; Herring and Meyer; and Herring, Meyer
17 and Coltrane.
18 In January of 1989, I moved to a law
19 firm that was variously known as Gray, Griffis,
20 Wilson and Coltrane, and ultimately Wilson and
21 Coltrane.
22 In 1995 I opened my own firm just under
23 my name, which continued until '98, '99, at
24 which point it became Coltrane, Alford and
25 Wilkins.

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25

1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 In 2003 I became the Master-in-Equity.

3 In 2010 when I returned to the practice
4 of law, it was in an entity known as Coltrane --
5 Alford, Wilkins and -- Alford, Wilkins and
6 Coltrane; and then, beginning in 2013, Coltrane
7 and Wilkins. Sounds like I can't keep a job.

8 Q And all of these law practices have
9 been in the Hilton Head Island area?

10 A Yes.

11 Q You served as Master-in-Equity, that
12 was for the Beaufort County Master-in-Equity,
13 2003 to 2007?

14 A Yes.

15 Q And then after that, you went to work
16 for the Town of Hilton Head Island?

17 A Yes.

18 Q And what was your position there?

19 A I was the Assistant Town Manager in
20 charge of Community Development.

21 And in that post, I oversaw the Town's
22 Land Acquisition Program and also the Community
23 Development Department, which was the zoning and
24 permitting arm of the Town of Hilton Head
25 Island.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 Q And did that involve in any way the
3 Land Management Ordinance of Hilton Head Island?

4 A Yes. I oversaw the department charged
5 with the implementation of the Land Management
6 Ordinance.

7 Q And is that the department in which the
8 Land Management Ordinance official would have
9 worked?

10 A Yes.

11 Q So you had overseen the LMO official?

12 A Yes.

13 Q Very good. Were you involved with any
14 of the permitting under the LMO or LMO issues
15 while you served in that capacity?

16 A Not as a direct actor. Those people
17 served under me.

18 Q Are you familiar with the Land
19 Management Ordinance for Hilton Head Island?

20 A Yes.

21 Q Have you had any recent involvement
22 with the actual drafting of the LMO?

23 A Yes. I was engaged as a consultant
24 with the Town of Hilton Head Island in January
25 of 2014 and assisted in the drafting of the

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

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2 current version of the Land Management
3 Ordinance, which was adopted the first part of
4 October 2014.

5 Q Backing up to the 1985 time frame, at
6 that time Jim Herring was the Town Attorney for
7 the Town of Hilton Head Island?

8 A He was.

9 Q And he served from '85 to '89; is that
10 correct?

11 A Yes.

12 Q Did you have any involvement assisting
13 him while he was Town Attorney?

14 A I did. I represented the Town in
15 zoning matters in Circuit Court, an appeal or
16 two in matters related to zoning and permitting
17 matters. Yes.

18 Q And then you became the Town Attorney
19 for the Town of Hilton Head Island in June of
20 1989; is that correct?

21 A Yes.

22 Q And what involvement, if any, would you
23 have had with the Land Management Ordinance when
24 you served as Town Attorney?

25 A I handled all of the appeals that came

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 from either the Board of Zoning Appeals or the
3 Planning Commission to Circuit Court. I

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4 assisted in various revisions of the Land
5 Management Ordinance between, really, 1989
6 through 1998. I assisted in the drafting of the
7 1998 version.

8 And I represented the Town also on
9 occasion before its own administrative bodies,
10 being either the Planning Commission or the
11 Board of Zoning Appeals..

12 Q As a result of your experience, have
13 you become familiar with the application of the
14 Land Management Ordinance?

15 A Yes.

16 Q And as a result of your experience,
17 have you become familiar with and acquired
18 expertise with respect to the practices and
19 procedures set forth in the Land Management
20 Ordinance?

21 A I believe that I have.

22 Q Okay. As a result of your experience,
23 have you become familiar with and acquired
24 expertise regarding the scope of the LMO
25 official's duties and responsibilities?

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 A Yes.

3 Q And as a result of your experience,
4 have you become familiar with and acquired
5 expertise with regard to the LMO's requirements?

6 A Yes.

06-21-16

7 Q And as a result of your experience,
8 have you been familiar with and acquired
9 expertise with respect to the Town of Hilton
10 Head Island's application, interpretation and
11 enforcement of the LMO?

12 A Yes.

13 MR. KUHN: Your Honor, I would proffer
14 Mr. Coltrane as an expert in those fields.

15 MR. PATTERSON: Your Honor, I would
16 object on several grounds. Basically, what
17 they're trying to do is to take a paid
18 expert and try to tell you the final
19 determination of the law, how to interpret
20 the law.

21 The LMO is the Town's law on
22 development, and it's like the South
23 Carolina Code. And that's like me bringing
24 in another lawyer and trying to tell you,
25 Judge Dukes, how to apply the elements of

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 prescriptive easement, because I've got a
3 lawyer that's done a lot of prescriptive
4 easement cases and has got a lot of
5 experience, so he's an expert on
6 prescriptive easements.

7 And the South Carolina Code of Laws
8 that apply to it, there's no way in the

06-21-16

9 world such a person would ever be allowed to
10 testify in any court.

11 The LMO is just like the Town
12 ordinance, it is the Town ordinance, it's a
13 law, we have copies of it that are part of
14 the record. It's up to you, the court, to
15 interpret what those provisions mean and
16 say, and it's inappropriate to have somebody
17 tell you what the law means, and so I would
18 object on those grounds.

19 THE COURT: Mr. Alford?

20 MR. ALFORD: And, Your Honor, with
21 obvious respect for Mr. Coltrane, and I do
22 acknowledge that he's probably an expert in
23 every bit of that.

24 Having said that, I think under the
25 case of Dawkins v. Fields, which is 354 S.C.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 58, 580 S.E.2d 433, a 2003 case, that it
3 would be entirely inappropriate for
4 Mr. Coltrane to share his wisdom with us on
5 how the LMO should be enforced or what
6 prescriptive easements are or aren't or
7 anything of that nature.
8 And while one day I'd like to hear his
9 thoughts on it, I respectfully submit this
10 isn't the appropriate time and place, based
11 on the law.

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12 THE COURT: Now, the questions haven't
13 actually been asked yet. I mean, the idea
14 is that Mr. Coltrane is an expert on the
15 LMO, and I suppose there are certainly
16 questions that could be asked that have to
17 do with objective observations having to do
18 with this. But, Mr. Kuhn, are you going to
19 ask him for subjective opinions of whether
20 or not something meets the LMO?

21 MR. KUHN: I am going to ask him if the
22 encroachment violates the LMO and if the --
23 and what the procedure is, and if Teri
24 Lewis' letter is an LMO official
25 determination subject to appeal.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 THE COURT: But, I mean, are those
3 questions going to require an answer that
4 goes outside that which he can simply point
5 to? Paragraph 3C says that the
6 determination follows these rules, the
7 evidence indicates it did or didn't follow
8 these rules, I mean, is that . . .

9 I think the objections have some merit
10 if the idea is the answers would be "in my
11 opinion as an expert." Of course, I guess
12 that's usually why you use an expert anyway.
13 But I suppose an expert could be used in a

06-21-16

14 very complicated document to point the
15 finder of fact towards objective facts as to
16 what happened and what this says, and that
17 might be helpful, and maybe that's not even
18 objected to. I don't know.

19 But I get it, y'all are concerned about
20 an opinion, and I think you're probably
21 right. Unfortunately it's my burden, not
22 Mr. Coltrane's, who certainly knows a heck
23 of a lot more about the LMO than I'll ever
24 know, but --

25 MR. ALFORD: Or want to know.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 THE COURT: Or want to know. Exactly.

3 MR. ALFORD: Your Honor, if I may, you
4 know, we've obtained some guidance as to
5 what Mr. Coltrane's testimony might be based
6 on an Affidavit he filed earlier in this
7 matter. And we of course filed a motion to
8 strike that Affidavit. And it's -- I mean,
9 it's pretty much, down the line, an
10 interpretation of the LMO, and it's how the
11 encroachment and how the enforcement
12 processes violate the LMO. I mean, it's
13 conclusions of law. And I think I joked at
14 the time that if you really wanted to make
15 this case easy, and I hope you don't, but
16 that you would just strike the word

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17 "Affidavit" and put "Order" and then just
18 sign it and this would be over.

19 And so, understanding that the
20 questions haven't been asked yet and
21 respecting that, rather than interrupting
22 every time, I'd just make a standing
23 objection, unless it gets -- if the court
24 would accept that. I know the rules
25 sometimes are a little back and forth on

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 standing objections.

3 MR. PATTERSON: Right, Your Honor, but
4 we don't need to go there. I mean, Mr. Kuhn
5 has already said he's going to use the
6 witness for exactly what you said is
7 inappropriate, so I don't see why we need to
8 go through the exercise.

9 The only reason Mr. Coltrane is here is
10 to say that the roadway is a violation of
11 the LMO and what Teri Lewis -- and he's
12 going to talk about what Teri Lewis, the
13 head of the LMO, did or didn't do and
14 whether there's an appeal. So he's applying
15 the facts, making subjective opinions of the
16 facts and then applying his interpretation
17 of the law, and that's your job.

18 THE COURT: How about all that,

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19 Mr. Kuhn? Are there other things that
20 Mr. Coltrane would be a witness to?
21 MR. KUHN: Yes, sir, Your Honor. And I
22 would note first of all, this is non jury.
23 So if I ask him, "what does this statute
24 say," obviously, you can look at the
25 statutes and draw your own conclusion.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 That's overstepping your bounds, what is the
3 law.
4 But if I ask him, "How does the Town
5 interpret, apply and enforce the LMO, what
6 are the procedures, who are these people,
7 what are their duties," I think that's
8 proper expert testimony.
9 THE COURT: Well, I don't even know if
10 it's expert testimony.
11 MR. KUHN: The LMO has been through,
12 you know, several revisions, several
13 changes. He'd submit how it's interpreted.
14 It's not a model of clarity. There is some
15 vagueness in it. I think he can -- has
16 expertise that can shed light on those
17 things.
18 THE COURT: I think if he stayed away
19 from opinion.
20 "How is this interpreted?" "Well, I
21 can't tell you how it's interpreted, but I

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22 can tell you what has happened on these
23 three specific instances that I'm familiar
24 with in the past." I mean, that wouldn't be
25 an opinion so much. That would be an actual

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 factual testimony about how the LMO is
3 applied.
4 MR. KUHN: But I think he can give
5 guidance to the court, in that if presented
6 with this situation, this is the section of
7 the LMO that you look at --
8 THE COURT: Oh, I don't even know if
9 y'all would object to that.
10 MR. KUHN: -- so that you don't have to
11 -- where is it -- it's huge.
12 MR. PATTERSON: If that's all he's
13 going to say is, "If you have this
14 situation," yes.
15 But he's got stop there. He can't say,
16 "And here's how the determination should be
17 made under these facts with this roadway."
18 Or, "What Teri Lewis did in this case --"
19 He can't talk about anything about what
20 happened in this case or what should happen
21 in this case.
22 MR. KUHN: It's almost impossible to do
23 that without applying these facts to those

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24 things. But I think Your Honor can take
25 that and say, "All right, that's where

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 he's -- he says this, but I have to --
3 that's my -- that's my job."

4 MR. PATTERSON: No. No, sir. He can't
5 do that.

6 That's telling you how to interpret
7 South Carolina code and say, "Under these
8 facts, judge, this is what you should do,
9 under the -- Statute Elizabeth or whatever
10 the --"

11 THE COURT: I think there's a good bit
12 Mr. Coltrane could enlighten me on as to --
13 I wouldn't even know where to start in the
14 LMO to figure this out, so, you know, I
15 think that's probably going to be helpful.

16 If the testimony gets into, "And here's
17 how you ought to rule because the law says
18 it this way," yeah, I mean, I can understand
19 the objection and agree with you. But I
20 don't -- I think there's probably a lot to
21 tell.

22 MR. KUHN: I'm trying to think of
23 something. Yeah, I'm not going to ask --

24 In his Affidavit, for example, he goes
25 into stuff on prescriptive easement. And, I

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 agree, that's getting into, "This is what
3 the law is, Your Honor."

4 I'm not going to do that. I'm going to
5 go through the LMO, the facts of this case,
6 what sections apply, that type thing.

7 MR. PATTERSON: But in his Affidavit,
8 he did conclude -- he did make conclusions.

9 THE COURT: Oh, I know, but the
10 Affidavit, we're not -- we're talking about
11 the testimony separate from the Affidavit.

