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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Case No. 2010-CP-10-5449
App. No. 2015-002550
Ct. App. Op. No. 5581 (filed August 1, 2018)

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

Petitioners,

v.

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

Respondents.

Petition for Writ of Certiorari

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CERTIFICATION OF COUNSEL

Counsel for the Petitioners certifies that their Petition for Rehearing was timely made on August 15, 2018, and ruled on by the Court of Appeals on September 20, 2018. [App. 1, 22.]

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the Trial Court's grant of summary judgment to the Respondent Town on the Petitioners' breach of contract claims because the courts have misinterpreted the language of the 1991 Deed and ignored the express intention of the parties to preserve the conditions and character of the oceanfront area as it existed in February 1991?

   A. Did the Court err in ignoring the intention of the parties, as expressed in the 1991 Deed, to set a standard for maintaining the natural character of the Property as it existed in February 1991?

   B. Did the Court err in construing Paragraph 6 to authorize changes to the trimming/cutting ordinances to allow overgrowth of the vegetation which has created a maritime forest on the accreted land?

   C. Did the Court err in relying upon the Land Trust's failure to recognize or report any violations of the Deed restrictions as conclusive evidence of the Town's compliance?

2. Did the Court of Appeals err in affirming the Trial Court's grant of summary judgment to the Respondent Town on the Petitioners' nuisances claims because the Town's violation of the Deed Restrictions through its new trimming policies have allowed overgrowth that harbors a variety of pests, varmints and poses dangers to the Plaintiffs personally and the other citizens generally?

INTRODUCTION

This case revolves around the trimming and pruning of vegetation on beachfront accreted land owned by the Town of Sullivan's Island. However, this is not an ordinary zoning case challenging the Town's enforcement of the trimming ordinances; rather, this is a land contract case founded, at its core, in a unique Deed arising from the unique geology of the Island's shoreline. Namely, this barrier island is unique in that the beachfront lands, which have accreted over the years, are owned by the Town pursuant to a Deed that was executed, in a two-step land transfer in

1991. As expressed in the 1991 Deed, the purpose for the land transaction was "maintaining the natural character of the property" -- as it existed in February 1991 -- which included vegetation at levels no higher than three feet as provided under the Town's trimming ordinance in place at that time. At that time, vegetation on the accreted land was comprised of sea oats and wildflowers, which allowed front row property owners to enjoy ocean views and breezes. In 1995 and 2005, the Town of Sullivan's Island rewrote the ordinances limiting the trimming and cutting of trees and shrubs on the accreted lands which have allowed a virtual maritime forest to grow, obscuring the ocean view of the front-row homes and creating a variety of nuisances including a habitat for an assortment of varmints and pests and a very serious fire hazard.

The Plaintiffs, as front-row property owners and third-party beneficiaries under the 1991 Deed, bring this action – primarily grounded in contract law -- to compel the Town to abide by the Deed restrictions so the accreted land can be restored to the February 1991 standards, thereby restoring the ocean views and abating the nuisances from the overgrowth. The Trial Court, as affirmed by the Court of Appeals, granted summary judgment to the Town based on its misinterpretation of certain provisions in the Deed in disregard for the express intent as stated therein. The Petitioners respectfully submit that this Court should review the Court of Appeals' opinion because it effectively ignores the Town's obligations and the Petitioners' third-party rights under the 1991 Deed. This ruling is inconsistent with this Court's prior decisions on deed restrictions and it deprives the Petitioners property owners of valuable rights to enjoy ocean views and breezes, and subjects them to nuisances from the overgrown maritime forest. For these special and important reasons, as well as those also covered in their Final Brief, the Petitioners respectfully request that the Court grant this Petition for Writ of Certiorari to review the Court of Appeals' decision and reverse the judgment granted to the Town.

STATEMENT OF THE CASE

This action arises from a 1991 Deed by which the Town of Sullivan's Island obtained ownership of certain ocean-front accreted lands and bound itself to certain restrictions and obligations aimed at preserving the conditions and character of the oceanfront area. The Plaintiffs are front-row property owners on Sullivan's Island, who bring this action as third-party beneficiaries under the terms of that Deed.[1]

The original complaint was filed on July 10, 2010, naming the Town of Sullivan's Island and Sullivan's Island Town Council as Defendants (collectively referred to as "the Town"), asserting claims for declaratory and injunctive relief, nuisance, and inverse condemnation. The issues ultimately became joined by a second amended complaint filed December 10, 2013, which also asserts causes of action including breach of contract and breach of contract accompanied by a fraudulent act, violation of the State and Federal Constitutional contract clauses, and violation of the S.C. Unfair Trade Practices Act. [ROA 51.] The Defendants filed an answer to the second amended complaint on December 16, 2013. [ROA 171.] The matter was referred to the Master-in-Equity by order of February 7, 2012. [ROA 1.] Thereafter, both Plaintiffs and Defendants filed various motions for summary judgment. [ROA 187, 724, 729, 738, 811.] The Trial Court issued orders on the pertinent motions, including:

- Form 4 Order granting Defendants motion for summary judgment as to breach of contract accompanied by a fraudulent act, filed May 21, 2104 [ROA 2];
- Order Granting Summary Judgment to Defendants Regarding Breach of Contract by Accompanied by Fraudulent Act, filed December 4, 2014 [ROA 3];
- Order Granting Summary Judgment to Defendants based on Plaintiffs' Lack of Right to a View, filed July 30, 2015 [ROA 7];

[1] The 1991 Deed expressly grants any property owner within the Town the right to enforce the Restrictions. [ROA 98; 1991 Deed ¶ 5.]

- Order Granting Defendants' Motion to Strike Damages Claim Due to Location of OCRM Critical Line, filed July 30, 2015 [ROA 22];
- Form 4 Order, denying the Defendants' Motion for Summary Judgment on Plaintiffs' causes of action for Declaratory Judgment, Claim of Mandamus, Nuisance, Untimeliness, and Contract Clause, filed August 4, 2015 [ROA 28]; and
- Form 4 Order, denying Plaintiffs' motion for summary judgment on breach of contract, filed August 5, 2015 [ROA 30].

Thereafter, the Plaintiffs filed a Motion for Reconsideration and Clarification, and the Town filed a new Motion for Summary Judgment. [ROA 851, 878.] The Trial Court issued its final orders, consisting of a Form 4 Order, denying Plaintiffs' motion for reconsideration, filed November 5, 2015 [ROA 43]; and a formal Order Granting Defendants' Motion for Summary Judgment on Plaintiffs' Nuisance, Breach of Contract, and Mandamus Claims, filed November 10, 2015, which ended the case [ROA 45]. The Plaintiffs timely served their Notice of Appeal. [ROA 881.]

STATEMENT OF THE FACTS

Pertinent Background regarding Accreted Lands on Sullivan's Island

Through a unique phenomenon of maritime geology, Sullivan's Island is one of just a few barrier islands on the South Carolina coast that has actually gained sand and land mass during the past century. The accretion has presented certain land management concerns and legal issues over the years, and this is not the first time that the subject of the accreted land on the Island has spawned legal issues. For example, during the 1920s, the Township of Sullivan's Island had laid out lots on accreted land and sold licenses for such lots. In the years after World War II, license holders became property owners when the Town obtained federal and state authorization to sell the accreted land in fee. Over time, the accreted land continued to grow, and in the late 1960s/early 1970s, property owners were given opportunities to purchase the newly accreted land abutting

their lots. A study conducted by the South Carolina Coastal Council in the mid-1980s, showed an accretion rate ranging as much as 17.3 feet per year. [ROA 80.]

Contemplation of the inevitability that accretion would continue and the potential for development on the accreted land, and awareness of a legal dispute on neighboring Isle of Palms involving accreted land,[2] all prompted the Town to explore options for protecting the land from development and thereby preserving both the condition of the land and the character/lifestyle of the Town. A plan was devised that involved selling the accreted land to the Lowcountry Open Land Trust, a nonprofit corporation organized to preserve and conserve natural areas and dedicated to the preservation of scenic vistas and open spaces. In turn, the Land Trust would reconvey the accreted land back to the Town by deed with restrictions and enforcement rights. This two-step transfer of ownership was deemed "necessary to ensure enforceability of the restrictions and prevent a future Town Council with different motivations from changing or weakening the restrictions or doing away with them altogether." [ROA 80.] The plan also involved fundraising efforts to fund the Land Trust purchase of the accreted land. The transaction was authorized by the Town Council by ordinance in compliance with the law, [ROA 81], and the Deeds were executed simultaneously on February 21, 1991. [ROA 84, 96.]

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

The 1991 Deed describes the accreted land as having "aesthetic, scientific, educational, and ecological value in its present state as a natural area which has not been subject to development or exploitation." [ROA 96 (emphasis added).] The parties' intention in protecting the land is expressly stated in the 1991 Deed, as a "desire to place restrictions upon the Property [the accreted

[2]Hill v. Beach Co., 279 S.C. 313, 306 S.E.2d 604 (1983).

land] for the purposes of, inter alia retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants, or wildlife." [Id.]

In order to effectuate that intent to preserve the conditions on the accreted land as it existed in February 1991, the Deed specifically provides for methods of documenting that condition, including survey maps, aerial photographs, and on-site photographs. These provisions emphasize that the overriding intent of the Town and the Land Trust was to literally and figuratively take a snapshot in time and preserve the accreted land in the same general condition as it existed in February 1991, for the benefit of the property owners as well as the benefit of the entire Township.

