20367

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

RECEIVED
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SC Court of Appeals

Ralph P. Stroman, Special Referee
Case No. 2009-CP-26-1909
Appellate Case No. 2012-212984

Randy A. Beverly, LLC, and Donald Godwin, LLC, ... Plaintiffs,

v.

Bucksville Farms, Inc., ... Defendant and Third-Party Plaintiff,

v.

Randy A. Beverly and Donald Godwin, ... Third-Party Defendants and Fourth-Party Plaintiffs,

v.

Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc., ... Fourth Party Defendant,

OF WHOM

Bucksville Farms, Inc., and Benjamin J. Creel, individually and as surviving Director of Bucksville Farms, Inc., are ..... Appellants,

and

Randy A. Beverly, LLC, Donald Godwin, LLC, Randy A. Beverly and Donald Godwin, are ..... Respondents.

RECORD ON APPEAL
VOLUME II

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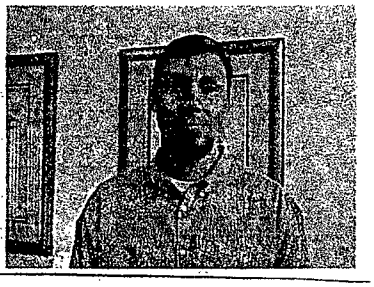
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State of South Carolina)	In the Court of Common Pleas
)	15th Judicial Circuit
County of Horry)	Case # 09-CP-26-1909
Randy A. Beverly, LLC and Donald Godwin, LLC,)	Deposition of: CHARLES OATES
Plaintiffs,)	
-vs-)	
Bucksville Farms, Inc.,)	
Defendant/3rd Party Plaintiff,)	
-vs-)	
Randy A. Beverly & Donald Godwin,)	
3rd Party Defendant and)	
4th Party Plaintiffs,)	
-vs-)	
Benjamin J. Creel, Individually and as)	
Surviving Director of Bucksville)	
Farms, Inc.,)	
4th Party Defendants.)	



The deposition of Charles Oates was taken before Sarah B. Fry, a Notary Public in and for the State of South Carolina, at the Hudson Law Office, 1203 48th Avenue North, Myrtle Beach, South Carolina 29577 on April 13, 2010 commencing at 10:28 a.m.

COPY

ADVANTAGE COURT REPORTING
OF MYRTLE BEACH
7201 Enterprise Road, Myrtle Beach, S.C. 29588
843-650-6263

BEING FIRST DULY SWORN, Charles Oates testified as follows:

EXAMINATION BY MR. HUDSON:

Q. Mr. Oates, I'm attorney Dwight Hudson. I represent Mr. Beverly and Mr. Godwin in connection with this lawsuit that concerns property out on 701, that I understand you've been involved with in your professional capacity, and I'll be asking you some questions about your involvement in it. Before we get into the details of the situation, I need to kind of introduce you to the Court, so let me start at the beginning by getting your full name and professional address, please?

A. Full name, Charles, middle name Clentis, last name Oates, Junior. My profession is, I am a department manager with S&ME, Incorporated in Conway, and do environmental and natural resources work.

Q. Okay. What -- who do you work for? You gave some initials. What is that?

A. S&ME stands for soils and material engineering. We're an environmental and geotechnical engineering firm.

Q. Okay. And how long have you worked there?

A. Since 2002.

Q. All right. And what do you do for them?

A. I do environmental and natural resources work, including phase one environmental site assessments, wetland

delineations, wetland permitting, protected species assessments, and mitigation review, and mitigation banking with the Corps of Engineers.

Q. I'm going to get you to explain that in a little bit more detail for us laymen in here in a minute, but let me get your educational background, maybe starting with high school and all your professional training, if you could give us that, please?

A. Okay. High school was West Florence High School, graduated in 1988. Went to Francis Marion University for a business degree. Stayed there until 1991. Did not finish my business degree. Decided to get into environmental and forestry field. Went to Horry Georgetown Technical College, and received an associate's in forestry management, and subsequently got out of there and went straight into the environmental field. Started doing wetland delineations with the Brigman Company in Conway in 1994.

Q. Okay.

A. Had a nine month stint away from doing wetlands work, where I wanted to get back into business, and found out that I belonged back in the field again. So other than a nine month gap, I have been doing wetland delineations since 1994 to the current date.

Q. All right. Now, explain what you do, and we're talking to

folks -- other folks that are like myself, maybe need a little bit of an educational description of what you do and what is wetlands delineation. Tell us about that.

A. I will. When we do a wetlands delineation, or someone wants to develop or purchase a piece of property, the US Army Corps of Engineers is bound by the Clean Water Act to protect the nation's waters from pollutions, anything that could potentially have a negative effect on the nation's navigable waters. That's a very simplified explanation of the Clean Water Act. We can go into hours on that. But so what we're doing, when we go out and determine if a piece of property has wetlands, it is defined by the US Army Corps of Engineers Wetland Delineation Manual, and is a three parameter approach. We're looking at soils, to determine if the soils are hydric or non-hydric, which is wetland or non-wetland soils. We're looking at the vegetation, the plants on the property. All the plants have some type of an indicator as either being wetland plants, upland plants, or facultative, which is a large group of all the plants that kind of will grow in wetlands or dry soils. And then we're looking at ground water hydrology, which is one of the more difficult parameters to prove or disprove. We're trying to determine if the groundwater stays perched near the surface, in the upper ten to twelve inches of the soil, throughout periods of the growing

season. So it's a three parameter approach, and a really good analogy is like a three legged barstool. All three have to be there for it to stand. If one of the parameters is missing, then you either move down the hill to pick up that parameter, and that's where you determine the wetland line to be, or it's just not there. So all of my work is audited by the US Army Corps of Engineers. They're the sole agency that has the authority to say if wetlands are present or not present.

Q. All right. Are they basically the final word and authority on what is a wetland and what is not, for legal purposes?

A. That is correct.

Q. All right.

A. That is correct. And basically, when we do our field work, we'll submit a report of our findings to the Corps of Engineers, and it will have a series of maps, some data sheets that outline those three parameters, the vegetation we encountered, the soils we encountered, and if we encountered hydrology or indicators of hydrology in the soil.

Q. Okay.

A. We submit that to the Corps of Engineers. They will come out and audit our fieldwork, and agree or disagree with our delineation of where we placed the flags in the field. When that is approved, a licensed land surveyor will

prepare a plat, and we'll submit the plat to the Corps of Engineers for their final approval. They in turn issue a letter, which is the only way to tie it down in the real world. They submit a letter saying that that survey plat is an accurate representation of the wetlands on the property.

Q. All right. This process that you've just described, does it always require the Corps of Engineers representatives or personnel coming out to the site and verifying or going over what has been submitted to them in the application by way of what you've just described, by way of soils, vegetation, hydrology, and the like?

A. It does not. They can do what they call a desktop determination. If they know your work, if you've done work long enough for them, and they understand your work, and they trust your work, they can do a desktop determination. But they typically do that on smaller sites, where all the information we've provided is, for lack of a better term, is cut and dried. You know, if it's obviously all uplands or obviously all wetlands, and that's what we're saying, and they can do a desktop. But typically, they go in the field. They like to go and do the fieldwork.

Q. All right. When you say a smaller site, what's a smaller site?

A. Ten acres or less would be considered probably a small site.

Q. Okay. So generally most things bigger than ten acres, and over ten acres, they visit the site?
A. Unless there's just overwhelming proof of soil maps and provided information, photographs that we would submit, that would help them not have to go in the field. But you're right. Anything over ten acres, they typically want to walk on.
Q. Okay. So your job is, again, just briefly, give me the thumbnail sketch of what you, in your professional capacity, do to submit to the Corps to get their approval. What do you do? Just physically, what does it take you to do?
A. Well, at the very -- at the start of the project, of course, I'll go out and walk the property, and I'm looking at the vegetation. I have a hand auger that I take soil samples in the upper fifteen to twenty inches, and we're looking at the color of the soil. The color of soil determines wetland or non-wetland soils.
Q. Just hold your place right there, but just by way of explanation, for the purposes of laypersons in the courtroom, it doesn't require mud puddles or water on the property, ponds or streams or anything else, to be considered wetlands?
A. That's correct.
Q. Okay. Go ahead.

A. Wet lands, two words, is standing water. Federal definition of wetland, one word, is saturation to the surface. You don't -- and many of the wetlands in Horry County, we don't have standing water. We're looking at the groundwater. And the definition is that the surface water has to stay near the surface for thirteen -- it's the percentage of the growing season in South Carolina, in the type of soils we have. That definition by the Corps of Engineers is loosely defined as the upper fifteen inches of the surface, and it has to stay in that area for fifteen consecutive days during the growing season, which is April to November in South Carolina.

Q. Okay. So it can look dry to us laymen out here, but it could still be wet?

A. That's correct.

Q. Wetlands.

A. And part of what we're looking at in groundwater hydrology, because we don't have the time, and the Corps of Engineers knows we don't have the time to put in monitoring wells and determine if that water is there, there's indicators in the soil that we can look at to give us an idea if it does stay there. There's morphological adaptations that the trees and different soil types have. So there's -- when we take a soil sample with our auger and basically break it open and look at it, there's indictors in

the soil that we can see, that would tell us if that groundwater does -- it is present throughout the majority of the growing season.

Q. Great. Okay. I interrupted you. I hope you kept your place.

A. I did.

Q. But just what you actually do when ...

A. Right. I was on that second part of going into the field, looking at the vegetation in the soils, and then thirdly we're looking at those hydrological indicators. If all three of those are present, and it is where we're standing would be considered a wetland, we slowly start working our way up some type of a topographic divide until one of those parameters drop off. Either you have a change in vegetative community, you have a soil type change, or the indicators of hydrology cease to exist. And that's where we hang our first flag. That's where you start the process. And typically, that's either on a property line, or if you're in the middle of a property, you will just continue working that system all the way back around till your flags will tie back together and close the loop or tie it from property line to property line. You have close that traverse for the surveyor.

Q. Okay. Kind of describe the flags. Paint the picture for us. Just what are you talking about with the flags?

A. Well, each -- all firms using different flagging tape. We use pink flagging that very boldly says in black print, "wetland boundary," or, "wetland delineation," on the flagging tape. And we tie them typically about thirty feet apart. A lot of it depends on how thick the site is. Basically, we want the surveyors to be able to walk from flag to flag and not get off of the wetland delineation, want to make sure that they hit it accurately in the survey. And on some of the thicker sites, we'll actually number our flags A1 through whatever we end up on, so that way they know that they're hitting every one of the flags in their survey, and collecting that data.