12 MR. PATTERSON: Right. Yes, sir.

13 THE COURT: Okay.

14 MR. PATTERSON: That's fine. And I
15 guess we'll just -- once we think he's going
16 over that line, if you don't stop it,
17 we'll just make --

18 THE COURT: We'll just deal with it
19 case by case.

20 MR. KUHN: Or if they want a running
21 objection, whatever, I have no --

22 THE COURT: Well, we probably need to
23 make them specific for the record, because
24 otherwise we'll never be able to sort it out
25 or an Appeals Court never would.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 MR. PATTERSON: If I can address one
3 other thing.

4 Mr. Kuhn, I've attached what I thought
5 were the appropriate versions of the old LMO
6 and the new LMO. But are y'all planning to
7 put in whatever -- I tried to cite
8 everything Mr. Coltrane had in his Affidavit
9 in anticipation. But right now in the
10 notebook, the only part of the LMO we have
11 is Exhibit 83.

12 Do y'all have an extra set of whatever
13 Mr. Coltrane is going to be referring to? I
14 guess I'm not trying to help you put up your
15 case, but I do know Mr. Coltrane is going to
16 cite to a bunch of provisions, and I don't
17 know that the judge is going to have what
18 he's citing.

19 MR. KUHN: It's actually a good time to
20 take that up.

21 I was just going to ask Your Honor to
22 take judicial notice of the LMO. And the
23 sections that we've got into evidence I
24 think are the relevant ones, but if it turns
25 out there are other sections that turn out

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 to be relevant, we'll just put those in at
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3 the appropriate time before the case is
4 over.

5 MR. PATTERSON: I just want to make
6 sure we get to the court the LMO.

7 Because you don't have any way of
8 getting the LMO.

9 THE COURT: No, I mean, not unless
10 y'all make it an exhibit.

11 MR. KUHN: And I don't think we need to
12 put the whole thing in, because it's huge.
13 So if there are sections in here that
14 Mr. Coltrane references that are different,
15 then we can just supplement those before we
16 close the record.

17 MR. PATTERSON: Okay.

18 MR. KUHN: I think they're all in here,
19 but I just don't know.

20 THE COURT: Just out of curiosity, is
21 the purpose of this testimony that it
22 doesn't matter if there's an easement or
23 not, the city isn't going to let you use it?

24 MR. KUHN: That's sort of putting that
25 cart ahead of the horse, but --

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 THE COURT: I mean, I don't want to
3 ruin the Perry Mason moment, but --

4 MR. KUHN: It's no big Perry Mason

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5 moment. Yes, Your Honor, our theory is that
6 even if there is an easement, written,
7 signed easement, sealed in blood, that they
8 signed yesterday, in front of a hundred
9 notaries, that it violates the LMO and it's
10 got to be ripped up and torn, if Kumar says,
11 "I love it, I want it," it violates the LMO.

12 THE COURT: Okay. All right. I just
13 want to make sure what the -- so, okay.

14 MR. KUHN: And, of course, conversely,
15 also, that under the prescriptive easement
16 theory, an illegal encroachment can never
17 ripen into a prescriptive easement even if
18 you meet all the elements.

19 MR. PATTERSON: And that's where we
20 don't have any case law, so you'd be on
21 establishing a new nationwide precedent.

22 THE COURT: All right. Well, thank you
23 then. All right, so back to the issue.

24 I think Mr. Coltrane is an expert in
25 this, but we'll proceed with the questions

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 within the parameters that we previously
3 discussed, trying to avoid subjective
4 opinions in favor of objective observations.
5 So go ahead, please, Mr. Kuhn.

6 BY MR. KUHN:

7 Q In formulating opinions in this case,

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8 what have you reviewed?

9 A I reviewed the -- what I believed
10 anyway to be the applicable terms of mainly the
11 1998 Land Management Ordinance, primarily
12 because that was what was in effect when the
13 lawsuit was begun and when most of the actions
14 that appear to be relevant here took place.

15 I reviewed the depositions of a
16 Ms. Alice Means, a Jim Scott Middleton and
17 another fellow whose name escapes me right this
18 second.

19 Q Robert Houstoun Demery?

20 A Well, yes, Mr. Demery.

21 I reviewed the permitting files for the
22 Chevron/Enmark station on Palmetto Bay Road by
23 both the County and the Town of Hilton Head
24 Island.

25 I reviewed the correspondence by and

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2 between the lawyers for the various owners and
3 the current participants in this lawsuit and by
4 various owners going back to materials related
5 to the original permitting by Chevron.

6 I reviewed the Order that was issued
7 when Chevron challenged its inability to have
8 two curb-cuts on Palmetto Bay Road.

9 I reviewed, there were a number of

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10 plats that were bits and pieces of the title
11 work, not the complete title work.

12 I saw a number, seven or eight, aerial
13 photographs of the area in question, and the
14 drawings of the whole area that is involved
15 here, meaning an area defined by Palmetto Bay
16 Road, by Greenwood Drive, the parking lot of
17 the -- currently the Staples parking lot, and
18 the strip owned by the owner of the -- it was a
19 Japanese steakhouse at one point. I'm not sure
20 what it is today. I don't pay much attention to
21 it.

22 Q Did you also review the deposition of
23 Teri Lewis, Theresa Lewis?

24 A Oh, I'm sorry, yes, I did. I don't
25 have a copy of that. I did review Ms. Lewis'

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 deposition.

3 And actually, I've also seen the --
4 seen the property on the ground. I went and
5 looked at it.

6 Q Very good. And just to be clear, the
7 Town of Hilton Head has a permitting file on
8 this property, and Beaufort County has a
9 permitting file on this property, and you
10 reviewed both of those?

11 A Yes. The permitting started prior to
12 the Town taking over, permitting activity within

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13 the confines of the Town.

14 Q And the Town of Hilton Head was created
15 when?

16 A It was organized in 1983.

17 Q And the LMO was first enacted when?

18 A January of 1987.

19 Q Between 1983 when the Town was
20 incorporated or created and 1987 when the Town
21 enacted the Land Management Ordinance, how was
22 development within the Town of Hilton Head
23 controlled?

24 A It operated under a document known as
25 the Development Standards Ordinance that was

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 largely the same as the Beaufort County
3 Development Standards Ordinance.

4 Q And what is the LMO?

5 A The Land Management Ordinance is a
6 zoning ordinance for all land lying within the
7 boundaries of the Town of Hilton Head Island.

8 Q And does it regulate the development
9 and redevelopment of real property within the
10 Town.

11 A Yes.

12 Q And it first came into effect you said
13 in 1987. Has it been amended at all since then?

14 A Yes. There have been -- bits and

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15 pieces of it get amended at various times.
16 There was a major amendment to it in
17 1998. Again, there were various amendments that
18 went along. As you find problems in any
19 ordinance of this complexity, things pop up that
20 show you that you need to address something, and
21 so when that happens, it gets amended.

22 And then there was an overall rewrite
23 in 2014, which resulted in all of the 1998
24 version being repealed, with the exception of
25 the chapter related to traffic impact fees and

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 being replaced with a wholly new ordinance. By
3 "wholly new," that's a little more dramatic than
4 it actually is. Most of what was happening in
5 the 1998 version continues on now. Some of the
6 administrative procedures and things like that
7 have changed, but . . .

8 Q Were there any material amendments to
9 the LMO of which you're aware that affect the
10 facts of this case, any changes in the LMO that
11 were significant?

12 MR. ALFORD: I'm going to interpose an
13 objection, Your Honor, based on the fact
14 that when it's applied to the facts of this
15 case, it becomes outside the parameter of
16 the testimony that he can put forth in this
17 court.

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18 MR. PATTERSON: I'll also object.
19 THE COURT: You're saying the word
20 "material" requires an opinion.
21 MR. ALFORD: No, sir. I'm saying that
22 when he puts it in "as applied to the facts
23 of this case," he's asking for the witness'
24 opinion --
25 THE COURT: Okay, sustained then.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 MR. ALFORD: -- as an application.
3 Thank you.
4 BY MR. KUHN:
5 Q why is the LMO applicable to this case?
6 MR. ALFORD: Same objection.
7 MR. PATTERSON: Same objection.
8 THE COURT: why is the LMO applicable
9 to this case, yeah, I can see that being
10 objectionable. I can think of a couple
11 other ways to get to where you're trying to
12 go.
13 MR. KUHN: Let me lead.
14 BY MR. KUHN:
15 Q Does the encroachment and the property
16 surrounding the encroachment lie within the Town
17 of Hilton Head Island?
18 A Yes.
19 Q would you describe the encroachment,

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20 please. And if it helps, there's a color plat,
21 Exhibit 74.

22 A The property owned by currently Enmark
23 and the property owned by Carolina Building
24 Center have a common boundary. And the
25 encroachment begins along that common boundary,

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 runs parallel to the common boundary to a point
3 where it crosses onto the property owned by the
4 owner of the Japanese steakhouse restaurant.

5 Q Is it possible to go from the Enmark
6 gas station -- if you exit the Enmark gas
7 station and enter onto the encroachment, is it
8 possible to access a public roadway without
9 traversing over third parties' properties?

10 A No. The encroachment does not have a
11 terminus on any public roadway.

12 Q So to get -- the two closest public
13 roadways are Palmetto Bay and Greenwood Drive?

14 A Yes.

15 Q And to get to either one of those, you
16 have to traverse over somebody else's property?

17 A Well, to get to Palmetto Bay Road, you
18 traverse over the property of Enmark. But to
19 get to Greenwood Drive, you have to traverse
20 over the property of the owner of the Japanese
21 steakhouse and the owner of the Staples shopping
22 center property.

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- 23 Q Just to expand on that, the Enmark
24 property has direct access to Palmetto Bay Road?
25 A Yes.

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- 1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 Q So this encroachment is not necessary
3 to acquire access to a public road?
4 A No. The Enmark property fronts on
5 Palmetto Bay Road and has two curb-cuts.
6 Q If you would look at Exhibit 2.
7 A I have it.
8 Q This is the deed in March 1974 where
9 Sea Pines Plantation Company sold the property
10 on which the Enmark gas station is now located
11 to the Chevron Oil Company. And it references a
12 plat in Plat Book 22 at Page 47. Do you see
13 that as being the property?
14 A Yes.
15 Q If you'd turn to Tab 18.
16 A I have it.
17 Q That is the plat. At that time, was
18 this property improved or unimproved?
19 A No improvements are shown on the plat.
20 Q If you look at the next exhibit in
21 line, Exhibit 19, which is a plat at Plat Book
22 22, Page 85; a little bit later in time, that
23 situation still exists, no improvements shown on
24 the standard -- what's marked the "Standard Oil

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25 Company of Kentucky" property; is that correct?

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 A I see no improvements shown on the
3 property labeled "standard oil of Kentucky."

4 Q You indicate you also looked at some
5 aerial photographs; is that correct?

6 A Yes.

7 MR. KUHN: Your Honor, these are just
8 too big for the book. They are Exhibit 44.

9 May I approach, Your Honor, since we
10 don't have copies of this?

11 THE COURT: Yes, please.

12 MR. PATTERSON: Your Honor, and I also
13 call your attention, most if not all of the
14 exhibits he has, we have smaller exhibits
15 of, from Exhibits 30 to 41. He's just got
16 oversized ones.

17 THE COURT: Okay, great. Thank you.

18 BY MR. KUHN:

19 Q Mr. Coltrane is showing you the first
20 part of Exhibit 44, I believe it was, the '72
21 aerial photograph.

22 A I don't think that's Exhibit 44. In my
23 book, Exhibit 44 is --

24 Q Oops, I'm sorry.

25 A -- is a -- is a later one.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 MR. PATTERSON: I didn't
3 put the earlier ones that didn't have
4 anything on there, so if that one's not in
5 the book . . .

6 MR. KUHN: Okay. Could we just mark
7 these separately then, whatever the next
8 exhibit in order is.

9 MR. PATTERSON: Sure. If you have some
10 exhibit stickers, I'll put them on there.

11 That's Exhibit 87. What's the date of
12 that one?

13 MR. KUHN: '72. I guess we could mark
14 them all as Exhibit 87 -- they're all dated
15 different, or maybe we should just mark them
16 separately.