The 1991 Deed Restrictions

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

> 1. Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the Property shall remain in its natural state, no changes shall be made to its topography or vegetation and no structures or improvements shall be erected on the Property.
>
> 2. Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given the unrestricted authority to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean and providing views of the ocean and beaches to its citizens.
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> ***
>
> 6. During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of law for any person to violate the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof. The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions. [ROA 96-99 (emphasis added).]

The Town's Trimming Ordinances

As of the date of the 1991 Deed, the Town zoning ordinance provided that residents/owners of the front-row lots, such as owned by the Plaintiffs, could obtain permits to prune, cut and trim all varieties of trees and to a height of no less than three (3) feet without any restriction as to the time of year. [ROA 147.] Just a few years later, the Town Council – with newly elected members -- radically rewrote the trimming ordinance. [ROA 441.] As rewritten, the ordinance added limitations on the time of year when trimming could be done and the species of trees that could be trimmed, but most significantly, the Town changed the height limitation from three feet to seven feet. [ROA 443.] Ten years later the Town amended the trimming ordinance, again changing the height limitation. [ROA 451.]

Both the 1995 and the 2005 versions of the trimming ordinance expressly reference the limiting power of the 1991 Deed restrictions, yet the Town proceeded to make drastic changes to the trimming ordinance with a "we can do what we want to" attitude. While the two-step transfer in February 1991 was deemed "necessary to ensure enforceability of the restrictions and prevent a future Town Council with different motivations from changing or weakening the restrictions or doing away with them altogether,"[3] unfortunately, as anticipated, a change in leadership of the Town Council with different agendas did come to power. Ironically, however, while the concern in 1991 may have been for changes that would allow development, the new leadership has revised the trimming ordinance to create an overgrown maritime forest previously unknown on Sullivan's Island oceanfront.

[3] [ROA 80.]

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

A commonly-used adage that seems apropos in this case is that a picture can sometimes be worth a thousand words. In this case, a picture – or more specifically photographs – were expressly required as part of the Deed to document the condition of the accreted land as it existed in February 1991. Those photographs – which constitute a virtual snapshot in time -- are expressly intended to set the standard for the Town's obligations and the rights of the Plaintiffs as third-party beneficiaries of those Deed Restrictions. The Trial Court has acknowledged that there is photograph evidence reflecting the appearance of the AL in 1991, and since 1991, nature has caused plants to grow higher on the Accreted Land such that it no longer looks as it did in 1991. [ROA 12.] These findings are a vast understatement that reflects the Trial Court's misapprehension of the full extent of the current condition of the accreted land as evidence of the seriousness of the Town's breach of the Deed Restrictions.

The photographs clearly depict that in February 1991, all vegetation on the accreted land was no taller than three feet, and mostly consisted of sea oats and wild flowers. [ROA 116, 1024.] Those 1991 photos establish – beyond any reasonable argument – that the accreted land was not full of unchecked overgrowth. In shocking contrast, a series of photographs taken twenty years later in 2010 sadly show the drastic change that has occurred as the result of the Town's deliberate failure to abide by the Deed Restrictions in the 1991 Deed. These photographs depict the shocking and unchecked overgrowth of a maritime forest that has completely obstructed, or imminently will obstruct, all views of and from the ocean and shoreline. [ROA 128, 1036]. Every year the unchecked overgrowth on the accreted land becomes more of a problem, growing taller, thicker and more unmanageable.

The Impact of Overgrowth of Vegetation on the Accreted Land

At the time this action was filed, the Plaintiffs resided in front-row homes on Atlantic Avenue on Sullivan's Island. As noted above, in 1991, at the time of the transfer, the accreted land was comprised of sea oats and wildflowers, and the Plaintiffs' homes were oceanfront with scenic views of the shore and ocean breezes; however, over the next two decades, with the new trimming restrictions in place, the vegetation on the accreted land grew into a maritime forest. At the time of the filing of this action in 2010, the unchecked growth on the accreted land has resulted in public and private harms. The overgrowth personally has deprived the Plaintiffs of the ability to reasonable use and enjoyment of their properties for normal and conventional uses by substantially impairing and/or completely obscuring the view of the ocean from their front-row homes and diminishing the ocean breezes. The overgrowth also is obscuring the public views from the shoreline, and as well, the overgrowth has also created various forms of public and private dangers and nuisances, ranging from very serious fire hazards, mosquitos, and varmints including raccoon, snakes, rats, and coyotes.

Apart from the impairment of the Plaintiffs' personal enjoyment of their beach front home, the overgrowth also has damaged them financially. At times previous, both Petitioners' properties were appraised, assessed and classified as "beach front and ocean view" property by the Charleston County offices, and taxes were being paid on those values. However, an appraiser has expressed the opinion that the unchecked vegetation growth in the accreted land has reduced in fair market value the Plaintiffs' properties by at least one million ($1,000,000.00). [ROA 152.]