Q. With your -- in your profession and your employer, you've identified the folks that you work for. Do y'all also provide the surveying of the wetlands?

A. We do not. We are not registered land surveyors. We work hand in hand with many of the surveyors in Horry and Georgetown Counties, and what we'll do is, we'll provide a sketch. When we've finished our field work, we'll provide a sketch of where we found wetlands, and provide that to the surveyor, so that it makes his job easier. He's not randomly walking around trying to find our flags. He has a point to start, and then he can go from there.

Q. When the surveyor goes out there, and I guess particularly on any of these tracts we're going to eventually be talking

about here today, are you out there with the surveyor to assist them?

A. Typically not. I have in the past on some sites that are really thick, where they can't find the flagging. Or when the Corps of Engineers has a backup in their workload, it can take five to six months from the time we flag the site until the surveyors come out to look at it. So the flagging tape has a tendency to fade in the sunlight from a bright pink to a very dull, muted pink. Many times we do have to meet the surveyors and kind of walk them through the process to get them going.

Q. Okay. So there's a time lag between the time you, as an environmental delineation -- wetlands delineation person and the surveyor come out there. Is that interim period when the Corps of Engineers goes out there to check the accuracy of the delineation, or what you've marked or flagged? Is that correct? Is that the sequence of events?

A. That is correct, yeah.

Q. Okay.

A. When we complete our field work, and we go back to the office and prepare our maps and our data sheets, typically we'll have a location map. We'll show the site on a portion of a USGS topo map, which would show where the topography reveals on the site, an aerial photograph with a sketch of approximately where we found wetlands on the

site, if we found them. And then we'll provide some soils information. And the data sheets that we provide, our -- the representations of what we found at the site. We submit that to the Corps of Engineers. It is logged in. It is stamped in as a log-in at the Corps of Engineers office, and it's assigned to a project manager at the Corps of Engineers. And once it ends up at the project manager's desk, depending on his workload, they work on the projects in sequential order from when they received it stamped as part of their -- into their stack. So it can be, from the time we're done with our work, and we submit it to the Corps of Engineers, it can be four to six months, depending on their workload, before they ever come out to audit our work. And then, once it's audited, you're dealing with the surveyor and his timeframe to go and survey the flags, which could take several weeks. And then getting a plat back to the Corps of Engineers. So it's not uncommon for our work to lag on, from submission to the Corps of Engineers to final receipt of the letter, eight to ten months, sometimes a year, depending on the workload.

Q. Okay. So all of what you just described is -- the object is to get that final letter from the Corps as to the extent or the delineation of the wetlands, approved by them?

A. That is correct. The Corps of Engineers wetlands certification letter, or what they've determined to call a

jurisdictional determination, or they shorten it, as everything in the military, as a JD letter.

Q. Right.

A. That is the Rosetta stone for most developers. That is the point where the plat is approved, can then be handed to a civil engineer for their layout of whatever they want to do to avoid those -- impacting those wetlands.

Q. All right. And do lending institutions get these letters from the Corps as well?

A. Only if the client gives them to them. Our company, we work directly for our client.

Q. Right. Right.

A. We hand everything over to our client, and then at that point, what they do with it, I'm unaware of.

Q. Right. Okay. All right. I think another term that might come -- become involved in some of this testimony today is silvaculture. Can you tell us what that is in the context of wetlands and wetlands delineation?

A. Yes. Silvaculture, as defined by the Corps of Engineers, or loosely described by the Corps of Engineers, is dealing with pine monoculture. Going into a piece of property, and basically you can row crop silvaculture. I guess agriculture is a form of silvaculture, but silvaculture is typically agreed upon as growing of trees for a cash crop. And silvacultural exemptions were put in place when the

Clean Water Act was written, so that foresters and timber buyers were not excluded from cutting certain tracts of land. So some of the silvaculture exemptions you can do in wetlands is, you can harvest timber out of a wetland, provided that you don't do any mechanized land clearing like bulldozing. You have to leave the stump in the ground, so you would shear the tree off at ground level to harvest that timber. And that is a silvaculture exemption, that you can legally go into a wetland and harvest timber. Another part of silvaculture exemptions is cleaning out existing ditches, so if you've got some ditches around a piece of property that was historically wet, and there were existing ditches, you can go in and maintain those ditches. The Corps of Engineers will allow you to go in and maintain them to restore the flow patterns and keep the water moving off the site, remove beaver dams, logjams, sediment debris. Maintenance of a ditch is not taking a small ditch and turning into a large ditch. They typically agree that you're going to go in and clean out several inches of silt and organic debris out of the bottom of the ditches to get the flow going, and that is a silvaculture exemption. But typically it's going in and harvesting trees in wetlands. It's replanting trees back into wet areas, if you need to, for silvaculture exemptions. Cleaning out ditches. There are some best management practices that

the US Forest Service has in place for silvacultural work in wetlands. It describes temporary haul roads, temporary logging decks, and then how to restore those back when you're done.

Q. Okay. And silvaculture in this process, is that a typical or an accepted practice in, say, landowners maybe attempting to lessen the impact of what would otherwise be wetlands on the property?

A. It can be, yes. In Horry and Georgetown Counties, in this whole region we're in, we've very strong in timber production, with a local timber mill not far from where the site is. So a lot of landowners will go into a piece of property that has sat idle for many years, and is a very thick tract that is just not doing anything. Will go in and harvest this timber, and open the property up, and allow it to dry out some, to be able to get in there and find some of the old ditches and clean those ditches out. And will just allow the sun to shine on the property, and just see if there's some positive results from that on what would be otherwise property that's just so thick and sitting there that nothing's happening. It's just basically growing at a very slow rate because of backed up ditches and inundation of water that may or may not be on the property.

Q. All right. Okay. Well, great. That's a good explanation. I appreciate that. Now, we're here today about some

property out on 701, Highway 701, and the other parties that I've identified earlier, Mr. Godwin, Mr. Beverly, and Mr. Creel, who is here today. Can you tell us how you -- and Jimmy, I'll probably you to let him have his file now. I hope you kept it in the same order. Is that all of it? Okay. Take this opportunity to go through your file and make sure that maybe the deck hasn't been shuffled too much there, and you've kind of got your handle on everything, and I'll be asking you some questions.

A. Actually, there's one ...

Q. Everything look like it's there in order?

A. I'm looking for one particular handwritten note from the field. Okay, yes. Everything's here.

Q. Everything there in order?

A. Yes.

Q. Okay. Very good. All right. Okay. I did ask you to bring your file, and it looks like you've brought your file, and you've just checked it. Mr. Creel's attorney has been ferreting through the file, and I'll ...

MR. STEVENS: Object to the form of that question, and that -- I object to "ferreting."

Q. And I'll be asking you some questions about that. When did you first become involved in this tract, or your company -- well, there's two questions, your company and or you become involved in this property out on 701 with

the parties that I've just identified?
A. We were asked by our client to perform a wetlands delineation on a portion of this property on November 21st of 2005.
Q. Okay.
A. We subsequently prepared a proposal outlining the services that they were requesting that we could provide, and that proposal was dated November the 21st of 2005. It was prepared for Southern Asphalt. At the time, that was our client, to the attention of Mr. Jamie McClain.
Q. Okay. And what was the request, or what did they want to hire you to do?
A. They asked us to do a wetland delineation on a tract which we roughly called two hundred and eighty acres, and that was based on some numbers provided by Mr. McClain. And they were asking us to do a wetlands delineation, which included the fieldwork, submission to the Corps of Engineers, and all the way through to the audit process of the Corps of Engineers.
Q. All right. Was that the same property that you know that we're here today about, or at least a portion of it?
A. It is a portion of that property, yes.
Q. Okay. All right. Did you proceed to provide your services pursuant to that request?
A. We did. They authorized us to proceed on January the 5th

of 2006, after the holidays, by signature of our contract.
Q. Okay. And that was with Southern Asphalt and ...
A. That was correct, and it was authorized to proceed by Mr. Jamie McClain.
Q. Okay. All right. And what did that authorization consist of? To what extent were you to proceed with your services?
A. We were authorized to proceed with wetland delineation of what was originally assumed to be roughly two hundred and eighty acres, and we sketched the property boundaries on an aerial photograph to move forward.
Q. Okay. I'm going to ask you to maybe explain, you know, what y'all did, using these maps. And I think maybe we can mark them as exhibits on the back, where it won't interfere with any of the front or the illustrations or photographs, I guess.
MR. STEVENS: You're going to make the court reporter have to copy the back?
Q. And then we'll have to copy, you know, those, but I don't -- well, let me see.
A. I have no problem -- I have no problem with you writing on the front.
MR. STEVENS: I don't think there's a problem with ...
Q. Okay. Well, let me see.

MR. STEVENS: ... pictures on the front.

Q. Well, that was going to be -- is there any -- is there a good place to put the stickers on here that's ...

MR. STEVENS: Sure.

A. Yeah. There's gaps around the property that ...

Q. Okay. How about these little blank areas here? Is that okay?

A. That's perfectly fine.

Q. In most all of these?

A. That's perfectly fine.

Q. So just -- so on part of the picture itself, kind of a blank area there, we can put the stickers. Okay. All right. Very good.

A. So once we were -- should I continue?

Q. Absolutely.

A. Okay. Once we were under contract in early January to go out and conduct the fieldwork of the wetland delineation on the property, we were right in the midst of winter rains. And Mr. Jamie McLain, who was our client, who was very, very familiar with wetlands and forestry, kind of recommended that we hold off until we get into the spring, March area. So in January we prepared some maps, some sketches, of what we thought the property boundary was, based on some TMS information that we were able to get from ...

Q. A TMS is -- explain to us folks what ...
A. The tax map information.
Q. Okay.
A. Horry County tax map information.
Q. Is that a normal source that you go to or ...
A. It is.
Q. ... folks go to, to ...
A. It is. It's an available source online.
Q. Great.
A. It's open to the public to go in and look at tax boundaries, or parcel boundaries of property.
Q. Right. And I hate to keep interrupting you, but maybe if you can bear in mind, when you're describing things, there's folks over here, including maybe myself, that don't understand a lot of the lingo or the terminology within the industry. Maybe if you could just kind of paint the picture for us?
A. Sure.
Q. But go right ahead. I still want to turn it over to you. And go ahead with your explanation, and I'll try not to interrupt. And what we want to do is have you identify these maps that you did sequentially, with the work, and we'll have to probably put some little -- neat little stickers on them as we go, and we need to interrupt you for that.
A. That's not a problem.