17 MR. PATTERSON: Why don't we mark them
18 separately.

19 THE COURT: What was the year on
20 Exhibit 88?

21 MR. KUHN: Exhibit 88 is the '79.
22 Exhibit 90 is '86.

23 THE COURT: Exhibit 90 is 1986, okay.
24 I'm trying not to mix the numbers up.

25 MR. PATTERSON: Exhibit 91 is what?

1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 MR. KUHN: 1995.

3 (Whereupon, Plaintiff's Exhibit
4 Numbers 87 through 90 were marked
5 for identification.)

6 BY MR. KUHN:

7 Q I'll try to just run through these
8 quickly. Orient His Honor on what we're looking
9 at here.

10 A Looking at what is marked as
11 Exhibit 87, to Your Honor's right, running sort
12 of perpendicular, is Palmetto Bay Road. The
13 Enmark property is the large square that I am
14 signifying here. The Carolina Building Center
15 property is the one with all the trees on it.

16 Q And the 1979 aerial photo, same layout?

17 A It's showing the same area. It does
18 now show construction of a building on the
19 Carolina Building Center property and
20 development of the MarketPlace shopping center.
21 This at that time would have been a Winn-Dixie
22 grocery store and the parking lot. Nothing
23 appears to be on the Enmark parcel.

24 Q The next, 1986, Exhibit 89?

25 A Exhibit 89 shows, again, same

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 orientation as the previous ones. The Enmark --
3 what was then a Chevron filling station and car-

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4 wash had now been built on what is the Enmark
5 property.

6 The Carolina Building Center property
7 still has the same structure, which at the time
8 was the Sea Pines Welcome Center. The
9 undeveloped stripe, which kind of runs in the
10 middle of this, is the parcel of property that's
11 owned by today the Japanese steakhouse owner.

12 And then again, on Your Honor's extreme
13 left is the former grocery -- this is 89 --

14 Q In 1986.

15 A -- the grocery store at Staples with
16 the parking lot of the Staples center.

17 Q If the encroachment existed at this
18 time, where is the area it would be in?

19 A Well, signifying with my fingers, about
20 there to about there, meaning from maybe halfway
21 through the east, west boundary of the Enmark
22 property to the western boundary of the Japanese
23 steakhouse, thereabouts.

24 Q Juxtapose something like that, just to
25 give you an idea, we can look at Exhibit 74,

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 compare it. Is that sort of a fair comparison
3 of the layout?

4 A I can't speak to the scale exactly,
5 but . . .

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6 Q Roughly.

7 A The orientation of the properties is
8 the same.

9 Q So that's 1986. And then we go to
10 1995.

11 MR. PATTERSON: That's Exhibit 90?

12 BY MR. KUHN:

13 Q Exhibit 90.

14 A The material difference between
15 Exhibit 89 and this one is that it shows some
16 development in the Japanese steakhouse property,
17 meaning that it's been paved and parking stalls
18 have been painted on it.

19 The Enmark station and gas -- Enmark
20 filling station and car wash structure are the
21 same. The Sea Pines Welcome Center structure is
22 still the same, and no material changes to that
23 property either.

24 Q 1999.

25 MR. PATTERSON: Exhibit 91.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 A The material -- there's been some
3 additional development on the Sea Pines -- what
4 is the Carolina Building Center property.
5 There's now parking on the eastern part of that.
6 And there have been some additional buildings
7 built on the northern -- behind the old Welcome
8 Center property.

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9 The Staples parking lot has not changed
10 materially. The Japanese steakhouse stripe has
11 not changed materially.

12 The Enmark property has not changed
13 materially, although it does appear at this
14 point that you can see something in the area of
15 the easement. The photograph is not
16 particularly clear, so it's hard to define
17 exactly what it is, but there's certainly
18 something in that area..

19 Q That's 1999.

20 In 2009?

21 A This is a much clearer photograph. The
22 existence of the encroachment area is much more
23 easily seen here. There don't appear to be any
24 other material changes to either the Enmark, the
25 staples or the Japanese steakhouse property.

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1 KUHNS - COLTRANE (DIRECT EXAMINATION)

2 And with respect to the Enmark, the structures
3 and all that, they don't appear to have changed
4 either.

5 Q And if you'd just, so we're all clear,
6 would you point to His Honor where the
7 encroachment is shown on this photograph.

8 A It is from, well, really, maybe
9 three-quarters of the way across the east, west
10 boundary of the Enmark property, to the west,

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11 western boundary and not quite the western
12 boundary of the Japanese steakhouse that runs
13 sort of like a semicircle.

14 Q Let's up the date. The next is 2011.
15 MR. PATTERSON: Exhibit 93.

16 A No material change between Exhibit 93
17 and Exhibit 92 that I can see.

18 Q And then in 2013?
19 MR. PATTERSON: Exhibit 94.

20 A Yes. Again, no material change between
21 what is shown on Exhibit 94 and Exhibits 92 and
22 93.

23 Q Thank you very much.
24 Were you able to determine when the
25 construction of the improvements to the gas

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 station on what is now the Enmark tract was
3 completed?

4 A 1984 is my recollection from the
5 permitting file materials I looked at.

6 Q Referring to those permitting file
7 records, if you'd look at Tab 78.

8 A I have it.

9 Q Do you see how they're numbered at the
10 bottom right-hand corner?

11 A Yes.

12 Q If you'd turn to what is marked Page
13 1460.

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14 A I have it.

15 Q And what is that document?

16 A It is a Certificate of Occupancy issued
17 by Beaufort County for a property located at
18 Number 3, Palmetto Bay Road, on Hilton Head
19 Island. The owner is identified as Chevron USA,
20 Inc. Occupancy class is business. The date is
21 June 1, 1984.

22 Q And is that the Enmark station property
23 we're talking about?

24 A Yes.

25 Q Okay. As we just saw, the '86 aerial

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 photograph, which would have taken about two
3 years after that permit was issued, shows the
4 construction of those improvements in the
5 photographs; is that correct?

6 A Yes.

7 Q And the LMO was enacted approximately
8 three years after that time? Constructed in
9 '84, LMO passed in '87?

10 A Yes. Early -- well, January of '87, so
11 two and-a-half.

12 Q So at this time, Beaufort County --
13 that's why we see a Beaufort County C.O.; the
14 Beaufort County DSO is what was controlling?

15 A well, it was the Town of Hilton Head

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16 Island DSO, but the Town was utilizing Beaufort
17 County for some of the permitting early on, as
18 it didn't have the staff and facilities in place
19 to do it itself. And things that had commenced
20 prior to the organization of the Town continued
21 where they were.

22 Q If you would look to Tab 21, the plat
23 shown there.

24 A I have it.

25 Q And this plat shows the encroachment?

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 A Yes, on the northern side of the Sea
3 Pines -- of the property labeled "Sea Pines
4 Reception Center."

5 Q And this plat is -- the date is hard to
6 read, dated November 11th, 1989, recorded
7 March 9th, 1990. This is consistent with the
8 aerial photographs we just looked at? It's
9 impossible to read, you have to trust me on
10 that.

11 MR. PATTERSON: Your Honor, I think we
12 stipulated to those dates, that it was a
13 January 11th, 1989 plat.

14 THE WITNESS: Yes.

15 BY MR. KUHN:

16 Q Then if we look at the next plat, which
17 is Exhibit 22, that's done a year later. It's
18 almost the same layout; is that correct?

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19 A Yes.

20 Q In looking at the permitting files for
21 Beaufort County, did Chevron have any difficulty
22 obtaining a permit file, a permit?

23 A Didn't appear to have any difficulty
24 obtaining a permit.

25 Q But did they have to file suit?

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 A Well, they filed suit over access to
3 Palmetto Bay Road. The file reflects that
4 Chevron sought two curb-cuts onto Palmetto Bay
5 Road that was necessitated by the fact that,
6 number one, the property is very small; and
7 number two, fuel tank trucks are very large, and
8 there was no particularly easy way for a fuel
9 tanker to enter the property, fill the
10 underground tanks and then leave through a
11 single entrance. And the suit was founded on
12 the fact that there was but a single entrance to
13 this property.

14 Q If you will look at the -- if you'd
15 turn to Tab 78 of Beaufort County's permit file,
16 and then the small page number is 1473.

17 A I have it.

18 Q Is this the construction permit that
19 Chevron was able to obtain for their gas
20 station?

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- 21 A Yes.
- 22 Q And this was issued on January 27th,
- 23 1984?
- 24 A Yes.
- 25 Q And we know from the prior exhibit that

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- 1 KUHN - COLTRANE (DIRECT EXAMINATION)
- 2 they completed construction later that year.
- 3 A Yes, they got their C.O. in June of the
- 4 same year.
- 5 Q Okay. With respect to this permit, are
- 6 they allowed to make changes to what is
- 7 permitted without obtaining an additional
- 8 permit?
- 9 MR. ALFORD: Objection.
- 10 MR. PATTERSON: Same objection.
- 11 THE COURT: Is the question, can you
- 12 find that here in the documents somewhere,
- 13 or . . .
- 14 MR. KUHN: Those documents say -- they
- 15 say pointblank, "no alterations without
- 16 approval."
- 17 THE COURT: Yeah.
- 18 MR. KUHN: It's difficult to read,
- 19 but that's --
- 20 THE COURT: Yeah. I mean, overruled if
- 21 that's something he can point to it in the
- 22 document rather than if it's his opinion
- 23 whether or not changes can be made.

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24 THE WITNESS: The document does so
25 state.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 BY MR. KUHN:

3 Q And if you would turn to Page Number
4 1481 of that same exhibit.

5 A I have it.

6 Q What is this?

7 A This is an application for an
8 encroachment permit that was submitted by
9 Chevron USA, Inc., to the -- what was then known
10 as the South Carolina Department of Highways and
11 Public Transportation, seeking an encroachment
12 from the now Enmark property onto Palmetto Bay
13 Road, which is a state highway.

14 MR. KUHN: Okay. Your Honor, may the
15 witness approach?

16 THE COURT: Yes.

17 BY MR. KUHN:

18 Q The property shown, this is the gas
19 station property?

20 A Yes. This is the Enmark -- what is now
21 the Enmark property is what is described by this
22 plan.

23 Q And Palmetto Bay Road is where?

24 A Palmetto Bay Road is on the
25 northeastern side of the Enmark property,

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 looking at the plat on the bottom.

3 Q And Mr. Viswanathan's property would be
4 where?

5 A It is to the left of the Enmark
6 property in the location of where the
7 directional sign with the arrow with the "N" on
8 it is.

9 Q There is a solid line that starts on
10 Palmetto Bay Road, curves around, and doesn't
11 quite envelop all the property. Do you know
12 what that is?

13 A I believe a depiction of the curb, and
14 that being the interior. There's the exterior
15 boundary of the property that runs to the -- to
16 the circular dots that show the corners.

17 And then there's a solid line that
18 begins at Palmetto Bay Road and traverses the
19 entire boundary of the property but for the
20 proposed curb-cut onto Palmetto Bay Road.

21 Q Is there any curb-cut shown on this
22 application between the gas station property and
23 Mr. Viswanathan's property?

24 A No. On this drawing the only access
25 shown is the entry onto Palmetto Bay Road.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
 2 Q If you would turn to Exhibit 77.
 3 A There is no 77 in this book.
 4 MR. PATTERSON: That's the large one
 5 right here. We didn't put in the notebook.
 6 MR. KUHN: I was going to say, mine is
 7 gone too.
 8 MR. PATTERSON: I gave you a 77
 9 yesterday. Let me see where it is.
 10 MR. KUHN: So that it might be it right
 11 over there.
 12 MR. PATTERSON: Yeah.
 13 MR. KUHN: That's it. I didn't know
 14 that was mine.
 15 BY MR. KUHN:
 16 Q There's numbers on the bottom right,
 17 just like there are on 78.
 18 A I see them.
 19 Q If you would go to Page 1313 --
 20 THE COURT: This looks like a really
 21 large exhibit. Do we want to take a break
 22 before we launch into it?
 23 MR. ALFORD: I'd love a break.
 24 THE WITNESS: I'm all for it.
 25 THE COURT: We'll take a break for.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

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2 about five minutes.
3 Mr. Coltrane, as you well know, don't
4 discuss your testimony with anybody.
5 (Whereupon, a break was
6 taken.)
7 THE COURT: Back on the record.
8 Mr. Coltrane, you're still up, still under
9 oath.
10 BY MR. KUHN:
11 Q May it please the court, Your Honor.
12 Mr. Coltrane, if you would look at
13 Exhibit 77, which is the Town's permitting file.
14 A I have it.
15 Q Page 1313, I guess, would be a good
16 place to start. Do you see 1313, 14, 15, 16 and
17 17 are pieces of the plat. If you look at 16
18 and 17, do those appear to be -- side by side,
19 place them side by side, a photocopy of the same
20 plat?
21 A Yes.
22 Q And down at the bottom right of 1317,
23 do you see it's dated March 23rd, I guess, 1983?
24 Do you see that?
25 A On 1317?