ARGUMENT

I. INTERPRETATION OF THE DEED: The Court of Appeals misinterpreted the clear language of the 1991 deed and ignored the express intention of the parties to preserve the conditions and character of the oceanfront area as it existed in February 1991.

The Town holds ownership of the ocean-front accreted lands pursuant to the 1991 Deed wherein the Town bound itself to certain restrictions and obligations aimed at preserving the conditions and character of the oceanfront area as it existed a specific point in time - February 1991. The Petitioners do not assert any common law right to an easement of unobstructed ocean view, breezes, light, or air. *See* Hill v. The Beach Co., 279 S.C. 313, 306 S.E.2d 604 (1983); *but see* Pacifica Homeowners' Assn. v. Wesley Palms Ret. Cmty., 178 Cal. App. 3d 1147, 1152, 224 Cal. Rptr. 380, 382 (Ct. App. 1986) ("right to a view" may be created by contract). Rather, the Petitioners' claims are based in contract under the 1991 Deed, and they maintain that the Town is obligated under the terms of the Deed to cut, or to at least allow the property owners to cut, all trees and shrubs on the accreted land to a height of three feet in accordance with the Town ordinance in effect in February 1991.

The Court has long recognized the value of restrictive deed restrictions and enforced them accordingly to their terms to effectuate a grantor's intent. See e.g. Abbott v. Arthur, 261 S.C. 31, 43, 198 S.E.2d 261, 267 (1973). However, in affirming the dismissal of all the claims founded on the Deed, the Court of Appeals has failed to follow the established precedent by misinterpreting and/or ignoring the core component of the deed restrictions which created a carefully documented, temporal standard for maintaining the accreted land. Accordingly, the Petitioners respectfully request that the Court grant this petition to review the Court of Appeals' decision.

A. The Court has ignored the express intent to set a standard for maintaining the natural character of the Property *as it existed in February 1991.*

There are several well-settled principles applicable to interpretation and enforcement of this deed. Wayburn v. Smith, 270 S.C. 38, 41-42, 239 S.E.2d 890, 892 (1977). "First, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." Id. (citation omitted). This is a corollary to the basic contract rule that when an agreement comes before the court for interpretation, the main concern of the court is to give effect to the intention of the parties. Id. (citation omitted). Second, the Town's intention must be found within the four corners of the deed: "[T]he intention the deed must be construed as a whole, and effect given to every part thereof, if such can be done consistently with law." Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 583 (2009) (citing Wayburn, supra.) However, in construing such covenants/restrictions: "It is proper to consider the overall plan. Such intent should, as nearly as possible, be gleaned from the instrument itself. However, the circumstances surrounding the origin of covenants should also be considered." Arrants v. Rankin, 268 S.C. 567, 570-71, 235 S.E.2d 135, 136 (1977). Ultimately, a court's duty is "limited to interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully." 30 *S.C. Jur.* Contracts § 30; Gilstrap v. Culpepper, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984).

The 1991 Deed expressly states the purpose for the land transaction as "maintaining the natural character of the property" -- as it existed in February 1991. The intent of the parties as expressly stated in the Deed is a "desire to place restrictions upon the [the accreted land] for the purposes of, inter alia retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants, or wildlife" – as it existed in February 1991. In addition, the overall plan for this two-step transfer orchestrated by the Town with the

Land Trust, and the circumstances surrounding the origin of Deed Restrictions, fully support the intent expressed in the Deed, which is to preserve the condition of the accreted land as it existed in February 1991. Clearly, the Deed restrictions are intended to preserve the conditions of the accreted land, including the significant and valuable scenic views, in the same condition as they existed in February 1991. Unfortunately, the Court of Appeals, as well as the Trial Court, have ignored or misapprehended the applicable rules of construction and the clear, intent of the Town in orchestrating the two-step land transaction and expressly stated in the Deed that ultimately accomplished the land transfer.

The Court of Appeals states that: "Appellants' interpretation of the deed would require the town to continuously remove all vegetation from the beach that was not present in 1991 to preserve this character. We do not read the deed as requiring such drastic management." [App. .] While the Petitioners maintain that the overriding intent of the Town and the Land Trust was to literally and figuratively take a snapshot in time and preserve the accreted land in the same condition as it existed in February 1991, the Petitioners have not made such unreasonable, arduous demands.[4]

As the Court of Appeals states, "[t]he deed indicates the parties intended for the land to stay in the 'condition of the Property at the time of this grant' as shown in multiple photographs taken in 1991." [App. 8.] However, it appears that the Court has misapprehended the import of these photographs and the significance to the parties' intent. In this case, those photographs were expressly required as part of the Deed to document the condition of the accreted land as it existed in February 1991. Those photographs are expressly intended to set the standard for the Town's obligations and the rights of the Plaintiffs as third-party beneficiaries.