Q. But go right ahead. You were doing great till I interrupted you. Go ahead and describe what you were doing.

A. Okay. The typical process that takes place, when we are hired to go out and do a wetland delineation, is we will gather as much data as I can gather prior to going into the field. And part of doing that is looking at the Horry County online tax parcel information to get an idea of what the property boundaries look like, if a plat is not provided. Typically they're not, so we'll have a rough idea of where our property boundaries are. And we'll do -- overlay that information on a vicinity map, so we can find the property. Portions of the USGS topographic maps, which will show us where topographic relief is and potential streams, blue line streams that are showing up on those maps. We'll get the most current color infrared aerial photograph that we can get, and those are available online from DNR. They're publically available as well.

Q. Okay. DNR?

A. South Carolina Department of Natural Resources.

Q. Okay.

A. I apologize. And we start overlaying all this data on different backgrounds to get an idea of where they overlap, and that's a great place for us to start our field investigation. No one source is one hundred percent

accurate, but when all of our sources overlap and tell us there's a region of the property that needs some investigation, that's where we'll start our process. And in doing that, in January, after being notified to proceed, we put together a series of these maps or figures, is what we call them, for our report. We met with Mr. McLain to verify that that was the correct, or at least the approximate boundary information for his study area, and ...

Q. Before we get right into that discussion, when you say, "we," that includes yourself and ...

A. Myself and a Mr. Casey Wollard, who is a -- also does wetland delineations. He's in my department.

Q. Okay. Very good. All right.

A. Mr. Wollard has been doing wetland delineations for approximately four years now, under my supervision.

Q. As we go through this process, if "we" includes anybody else or whatever, maybe identify the new players.

A. I apologize.

Q. All right.

A. So I prepared these figures ...

Q. I do all this -- you're doing great. It really is. But when we read it back -- and this will help everybody, if we can just identify people and things, when we read it back. All these little interruptions I'm doing are for clarification, for when we read it back after the court reporter transcribes it.

So I hate to be so picky, but that's generally what we're talking about.

A. Okay.

Q. Thank you. Go right ahead.

A. When we decided it was time to go and do the field work, we -- as in myself and Mr. Wollard -- we met with Jamie McLain, explained to him that conditions were favorable. We were out of the wintertime. We were into the growing season, which is when we're supposed to be monitoring our groundwater hydrology, or looking for indications of hydrology. So when we went out on the site, we prepared to go to the site and start this work, we met with Mr. McLain to verify that this was the tract or the approximate boundary of what we were supposed to be looking at. At that time, I had an aerial photograph, which we have labeled as site aerial photograph, two hundred and eighty acres, Highway 701 property, Figure 3, dated January of 2006.

Q. Okay. Can we mark that, and that would be ...

MR. STEVENS: Do you have a color copier, Dwight?

Q. Say again?

MR. STEVENS: Do you have a color copier?

Q. Yes, I do.

MR. STEVENS: Can we get color copies of this

now, so that we can look at it as we go through? It's kind of hard to follow. If we could make copies of these -- just mark them and ...

Q. Can you keep them -- put them back in order the way you're going to do it, and we'll make copies right quick?

A. Uh-huh.

Q. I don't know how long ...

MR. STEVENS: Why don't you go ahead and mark all the color copies.

Q. Go ahead and put the stickers on them. That will be good, yeah.

MR. STEVENS: And that way we can identify, and you can make copies.

Q. In any order you want to do them, Chuck, you just go ahead, and give them to her, and make -- and I'm not sure whether it makes any difference, but let's do it sequentially the way you want to ...

A. Well, she's already started.

Q. Very good.

A. She's already started the stickering process, so I will start back over and identify these photographs by her exhibit numbers.

Q. Okay. That will be good. What we'll do is make copies kind of now, once she gets all the stickers on there, and then everybody can follow along.

(PLAINTIFF'S EXHIBITS 1 - 7, FULL PAGE SIZED COLOR PHOTOGRAPHS, PLAINTIFF'S EXHIBIT 8, A LARGE WETLAND SURVEY MAP, AND PLAINTIFF'S EXHIBIT 9, FULL PAGE SIZED COLOR PHOTOGRAPH, WERE MARKED)

(A SHORT BREAK WAS TAKEN OFF THE RECORD)

EXAMINATION CONTINUED BY MR. HUDSON:

Q. If you can remember where we were on the maps, go ahead and proceed.

A. I'll start with where I think we ended up, and that was, once we were under contract to do a wetland delineation on the parcel, we obtained the Horry County tax parcel information for the site, overlaid that information or drew it in using a computer program on a portion of a USGS topo map and an aerial photograph to get some ideas of what the site may look like when we get out there.

Q. All right.

A. We met with -- we, as in myself and Mr. Casey Wollard, with my company, met with Jamie McLain on March the 8th of 2006 prior to starting our fieldwork, to verify the approximate location of the property boundaries. This boundary information was not provided by a registered land surveyor. It is our take of what Horry County said the property parcel information loosely represents. In that meeting, we were told by our client, Mr. McLain, that a

portion of the property line was incorrect for what they wanted us to look at. Correct, relatively correct, by parcel, but not correct by the size or portion of the property they were interested in us doing the wetland delineation on. That information is marked on Plaintiff's Exhibit 1, was when it was written in the handwriting of Mr. Casey Wollard with S&ME on 3/8 of '06, and it basically states, "Changed by Jamie McLain, 3/8/06," where we highlighted with black Sharpie an area that was intended to be reviewed. Figure 2, which is Plaintiff's Exhibit 2, is a USGS topographic map of that same information, where we were highlighting with a Sharpie the project study area, and actually hashed out an incorrect portion that we were asked not to look at.

Q. So the portion you were asked not to look at is hashed out there?

A. On figure -- on Plaintiff's Exhibit 2, is correct.

Q. All right.

A. At that time, we went back to our office ...

MR. STEVENS: Excuse me.

A. Yes?

MR. STEVENS: Did you tell him -- did you say the date on Exhibit 2, that you were told not to ...

A. I did not. There was not a date indicated on Figure 2. Based on ...

MR. STEVENS: But number 1, you said 3/8/06?

A. Plaintiff's Exhibit Number 1 is written -- was written in pen on 3/8 of '06 by Mr. McLain, and that was the figure that the proposed project area was highlighted with black Sharpie.

MR. STEVENS: Could you explain on number 2?

A. Figure 2 was also with -- stapled to Figure 3, as indicated by the staple marks on the original copies, where you can see that they were correctly positioned when stapled. Do you agree with that?

MR. STEVENS: Yeah.

A. Okay. So these two were stapled together.

MR. STEVENS: This came from ...

Q. All right, now. Wait a minute. He's answering my questions. What is ...

MR. STEVENS: I was just trying to find out where it came from.

Q. Well, let me ask my questions, and then you can ask yours.

MR. STEVENS: I'm so sorry.

Q. Well, thank you. I mean, you were ...

MR. STEVENS: I'm trying to clear it up.

Q. You were carrying on a -- let's do the South Carolina Rules of Procedure rather than Jimmy's rules of procedure.

MR. STEVENS: Excuse me. I was just trying to

understand what you had asked.
Q. Yeah. Well, thank you very much. Thank you very much. You can understand later. Let's play by the one set of rules. All right. Go ahead with your testimony, before Jimmy Stevens started testifying.
MR. STEVENS: Object to the form of that question. I was asking him questions.
A. These two figures, the Plaintiff's figure -- Plaintiff's Exhibit 1 and 2, that were marked up in the field, when we met with Mr. McLain on 3/8/06, were used to revise our project study area, where we were being asked to do a wetland delineation.
Q. All right.
A. Plaintiff's Exhibit 3 and 4 are the same backgrounds, which is USGS topo and aerial photograph, with a revised property boundary per our meeting on '06.
Q. All right. 3 is ...
A. A US -- a portion of a USGS topographic map.
Q. Right.
A. Which is the Bucksville, South Carolina quadrangle. And Plaintiff's Exhibit 4 is a 1999 color infrared photograph that was obtained through the South Carolina Department of Natural Resources website.
MR. STEVENS: Would you mind asking him the question on Exhibit 3 and 4, he said pursuant to a meeting

in '06. Can we get the exact date, if he has it?

Q. Well, let him testify. Because we -- your interruptions are ...

MR. STEVENS: I'm just asking.

Q. Well, don't ask. Wait. You're going to have a chance to ask anything you want to ask.

MR. STEVENS: I'm just trying to get it now, so I don't have to ask any questions.

Q. Well, wait your turn. All right. So the aerial photograph -- now, Plaintiff's Exhibit 3 and Plaintiff's Exhibit 4, these are sources you normally use?

A. That's correct.

Q. Okay.

A. They're part of typically what we submit to the Corps of Engineers as a package, which is a combination of vicinity, topo, aerial photographs and data sheets.

Q. And of course, the Corps, they expect these sources and these maps to come to them as part and parcel of your -- what do you call it, an application?

A. The US Army Corps of Engineers has a minimal requirement for an application, which is very minimal. We typically try to exceed that, to help them as much as possible, to expedite the process. If you provide them the minimal data, it takes them longer to gather their internal data. So ...

Q. Okay.
A. ... the more information we provide them helps.
Q. All right. So we have on Exhibit 3, got a little area that says, "subject property." And that means what?
A. That's the area that we were asked to do our wetland delineation in. That is our subject property area that we will be conducting wetland delineations inside of that approximate boundary.
Q. Okay. And to the exclusion of the other property in the tract?
A. Correct. To the exclusion of the areas marked on Exhibit 1 and 2 that were marked out in our field meeting on 3/8/06.
Q. Okay. Very good. All right. So go ahead -- go ahead with your explanation, because these are your maps. We want you to stay sequential with them, please.
A. So we modified our tract boundary, per our client. We started our fieldwork.
Q. All right. And about when was this?
A. Would have been late March to early April. I'm not sure of the exact date that we conducted ...
Q. '06?
A. I apologize. April the 10th was the date that we did our data forms in the field. This process took ...
Q. Now, data forms are ...