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 MR. PATTERSON: That date right there.
3 THE WITNESS: Oh, oh, oh. Okay, yes, I
4 see that date.

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5 BY MR. KUHN:

6 Q And that's the date that it says
7 development recorded?

8 A Received development approval from the
9 Beaufort County Development Standards Ordinance.

10 Q And that's the same date we saw on the
11 permit we looked at earlier?

12 A Yes.

13 MR. KUHN: Your Honor, may we approach?

14 THE COURT: Yes.

15 BY MR. KUHN:

16 Q Earlier, we'd looked at the permit
17 plat, and it talked about I think it appeared to
18 be a curb that sort of wrapped around and then
19 ran between Mr. Viswanathan's property and the
20 gas station. Do you recall that?

21 A Yes.

22 Q On this plat, we actually have that
23 displayed. Does this say, "6-inch concrete curb
24 typical"?

25 A Yes. There's an indication on the

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 double line that runs mostly around the interior
3 boundary of the property labeled "6-inch
4 concrete curb." It fans out on the northeastern
5 -- as it approaches the northeastern corner in
6 the vicinity of a curb-cut onto Palmetto Bay

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7 Road.

8 Q If you'll give me just one second.

9 Referring to Exhibit 42, it's a
10 photograph of the area we talked about
11 yesterday. To get you oriented from yesterday's
12 testimony, this is the Enmark station here,
13 Mr. Viswanathan's property here, the
14 encroachment here leading towards the Staples
15 center.

16 A Yes, I see it.

17 Q There is a curb -- appears to be a
18 6-inch concrete curb, but then it is cut between
19 Mr. Viswanathan's property and the gas station.

20 Can you show His Honor where that
21 curb-cut would be, approximately, on Page 1316.

22 A Utilizing my two fingers, about right
23 there, which would mean near the southwest
24 corner of the property.

25 Q Thank you. When these permits are

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 issued, do they typically say that no changes
3 can be made or no alterations without further
4 approval?

5 A Yes.

6 Q And would adding the curb-cut be an
7 alteration that would require further approval?

8 MR. ALFORD: Objection.

9 MR. PATTERSON: Objection.

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10 THE COURT: Well, I tell you what, I'll
11 let him answer if he can point to in the LMO
12 a provision that indicates that rather than
13 his opinion.

14 BY MR. KUHN:

15 Q Can you do that?

16 A At the point in time that this
17 construction was approved, the Town operated
18 under the -- what was then the Development
19 Standards Ordinance.

20 In the existing Land Management
21 Ordinance or the one that was applicable when
22 this lawsuit commenced, which is the one I've
23 largely relied on, you can look at Section
24 16-1-105, which defines development. And
25 development is --

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 MR. PATTERSON: Your Honor, can I make
3 an objection?

4 THE COURT: Sure, go ahead.

5 MR. PATTERSON: I think we've
6 established or at least the plaintiff has
7 had this witness testify as to when the
8 roadway came into existence, and it was well
9 before the current LMO.

10 And the witness just testified that
11 when this was built, the Development

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12 standards Ordinance was applicable. So if
13 he wants to cite something, it needs to be
14 in the Development Standards Ordinance.

15 It doesn't really matter what the law
16 is today about what development is, it
17 matters what it was when that was built, and
18 he's not testifying to that.

19 THE COURT: Mr. Kuhn, how about that?

20 MR. KUHN: Your Honor, the permit
21 issued says, "no alterations without
22 approval." This plat cites that permit, and
23 it says you have to construct in accordance
24 with this.

25 THE COURT: Well, I'll tell what you,

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 I'll overrule it. I'll let him answer as to
3 what he could find.

4 THE WITNESS: What I would have said
5 was is that with respect to definition of
6 development, I don't believe that there was
7 a material difference between the two. It's
8 just broadly defined in 16-1-105.A1. I
9 won't read it unless you want me to, but
10 that's the reference.

11 BY MR. KUHN:

12 Q And that definition of development has
13 been consistent from day one?

14 A Yes.

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15 Q And day one being since at least since
16 1984 -- or '83?

17 A For all intents and purposes, yes. And
18 it was broadly defined in the DSO as well as the
19 LMO.

20 Q Did you find, in reviewing either the
21 County or the Town's permitting files, any
22 permit to add a curb-cut between the gas station
23 and Mr. Viswanathan's property, as depicted on
24 that photograph that's part of Exhibit 42?

25 A No.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 Q In reviewing the County and the Town's
3 permitting file, did you find any permit for
4 paving the encroachment?

5 A No.

6 Q Is paving something that would require
7 a permit under either or both of those
8 ordinances?

9 MR. PATTERSON: Your Honor, I would
10 object to him giving his opinion over the
11 exact issue of what we have. We have an
12 issue of a pavement. He's now being asked,
13 would paving of this roadway violate the
14 Ordinance. So that's --

15 THE COURT: Was the question this
16 roadway, or was the question does paving

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17 require a permit? If the question is does
18 paving require a permit, in general, I think
19 that's a permissible question. If you could
20 restate the question.

21 BY MR. KUHN:

22 Q That was the question. Is paving
23 something that would require a permit under
24 either the DSO from '83 to '87 and/or the LMO
25 from '87 forward?

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 A It would require a permit of some
3 description, depending on specifically what you
4 were doing.

5 Q okay. Did you find a permit of some
6 description for paving in either of the
7 permitting files?

8 A No.

9 Q Would repaving and adding speed bumps
10 require permitting?

11 MR. PATTERSON: Same objection, Your
12 Honor.

13 THE COURT: And again, please answer --
14 overruled, except please answer the question
15 generally as opposed to specifically with
16 regard to this property.

17 THE WITNESS: I do not believe that
18 maintenance of existing permitted
19 development would require a separate permit.

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20 But if the development was un-permitted in
21 the first place, then you would still need a
22 permit to do anything.

23 BY MR. KUHN:

24 Q To make sure I understand that, if
25 you're simply maintaining an already permitted

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 paved road, no new permit would be required?

3 A No.

4 Q But if you were repaving an already
5 paved road that has no permit, you would still
6 need a permit?

7 A Correct. It's still a violation
8 because there was never a permit.

9 Q What about if you add speed bumps, if
10 you go beyond the maintenance?

11 A Again, if it was existing permitted
12 development, I don't believe anyone would
13 require you to get a permit to put a speed bump
14 down.

15 Q So the crux is, was a permit obtained
16 to begin with?

17 A Yes.

18 Q And is there any way or can a paved
19 curb-cut road that is not permitted, is there
20 any way it can become a legal nonconformity?

21 A Well, you mean if I violated the

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22 Ordinance, and through the passage of time or
23 otherwise, it just becomes valid? No. The
24 LMO . . .

25 MR. ALFORD: I'm going to object to

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 that, Your Honor. Whether something becomes
3 legally valid over time . . .

4 THE COURT: Yeah. Why don't we see if
5 he can point to a provision in it rather
6 than an opinion.

7 MR. ALFORD: I have a high level of
8 confidence that he can.

9 THE COURT: All right.

10 THE WITNESS: Section 16-8-108,
11 Violations Continue. I mean, I can read it
12 for Your Honor, again, but effectively, it
13 says that if you're in violation, you're in
14 violation until you fix it.

15 THE COURT: All right.

16 BY MR. KUHN:

17 Q If you would, I guess, turn to
18 Exhibit 78, Page 1477.

19 A I have it.

20 Q This is a letter from Sea Pines
21 Plantation Company Architectural Review Board to
22 Chevron, November 8th, 1983, giving approval to
23 Chevron to construct improvements in accordance
24 with the plans they submitted. Do you see that?

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25 A Yes.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 Q Now, why is Sea Pines Plantation
3 Company Architectural Review Board involved in
4 this?

5 A The property that is today the Enmark
6 station is within properties covered by one or
7 more sets of declarations of restrictive
8 covenants filed by Sea Pines Plantation Company
9 and its predecessors, all of which required that
10 you obtain approval from the Sea Pines Company
11 before you build anything.

12 Q And the end of -- and are you familiar
13 with these? Did you have to deal with Sea Pines
14 and approvals for the ARB when you worked for
15 the Town?

16 A Not specifically on behalf of the Town.
17 The Town does own a fire station within Sea
18 Pines, but it was not re-developed during my
19 tenure.

20 Q And do you see the last sentence of the
21 first paragraph reads, "These plans are on file
22 with the board, and any changes thereto must be
23 submitted for approval."

24 In reviewing the permitting files for
25 the Town or the County, did you see where Sea

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- 1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 Pines Plantation Company approved any curb-cut
3 such as we saw in Exhibit 42 or paving?
4 A No.
5 MR. KUHN: And, Your Honor, just for
6 the record, the actual covenants themselves,
7 we don't need to go through those. Sea
8 Pines restrictive covenants specific for
9 gasoline stations are Exhibit 26. They talk
10 about the ARB, the approval process and so
11 forth.
12 BY MR. KUHN:
13 Q How is the LMO administered by the
14 Town? How does it function? How does it run?
15 A Through its Department of Community
16 Development, which today currently is headed by
17 Mr. Charles Cousins.
18 Reporting to Mr. Charles Cousins is an
19 individual who is today designated as the LMO
20 official, who in the previous version, the '98
21 version, was designated as the LMO
22 Administrator.
23 Q And is that an official designation?
24 A Yes.
25 Q And where is that in the LMO?

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 A It is in two places. Number one, it
3 appears in Article 16-10-102, which is a list of
4 defined terms. Administrator is defined under
5 that.

6 And it also appears in Article
7 16-3-201, which states that the Administrator is
8 the person that makes all written
9 interpretations concerning the Land Management
10 Ordinance and the Official Zoning Map.

11 Q And do you know who the Land Management
12 official is now?

13 A Theresa B. Lewis.

14 Q Do you know how long Ms. Lewis has been
15 the Land Management official?

16 A I believe since 1980 -- 2007, rather.

17 Q And in reviewing the Town or County
18 permitting files or in reviewing the documents
19 you reviewed, have you seen any decision issued
20 by the LMO Official regarding this encroachment?

21 A I have seen one.

22 Q If you'd turn to Exhibit 63.

23 A I have it.

24 Q Is that the decision you're
25 referencing?

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 A Yes.

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3 Q And is that the only decision by the
4 LMO official that you've been able to discover
5 in connection with this case?

6 MR. PATTERSON: Your Honor, I would
7 object. That's applying the facts and his
8 review of various documents and emails and
9 letters as to what was the only decision by
10 the Town. And that's up for the court to
11 conclude, not somebody looking at the
12 documents and applying the LMO ordinances to
13 the facts in this case.

14 THE COURT: First of all, sustained as
15 to that question.

16 But I mean I think I'll permit the
17 witness to go through, again, under the
18 Ordinance, what leads up to a decision and
19 then tell me what's in the file on this one.

20 I understand that it's at issue whether
21 or not this letter is a decision. But in
22 order to help me decide, if I'm supposed to
23 decide, whether or not the letter is a
24 decision, I think it would probably be
25 helpful to me to go through the process as

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 it is set forth in the Ordinance.

3 MR. KUHN: Understood.

4 Your Honor, Mr. Viswanathan -- the copy
5 of the letter that we have currently is very

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6 poor. He went and got a better copy.

7 THE COURT: Good, because I can't read
8 this one.

9 MR. KUHN: I gave Mr. Patterson,
10 Mr. Alford and Mr. Coltrane better copies.
11 If we could just substitute these.

12 THE COURT: Is this for me to put in
13 the book?

14 MR. KUHN: Yes, Your Honor.

15 THE COURT: Thank you. This is much
16 better.

17 BY MR. KUHN:

18 Q Mr. Coltrane, would you explain the
19 process of how the Land Management Official
20 comes to make a determination or a decision.

21 A It can come up in several ways. But if
22 you look at Article 16-2-102.A, the official is
23 vested with the authority to make
24 interpretations under the zoning ordinance and
25 the zoning map.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 On August 8, 2013, the version of what
3 y'all have referred to as the 1998 LMO was the
4 one that was in effect.