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[4] In fact, the Petitioners have themselves attempted to arrange for the trimming on the accreted land abutting their property but they were denied permits to do so.

As the Trial Court acknowledged, the photographs clearly reflect the appearance of the accreted land in 1991. Photographic evidence also establishes beyond dispute that since 1991, nature has caused a variety of plants to grow higher such that the area no longer bears any semblance to the low-level sea oats and wildflowers found there in 1991. Rather, in shocking contrast, a series of photographs taken in 2010 depict the shocking and unchecked overgrowth that has completely obstructed, or imminently will obstruct, all views of and from the ocean and shoreline.

The Court of Appeals' view that the Deed restriction, if enforced as written, would require "drastic management" has effectively eviscerated that "February 1991" standard and defeats the parties' express intent. While freezing time and stopping all growth may not literally be possible and constant trimming might be arduous, that should not negate the parties' express intent to set a standard for preservation and maintaining the oceanfront ***as it existed in February 1991***, and specific provision of a method for documenting that standard. The Town should not be allowed to avoid the clear express Deed provisions because the current administration now deems compliance unreasonable or impractical.

Common sense and good faith are the leading touchstones of construction of the provisions of a contract[5] and the Town's actions demonstrate neither. Common sense and good faith would require substantial compliance with regular, periodic trimming to the 1991 three-foot levels, or at perhaps at the very least, the Town could allow the property owners to perform the trimming if it views the job as so drastic or unpractical.

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[5] C.A.N. Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

B. The Court misinterprets Paragraph 6 to justify the Town's amendment of the trimming ordinances to avoid its obligations under the Deed restrictions.

The Court of Appeals also misapprehends the provision and implication of Paragraph 6 of the 1991 Deed, which permits the Town to "enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions." This Court states that: "It is illogical that an organization 'whose purpose is to preserve and conserve natural areas' would transfer property to the Town and require more land management as a less restrictive regulation. Instead, the master found, and we agree, the Town's ordinances, which permit less trimming of vegetation on the accreted land, are more restrictive than those indicated in the deed, and were specifically contemplated by the deed's unambiguous language." [App. 8.]

First, the Court of Appeals has overlooked or misapprehended the Land Trust's role in the land transaction as evidence of the parties' intent. The Trust has never owned or operated the accreted land as a nature preserve or refuge such as with Botany Bay Plantation or Waites Island. The accreted land was owned by the Town, and a plan as devised by the parties involved selling it to the Lowcountry Open Land Trust, and in turn, the Trust simultaneously reconveyed the accreted land back to the Town by deed with restrictions and enforcement rights to preserve both the condition of the land and the character/lifestyle of the Town – as it existed in February 1991. This two-step transfer of ownership was deemed "necessary to ensure enforceability of the restrictions and prevent a future Town Council with different motivations from changing or weakening the restrictions or doing away with them altogether." [ROA 80.] Unfortunately, that plan has failed and the Town's new administration has allowed a maritime forest to replace the low sea oats and wildflowers, obstructing the ocean views and breezes and creating nuisances.

Second, the Trial Court's perspective of "more restrictive" is skewed. The "more restrictive" language must be construed in the context of the core intent of the Deed Restrictions and "not inconsistent" with all the Restrictions. *See* Wayburn v. Smith, supra. The Court overlooks or misapprehends that by deliberately adding a temporal defining mark to the standard for preservation, the Trust obviously must have contemplated that management would be required to maintain that status. Any interpretation that allows the Town to limit trimming and allow overgrowth does not serve the intent of the Deed to preserve the accreted land in the condition as it existed in February 1991. In the proper context, the "more restrictive" provision of Paragraph 6 might allow the Town to limit the trimming to shorter – but not taller – heights.

Third, the Court has also overlooked that such construction of Paragraph 6 is inconsistent with the provisions of Paragraph 2 which specifically addresses trimming and places specific parameters on the Town's "unrestricted authority ... to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean, and providing views of the ocean and beaches to its citizens." [See discussion of Paragraph 2 below.] Paradoxically, the Town's new trimming policy in allowing overgrowth to the extent of creating a maritime forest actually contravenes these purposes. Ultimately, the Town's interpretation is not supported by a proper reading of all the Deed restrictions in the context of the express overriding purpose to preserve the accreted land to comparable February 1991 conditions.

C. The Court erred in considering the lack of enforcement by the Land Trust to deprive the third-party beneficiaries of their rights to challenge the Town's violation of the Deed restrictions.