A. ... one to two weeks.
Q. ... are what?
A. The data forms are what the Corps of Engineers requires for outlining vegetation, hydrology, and soil types for each individual area that we determine to be a wetland or non-wetland.
Q. Okay. So April of '06, April the 10th of '06?
A. Was we were in the field on April the 10th of '06.
Q. All right. And physically doing what?
A. Physically delineating wetlands, or actually determining if wetlands were present first. And then, once encountered, they were delineated with the flagging tape that -- it's pink flagging tape that says, "wetland boundary" or "wetland delineation" on it.
Q. Okay. All right.
A. We completed our fieldwork, put together this submittal package that we've mentioned, which is a combination of vicinity, topo -- topographic maps, aerial photograph, and the data forms, along with the request for a determination, which is a US Army Corps of Engineers form that is downloadable from their internet site, which basically has property owner information, agent information, status of the project, project type, the information being provided, and a place for a signature. So ...
Q. So it's ...

A. It's a one page form.
Q. All right. So that form, and you had that in your file?
A. I do have that in my file, and this is a file copy of what was submitted to the Corps of Engineers in April.
Q. Okay. Can we mark that as -- how many sheets? Is it just one sheet there, or those maps are attached?
A. One, two, three, four, five, which is front and back. It would actually be five, six, seven, eight, nine. It would be a total of ten pages. The data forms are front and back pages.
Q. Okay. Ten pages?
A. Back pages, three of which are front and back, and the remainders are one page.
Q. Okay. Well, let's just ...
MR. STEVENS: Can we make a copy of that?
Q. Let's go ahead and mark that as one exhibit sequentially, and we'll deal with the copying of the back and front a little bit later.
(PLAINTIFF'S EXHIBIT 10, TEN PAGE SUBMITTAL PACKAGE, WAS MARKED)
A. So this is our US Army Corps of Engineers submittal package, Exhibit 10.
MR. STEVENS: That will be Number 10?
Q. Okay. And can I see that just a moment, please? Okay. This has been marked as Plaintiff's Exhibit 10, so -- and

the purpose of this submission is what?

A. This is the official request to the Corps of Engineers where we -- when we complete our fieldwork and submit this package, this is a request for the Corps of Engineers to come out and concur with our findings, to ultimately obtain the end result, which is a letter from the Corps of Engineers agreeing with our wetlands delineation?

Q. Fine. Okay.

A. This is what starts the process internally for the Corps of Engineers, is a request.

Q. Okay. Great.

A. Has to be a written request. Cannot be a verbal request to come out and visually walk a piece of property.

Q. All right. And that is dated?

A. This is dated April the 19th, 2006.

Q. April 19th, 2006. All right. Go ahead with your testimony as to what you did.

A. All right. When we completed our wetland delineation, which within Plaintiff's Exhibit 10 is a Figure 3, which is an aerial photograph -- a 1999 aerial photograph from the South Carolina Department of Natural Resources that we used as our background. We have the approximate subject property or study area outlined in red. We have the approximate location of the wetlands that we encountered during our delineation in blue. And there are three sets of

data points, which are also in this package, which are the documentation of the vegetations, soils, and presence or absence of hydrology in each one of those three areas.

Q. All right. Okay. So the wetlands that y'all have designated or delineated are in blue?

A. They are in blue, and they are in the -- this map is oriented to the north, with the north arrow, so it is in the southern portion of the property is the wetlands that were delineated. There's also some explanations of anomalies or different looking spots on the aerial photographs for the Corps of Engineers' assistance, one of which was a logging deck, which is in the northern portion of the site within the planted pine regions. It is a very dark spot, and when we went in and investigated that area in the field, we determined that it was one of the original logging decks, which was just a matted down, very poorly maintained area. Additionally, we indicated that the northeastern portion of that site, up adjacent to Highway 701, we have it labeled as old agricultural fields that were planted in pines and clear-cut, and that it historically had been cultivated. The reason that we indicated that is because the soils in that site had been turned by a plow, so we're not looking at natural soils, as you would in an undeveloped tract of land. So indicated that, although they may be hydric soils, they have been worked for years

and years with a plow, breaking the soils up and allowing them to dry out. And that was just indicated as, once again, information to provide to the Corps of Engineers based on our site review. Because indications on some of the maps showed that that may potentially have been wet, and this is just a little note outlining our findings in the field.

Q. Okay.

A. So we completed that package and submitted it to the Corps. It went into the US mail, and it would have been around -- well, it's dated April the 19th, so ...

Q. Okay. All right. And what took place following that submission?

A. To the best of my knowledge -- I don't have a date. You know, I don't know if I can say that. But 2006, the Conway field office of the US Army Corps of Engineers was not accepting packages directly. You could not physically drive there and hand-deliver it. So we had to mail this to Charleston, which was a gap in time. So there was an April the 19th mail going to Charleston.

Q. Right.

A. Logged in as a project in Charleston, and then at some point Charleston mailed it to -- the Charleston US Army Corps of Engineers office mailed it to the Conway US Army Corps of Engineers office. So there was a several

week delay in there.

Q. So the Corps has an office in Conway?

A. The Corps of Engineers now has a Conway field office. That is correct.

Q. But you had to submit it to Charleston first?

A. That's correct. When they first started, they didn't have signature authority. They didn't have anyone that was qualified to sign reports. So Charleston being a district office, not a field office but a district office ...

Q. I see.

A. ... of the US Army Corps of Engineers, our submissions were mailed to Charleston, and then put in an envelope periodically, and packages were sent back to the Conway Corps of Engineers office.

Q. Okay. Okay. All right.

A. We completed that, submitted it, conducted a site visit with the US Army Corps of Engineers. Actually, the Corps of Engineers audited the site without us being there. I stand corrected. We were not present on the day the Corps of Engineers audited this site.

Q. What date did they audit the site?

A. I don't have that information, because I was not present at that audit. It is not uncommon for a project manager at the Corps of Engineers to have one site to look at, and then look at several other sites en route or on the way back, to

fill up and entire field day. During that audit, once again in this same figure, Plaintiff's Exhibit 10, which is the submittal to the Corps of Engineers, Figure 3 you will see a hand-drawn very unique figure in the northeastern portion of the tract, which is an area that the Corps of Engineers, when they examined it the day they did their audit, with my absence, with me not being there, said that it met the criteria to be a wetlands, and that we needed to include that in our survey.

MR. STEVENS: For the record, that is an area right above the yellow dot and the words "data point one."

A. Correct. And just west of Highway 701 south.

Q. Okay. And ...

A. So this is an area ...

Q. ... so tell us again ...

A. ... that they disagreed with.

Q. Okay.

A. That the US Army Corps of Engineers field representative disagreed with our area, with our call where we said that that was not a wetland. In our opinion, it was lacking hydrological indicators in the soil, meaning that the groundwater didn't stay there long enough during the growing season to be a wetland. It was altered in pine monoculture. This area has been bedded, which means a raised area to plant the pine trees in. And it was -- we

considered it to be altered.
Q. Okay.
A. The Corps of Engineers, during their audit, determined that they thought it did have the hydrology. So in turn we did add that to our map, and that is indicated on the overall survey plat, which I believe is your figure here.
Q. Thank you very much. All right.
A. We, at the request of the Corps of Engineers, added that wetland area to our delineation, which was later surveyed by Carolina Land Surveyors, and a survey plat, which is labeled Plaintiff's Exhibit 8.
Q. Okay.
A. And it is labeled as wetland A.
MR. STEVENS: How do you want to handle this? Do you want to put it in the record?
Q. Well, that's the best we can do.
MR. STEVENS: Put one in the record, and then we'll keep one?
Q. I've handed her one, yeah. So ...
MR. STEVENS: For the record ...
Q. Let's mark that. What exhibit is that?
A. This is Exhibit 8. Exhibit 8.
Q. Exhibit 8.
MR. STEVENS: For the record, it's nine eight and a half by eleven pages, which is pieces of the map from

Carolina Land Surveyors. We just have to put it together.

Q. Okay. Go ahead with your testimony now.

A. All right. So once the wetlands were relocated in the field, we -- the Corps of Engineers did not need to revisit that area, once it was determined to flag the wetland A area. The surveyors went out and located our wetland flags, which we indicated to be in the southern portion of the site originally, and then the additional area the Corps of Engineers added, which was in the northern portion, which is labeled as wetland A on Exhibit 8. We provided this plat to the Corps of Engineers as a closure on S&ME's portion of the project, which is providing all the information to the Corps of Engineers. And once they received that survey plat, they prepared a wetlands determination letter which they -- the US Army Corps of Engineers calls a jurisdictional determination letter, or JD. That letter is dated November 27th, 2007, and it is for a portion of a tax map number, and it is for two hundred and twenty-two point seven seven acres of land, and it references the plat prepared by Carolina Land Surveyors, which is Exhibit 8. The Corps of Engineers references survey plats to be able to tie it down to a known location in the real world. If there was ever a question of wetland violation, and there was a wetland determination letter

done, theoretically a surveyor could go back out to these original wetland points, even if they were gone, and relocate that. So this is the only tool the Corps of Engineers has to tie our pink flags that we hang in the field down to the real world, to be able to go back and relocate anything that may or may not be impacted.

Q. Okay.

A. So this letter basically is saying that the plat is an accurate representation, and it has a lifespan of five years. So it is valid for five years from the date of November 27th of 2007.

Q. Okay. So that is the -- that is the permit so to speak from the Corps of Engineers?

A. This is the Corps of Engineers tool or method of saying that our delineation and the survey of that delineation are correct.

Q. All right. So that is the legal document that you're seeking from the Corps to finalize what's wet and what's not?

A. That's correct.

Q. Okay. Let's mark that...

A. The Corps of...

Q. Let's mark that next exhibit.

(PLAINTIFF'S EXHIBIT 11, 11/27/07 LETTER, WAS MARKED)

Q. All right. That's Exhibit 11. What's the date on that letter,

Mr. Oates?

A. The date is November 27th, 2007, and it is a two page letter.

Q. Okay. It looks like these things started in April of '06, or at least the data, and the letter was finally received in November of '07?

A. That's correct.

Q. That's roughly a year and a half later?

A. That's correct.

Q. Why the -- why the passage of time?

A. In 2007 and 2006, the workload that the Corps of Engineers was experiencing, and the project managers that they had in the Conway office, which at that time may have been two or three, was extremely overwhelming. And it was very common practice for a project to take upwards to a year and a half to sometimes two years to finally obtain this letter from the Corps of Engineers, due to workload.

Q. Okay.

A. As I stated before, the Corps of Engineers processes submittals as stamped.

Q. Right.

A. So there's no favoritism. You don't get your package pulled from the middle of the stack.

Q. Right. Okay. And again, this approval covered how many

acres?

A. Two hundred and twenty -- two hundred and twenty-two point seven seven.

Q. And by your understanding in your records, how many acres in the tracts were not included in the delineation process? Can you do the math on that?