5 In directing your attention to the
6 August 8, 2013 letter from Ms. Lewis to
7 Mr. Arundell, this particular determination was

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8 made because the Town received a request for an
9 interpretation. And that is certainly one of
10 the ways that any person can get an
11 interpretation on the code, is you write to the
12 zoning Official and you ask, and they will make
13 a determination.

14 Q And is this, referring to Exhibit 63,
15 the format that a determination typically
16 follows? Is there anything unusual about this?
17 Is it usually in a letter format, in writing,
18 signed, on Town stationery, signed by someone
19 who identifies herself as the LMO official?

20 A Yes.

21 Q There's nothing unusual about this
22 particular letter being an official decision or
23 official determination?

24 A It has the form of such determinations.

25 Q If someone does not agree with a

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1 KUHN - COLTRANE (DIRECT EXAMINATION)
2 decision or a determination by the LMO official
3 as of August 8th, 2013, is there a procedure to
4 challenge that? Is there any sort of formal
5 procedure in place to challenge that?

6 A There is.

7 And can I back up one second? There
8 are specific code sections that relate to asking
9 the Town for written determinations, and that
10 appears in Article 16-3-202 and 16-3-203. And

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11 then two -- one more down, in 16-3-205, it
12 provides for an appeal of a determination to the
13 Town's Board of Zoning Appeals.

14 Q So if you are aggrieved by a decision,
15 what is the procedure that you follow
16 specifically?

17 A File an appeal to the Town of Hilton
18 Head Island Board of Zoning Appeals using the
19 process that's outlined in the appendix. I
20 think it's the appendix -- no, it's currently in
21 the -- using the process outlined in the LMO,
22 wait a minute, and that appears in Article 16-3,
23 2001, 2002 and 2003 -- 2004 as well. So 16-3,
24 2001 through 2004.

25 Q And what is that process?

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 A Filing a written appeal to the Town
3 within 14 days of receipt of the determination
4 stating the grounds of appeal. It gets put on
5 an agenda for the BZA to hear, and the BZA will
6 proceed to hear it.

7 Q And the BZA is the Board of Zoning
8 Appeals?

9 A I'm sorry, the Board of Zoning Appeals,
10 yes.

11 Q And what is that?

12 A It is an administrative body created by

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13 the Town of Hilton Head Island under the
14 authority of chapters -- Title 6, Chapter 29 of
15 the South Carolina Code that allows for any
16 municipality to create administrative bodies for
17 the purpose of resolving disputes related to
18 administrative decisions of the municipal
19 government and county governments as well.

20 Q And from reviewing the files in this
21 matter, do you see if this determination by the
22 LMO Official dated August 8th, 2013, was ever
23 appealed?

24 A I've seen nothing indicating an appeal
25 was ever filed.

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1 KUHN - COLTRANE (DIRECT EXAMINATION)

2 Q Is there any procedure in the LMO for
3 the Town Attorney to hear an appeal --

4 A No.

5 Q -- or for the Town Attorney to overrule
6 the LMO Official?

7 A No.

8 Q Is the appeal to the Zoning Board of
9 Appeals the exclusive remedy if you are
10 aggrieved by a decision by the LMO Official?

11 A Yes.

12 Q And then if you disagree with the
13 Zoning Board of Appeals, are there further
14 appellate recourse?

15 A You can appeal to Circuit Court, then

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16 from there to the appellate courts of the state
17 of South Carolina if you continue to be
18 aggrieved.

19 Q From your review of the totality of
20 everything you looked at, do you have an opinion
21 as to whether or not this encroachment violates
22 the LMO?

23 MR. ALFORD: Objection.

24 MR. PATTERSON: Objection.

25 THE COURT: Overruled.

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 MR. KUHN: I have no further questions,
3 Your Honor.

4 CROSS EXAMINATION

5 BY MR. PATTERSON:

6 Q Mr. Coltrane, we've known each other
7 since you were law clerking with Mr. Herring. I
8 represent Enmark station. When did you first
9 move to Hilton Head?

10 A June of 1981.

11 Q And where did you live?

12 A Four windflower Court, Hilton Head
13 Island, South Carolina.

14 Q And where is windflower Court?

15 A It's in Spring Lake in Hilton Head
16 Plantation.

17 Q But you worked with Mr. Herring on the

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- 18 south end of the island in an office on Pope
19 Avenue?
20 A Yes.
21 Q And do you recall when the Chevron gas
22 station was built in 1984?
23 A Yes.
24 Q Have you used that station since 1984?
25 A I have, although not very frequently.

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- 1 PATTERSON - COLTRANE (CROSS EXAMINATION)
2 Q Have you ever used the roadway or
3 encroachment?
4 A I have not.
5 Q Never used that roadway?
6 A No.
7 Q Have you ever seen others use the
8 roadway?
9 A Yes.
10 Q It's been used by, would it be fair to
11 say, a large number of people trying to bypass
12 the Circle or just to get to the traffic light,
13 the MarketPlace or get --
14 A Well, I have no idea why anybody uses
15 it.
16 Q Have you seen a large number of people
17 use it?
18 A I have seen people use it. I mean, I
19 don't -- you need to be there all the time to
20 see a large people use it, I think. I mean, I

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21 have observed that, yes.

22 Q Do you know when the roadway was first
23 established?

24 A I do not.

25 Q But you've testified as to plats and

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 other aerials that at least since 19 I think
3 '89, it's clear that it was in existence at that
4 time?

5 A Something was there, yes.

6 Q Do you know when the roadway was
7 initially paved?

8 A Only from what I read in the deposition
9 of Mr. Middleton.

10 Q And also Ms. Means, she testified on
11 when it was paved also?

12 A Their testimony was not consistent.

13 Q All right. would you take a look at
14 Exhibit 44A.

15 A I have it.

16 Q And I'll represent to you these are
17 photos I took, four photos I took just three
18 days ago on Saturday. Do you recognize those as
19 photos of the roadway?

20 A They're photos of a roadway.

21 Q All right. If you look at Page 2, do
22 you see the green dumpster in the foreground?

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23 A That one, you can -- you can -- yes,
24 that one appears to be of the area in question.
25 Q Okay. And I believe you testified you

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)
2 inspected the site. Did you walk over it?
3 A No. I looked at it. I've never set
4 foot on it.
5 Q When you inspected it -- what did you
6 mean when you said, "I inspected the site"?
7 A Pulled into the parking lot of the
8 Staples center and looked at it.
9 Q All right. Would you agree that there
10 are two different layers of asphalt along the
11 roadway?
12 A That's what this picture shows.
13 Q And you don't know the date of when
14 either one of those was placed on the roadway,
15 do you?
16 A I don't. You also can't tell the
17 extent of the first one. I mean, it -- you
18 know, there's certainly something else there,
19 but you don't know much else other than that,
20 from looking at this.
21 Q Okay. And would you agree with me that
22 if there was some construction activity prior to
23 the adoption of the 1987 LMO, then whatever
24 happened prior to that could not be a violation
25 of the LMO?

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 A Insofar as that question goes, yes.

3 But that doesn't mean it's not a violation of
4 the existing Development Standards Ordinance,
5 which had the same provisions related to
6 continuing violations like they all do.

7 Q All right. would you look at Tab 83,
8 which is where I've copied portions of what I
9 believe to be the 1988 LMO, which you have been
10 testifying about.

11 A '98.

12 Q '98, excuse me.

13 A Yes.

14 Q And turn to -- or you can use your
15 notebook -- 16-7-103. Does that provide for
16 nonconforming uses? And if you want to use your
17 notebook to find them easier, that's fine.

18 A I don't see 16-7-103 in there. I can
19 get one in here.

20 Q Here it is right there. Sorry.
21 Does 16-7-103 state, "Nonconformities
22 shall be allowed to continue in accordance with
23 the regulations of this Chapter"?

24 A That is the exact text, but it of
25 course deals with legal nonconformities.

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 Q But 16-7-103 doesn't state legal
3 nonconformities, does it?

4 A Wait a minute. No. But 16-7-101 and
5 102 do.

6 Q And that's the definition section?

7 A No. That's the first part of the legal
8 nonconforming section.

9 THE COURT: I don't have that part.

10 BY MR. PATTERSON:

11 Q If I could look on to your . . .

12 And you're referring to 16-7-102?

13 A Yes.

14 Q All right. Under 16-7-106, Paragraph

15 B --

16 A Okay.

17 Q -- do you agree with me that the LMO
18 provides that the "proposed expansion,
19 enlargement or extension of a nonconforming use
20 that does not occupy a greater footprint than
21 the existing nonconforming site or structure can
22 be waived by the LMO Official"?

23 A That is one of the items appearing
24 under 16-7-106 that the Administrator can rely
25 on in reviewing an application for a permit to

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

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2 exact a change in an existing nonconformity.

3 Q Right. And so, to kind of put it in
4 simple English, if there is an existing
5 nonconformity and someone applies for a permit
6 and they're not going to expand the footprint of
7 the nonconformity, then the LMO Official can
8 allow that activity?

9 A Well, that along with the other
10 requirements.

11 Q Yes.

12 A Yes.

13 Q Okay.

14 A But again, going back to 101,
15 nonconformities are things that become
16 nonconformities because of the adoption of the
17 Land Management Ordinance. If you have an
18 un-permitted illegal development, this doesn't
19 apply to that.

20 Q And if you have a legal nonconformity,
21 a paved roadway, and you want to re-pave the
22 roadway and not expand its existing footprint,
23 under 16-7-106.B, the Administrator can approve
24 that work, can he not, he or she?

25 A Was your question that it was a legal

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 nonconformity or --

3 Q Yes. A nonconformity under the LMO.

4 A If it is a legally existing
5 nonconformity, then B, among other things,
6 allows the Administrator to take into account
7 the fact that the nonconformity is not being
8 expanded.

9 Q would you agree with me that this
10 roadway is in a very highly visible location?
11 It's not hidden by a bunch of trees or bushes?
12 It's very wide open?

13 A Yes.

14 Q Are you aware that during a significant
15 period of time, that Town employees had an
16 account to purchase gasoline at the Chevron
17 station?

18 A I don't know that, but I don't dispute
19 it either.

20 Q And during the time you were employed
21 with the Town, did you ever from 1989 to 2003
22 when you were the Town Attorney or from March
23 16th, 2007 until September 2010 when you were an
24 employee of the Town, did you ever purchase gas
25 at the Chevron station on the Town's account?

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 A Not as to second part of that question.
3 As to the first part, maybe. I mean, I
4 never owned a Chevron card, so maybe. I don't
5 know.

6 Q Okay. If you'd look at Exhibit 79.

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7 A I have it.

8 Q And I'll represent to you, this is a
9 summary of Town permits or inspections for the
10 Chevron station after Beaufort County issued its
11 permit, the C.O., on June 1st, 1984.

12 THE COURT: Where is 79 again?

13 MR. PATTERSON: That's just documents.
14 Maybe I -- yeah 79.

15 THE COURT: Is 79 -- wait a minute --
16 no, that's 85.

17 MR. ALFORD: You can have mine, yes.

18 MR. PATTERSON: That's all right, I'll
19 let the judge look at -- let me look at
20 yours, Greg, and I'll give mine to the
21 judge.

22 BY MR. PATTERSON:

23 Q Okay. And you've testified at length
24 that you apparently spent a considerable period
25 of time reviewing the Town permitting file and

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)
2 the County permitting file, did you not?

3 A I testified that I reviewed them.

4 Q Okay. And you testified that upon your
5 review, there were permits for this, and there
6 weren't permits for that; correct?

7 A I'm not sure I understand what you're
8 asking me.

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9 Q well, that's a poor question. Do you
10 look at -- would you agree with me that the Town
11 of Hilton Head, on at least 12 different
12 occasions, has issued permits for construction
13 activity on the Enmark station since
14 November 4th, 1988?

15 A That appears to be correct.

16 Q And would you agree with me, is it
17 customary practice for Town officials in
18 enforcement or permitting to call to the
19 appropriate officer's attention of any
20 violations they see on a site when they go, for
21 example, to issue a sign permit or inspection?

22 A I believe that does happen. I can't
23 tell you that it happens each and every time
24 anyone does anything, or if the person making
25 the inspection would even recognize a violation

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 outside their realm of duty.

3 Q Okay. But in your review of the file,
4 you found no one -- during any of these 12
5 different inspections by the Town since
6 November 4th, 1988, there's nothing in the file
7 where anyone indicated that the roadway was a
8 violation of the LMO, did you?