The Court of Appeals overlooks or misapprehends the third-party rights granted to these property owners under the Deed by relying upon the Trust's failure to recognize or report any

violations of the Deed restrictions. The affidavit of the Land Trust Director regarding the Land Trust's annual reports -- noting in the most general way that the Town is in compliance and failing to take note of the serious problems associated with overgrowth – do not amount to an admission, concession, or stipulation binding upon the Petitioners. These Petitioners are third-party beneficiaries with separate and independent rights to seek enforcement of the Deed Restrictions. If the Land Trust annual reports might be some evidence of the Town's compliance, they do not automatically preclude the Petitioners from pursuing a breach of contract claim, and they cannot sustain the grant of summary judgment on interpretation of the Deed. *See* Trial Handbook for South Carolina Lawyers § 18:5 ("A judicial admission made by one party is not binding upon coparties unless they consent to it or there is privity between them."); Barringer v. Fid. & Deposit Co. of Maryland, 161 S.C. 4, 159 S.E. 373, 375 (1931) (surety's wavier of notice of default by contractor did not have any bearing on the right of materialman as third-party beneficiary; and release of bond by the contracting parties did not preclude third-party action); *see also* Restatement (Second) of Contracts § 309 (1981) ("[T]he beneficiary's right against the promisor is not subject to claims and defenses of the promisee against the beneficiary unless the contract so provides.")

II. NUISANCE -- The Town's violation of the Deed Restrictions through its new trimming policies have created a nuisance by allowing overgrowth that harbors a variety of pests, varmints and poses dangers to the Plaintiffs personally and the other citizens generally.

The Court of Appeals rejected the Petitioners' challenge to the grant of summary judgment on the nuisance clause of action based on its interpretation that the Deed does not require the Town to clear the land. The Petitioners respectfully submit that the Court of Appeals overlooked and/or misapprehended the points as stated above and in their briefs.

"A nuisance is anything which works hurt, inconvenience, or damages; anything which essentially interferes with the enjoyment of life or property." Strong v. Winn-Dixie Stores, Inc.,

240 S.C. 244, 253, 125 S.E.2d 628, 632 (1962) (internal quotations omitted). By breaching the Deed Restrictions, the Town has allowed the overgrowth of the vegetation on the accreted land into a maritime forest that serves as breeding grown for pests and varmint, poses a very serious fire hazard, and provides cover for criminal behavior. Equity demands that the Town Government abate these dangers and honor its contractual obligations to the citizens of Sullivan's Island.

III. OTHER ISSUES RAISED ON APPEAL

The Petitioners raised other issues on appeal as stated in their Appellants' Brief, to wit:

> I. A. Did the Trial Court err in construing the Town's right to trim in Paragraph 2 as foreclosing the Plaintiffs' claims for enforcement of the Deed Restrictions?
>
> C. Did the Trial Court err in holding that the Deed Restrictions impair the Town's legislative power?
>
> E. Did the Trial Court err in concluding that the existence of the Bayonne Avenue Extension relieves the Town from its obligations to comply with the Deed Restrictions on the accreted land?
>
> II. Did the Trial Court err in striking the Plaintiffs' claims based on its misapprehension of facts and law regarding the State OCRM permitting process for cutting vegetation located inside the designated Critical Line?
>
> III. Did the Trial Court err in granting summary judgment to the Defendant Town on the Plaintiffs' claim for breach of contract accompanied by a fraudulent act because the Tort Claims Act does not provide immunity from contract claims?
>
> V. Did the Trial Court err in striking the Plaintiffs' Contract Clause claims because there is no justification for the Town to purposefully and voluntarily enter a contract and then revise their Ordinances to defiantly breach the core purpose of the 1991 Deed Restrictions?

To the extent that the Court of Appeals did not address these issues, the Petitioners reassert and preserve those issues by this Petition. Each of these issues is fully set forth in the Appellants' Brief and Reply Brief as filed in the Court of Appeals and are incorporated herein as if fully restated. In addition, the Petitioners offer an abbreviated overview of the issues to demonstrate the significant errors in the Trial Court's decisions which justify reversal of the judgment.

I. A. The Trial Court erred in concluding that Paragraph 2 grants the Town a right to trim that forecloses the Plaintiffs' claims for enforcement of the Deed Restrictions to preserve the condition of the accreted land as it existed in February 1991.

Paragraph 2 of the Deed Restrictions which specifically addresses trimming reads:

> Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given the unrestricted authority to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean, and providing views of the ocean and beaches to its citizens. [ROA 96.]

The Trial Court held that "Paragraph 2's phrase 'unrestricted authority' conclusively settles this dispute in the Town's favor." [ROA 39.] However, the Trial Court failed to read the "unrestricted" language in context with all the provisions and in light of the overall plan and intended purpose of the Deed.[6] Arrants v. Rankin, supra. The Trial Court also failed to appreciate that the Town offered no proof that the limited trimming policy and the resultant overgrowth is intended, or in fact, serves the requisite purposes of mosquito control, scenic enhancement, beach access, and ocean views as set forth in Paragraph 2. To the contrary, the allegations and evidence are that the overgrowth has worsened the mosquito conditions, and marred the scenic enhancement of the ocean views. Under the well-settled rules on interpretation of contracts and deeds, the only reasonable interpretation of Paragraph 2 is that the Town may have "unrestricted authority" to trim – to the standards as they existed in 1991 – but not to change the standards to impair the ocean views and allow uncontrolled growth of a maritime forest that not only impairs the view, but creates a nuisance in other serious respects.