A. Well, originally we were asked to look at approximately two hundred and eighty acres, so there would be roughly sixty acres missing.

Q. Okay. Okay. All right. Let's go on with the next one. And I don't want to get you -- you go ahead and explain to us your process and whatever sequence of -- I don't think I have -- according to my stack here, I don't believe we ever got to Plaintiff's Exhibit Number 5, but I'm not trying to get you out of sequence with what you're doing.

A. I'm working chronologically through...

Q. Okay. That's good.

A. ... our file.

Q. All right. Good.

A. And that takes us up to November 27th of 2007, which is the Corps letter.

Q. All right.

A. The US Army Corps of Engineers certification letter, which is Exhibit 11.

Q. Right.

A. This letter was provided to our client for their files, and any development plans they may need to -- or whoever -- whatever state or federal agency may need a copy of this letter.
Q. Okay.
A. At that time, we closed our file and billed our client, and moved forward.
Q. Okay. Was there any work subsequently?
A. At a later date, I was asked by Mr. McLain, which I have a figure. It was Plaintiff's Exhibit 5. In June of 2008, there was a portion of the site that was omitted in Plaintiff's Exhibit Number 1 and Number 2, where I had commented that there was an area or a portion of the site that was not part of our study area on both Exhibit 1 and Exhibit 2.
MR. STEVENS: What was the date again?
A. It's June of 2008.
MR. STEVENS: June, what day? Do you know?
A. I do not know.
Q. Okay.
A. So we were asked to revisit a portion that we were originally omitted back in 3/8 of '06 on figures one -- Exhibits 1 an 2.
Q. All right. Okay. And that was again for what purpose, to revisit it?
A. Our client asked us to pull soil information, some national

wetlands inventory maps, which are prepared by the US Fish and Wildlife Service, which are readily available on the South Carolina Department of Natural Resources website. It's information that we call remote sensing information. It's data that we can gather without going in the field. It's basically, as I commented before, it's data we'll gather, and then overlap this data to see where there's areas of concern.

Q. Okay.

A. Our client asked us to look at the front roughly fifty acres. Our figure actually has it labeled as forty-nine point six. We are not surveyors. That is just part of our program. The boundary that we hand-drew in with our computer system indicated that it was forty-nine point six, roughly fifty acres. You know, we were asked to look at that area to see how much of that would be considered a wetland. And we prepared Exhibit 5, which is Figure 1 site aerial photograph, dated June of 2008, for our client, saying that based on the information we have, roughly twenty-eight point three acres of the forty-nine point six acres would be considered a wetland by the Corps of Engineers. And again, that was using remote sensing information and without any field observations.

Q. Okay. And without a final determination by the Corps of Engineers?

A. Correct.
Q. All right.
A. And that was also helpful in using the aerial photograph, which is the background information. It was very helpful in seeing water. These photographs were taken in the wintertime, when the leaves are off the hardwoods, and water shows up as blacks and blues and grays. And so that's why we use this as our background, because it is a great place for us to start our -- you know, our remote sensing investigation.
Q. Okay. You have a pre-printed entry at the bottom of this aerial photograph, black print in yellow background. What is that? And why is it placed there?
A. It's placed there to say that this is merely an approximation, or it's our best guess of what would be wet on the property. But it also states that nothing has been submitted to the Corps of Engineers or approved by the Corps of Engineers. It should be used for basically planning purposes. And it also states that, prior to any land clearing activities, that a wetlands delineation or a jurisdictional determination should be approved by the Corps of Engineers. And that's put there to -- so that a client would see this, use it as a planning tool, but would not use it to go in the field and start bulldozing, and potentially create a wetland violation.

Q. Right. Would that go back to the fact that the final word is with the Corps of Engineers, the final legal determination of wetlands is with the Corps of Engineers?
A. That is correct. That is correct.
Q. To issue a letter similar that you've identified previously, I believe, Exhibit ...
A. 11.
Q. ... 11, right.
A. Yes, sir.
Q. Okay. All right. Okay. Well, go ahead. That was Exhibit Number 5. What happened next, after you did this?
A. After we prepared a copy of this and gave it to our client -- when I say a copy of this, I mean Exhibit 5 -- we were told to actually expand that coverage area to the south side of the overhead power line right-of-way, which we had used as our southernmost boundary on Exhibit 5, to include approximately forty additional acres in our research. And this is Plaintiff's Exhibit 6, which we have labeled as Figure 2, which is August of 2008, where we included the -- August of 2008, we included the additional acreage, which made the tract become approximately ninety acres, excluding the overhead power line right-of-way that transects the site from east to west. And again, looking at national wetlands inventory data and soils information, which is provided by the Soil Conservation Service, and

interpreting the color infrared aerial photograph, we continued to mark what we felt like would be considered a wetland by the Corps of Engineers, I guess S&ME's best guess of what would be a wetland, without conducting a site visit. And on this aerial photograph, of the approximate ninety acres, we estimated roughly fifty acres of it to be considered a wetland, if a field delineation were to be conducted.

Q. Okay. Just so us folks over here that are not all that map-savvy, in actually Exhibit Number 5 and Number 6, are the wetlands area kind of indicated by -- it looks like these little computerized objects that appear to be plants or -- I'm not sure what they're supposed to be.

MR. STEVENS: You can just ask him if it's in white.

A. That's correct. Well, that is correct. In the legend block at the top of our aerial photographs, we have a block, a white box, and inside of the hash mark is basically a wetland feature or a marsh hatch, which is a common hatch used by many surveyors. And it is a white outlined area of hashed-in plants.

Q. All right. So that's the legend at the top. I see we've got some red markers, it says a slash or Z, or whatever that is. It says approximate tract boundary, and I really don't see any red marks.

A. In the program that was used in doing this, it was a GIS program, which is a layering program. And apparently, when this was drawn, we were just getting into using this program. We had just obtained it in 2008, and the layer for the wetlands, for the US -- if you'll continue down in that legend ...

Q. Right.

A. ... you'll see a green squiggly line that says, "US Fish and Wildlife Service 1994 Wetland Inventory -- National Wetland Inventory Data." That layer was apparently above the boundary layer when it was printed, so the boundary is underneath that green. If you would go to ...

MR. STEVENS: Is it green or yellow?

Q. It's kind of yellow.

A. Yeah, yellow.

Q. Yellow, right. Okay. Very good. Okay. That explains it. I was trying to ...

A. And I apologize for ...

Q. No, that's good.

A. And that was ...

Q. These are basically -- they're clear to you, but they're not to us folks who really don't know some of these things. Okay. So the red would be -- yellow superimposed over the red, so we're dealing with the yellow as to the ...

A. The approximate tract boundary.

Q. ... tract boundaries. Okay. Very good. Okay. And what took place -- and we've got part of this -- now, here again we talked about a power line easement or right-of-way. I guess it's Santee Cooper. That is the long white-looking tract, cleared area or strip of land in between, that divides the two boundaries of yellow?

A. That is correct.

Q. Okay.

A. That is -- well, it's basically east to west.

Q. Correct.

A. And it bisects the tract near the center.

Q. Okay. All right. Okay. And after this was done, what happened next?

A. Actually, back to Exhibit 5.

Q. Okay.

A. Where we only had the northern portion of this property outlined.

Q. All right. The northern portion would be part outlined in red?

A. Correct. North of ...

Q. On Exhibit 5.

A. North of the power line right-of-way, and southeast of US Highway 701, outlined in red on Exhibit 5. When we were asked to do a remote sensing review of this property, that forced me to go back into our archives and obtain our

2006 file folder. It was two years later, so it had been filed in our storage room. When I obtained the survey plat out of that file room ..

Q. Can we ...

A. ... we did the original -- which is Exhibit ...

MR. STEVENS: 8.

A. ... 8.

Q. 8, very good.

A. I used that to go by the property boundaries. At that time was when we realized that a portion of this property -- of the tract was included in the survey inadvertently by the surveyor, and as well was missed by S&ME, myself, Charles Oates, and the US Army Corps of Engineers, which was labeled as Parcel B.

Q. All right. When you say "missed," kind of backtrack for us on that. What do you mean? What was missed?

A. When we obtained the survey from Carolina Land Surveyors, which is Exhibit 8, in looking over what they had highlighted in bold, which they were including as part of the tract, and comparing it to our files, Parcel B was highlighted in black by the surveyor, but was not included in any of our submittals to the Corps of Engineers. That was not -- we did not observe that at the time we submitted it to the Corps of Engineers. The Corps of Engineers project manager reviewed the survey plat and

did not compare it to our files, nor did they catch that that was not something they had looked at in the field or that we were saying was part of ours. So it went through two processes, ourselves and the Corps of Engineers, and was never captured that that was an extra piece of property that was not supposed to be included.

Q. All right. So included in what? So tell me what the net result of ...

A. Included as ...

Q. ... that omissions, apparently, along the way?

A. Correct. Going back to Exhibit 10, which was our submittal to the US Army Corps of Engineers, all of our figures that we submitted to the Corps of Engineers omitted that Parcel B.

Q. Parcel B on Exhibit 8?

A. That's correct. So Exhibit 10, which is our submittal to the Corps of Engineers, what they used to go into the field, and walk around, and look for our wetland flags without our presence being there. Parcel B, it was added in -- Figure 8, I apologize, that was added in, part of the surveyor ...

Q. When you say, "added in," added into what?

A. Depicted on the survey plat.

Q. Okay.

A. Which is Figure 8.

Q. Right.
A. Which should not have been depicted as part of our subject area that we were sending to the Corps of Engineers in Exhibit B.
Q. Okay.
A. At that time, in June of 2008, we were asked to look at -- which is Exhibit 5, a piece that was originally omitted from the delineation that we did.
Q. Right.
A. Which is north of the power lines and south of Highway 701 on Figure 5.
Q. Okay.
A. The reason I digress is, on August of 2008 -- actually, in June of 2008, when we did this, I brought it to the attention of our client that additional land was covered under this Corps of Engineers letter that was not part of our study area, and it is a mistake, if you will, on our part and the Corps of Engineers' part for not catching that additional Parcel B of Exhibit 8, which is approximately -- which is labeled as forty-six point nine four acres as being uplands, not containing wetlands.
Q. So the net -- I mean, the net result of what you're telling us is that Parcel B, while it was approved, it was through mistake and inadvertence, and has not been delineated properly or legally, would be the Corps' position. Is that ...

A. That is correct.

MR. STEVENS: Object to the form of the question.