9 A No. Nor did I find any permit for
10 anything related to that roadway.

11 Q Okay. And if you look at Item C on
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12 November 23rd, 1993, that's a Corridor Review
13 approval?

14 A Yes.

15 Q And then there was a building permit
16 issued after the Corridor Review approved that
17 work?

18 A Yes.

19 Q And tell me what a Corridor Review, how
20 that process works.

21 A The Town, through the Land Management
22 Ordinance, has established a corridor along the
23 major roads within the Town. The Corridor
24 Review Committee reviews the external appearance
25 of development proposed along the corridor for

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)
2 compliance with the Town's design standards
3 guide to regulate the exterior appearance of
4 development within the corridor. You file an
5 application, you go have a hearing.

6 Q All right. And there is a public
7 hearing?

8 A Yes.

9 Q And there are inspections of the site?

10 A Yes, to determine compliance with the
11 permit that gets issued ultimately.

12 Q Okay. And then a building permit is
13 issued if the Corridor Review is approved and

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14 you apply for a building permit?

15 A Yes, if that's what you're doing. I
16 mean, you can get the Corridor Review for, you
17 know, things that don't require construction,
18 though.

19 Q The Chevron station and the roadway was
20 in part of the jurisdiction of the Town subject
21 to this extra layer of protection with the
22 Corridor Review?

23 A It's subject to the provisions of the
24 Land Management Ordinance related to the
25 Corridor Review.

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 Q And certain roads are designated to be
3 applicable to Corridor Review, require Corridor
4 Review?

5 A Yes.

6 Q Major roads?

7 A Yes.

8 Q And Palmetto Bay Road is a major road?

9 A Yes.

10 Q And are there people that are paid and
11 it's their full-time job with the Town of Hilton
12 Head to enforce the provisions of the LMO?

13 A Yes.

14 Q And do they go around and their job is
15 to -- if they see something that's being done or
16 has been done in violation of the LMO, they're

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17 supposed to initiate enforcement action?

18 A If they are aware of a violation, yes.

19 Q Okay. And you found nothing in the
20 file of any action by any Code Enforcement
21 officer from 1988 until the plaintiff contacted
22 the Town and Ms. Lewis in 2013?

23 A That is the first indication in the
24 file that the Town was aware of the issue.

25 Q Except for the fact that if you look at

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 Exhibit 79, the Town has been on this property
3 at least 14 times for different -- I mean 12
4 times for different permitting activities?

5 A Well, I hate to stoop to a
6 colloquialism, but so what? I mean, the mere
7 fact that a guy goes on the property doesn't
8 mean that he recognizes a violation.

9 Q But this is a pretty major violation,
10 and it's obvious it's a roadway. It's not that
11 you have the wrong ADA sign in some stairway.
12 This is a paved roadway. Isn't it pretty
13 obvious?

14 A Whether or not the guy inspecting for
15 Corridor Review compliance recognized that as a
16 violation is an open question to me. Clearly,
17 he didn't.

18 Q And clearly, when you were the

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19 Assistant Town Manager and had oversight over
20 the LMO and the code enforcement during the
21 three years you were with the Town, you didn't
22 notice this was a violation either, did you?
23 A No. I can't tell you that I paid any
24 attention to it.
25 I mean, during the time that I was

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)
2 there, and I think generally, they don't, you
3 know, have a -- have a squad that goes out
4 looking for trouble. If something gets brought
5 to their attention or if something is very
6 obvious, they'll address it, but they're not out
7 scouring pieces of property to find violations.
8 Q The Town of Hilton Head doesn't have
9 people that are out looking for violations? For
10 example, if I put a sign in front of my
11 business, how many hours, not days, how many
12 hours will it take before the Town of Hilton
13 Head contacts me about a violation?
14 A I don't know.
15 Q But you would agree it's a very short
16 time period if you put a sign out without a
17 permit on Hilton Head?
18 A Maybe.
19 Q But there are people out looking for
20 violations?
21 A My experience was that if they see them

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22 when they're out, they will report, but that
23 they're not out specifically looking at property
24 to see if you're in violation. I mean, the sign
25 is an obvious thing out on the road, and

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)
2 somebody notices it. And when someone notices
3 it, they do something about it.
4 Q And so with a paved road that many
5 people use in the public on a major Corridor
6 Review restricted road like Palmetto Bay, that's
7 a major obvious activity?
8 A Well, from Palmetto Bay Road, it's not
9 obvious. It's at ground level. I mean, it's
10 not like . . .
11 Q Okay. Let's look under 16-8-106 of the
12 19 -- well, under the current LMO, and the part
13 I'm referring to at Tab 83, the last part.
14 A Okay. No, this is still saying '98.
15 Q If you go to the last part. I'm sorry,
16 I should have probably made it a separate
17 section, exhibit. But the last four or five
18 pages is what I understand to be the current LMO
19 section.
20 A I didn't bring mine.
21 Q It's talking about remedies and
22 enforcement.
23 A Okay.

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24 Q would you agree with me, if you look at
25 16-8-106, which talks about Town Enforcement

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 Actions --

3 A Yes.

4 Q -- does this provision deal with what
5 remedies or what tools the Town has when they
6 find somebody has violated the LMO?

7 A That's the purpose of this text.

8 Q And would you agree with me there are
9 at least eight options available to the Town LMO
10 Official and the Town as to addressing LMO
11 violations?

12 A Yes.

13 Q Okay. And Paragraph 106.F says that
14 they can, "Bring an action for injunction or
15 mandamus to abate a violation." Do you see
16 that?

17 A I do see that.

18 Q And abate would mean that it wouldn't
19 necessarily have to be removed, that they would
20 have some other options to address a violation,
21 would it not?

22 A They have many options, although one of
23 the options is not to permit the violation to
24 continue or to ignore it.

25 Q And would you agree with me that all of

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 these different options, including Paragraph G
3 that says they can just impose a fine -- if the
4 violation is a misdemeanor, they can impose a
5 fine?

6 A That is one of the things they can do.
7 These are not mutually exclusive.

8 Q Under Paragraph H, they can, "Take any
9 other action at law or in equity to remedy any
10 violation, or otherwise enforce the provisions
11 of this Ordinance." Do you see that?

12 A That is the text.

13 Q Would you agree with me that the LMO
14 Official and the Town have very broad discretion
15 on how to address LMO violations?

16 A They have a large number of options as
17 to how to address them.

18 Q And would you agree with me that that
19 is an act of discretion as to which one of the
20 broad range of options the Town would use under
21 a particular set of facts?

22 A Yes.

23 Q And would you agree that some of the
24 factors they would do is the nature and type of
25 violation?

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 A Well, how the Administrator analyzes a
3 problem is something you'd have to address to
4 the Administrator or the Official.

5 Q And that would have some impact on what
6 response the Town has, would it not?

7 A If I understand the question, the
8 answer is yes.

9 Q And would it have any impact on the
10 options the Town uses if there was some other
11 property owner in the chain that may have
12 violated the Ordinance and not the current
13 owner, would that have some factor in the
14 consideration?

15 A The Land Management Ordinance in '98
16 and today has the same text regarding violations
17 continuing. So if it is a violation, it
18 continues. The mere fact that you sold somebody
19 else the problem doesn't change that.

20 Q I'm not asking you if it's a violation.
21 I'm asking if one of the factors that
22 the LMO Official uses in its discretion on
23 picking one of the eight remedies is, is the
24 person standing before me the one that violated
25 it, or was it someone 15 years ago that violated

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 it; would that be a factor in making a decision
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3 how they respond to this person?

4 A well, I can't answer what any person
5 occupying that office would do. You'd have to
6 ask them.

7 Q I thought you were the supervisor of
8 the LMO official and you had --

9 A I was. If you're asking, my theory on
10 that was, is, again, if you sell somebody a
11 problem, that person has simply brought your
12 problem. It doesn't change anything.

13 Q well, would you agree with me that the
14 Town has to take into consideration the facts --
15 or they do take into facts and consideration
16 when looking at the eight different options in
17 Section 106?

18 A I don't understand your question.

19 Q Section 16-8-106 gives at least eight
20 options for the Town to address a violation;
21 correct?

22 A Yes.

23 Q And does the Town look at the totality
24 of the circumstances in order to decide which
25 one of these eight or which combination of the

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 eight they perceive to enforce the violation?

3 A More than likely, yes.

4 Q Okay. And would the consideration --

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5 one of the considerations when they decide that
6 is how long ago the violation originally
7 occurred, would that be a factor?

8 A If you're asking me what my thoughts on
9 it were when I was with the department, it
10 wouldn't have made a bit of difference to me.

11 Q All right. Would it be a factor of
12 what is the impact of the violation?

13 A It wouldn't have made a bit of
14 difference to me.

15 Q Would it be a factor of the prior
16 history of the property owner as far as other
17 violations with the Town?

18 A No. I think the violations stand on
19 their own.

20 Q All right. Do you remember Mr. Ed
21 Flynn had problems with the Town of Hilton Head
22 that that you were involved with, I believe, on
23 seaside development with a plat that was altered
24 after approval by the Town of Hilton Head?

25 A That would have been Mr. Alford.

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 MR. ALFORD: It was, and I did.

3 BY MR. PATTERSON:

4 Q Okay. You weren't involved with that?

5 A No.

6 Q Okay. Just a few more questions.

7 Let's go to Exhibit 63.

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8 A Okay. I have it.

9 Q All right. You talked about what this
10 letter was. You thought it was a determination
11 and that you saw no appeal that was filed under
12 16-3-201 -- 2001 of the LMO; correct?

13 A Correct.

14 Q And the time period to appeal is 14
15 days after receipt of notice?

16 A Yes.

17 Q When did the Town of Hilton Head send
18 to Enmark, the one that was using the roadway,
19 when did they send this notice to Enmark?

20 A What I recall from the record is an
21 email from Russell P. Patterson dated
22 August 26th of whatever year this was
23 acknowledging receipt of it.

24 Q No, sir, I didn't ask you whether they
25 got it. I asked you, when did the --

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 This letter is not addressed to Enmark
3 or their attorney, is it?

4 A No.

5 Q All right. So how can Enmark appeal if
6 the Town of Hilton Head never sent to Enmark
7 their notice of decision?

8 A I know that Enmark had it at least as
9 of August 26th.

10 Q Right. But the Town LMO requires for
11 the Town to send the notice to whoever has the
12 right to appeal, wouldn't it? That's just
13 logical sense, is it not? How can I appeal
14 something if the Town doesn't send it to me?

15 A You did have it.

16 Q No, sir. I'm asking you, did the Town
17 send it?

18 A I don't know how you got it. I know
19 you had it because you acknowledged that you had
20 it, and your time to appeal would have run from
21 the time that you had it, and that would have
22 been 14 days.

23 Q My question, you didn't see anything in
24 the file that indicated that the Town of Hilton
25 Head ever sent Exhibit 63 or anything like it to

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)
2 it Enmark, did it?

3 A Other than your acknowledgement of it,
4 no.

5 Q Okay. Did you ever have the occasion
6 to work with the LMO official on issues of LMO
7 interpretation?

8 A Yes.

9 Q And did you consult with the LMO
10 official from time to time?

11 A Yes.

12 Q And did you ever call to certain
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13 provisions of the LMO or certain facts of the
14 LMO to an LMO official as part of that process
15 that maybe they overlooked?

16 A Yes.

17 Q In fact, that's your job in your
18 different capacities with the Town, to provide
19 advice to the LMO official?

20 A Yes.

21 Q And would you look at Exhibit 65,
22 please.

23 A Okay.

24 Q Do you recall seeing this email from
25 Ms. Lewis?

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 A Yes, he.

3 Q And does Ms. Lewis tell Mr. Arundell
4 that I have consulted with Greg Alford, the Town
5 Attorney, and that my letter of August 8th,
6 2013, Exhibit 63, was prematurely sent and that
7 she's, in essence, rescinded that decision?

8 MR. KUHN: I object to
9 mischaracterizing that letter. That's not
10 what -- she said she's rescinded the
11 decision.

12 THE WITNESS: I see that email.

13 THE COURT: Well, why don't we deal
14 with the objection real quick.

06-21-16

15 MR. KUHN: That's not what the letter
16 says. That's not what the email says. It
17 says what it says.

18 MR. ALFORD: Have you got a clean one
19 for the court?

20 THE COURT: I can read it, it's just
21 not easy to read it, but anyhow, see if you
22 can rephrase the question, Mr. Patterson.