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

I. C. The Trial Court erred in concluding that the Deed Restrictions impair the Town's legislative power.

In dismissing the Plaintiffs' claim, the Trial Court held "reading the contract in the manner advocated by the Plaintiffs would violate South Carolina's case law on impairment of legislative power," relying upon Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 131-32, 459 S.E.2d 876, 880 (Ct. App. 1995), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996). [ROA 16.] However, the Court's decision in Piedmont, holding that a municipal entity could not enter a 20-year employment contract with a public officer does not support the Trial Court's conclusion that the Town Council had no authority to make binding covenants in the Deed Restrictions. Rather, in contrast, the Supreme Court has upheld the city was bound to certain real estate covenants in the case of Cheves v. City Council of Charleston, 140 S.C. 423, 138 S.E. 867 (1927), stating in compelling language: "The city council ... is bound by the contracts in these cases and that subsequent acts of the Legislature, or ordinances of the city council of Charleston, cannot operate to permit the defendant to impair the obligations of its preexisting contracts, regularly made and authorized." *Id.* at 868. By the same reasoning, these Deed Restrictions should also be held valid and binding. This real estate transaction was thoughtfully considered by the Town Council in 1991 and duly approved and executed under seal. Promises were made and actions taken in reliance on those promises. It is simply untenable that the Town can simply walk away from the Deed Restrictions because of a change in Council members after an election.

I.E. The Trial Court erred in concluding that the existence of the Bayonne Avenue Extension relieves the Town from its obligations to comply with the Deed Restrictions on the accreted land.

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

owned between the Plaintiffs' properties and the accreted land – referred to as the Bayonne Avenue Extension. [ROA 14.] However, the Trial Court's ruling is incorrect and based on a misapprehension of the facts and illogical faulty reasoning. First, the Trial Court erred in finding that there is some separate parcel that lies between the Plaintiffs' front-row lots and the accreted beachfront property. While there is a portion of Parcel 9 –locally known as the Bayonne Avenue Extension – which has been left undeveloped and there is no vegetation obstructing the views on in that area, the 1991 Deed does not evidence any provision exempting such a portion from the Deed Restrictions. Moreover, the Trial Court separately found that: "The Plaintiffs occupy 'front row' lots on Sullivan's Island, meaning that no other buildable lots exist between Plaintiffs and the ocean." [ROA 23; see also 741.] Second, irrespective of the existence of the Bayonne Avenue Extension, it does not negate the Plaintiffs' right to enforce the covenant/promise on the accreted land which stands independently of any supposed obstruction of their ocean views that might arise on that strip of property. *See* Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 493 S.E.2d 875, 879 (Ct. App. 1997) (discussing impossibility of performance).

II. The Trial Court erred in finding that the location of the OCRM line and the need for an OCRM permit negates the Plaintiffs' claims to enforce the Deed Restrictions against the Town.

As has become routine in our ever-increasing bureaucratic world, a Town-trimming permit is not the only permit required for trimming vegetation on the accreted land. There are also State regulations that prescribe permitting to control trimming in a designated coastal region known as the "Critical Line." *See* S.C. Code § 48-39-10, 35. The Trial Court granted the Town's motion to strike the Petitioners' damages claims due to the location of the Critical Line, because the Plaintiffs have not applied for or obtained a trimming permit from the OCRM. [ROA 22, 25, 27.] In so

holding, the Trial Court misapprehended the facts and law regarding the vegetation in question and the OCRM lines.

First, there is no absolute prohibition that would prevent the Plaintiffs from obtaining the necessary OCRM permits; rather, there is an administrative process involving discretionary decision and the fact that the Petitioners ultimately might not be able to obtain an OCRM permits for trimming on all accreted land between their property and the shoreline does not negate their rights to trimming on the accreted land outside of the Critical Line. Perhaps most significantly, the Trial Court misapprehends or ignores that these Plaintiffs cannot even apply for an OCRM "cutting permit" without the Town's permission. See S.C. Regulation 30-2. Finally, lack of an OCRM permit cannot justify dismissal of the Plaintiffs' claims where the State permitting process is being road-blocked by the Town's lack of cooperation and blatant refusal to give permission. *See* 17A Am. Jur. 2d *Contracts* § 677 (impossibility excuse is subject to the requirement that the promisor is not at fault); 17A Am. Jur. 2d *Contracts* § 680 (denial of government permit does not excuse performance where party did not show diligence in trying to obtain the government's consent).