Q. Okay. All right. So -- okay. Well, go ahead. And so ...

A. So Parcel B, that was included by the land surveyors on the survey plat that was submitted to the Corps of Engineers, which is Exhibit 8, and approved by the Corps of Engineers under US Army Corps of Engineers letter Exhibit 11, was never physically observed or walked on by myself or Mr. Casey Wollard. So I have ...

Q. Or apparently the Corps? Is that ...

A. I don't know if he walked it or not.

Q. Okay.

A. He was -- when I say he, the US Army Corps of Engineers project manager.

Q. Right.

A. Going by Exhibit B, which was his information submitted to him, the drawings do not show that he should be on that piece of property.

Q. Okay.

A. So whether or not he walked it, I do not know. I wasn't there, but typically they only stick with the -- they only observe the areas that they're supposed to, which are indicated by the consultant, myself, on the property submitted. So when this was found to be a mistake, it was brought to the attention of our client to determine what we

do. He said, well -- he, as in Mr. McLain. That's who I've dealt with throughout this process. Said -- asked us to prepare the remote sensing information as we had done on the June of 2008 Figure 5, on that portion as well, which is indicated on Figure 6 and 7 -- Plaintiff's Exhibits 6 and 7.

Q. Okay.

A. To make a best guess on how far off the survey plat was, because it was not supposed to be originally included. It was inadvertently depicted by the surveyor. Figure 6 -- I'm sorry. I apologize. Exhibit 6 is S&ME Figure 2, which is an aerial photograph. On that aerial photograph is an overlay of the US Fish and Wildlife Service National Wetlands Inventory, which is commonly referred to as an NWI map that the Corps of Engineers typically use before they go in the field. They'll pull one of these pieces of information and look at it before they go in the field. And this map has some indications of U21, which is in a small agricultural field on this piece of the property in the northeastern corner, but then it goes on to have various other indications of PFO1, PEM, PFO14B. These are symbols from the US Fish and Wildlife Service that indicate wetland soils and wetland types. A PFO is a Palustrine forested. 1 and 4 meaning they're deciduous hardwoods, which are hardwood trees that drop their leaves in the winter. And B is an indication of seasonally

flooded or inundated. This is one of the pieces of information that we will use prior to going in the field, to try to get some kind of an idea of what we're -- we may be looking at.

Q. Okay.

A. Exhibit 7 is the same background, US DNR, Department of Natural Resources, 1999 aerial photograph. And on that photograph you will see a soils layer overlaid, and that is from the NRCS Soil Conservation Service, and it is also a layer that we can download off of the Department of Natural Resources website, and it gives us an indication or at least an idea of the soil types we may encounter on the property.

Q. That seems to be, according to the legend on Exhibit Number 7 ...

A. That is correct, yeah.

Q. ... the blue outline?

A. That's right. The soils layer and the soil types are delineated or broken on the map by a blue line.

Q. Okay.

A. And then the soil name, which is provided by NRCS, is in blue with a white shadow behind it to make it stand out a little bit better.

Q. All right. So these soil types look like local names anyway, so they're not -- those are soil types. Yauhannah,

Yemassee?
A. That's correct. Those are soil types that are -- that were labeled by the NRCS, South Conservation Service.
Q. Okay. All right.
A. These two pieces of information are very helpful, when you can look at a -- as I had indicated before, the three types of -- three criteria in a wetland are hydric soils, hydric vegetation, and groundwater hydrology. Exhibit 7 is a good indication of soil types. That's one of the three criteria I have to look at. So I can look at what is mapped as either a hydric or non-hydric soil by a soil map.
Q. Okay. Now 6 and -- Plaintiff's Exhibit 6 and 7 were prepared for what reasons?
A. August of 2008. Our client asked us to give a thumbnail sketch, or our view, approximation, without doing any field observations. Just give us an idea of what may be on this additional tract that was originally omitted ...
Q. Okay. And ...
A. ... when we were doing our first delineation.
Q. And both 6 and 7 obviously have the same black notice on the yellow background in the bottom right-hand corners concerning what you've published before about ...
A. That is our standard language, that we just basically state that this is an approximation. It is not a delineation. It has not been approved by the Corps of Engineers, and should

be used for basically planning purposes and not for any land-disturbing activities.

Q. Okay. Great. Okay. And I interrupted you again, but go ahead with an explanation, and sequentially with any of the other maps. But go ahead and finish with those, if you haven't.

A. Right. And these two pieces of information, Exhibit -- Plaintiff's Exhibit 6 and 7 were very helpful in our approximation or sketch of what we may encounter if we went in the field. Exhibit 7, which was the soil survey, that majority of that site, which would be the majority, being the northwestern portion of the site, is determined to be of Geechee soil, which is a listed hydric soil. That is on a list of soils for South Carolina that would be considered a hydric or potentially wetland soil.

Q. Okay.

A. So that's one of my three criteria I have to use, to determine if an area has a wetland, hydric soil or non-hydric soil.

Q. Right.

A. The NRCS Soil Conservation Service has mapped a large northwestern portion of this site as a Geechee or hydric soil. The southeastern portion of this site is mapped as Yauhannah, which would be considered a non-wetland soil. Yauhannah soils are moderately well drained sandy

soils, and that's here and here.
Q. All right.
A. So that's -- oh, I'm sorry.
Q. Go ahead. I'm sorry. I -- you go ahead. I'm sorry.
A. Again, as I had commented, no one source of information is a hundred percent correct.
Q. Okay.
A. And that's why we overlap data and information, when we can, using our GIS system. So we overlaid Figure 6, which is -- the US Fish and Wildlife Service prepared some maps in 1994 that were in -- that were entitled National Wetland Inventory Maps. Again, this is a layer that we downloaded from the Department of Natural Resources, and looking at that, it has the field in the northeastern portion of the site mapped as U21, which is an upland agricultural usage. And again, the field in the southeast, a small portion of the field, is U21. Adjacent to the southeastern corner that's U21, you'll see a U42P, which is P for planted in pines. That's here. The remainder of the property is marked as PFO, which is Palustrine forested. 1 and 4, which are -- 4 is broadleaf, deciduous, which are your hardwoods that drop their leaves in the wintertime. 1 is evergreen. And then there are also markings of B, capital B at the end, which indicates a seasonal saturation or inundation. Which

means what they have mapped is basically a hardwood area that, throughout the season, the growing season, may have saturation or inundation, which would be your groundwater, which is the second of those three criteria needed to be considered a wetland. So by these two pieces of information, I can relatively quickly say that it is mapped as a hydric soil, and that the Fish and Wildlife Service has mapped portions of the site as being forested wetlands. And utilizing those two pieces of data, and our interpretation of color infrared photography, the signatures on the photography, we were able to do a rough sketch or approximation of the wetlands that may be encountered, provided we were asked to go in the field.

Q. Okay. And what happened after the preparation there of Plaintiff's Exhibits 6 and 7? What happened next?

A. We provided a copy of the figure to our client, Mr. McLain, in 2008. We were never asked to go in the field. We were never asked for a proposal for cost to delineate those wetlands. And the file was once again put back into our archives in our office.

Q. All right. What happened next as far as your contact or involvement with the property out there on 701?

A. At a later date -- and I apologize for not having a good date. The landowner, I assume Mr. Benjamin Creel, had asked us to -- asked us -- asked me, Charles Oates, myself,

to meet with him about conducting a wetland delineation on this portion of the property as outlined in Exhibits 6 and 7.

Q. All right. So Mr. Creel contacted you about a delineation of the property indicated on 6 and 7?

A. And it was shortly after the August 2008 date of these maps that we provided to our client.

Q. So that request ...

A. To my best recollection, was in 2008.

Q. So the fall of 2008, the latter quarter?

A. I think ...

Q. After August?

A. ... that is a safe estimate, yes.

Q. All right, sir. Okay. All right. As a result of that ...

A. I ...

Q. Go -- I'm sorry. Go ahead.

A. I met with Mr. Creel at his office.

Q. Okay.

A. And provided a copy of our sketch, and indicated to him that, from riding down Highway 701 and looking into the tract, that there -- the property needed some attention.

Q. What do you mean by attention?

A. It needed a little effort. It was looking ...

Q. What do you mean by that?

A. There was water standing on the property.

Q. Okay.

A. This was -- it needed silvacultural help. It needed some ditches probably cleaned out. I had recommended going in and harvesting portions of the timber, and creating a park-like view, if you will, just sparsely spaced trees and underbrushing the property with some mulching equipment, all of which are -- fall within the silvaculture exemptions and are legal from the Corps of Engineers. But in doing that, you open up a piece of property and allow sunshine to hit the surface of the ground. You break up that leaf litter and allow evaporation to take place. And part of what we're looking at, as I indicated prior, the groundwater hydrology, which is the hardest of the three criteria to determine, because we are not monitoring a year's worth of data with wells in the -- monitoring wells in the ground. We're looking at indicators, indicators in the soil to determine if hydrology's there. So it's been our experience -- my experience, I apologize, properties that you will open up and allow the wind to blow across, the sun to shine down on, that you have some drying of that surface. You're going to have some evaporation that takes place in the property. When a forested area is very thick and, for lack of a better term, choked, if you will, no sunlight hits the forest floor, and you've got a couple of inches of leaf litter that is acting as a blanket. They're just

holding all that moisture in. There's nowhere for it to go. So my recommendation to Mr. Creel was to just go in there and harvest some of your timber, open the site up and underbrush it, and then let it sit and let some water do -- and then I'll take a look at it, and we'll proceed with potentially doing a delineation on it.

Q. What kind of a timeframe are we talking about for this silvaculture process that you recommended? I mean, on ...

A. It's very weather ...

Q. ... average?

A. It's very weather dependent. So coming out of last year's drought, during a very dry period, you can get in and harvest timber in areas like this without rutting and destroying the property, or very -- causing a lot of deep ruts that would hold water and defeat the purpose. It's very weather dependent. You typically -- you go in when it's dry, harvest the trees, because there are some large trees in there that are heavy, that during a wet period would cause the equipment to create ruts and hold water. So go in during a dry period. Harvest these trees. And then another piece of forestry equipment, which is loosely defined as mulching. It's basically a cutter head or a giant lawnmower, if you will, and it takes everything left behind from the logging operation and basically mulches it, and creates a park-like view, and makes it very open, and

allows wind to blow across the property and sunshine to beat down.

Q. All right. Does your company provide silvaculture services, or do you leave that to the landowner to ...

A. We leave that to the landowner. We do not provide that in our office. We leave that to the landowner to coordinate with the forester to come in and harvest the timber, and then ...