23 BY MR. PATTERSON:

24 Q All right. Mr. Coltrane, do you see
25 Exhibit 65, it says, "Basically, though, Greg

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)
2 said that I was premature in sending that letter
3 to you and that I should have advised you that
4 the issue of whether the access gets to stay or
5 not needs to be settled by a court before the
6 Town takes a position. I apologize for any
7 inconvenience this may have caused your client.
8 I should have discussed this issue with Greg
9 prior to sending you the initial letter. Once I
10 have formalized a new response to you and have
11 reviewed with Greg, I will send you a copy and
12 to Russell Patterson. I am not sure if this is
13 something that can be appealed to the Board of
14 Zoning Appeals. I will find that out as well."

15 Do you see that email?

16 A I do see it.

17 Q Does that tell you with your experience

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18 under the LMO that she had rescinded her earlier
19 letter and that she has advised the parties she
20 is reviewing it and will send a new letter?

21 A It does not.

22 Q Okay. In what part of that email does
23 it say that the notice of decision remains the
24 same? Because I don't understand your response.

25 A Her August 8th decision had gone out;

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 the time to appeal it had expired. Case closed.

3 Q And the LMO, regardless if they know
4 they made a flat-out error, they do not have the
5 authority to correct any error?

6 A I don't agree that there's any
7 acknowledgement here that a flat-out error was
8 made.

9 Q That wasn't my question. My question
10 was, if the LMO Official makes an error, it is
11 your opinion the LMO does not let the LMO
12 official correct a mistake?

13 A Mistakes can be corrected.

14 Q Okay.

15 A Again, I disagree that this qualifies.

16 MR. PATTERSON: Well, I would object,
17 Your Honor, to that testimony. But that's
18 fine, he can give his opinion about it.

19 MR. KUHN: It's in response to the

06-21-16

20 question.

21 THE COURT: You asked him a question
22 about that.

23 MR. KUHN: He just doesn't agree.

24 BY MR. PATTERSON:

25 Q You have reviewed the -- you've

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 referred to the Chevron title. would you look
3 at -- I mean, excuse me, the Welcome Center
4 title.

5 Will you look at the Deed, Exhibit 15,
6 into the Welcome Center.

7 A I have it.

8 Q And if you'll turn to the fifth page,
9 is there a list of permitted exceptions?

10 A Is that 1278?

11 Q Yes.

12 A Yes.

13 Q And in Paragraph D, does it list one of
14 the exceptions, the easements shown on Plat Book
15 38 at 53?

16 A Yes.

17 Q And if you turn to Tab 21, which is the
18 plat you discussed before -- if you can turn to
19 21, sorry.

20 A Okay, got it.

21 Q Do you remember talking about Plat Book
22 38 at 53?

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23 A Yes.

24 Q And that plat I think you testified

25 does indicate the existence of the roadway or

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1 PATTERSON - COLTRANE (CROSS EXAMINATION)

2 encroachment?

3 A Yes.

4 Q And would you agree with me, as an

5 attorney experienced in closing, that the

6 conveyance by Sea Pines to the plaintiff was

7 subject to the encroachment shown on Plat Book

8 38 at 53?

9 A Well, it is subject to what those are

10 described as, as permitted exceptions. And I

11 think what that means is, is that

12 Mr. Viswanathan or his company can't turn around

13 and sue the person that sold him this property

14 over anything that is related to the permitted

15 exceptions.

16 Q And is another way of kind of plain

17 English, buyer here issues -- here are all the

18 issues with the property; you're taking them

19 subject to those issues, and you can't come back

20 and sue me because of the issues shown on this

21 plat?

22 A That's what I just said.

23 Q And would normally the purchase price

24 of a property take into consideration the status

06-21-16

25 of the title and the easements, in your

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1 ALFORD - COLTRANE (CROSS EXAMINATION)

2 experience?

3 A Yes.

4 MR. PATTERSON: Give me one second.

5 I don't have any other questions.

6 THE COURT: Mr. Alford?

7 MR. ALFORD: Yes, sir.

8 CROSS EXAMINATION

9 BY MR. ALFORD:

10 Q Mr. Coltrane, sir, you have in front of
11 you sections -- if you don't mind, would you get
12 Section 16-8-106, please, sir, 16-8-106.

13 A I'm looking at the '98 version.

14 Q Well, is there any difference between
15 the '98 version and the current version that
16 you're aware of?

17 A Wait a minute. 16-8-106 is Tree
18 Protection.

19 MR. KUHN: There's a lot of difference.

20 They renumbered. The numbers are different.

21 BY MR. ALFORD:

22 Q What was the enforcement section in
23 the --

24 MR. KUHN: That's the current code.

25 MR. PATTERSON: The current code I've

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1 ALFORD - COLTRANE (CROSS EXAMINATION)
2 got in the notebook.
3 MR. ALFORD: Which one is the current
4 code?
5 MR. KUHN: It's like the fourth or
6 fifth page from the back.
7 MR. PATTERSON: Exhibit 83.
8 BY MR. ALFORD:
9 Q Is that the one, Mr. Coltrane, you
10 think we should be operating off of?
11 A Which one?
12 Q 16 -- we'll see, hang on. What's the
13 enforcement provision in effect at this time for
14 the Town?
15 A That would be 16-8-106.
16 Q In the current code?
17 A Yeah. In the rewrite, the various
18 chapters were reordered, which is why you've got
19 this.
20 Q All right. So we're looking
21 at 16-8-106.
22 A Yes. But I was looking at the '98.
23 Q I'm sorry. Thank you, sir.
24 A That's all right.
25 Q I want to look at the current 16-8-106

1 ALFORD - COLTRANE (CROSS EXAMINATION)

2 that talks about Town Enforcement Actions.

3 A I have it in front of me.

4 Q All right, sir. Would you be kind
5 enough to just read the first section of it.

6 A To myself or out loud?

7 Q Out loud, please.

8 A "On behalf of the Town, the official
9 may take any one or more of the following
10 actions as a remedy for any violation of this
11 Ordinance."

12 Q All right, sir. And "may." The word
13 may, would you agree with me that the word may
14 implies a discretion?

15 A Yes.

16 Q All right, sir. And, in fact, the word
17 "shall" implies no discretion, conversely?

18 A Yes.

19 Q So would you agree with me that an
20 enforcement action the official may take,
21 meaning the official has discretion whether or
22 not to take that action?

23 A No. I believe the official has a duty
24 to abate violations of the Land Management
25 Ordinance.

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1 ALFORD - COLTRANE (CROSS EXAMINATION)

2 Q Sir, if I may ask you what the code
3 says. Does the word say "may"?

4 MR. KUHN: You've asked him what he
5 believes, so I object. He answered the
6 question.

7 BY MR. ALFORD:

8 Q Do you believe that the word "may"
9 implies that there is discretion?

10 MR. KUHN: It's been asked and
11 answered.

12 THE COURT: Well, I'll let him answer.

13 THE WITNESS: The word "may" relates to
14 the following list of things that the
15 official may utilize in his or her
16 enforcement of the code. It doesn't suggest
17 that the official may ignore their
18 obligation to enforce the code.

19 BY MR. ALFORD:

20 Q All right, sir. And where -- so you
21 believe the enforcement of the code is an
22 ministerial act?

23 A That's not what I said.

24 Q Well, I'm asking you. Do you believe
25 the enforcement of the code is an ministerial

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1 ALFORD - COLTRANE (CROSS EXAMINATION)
2 action?

3 MR. KUHN: I object. It's a vague
4 term.

5 THE COURT: Well, I don't know, if he

6 knows the answer, if he . . .

7 THE WITNESS: I'm not sure I understand
8 what you mean. I think that the only way I
9 can answer is to tell you that I believe the
10 official has a duty to enforce the code.

11 BY MR. ALFORD:

12 Q All right. Does it say that in this
13 enforcement section?

14 A No. But it says that earlier on in the
15 description of the Official's duties.

16 Q You would agree with me, 16-8-106, the
17 Town Official "may" take any one or more of the
18 following actions as a remedy for a violation,
19 that's what it says; right?

20 A Well, I agree that you've read what it
21 says.

22 Q Okay. And you agree with me that at
23 least as it applies to 16-8-106, the official,
24 by virtue of the word "may," has discretion as
25 to whether or not they elect to take one or more

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1 ALFORD - COLTRANE (CROSS EXAMINATION)
2 of any of the following?

3 A No. The official has discretion as to
4 which of them they will take.

5 Q Shall take -- wait a minute. So is
6 there a "shall," that they have to do one of
7 these, somewhere?

8 A In the description of the official's
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9 duties under the LMO, the official is charged
10 with enforcing the Land Management Ordinance.

11 Q Okay.

12 A And I can show you that in the '98
13 code. I don't have my '14 code here.

14 Q Well, but these are the things that the
15 official, 16-8-106, could do to enforce the
16 code; correct?

17 A They are options that the Official may
18 utilize in its action of enforcing the code. It
19 does not say that the Official can simply ignore
20 violations and fail to enforce the code.

21 Q Who has the discretion to determine
22 whether or not there's a violation of the code?
23 By definition it's the Official, isn't it?

24 A I would disagree with the way you
25 stated the question.

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1 ALFORD - COLTRANE (CROSS EXAMINATION)

2 Q To whom does the code give the
3 discretion to determine whether or not there's
4 been a violation of the code?

5 A The code gives the LMO official a duty
6 to enforce the code.

7 Q Sir, would you answer my question,
8 please. To whom --

9 MR. KUHN: He has answered it.

10 THE WITNESS: Show me which section

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11 you're talking about, and I'll tell what you
12 what it says.

13 BY MR. ALFORD:

14 Q I'm asking you right here what it says,
15 16-8-106, and I'm trying to be --

16 A This lists options that the LMO
17 official can utilize in performing his or her
18 duty to enforce the code.

19 Q Sir, may I direct your attention to
20 16-8-105.

21 A Okay.

22 Q According to that code section, to whom
23 is the responsibility for enforcement of this
24 Ordinance delegated?

25 A The Official.

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1 ALFORD - COLTRANE (CROSS EXAMINATION)

2 Q All right, sir. And then if I can
3 direct your attention to Paragraph 2 underneath
4 Subsection A. If you'd be kind enough to read
5 that out loud to the court.

6 A "The responsibility for enforcement of
7 this Ordinance is delegated to the official."

8 Q Okay. Keep going please. Number 2.

9 A "The Official shall properly record
10 such complaint, immediately investigate the
11 complaint to determine the validity of the
12 charge, and take whatever action is necessary to
13 ensure compliance with this Ordinance."

06-21-16

14 Q All right, sir. And in reading Number
15 2 then, upon -- according to what you just read,
16 who determines whether or not the complaint is
17 valid?

18 A The official.

19 Q So would you agree with me, sir, that
20 under the writing of the code, the official has
21 the discretion to determine whether or not a
22 complaint is valid?

23 A I don't agree with it the way you say
24 it, Greg.

25 Q All right.

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1 ALFORD - COLTRANE (CROSS EXAMINATION)

2 A The official has the duty to enforce
3 the code. The official can look at a given
4 state of facts and determine that there is no
5 violation.

6 But, you know --

7 Q Yes, sir. She can; right?

8 THE COURT: Maybe if you could use a
9 word other than "discretion."

10 THE WITNESS: But it's not a
11 discretionary matter. You still have to
12 read and follow the code.

13 MR. KUHN: I think he's just
14 disagreeing with the word "discretion."
15 There's no discretion to ignore the code, a

06-21-16
16 duty to enforce it.
17 MR. ALFORD: Would you like me to swear
18 you in, or is that an objection?
19 Let me try it again.
20 MR. KUHN: Can the LMO official ignore
21 a violation?
22 MR. ALFORD: Listen, you get to ask
23 your questions. I get to ask mine.
24 Let me reask it, unless the court would
25 prefer that I didn't.

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1 ALFORD - COLTRANE (CROSS EXAMINATION)
2 THE COURT: Well, I tell you what, I've
3 listened to it back and forth, and I think,
4 and y'all correct me if I'm wrong, that the
5 fundamental difference here is, Mr. Coltrane
6 is saying there is no discretion once a
7 determination has been made that there is a
8 violation. And you keep asking who makes
9 the determination is a violation.
10 And it looks to me like the LMO
11 official makes -- there's a complaint made.
12 And then somebody, and it looks like the LMO
13 official, correct me if I am wrong, gets to
14 say it's a violation or it's not a
15 violation. That is not a discretionary
16 matter, but it is a decision. And once the
17 decision is made, then there's no
18 discretion. Is that --

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19 MR. ALFORD: well, respectfully, I
20 don't agree with the latter part of the
21 statement.