III. The Trial Court erred in concluding that the Tort Claims Act provides the Town with immunity for a claim of breach of contract accompanied by a fraudulent act.

In addition to alleging breach of the 1991 Deed, the Petitioners have also asserted that the breach of contract was accompanied by a fraudulent act entitling them to punitive damages. The Trial Court granted summary judgment on the Petitioners' causes of action for breach of contract accompanied by a fraudulent act on the ground that "the Defendants are immune from suit under the South Carolina Tort Claims Act." [ROA 5.] The Trial Court erred in granting summary judgment on this claim because the cause of action asserted by these Petitioners is one in contract, not tort, to which the Tort Claims Act does not apply.

First, as a matter of record, the Plaintiffs' second amended complaint does not assert a cause of action for fraud, and as a matter of law, a claim for breach of contract accompanied by a fraudulent act is not the same as a claim for fraud. Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374, 378 (Ct. App. 1986) (citations omitted); *see also* Ball v. Canadian American Exp. Co., Inc., 442 S.E.2d 620, 314 S.C. 272, 276 (Ct. App. 1994) ("Breach of contract accompanied by a fraudulent act is not simply a combination of a claim for breach of contract and a claim for fraud."). Second, the South Carolina Tort Claims Act only applies to tort actions, and expressly provides that the Act does not affect liability based on contract claims. S.C. Code Ann. § 15-78-20(d). A claim for breach of contract accompanied by a fraudulent act is not a tort claim. Cox v. Am. Oil Co., 183 S.C. 519, 191 S.E. 704, 710 (1937). Rather, it is a breach of contract claim in which punitive damages may be recovered upon proof of a fraudulent act. Ateyeh v. Volkswagen of Florence, Inc., 288 S.C. 101, 341 S.E.2d 378, 379-80 (1986).

Accordingly, the Tort Claims Acts does not immunize the Town of Sullivan's Island from liability arising from its contracts. The Town of Sullivan's Island is bound to its contractual obligations under the 1991 Deed just as any private individual. *See* U. S. Fid. & Guar. Co. v. City of Asheville, 85 F.2d 966 (4th Cir. 1936) ("Municipalities and other public bodies are held to same standard of accountability for their contracts as individuals.").

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

The Trial Court also ruled that there is no contract clause violation because the 1991 Town Council did not have the power to bind subsequent Council actions, and citing to I'On, L.L.C v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (SC 2000). However, as the Supreme Court explained in Greenville Cty. v. Kenwood Enterprises, Inc., 353 S.C. 157, 167, 577 S.E.2d

428, 433 (2003), the I'On decision simply holds that land use regulation cannot be achieved by referendum, which holding has no application in this case.[7] This is a contract case arising from the two-step transaction proposed by the Town officials, given all legally due consideration, and duly approved by the Town Council.

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

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

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

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

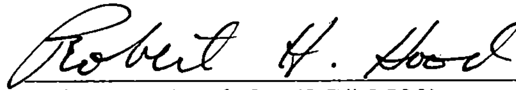
CONCLUSION

The Town faced a longstanding and enduring issue with the accreted land and after due consideration, the Town chose to address that problem, not through a governmental/bureaucratic zoning land use system, but through a traditional land transaction with deed restrictions. That option was expressly intended to ensure enforceability of the restrictions by third party beneficiaries such as these landowners, and to avoid the risk that a change in political leadership in the Town government could easily alter the restrictions. The lower courts' failure to apply well-settled contract law to honor the thoughtfully considered and clearly expressed intent that underlies the 1991 Deed has allowed the Town to avoid the restrictions and create a maritime forest in the beachfront accreted land that has absolutely no semblance to the condition of that land in February 1991. Under bedrock principles of contract law, applicable to all landowners, the Town should be bound to the 1991 Deed restrictions to restore and maintain the conditions and character of the oceanfront area as it existed in February 1991.

WHEREFORE, based on the special and important reasons discussed above, Petitioners respectfully request that this Court grant the petition to review the Court of Appeals' decision and reverse the Trial Court grant of summary judgment to the Town.

Respectfully submitted,

Hood Law Firm, LLC



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October 22, 2018

CERTIFICATE OF SERVICE

The undersigned certifies that on this day of October 22, 2018, a copy of the foregoing Petition along with the accompanying Appendix was served on the Respondents by depositing said copy in the U.S. Mail, with sufficient first-class postage, on the following counsel of record at the address listed below:

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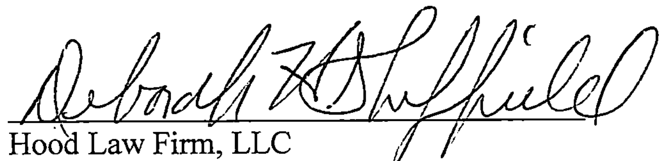

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