Q. All right. So the landowner would coordinate -- or do this with a forester or on his own, to try to accomplish this silvaculture technique that you've described to us?

A. Correct.

Q. Okay. Okay. Go ahead. I interrupted again.

A. And that was it. That was the end. After I met with Mr. Creel and made some recommendations on how to maybe better the property from a wetlands standpoint, to try and open it up and dry it, I've ridden past the site since and have continued to look in onto the tract as I ride by. I have not seen anything happen, and assumed myself that the project was done, and nothing was moving forward. And other than obtaining a letter for this meeting today, that was the end of the project.

Q. All right. So when you say you're riding by and didn't see any activity, have you observed any change on the property that would indicate any silvaculture attempts or

anything had been done at all?
A. Not from Highway 701, which is the road that I've traveled. I have not seen any silvacultural changes on the site.
Q. All right. Has Mr. Creel asked you at any time afterwards to do anything else by way of delineation or activity on the property?
A. No, sir.
Q. All right. Have you had any conversations with him at all since that time, or let's say late '08, the fall of '08 or the last quarter of '08, concerning the property, after the -- your conversation with him at that time, and suggesting silvaculture activity?
A. No, sir. I have not spoke with Mr. Creel on this particular property until yesterday.
Q. Okay. And what kind of conversation did you have yesterday?
A. A conversation about the approximate amount of wetlands on the property, just inquiring as to my knowledge of what took place in 2008 as far as roughly how many acres were wet and how many acres were not.
Q. And what was your response? Can you just give me the benefit, as much detail as you can remember about the conversation?
A. My response was, I remember that a large portion of it was

wet, and that I had provided a copy of the same map that I gave to Jamie McLain, our client, to him, and he would have to go to that figure to get that acreage.

Q. All right. So you provided that to him yesterday?

A. No, sir. He was provided the ...

Q. That back in ...

A. ... same figure back in '08.

Q. In '08, the fall of '08, I'm going to say? Yeah, fall or winter of '08. Okay. All right. And you had heard nothing else from Mr. Creel until yesterday?

A. That's correct.

Q. Since the fall of '08?

A. That's correct.

Q. All right. Okay. Have you -- since the fall of '08, the last time -- let me back up. The last time that you've heard from Mr. Jamie McLain, I think, after he had you do, I think, 6 and 7, Exhibits 6 and 7, is that right?

A. (NODS HEAD)

Q. When's the last time you heard from Mr. McLain since Exhibits 6 and 7 were prepared at his request?

A. I heard from -- via telephone call from Mr. McLain, and Donald Godwin, and Randy Beverly, that we would be -- that they were -- let me think how this took place. There were questions about the remainder of the portion, that they may have to purchase, based on a contract that they

had with Mr. Creel, that I have never seen. But there was talk that they may have to purchase this site, and what did I think could be done on the site. And I explained to them the same things I told Mr. Creel. You know, it needs some attention. You need to do some harvesting of timber, and open the site up, and try and make it better.

Q. All right. When would those conversations have taken place?

A. It was last year. I apologize for -- again, if I had my Outlook calendar, I may still have it on the Outlook for the meeting. It was a phone call conversation, but ...

Q. Sometime in '09? We're on '10 now, so it would be '09?

A. Yes, sir.

Q. Early '09 or ...

A. Probably mid '09, the summer.

Q. Mid '09?

A. Somewhere, because we were still relatively busy before the crash in the economy, so ...

Q. I know this is taxing your memory, but can you be as specific as you can about those conversations more than you've done so far? If you can't, I understand, but just we're looking for specifics.

A. Specifics was that they may have to buy a piece of property, or that there was question as to whether or not they would have to buy the property. And did I think,

based on riding by the property and looking at it, was it any different than the original approximation we provided them. And my answer was, nothing has been done to the property that I can physically see from the road that would have changed my approximation in 2008.

Q. In your conversations back with Mr. Creel, back in the fall of '08, which I think is a little -- you indicate is the last time you talked with him prior to yesterday. Was there any conversation as to why he was requesting your services?

A. I don't recall. I really don't. I just remember that he had asked me to meet with him at his office in Conway on the remainder of the portion about hiring us to do a -- potentially hiring us to do a wetland delineation. And that was when I took a copy of the figure to show him where -- what we provided to Jamie McLain and my client as to what was approximately wetlands. And at that time was when I made the recommendations for some additional work.

Q. All right. Did he give you any indication or conditions in his conversation as to that he might not proceed, or what might keep him from proceeding?

A. Not to my recollection did he ever say that, "I'm not going to do anything with the property, based on your recommendations," no. I do remember leaving the

meeting that day expecting that he was going to do some work in the field to -- some silvacultural work in the field to harvest timber and open the site up.

Q. All right. And did he give you any indication in the conversation as to why he was doing this, why he was going to proceed with this indication that he gave you, that he would be proceeding with silvaculture and ...

A. I do recall that -- I recall that he commented on the same contract of what I'm calling it, is the way I was told, that they had between the two parties.

Q. All right. The parties being Mr. Beverly and Mr. Godwin and ...

A. That's right. And that a wetlands delineation was required before the takedown of the property.

Q. All right. Okay. Prior to that meeting in the fall or late '08 with Mr. Creel, that we've been talking about, and were talking about the silvaculture, had you ever had any discussions with Mr. Creel on this property in your professional capacity prior to that?

A. No. I did know who the landowner was. I was working for -- at the time who we called Southern Asphalt, Mr. Jamie McLain, and did not know who the property owner was. I was working for our client, who I was told had the property under contract, and we were -- we could legally be on the property and do our work. I did not know who

the landowner was until later in the project.
Q. All right. Have you spoken with anybody else about this situation, with delineating this last tract, that might shed some light on why things didn't go forward?
A. No.
Q. Okay. And the tract that Mr. Creel was inquiring about for your services was which one, in which exhibits?
A. Exhibits 6 and 7.
Q. Okay. All right.
A. I stand corrected. I apologize. Mr. Creel and I discussed Figure 5, which is the smaller of the two portions.
Q. Okay.
A. I don't know that Mr. Creel at that time was aware of the ...
Q. Mistake? Omission?
A. ... the Exhibit 8, which was the survey plat, the addition of Parcel B, which was inadvertently added.
Q. Right.
A. I don't know if that piece was -- I don't believe it was discussed, which was Exhibit 5, which is the property north of the overhead transmission line.
Q. Okay.
A. Which is approximately fifty acres.
Q. All right. Okay. So we're talking about Exhibit 5 is what he inquired for your services about, and y'all discussed the

need for silvaculture on it, or the desirability of silvaculture?

A. To the best of my knowledge, yes.

Q. In Exhibit -- Plaintiff's Exhibit 5. Okay. And so Plaintiff's Exhibit 6, which shows the inadvertently omitted portion of the tract south of the Santee Cooper right-of-way or easement. I understand they actually own it, so I don't know what you'd call it then. But anyway, it's their property. What is the current status of it legally with the Corps?

A. Right currently today, Parcel B on Exhibit -- I apologize. I'm reading your paper upside -- in Exhibit 8 is legally determined to be non-wetlands, all uplands, by the US Army Corps of Engineers by ...

MR. STEVENS: The whole thing?

A. ... by Exhibit 11, dated November 27th, 2007, which is valid for five years from that date.

Q. Okay. So the -- Jimmy, let me finish before you ...

MR. STEVENS: I just want to see.

Q. No ...

MR. STEVENS: Are you talking about all of the Parcel B was determined to be uplands?

Q. Jimmy.

MR. STEVENS: I'm just getting clarification.

Q. Well, you can get your clarification. You let me finish my

questions, and you can do all the dancing you want to do. All right. So what I'm trying to clarify is just legally -- and it might not have anything to do with this. But would the Corps not say, "Hey, we made a mistake, and everybody knows there was a mistake here, so you can't do something." Or would they say, "Well, we made a mistake. Go ahead." I mean, that's what I'm trying to clarify. Legally, in the legal protocol with the Corps. Has this happened before, and ...

A. I can tell you that ...

Q. ... what would you recommend to a landowner?

A. ... it has not happened -- to my knowledge, it has not happened to me since 1994. If there is a case of it out there, it was one that slipped through the cracks, that was never brought back up, as this file was. But to my knowledge, this is the only one I've encountered since 1994 of doing wetlands. And if the Corps of Engineers, if this was brought to their attention, would likely require us to redo it.

Q. Okay. Well, I guess that's what I'm asking. All right. Would they say, "Okay, Beverly, Godwin, or Creel, or whatever, you know about this. You should have told us, so you move forward at your own risk without getting ..."

MR. STEVENS: Object to the form ...

Q. "... it properly delineated"?

MR. STEVENS: ... of the question.

Q. Okay. You're finally doing it right. Okay. You can go ahead and answer.

A. If this was brought to the attention of the US Army Corps of Engineers, they would require the landowner to do a full-blown wetlands delineation and approval, and would more than likely change the 2007 Exhibit 11 Corps of Engineers letter, would be probably changed, because it is considered inaccurate.

Q. Right. So it would be a mistake that you would not be really ultimately or legally entitled to allow, and if they know about it?

MR. STEVENS: Object to the form of the question.

Q. You can go ahead and answer.

A. Correct.

Q. All right. Okay. Let's see. Any other part of your file that we haven't gone over?

A. The only portion of any of the file that we have not gone over was our billing file, which -- I'm sorry. I'm not going to call you Jimmy. Your last name? What's your last name?

MR. STEVENS: Yeah, you can call me Jimmy. That's fine.

A. Okay. Jimmy ...

Q. Stevens.

and ...

Q. ... as soon as possible.

MR. HUDSON: ... is it a big -- do you recall the size of the map or anything?

A. I don't.

MR. HUDSON: Well, go ahead and make copies, and send one to the court reporter and to each lawyer, and we'll take care of it, if you don't mind, or call us to pick it up or something. Whatever's easier for you. We don't want to put you to work too much. We'd like three. One for the record, and one for the lawyers. If it's easier for us to come by and pick it up, we'll do that, because I drive right by your office about every day. It will be your choice.

Q. Now, with regards to the proposal and the Agreement for Services, you were to do your services across approximately two hundred and eighty acres, as it started out?

A. As it started out, that was the number -- acreage number that we were given.

Q. Okay. Now, what I want to do is take Exhibit Number 1, which is an aerial photograph, and it's got that language, "Changed by Jamie McLain on March 8th, '06." Do you see that?