22 THE COURT: Okay, because you're saying
23 the "may" there --

24 MR. ALFORD: Correct.

25 THE COURT: -- but I'm saying the

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1 ALFORD - COLTRANE (CROSS EXAMINATION)
2 witness' testimony is, once a decision has
3 been made and the LMO makes the decision
4 whether the complaint is valid or invalid
5 and that's the decision the LMO official has
6 the ability to make, I'm not going to use
7 the word discretion, then we fall into that
8 other category. And then I understand the
9 witness's testimony is, at that point he
10 shall do something, but the may has to do
11 with which of those things he chooses, if I
12 understand your testimony correctly.

13 THE WITNESS: That is the testimony.

14 THE COURT: Okay.

15 MR. ALFORD: That's the testimony. And
16 I'm asking -- I'm not seeing the "shall,"
17 and that's I guess what I'm trying to get
18 to, is I'm seeing the -- that the court, I
19 think, and Mr. -- well certainly
20 Mr. Coltrane wants to --

06-21-16

21 I believe that there is discretion
22 vested in the decision of whether or not
23 it's valid. There has to be. She gets to
24 make the determination to determine the
25 validity of the charge --

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1 ALFORD - COLTRANE (CROSS EXAMINATION)
2 THE WITNESS: Correct. But if you look
3 at 16-8-105 --
4 MR. ALFORD: I did.
5 THE WITNESS: -- the official has the
6 responsibility for enforcement.
7 Responsibility, in my perhaps ignorant
8 and uninformed view, is synonymous with
9 duty. The LMO official has a duty --
10 MR. ALFORD: Well, now, if they wanted
11 to use the word "duty," they could have used
12 the word duty.
13 THE WITNESS: Well, responsibility is
14 not a -- you know, if you are responsible
15 for it, then you are responsible for it.
16 You do have a -- the official does have
17 a duty to enforce the Ordinance. And if a
18 complaint is made or if a request for a
19 determination is made, the LMO official has
20 a duty to investigate it and give them an
21 answer.
22 And once they give them an answer and
23 determine the existence of a violation,

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24 there is no discretion as to whether or not
25 you will enforce your Ordinance.

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1 KUHNS - COLTRANE (REDIRECT EXAMINATION)

2 BY MR. ALFORD:

3 Q And is the LMO official ever allowed to
4 be wrong?

5 A We all are.

6 Q Thank you. And if the LMO official
7 were to get subsequent information, would it be
8 incumbent on her to consider that information in
9 any determination she may have previously made?
10 I mean, you want to get it right; right?

11 A As far as your question goes and with
12 no -- no reference to any particular state of
13 facts, sure.

14 MR. ALFORD: Okay. Thank you, sir.

15 MR. KUHN: Unfortunately, I do have
16 some, Your Honor.

17 THE COURT: I figured you would.

18 REDIRECT EXAMINATION

19 BY MR. KUHN:

20 Q Going back in reverse, under Section
21 16-8-105, Subsection A, which is titled,
22 "Enforcement Responsibility," what is delegated
23 to the LMO official?

24 A The responsibility for enforcement of
25 the Land Management Ordinance.

06-21-16

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1 KUHN - COLTRANE (REDIRECT EXAMINATION)

2 Q And if you look at 16-8-105.B2, it
3 says, the official "shall" properly record such
4 complaint and so forth.

5 Is the word "shall" usually mandatory?

6 A Yes.

7 Q It's usually not discretionary;
8 correct?

9 A Correct.

10 Q It says, the official shall properly
11 record the complaint, I'll paraphrase it, shall
12 immediately investigate the complaint to
13 determine the validity of the charge, and then
14 lastly, shall do what?

15 A Take whatever action is necessary to
16 ensure compliance with the Ordinance.

17 Q Now, "ensure," that's kind of like
18 guarantee?

19 MR. ALFORD: Objection.

20 THE COURT: I'll let him answer.

21 THE WITNESS: You know, not to argue
22 with you, Mr. Kuhn, I believe that this
23 language makes it clear what the LMO
24 official's duty is, and the duty is to
25 enforce the Ordinance.

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1 KUHN - COLTRANE (REDIRECT EXAMINATION)

2 BY MR. KUHN:

3 Q well, to quote this section, the duty
4 is to, "shall ensure compliance with
5 this Ordinance." Is that quoting the Ordinance?

6 A That is the text.

7 Q And if we go down to Section 16-8-106
8 which is entitled "Town Enforcement Actions," as
9 Mr. Patterson pointed out, the Official may take
10 one or more of the following actions for a
11 violation, is that correct, and eight things are
12 listed?

13 A Yes.

14 Q Do any one of those things say ignore
15 the violation?

16 A No.

17 Q Under A, they can withhold pending or
18 subsequent development approvals or permits.

19 That's kind of worthless if it's
20 already an existing violation; correct?

21 MR. ALFORD: Objection, leading.

22 THE COURT: Try not to lead, please.

23 BY MR. KUHN:

24 Q If you already have an existing
25 violation, the only thing in here that is

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1 KUHN - COLTRANE (REDIRECT EXAMINATION)

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2 applicable would be to get rid of the violation?

3 MR. PATTERSON: Objection, Your Honor.

4 MR. ALFORD: Objection.

5 THE COURT: What was the objection?

6 MR. ALFORD: Fred is testifying.

7 THE COURT: Leading, yeah.

8 BY MR. KUHN:

9 Q But G is interesting. It says,
10 "Prosecute the violation as a misdemeanor." Did
11 I read that correctly?

12 A That is the text.

13 Q And if I look over at 16-8-11,
14 violating this Ordinance is actually a crime?

15 A Yes.

16 Q Is there anything in this Ordinance
17 that says if I'm committing a crime and just
18 because I'm not caught because the people
19 responsible for enforcing this ordinance aren't
20 perfectly diligent, that my crime will be
21 forgiven?

22 MR. ALFORD: And I'll just go ahead and
23 object just entirely to the entire question,
24 his characterization. It's leading. It's
25 dramatic.

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1 KUHN - COLTRANE (REDIRECT EXAMINATION)

2 THE COURT: It's dramatic.

3 MR. KUHN: It's dramatic, but it's not
4 leading.

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5 MR. ALFORD: When a question ends with
6 "correct," I mean, it's leading.

7 THE COURT: Just throw it into the
8 leading category, I'll say.

9 MR. KUHN: I'll rephrase that.

10 MR. ALFORD: Thank you.

11 BY MR. KUHN:

12 Q Is there any procedure in this
13 Ordinance that allows a criminal who is
14 violating this Ordinance -- someone who violates
15 this ordinance, are they subject to criminal
16 prosecution?

17 A Yes.

18 Q But is it fair to call someone who
19 violates this Ordinance a criminal?

20 MR. ALFORD: Upon conviction.

21 THE WITNESS: Upon conviction, yes.

22 BY MR. KUHN:

23 Q Very good. And if I look at Section
24 16-8-110, which talks about -- it's captioned,
25 quote, "Violations Continue," it sort of

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1 KUHN - COLTRANE (REDIRECT EXAMINATION)
2 addresses this topic. The very last sentence
3 says, quote, "The lack of prior enforcement
4 shall not constitute any degree of recognition,
5 approval, waiver, or enforcement." Did I read
6 that correctly?

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7 A That is the text.

8 Q Is there any provision in here that
9 forgives a violation just because the Town
10 doesn't catch it or enforce it in a timely
11 fashion?

12 A Not to my knowledge.

13 Q If you break the law, you've got to
14 bear the consequences no matter how long you get
15 away with it; is that fair under the LMO?

16 MR. ALFORD: Objection.

17 THE WITNESS: The text related to
18 continuing violations --

19 THE COURT: Is that really an
20 objection?

21 MR. ALFORD: Yeah. It's leading,
22 dramatic.

23 THE COURT: Well, drama is okay. I'll
24 allow it. Go ahead.

25 THE WITNESS: The text related to the

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1 KUHN - COLTRANE (REDIRECT EXAMINATION)
2 continuation of violations exists in the
3 current version and existed in the previous
4 versions. You don't improve your position
5 by violating the Land Management Ordinance.

6 MR. ALFORD: I object to the witness
7 rambling on, Your Honor.

8 MR. KUHN: He's responding to the
9 question.

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10 THE COURT: I'll allow it.

11 BY MR. KUHN:

12 Q Mr. Patterson called your attention to
13 16-7-102, which talks about nonconformities
14 being allowed to continue.

15 A Yes.

16 Q And actually, what it says in full is,
17 "nonconformities shall be allowed to continue in
18 accordance with the regulations of this
19 Chapter." Is that a more accurate quote?

20 A That is the text.

21 Q And then you'd indicated that a section
22 that's actually missing from here, Section
23 16-7-102, shed some light on what was meant by
24 nonconformities?

25 A Yes.

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1 KUHN - COLTRANE (REDIRECT EXAMINATION)

2 MR. KUHN: And I move to introduce
3 Section 16-7-102.

4 THE COURT: Do we have a copy of that
5 for the book?

6 MR. KUHN: I do not, but if I can make
7 one and substitute it later.

8 THE COURT: We can do that after lunch.
9 Any objection?

10 MR. PATTERSON: I don't have any
11 problem to adding that to Exhibit 83 in the

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12 right places.

13 MR. ALFORD: No objection.

14 THE COURT: All right. Let's leave
15 that up to Fred to make the copy and insert
16 it.

17 BY MR. KUHN:

18 Q And what part of Section 16-7-102 were
19 you referencing? If you'd just read that.

20 A 16-7-102 reads, "This chapter shall
21 apply to circumstances that become nonconforming
22 by initial adoption of this title, amendment to
23 this title, or expansion of territory subject to
24 the jurisdiction of the Town. It shall also
25 apply to nonconformities that were legal

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1. KUHN - COLTRANE (REDIRECT EXAMINATION)
2 nonconformities under a similar provision of a
3 previously applicable ordinance or resolution
4 and that remain nonconforming with one or more
5 provisions of this title, even if the type or
6 extent of nonconformity is different."

7 Q Shortening that, if it was an illegal
8 nonconformity prior to enactment, it remained
9 illegal afterwards?

10 A Yes.

11 Q This 16-7-103 doesn't magically change
12 it to a lawful nonconformity?

13 A No. 16-7-103 and on deal with the
14 types of situations described in 16-7-102.

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15 Q You've got to be legal to begin with?

16 A Yes.

17 Q And if you just look at this road, if
18 you're a Town employee buying gas and you just
19 look at this road, is there anything obvious
20 about this road that tells you it has a curb-cut
21 that was not permitted or was paved without
22 there being a permit --

23 MR. ALFORD: Objection. It calls for
24 speculation, leading.

25 BY MR. KUHN:

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1 KUHN - COLTRANE (REDIRECT EXAMINATION)

2 Q -- or that the speed bumps were put in
3 you without a permit; is there anything this
4 that tells you that all these things were done
5 without permits?

6 THE COURT: All right. Let me deal
7 with the objection real quick.

8 MR. KUHN: The implication from prior
9 questioning is that Town employees walked by
10 and saw a violation and ignored it. And my
11 question is to designed to determine if this
12 is something that a Town employee can walk
13 by and tell that, "Hey, that's a violation."

14 MR. ALFORD: Respectfully, Your Honor,
15 if you'll recall in the answer to the prior
16 question, it was, "I don't know, I can't

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17 speak for them."

18 THE COURT: That might be the answer
19 here. I don't know. I'll let him answer
20 it.

21 BY MR. KUHN:

22 Q Is there anything obvious about the
23 site that tells you that the curb-cut does not
24 have a permit?

25 A Well, no. The same goes for any piece

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1 PATTERSON - COLTRANE (RECROSS EXAMINATION)
2 of property. I mean, you can't look at a
3 building and tell from that whether or not there
4 was a permit issue.

5 MR. KUHN: That's all I have.

6 THE COURT: Anything else?

7 RECROSS EXAMINATION

8 BY MR. PATTERSON:

9 Q A couple questions. Mr. Coltrane,
10 certainly, you can tell the roadway is closer
11 than 20 feet to any -- to the plaintiff's
12 building, can't you?

13 A What? I'm sorry, I . . .

14 Q Certainly, you can tell the roadway is
15 right up next to a building, can you not,
16 without having to know any permits or anything?

17 A Well, I mean, you can certainly observe
18 whatever the physical conditions are just by
19 looking at it, yes.

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