A. I have that.

Q. Is that what it says, "changed?" Is that the word, "changed?"
A. That is correct.
Q. What was changed?
A. The property subject boundaries.
Q. Okay. Now, let's look at Exhibit Number 8. Now, in Exhibit Number 8, you -- I guess this is you, have gone through and marked yellow lines around four tracts of land. Is that -- am I correct there?
A. That is correct, and that was done by me.
Q. Okay. And that was done sometime -- had to be done sometime after October the 16th, 2007?
A. That's correct.
Q. Because the map didn't exist before that day, right?
A. Right.
Q. Now, this document, if you will look at it, you've got a source date of 1999.

MR. HUDSON: What number is that?

A. That's the ...
Q. Number 1.
A. That's Exhibit 1, and that's the date of the background aerial photograph.
Q. This is an actual aerial photograph?
A. That is an aerial photograph that you can download from South Carolina Department of Natural Resources website.

A. Correct.
Q. All right. And that was done on March the 8th of 2006?
A. Correct.
Q. All right. Now, when that occurred, did you -- did you amend your agreement, or was it just understood that you wouldn't do anything down here?
A. There was no amendment to our agreement. It was understood that the project subject area was less than what was originally stated.
Q. Well, did they tell you not to do any wetlands delineation down here on the southeastern portion in Parcel B?
A. We were told there was no need to go into that portion. We were refocusing -- we were focusing our attention on these tracts.
Q. To state it another way, they told you there was no do any wetlands delineation in the southwestern section and Parcel B?
A. If that's how you'd like to state it, yes.
Q. Well, that's what ...
A. That's not what I said.
Q. Is that essentially what it means?
A. What I said was, we were told to focus our areas in the areas outlined in black.
Q. Which was contrary to what it originally was?
A. That is correct.

Q. Okay. So how did they manifest that? Did Jamie McLain call you and tell you? Or did he meet with you?
A. That was in the field, meeting, out on the site.
Q. Who did you meet?
A. Jamie McLain.
Q. Anybody else?
A. No.
Q. Okay. And at that time, is that when you draw -- who drew the black lines?
A. Mr. Casey Wollard.
Q. Casey Wollard. That's ...
A. With S&ME.
Q. Okay.
A. While I was standing beside him, on the hood of the pickup truck.
Q. Was Jamie McLain there when he did it?
A. The three people present at that meeting was Jamie McLain, Charles Oates with S&ME, and Casey Wollard with S&ME.
Q. Did he help you with what he was going to -- that is, ask Mr. McLain to help ~~him~~ with where you were ~~going~~ to draw black ~~lines~~?
A. He indicated where we needed to draw the lines for our ~~new study area~~. Here's where we -- "Here's where you need to conduct your delineation."

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Q. Okay. And when you say delineation, you're talking about wetlands delineation?
A. Yeah. Fieldwork for wetlands delineation.
Q. All right. Now, when -- Exhibit Number 6, when -- who contacted you, and when did they contact you with regards to doing a wetlands delineation for Exhibit Number 6 and 7? The dates down here is August of 2008. Who contacted you and when?
A. Jamie McLain contacted us within the month of August of 2008 and asked what the wetlands sketch would look like on that acreage.
Q. What did he say? Is that when he said, "We may have to buy it"?
A. No. That's when he said, "Give me a rough idea or sketch of what the wetlands would look like on this property that we did not cover the first time."
Q. Okay.
A. During our original delineation, as marked on Figure 1.
Q. Okay. Are you familiar with the agreement to buy and sell real estate in multiple closings that were signed by Randy Beverly and Donald Godwin?
A. I have never seen that document.
Q. All right. Well, is this attached to the Complaint? It is attached to the Complaint, isn't it?
MR. HUDSON: I believe it is.

Q. Okay.
A. ... when it was redrawn, that was done for our purposes, so when we were back at the office, we could then produce Exhibits 3 and 4, which we had revised.
Q. All right. So that was to show you what was taken out of the original two hundred and eighty acres that you were going to delineate originally?
A. Correct.
Q. When it decreased, did you give them a cut in price or discuss that?
A. We did not.
Q. Okay. I don't know whether you do it by acreage, or whether you do it ...
A. It's impossible to do it by acreage. It's done by kind of an hourly basis, on what you anticipate spending.
Q. All right. You go back to the office, and you -- I guess this area in red on Exhibit Number 3 is the new area you were delineating?
A. This is our new study area, yes.
Q. Now, one thing that I'm kind of interested in, you've got January of 2006, but you didn't know that until March of 2006?
A. That's right. That was, again, a field note that was not properly changed when it was back at the office.
Q. Okay. All right. That answers that. And Number 4 was

done about the same time, Exhibit Number 4?
A. That's correct.
Q. All right. Now, looking at Exhibit Number 1, and 2, and 3, and 4, would you agree that the area that is marked U21 on Exhibit Number 6, or what we're looking at, what appears to be a field, is in the southeastern portion of that tract, that southeastern tract, and not within the yellow areas?
A. That's correct.
Q. All right. Do you know how many acres that was, that field?
A. I do not.
Q. I think we've got a plat here that was provided by the Plaintiffs on what is known as a takedown survey, and I believe that was takedown survey number two. And it shows that the area was about fourteen acres.
A. I think ...
Q. Takedown -- I've got a takedown survey number two. You've got this, don't you, Dwight?
MR. HUDSON: Yeah.
Q. All right. Takedown survey number two shows that field as being fourteen point four one acres. Am I correct there?
A. I'm going to have to assume, because there's no aerial background. It's not labeled as field, so I just don't -- I

don't know ...
Q. Hang on one second.
A. ... where that line is.
Q. Well, we've got Shelly Farm Road here.
A. And so let's ...
Q. And we've got 701.
A. But I don't know where these property boundaries are. You know, it could exceed the field. That -- without it being on an aerial photograph, it's hard to determine.
Q. Well, generally in the area of the field shown on Exhibit Number 6 as U21?
A. I can agree with generally, yes.
Q. Okay. And if you look at takedown survey number one -- if I can get it right -- that appears to be -- do you agree that appears to be the northernmost portion of Parcel A?
A. That's correct.
Q. Okay. Not the whole Parcel A, but the northernmost portion?
A. There's Shelly Farm Road.
Q. Yeah.
A. So that would be a portion of it.
Q. Okay. And these takedown surveys both appear to be done for Donald Godwin, and one is 2/17 -- excuse me, 5/12/06, and the second takedown survey is dated 2/21/07. My question is -- excuse me. I know you say you hadn't

seen a plat like this, but do you know if Carolina Land Surveyors had a plat?

A. I don't know.

Q. Did you ever talk to Carolina Land Surveyors?

A. After we completed our delineation, when I asked the client who was going to -- I asked Mr. McLain, Jamie McLain, who was going to survey our wetland flags, and he said to provide our sketch to Carolina Land Surveyors, so they could go out and locate our wetland flags.

Q. When did you finish it?

A. We did -- our submittal date to the Corps is dated April 19th of '06. My data sheets indicated I was in the field April 10th of '06, so sometime in early April, half of April of '06, we completed the field work. It was submitted, and I would have been finished by the 19th of '06 for completion to the Corps of Engineers.

Q. All right. Now, what I want to know is, how did the wetlands delineation on Exhibit Number 8 get done? Where did they get that from?

A. Where did -- who's the "they"?

Q. The date of this is October ...

A. No, I'm sorry. Who ...

MS. STEVENS-GRAZIANI: They.

A. The "they" part. You said, "Where did they."

Q. The surveyor, Carolina Land Surveyors.

A. The surveyors, where did they?
Q. Get the information to put the wetlands on it?
A. There are actual flags that were in the field.
Q. Okay.
A. And they went out into the field and physically surveyed each one of my points. Each one of these turns is an actual flag in the field.
Q. Do you know when they did that?
A. I do not, unless it's on the plat.
Q. This plat's not until October 16th of '07. Do you know why it was a year and a half before they went out there and did that?
A. Unless it had to do with the addition of this portion.
Q. Okay.
A. Typically, there's a revision date on a survey plat. If they had a revision ...
Q. So if someone were to ask you at trial who stopped the wetland delineation on Parcel B and the southeastern portion of the whole tract of land -- excuse me, the southwestern portion we've been talking about, your answer would be Jamie McLain?
A. Correct.
Q. On March the 6th, 2006?
A. March 8th.
Q. Excuse me. March -- is it March 8th?

A. As indicated on Exhibit 1, yes.
Q. Okay. March the 8th. All right. Now, let me ask you about Exhibit Number 6 and 7. You've talked about the -- I think it's PF01-4B.
A. Correct.
Q. And what does that signify, now?
A. That's part of the US Fish and Wildlife Service National Wetlands Inventory information, and it stands for Pelustrine forested. 1 and 4 means broadleafed and evergreen trees, which would be some pine trees and then hardwoods that drop their leaves in the wintertime. And B is seasonally saturated or flooded.
Q. Okay. What is -- right below that is a real small triangular area entitled PEM, I believe, 1B?
A. You are correct with that. That is actual -- the remainder of the National Wetlands Inventory Map is not shown on this.
Q. Okay.
A. This is only what's called clipped to just our subject area. So that is actually trying to grab a piece of that power line right-of-way. The PEM is Pelustrine emergent vegetation, which is 1, which would be deciduous, and B means seasonally flooded or saturated. Emergent, meaning on the power line right-of-way, where they keep it mowed and maintained, you would have basically herbaceous,

small vegetation that would be growing there, but wetland vegetation.

Q. I notice in these the yellow things with the different letters.

A. Correct.

Q. U21 means what?

A. That's an agricultural field.

Q. Okay. Cleared land?

A. Cleared. U for uplands. 21 would be agricultural purpose.

Q. And over here you've got U42P. What is -- does that U stand for uplands, too?

A. It does, and it is typically in planted pines.

Q. Why is ...

A. For the P.

Q. Is the U2 -- U42P, is that describing the yellow boundary?

A. It's describing the yellow boundary around this portion of the site. This very small little section is a U42P.

Q. Well, why -- well, you got a portion of the wetlands there, and the white boundary is in there, too.

A. I do. As I had commented earlier, no one source of information is a sole source.

Q. Okay.

A. There's multiple things to review in it. If you will look at Figure 7, Exhibit 7, you will also see where that wetland or hydric soil, the Geechee type, the blue line, also

indicates something coming wet down into this area.
Q. Okay.
A. Again, those are approximate. And then, when you look at color infrared photography, you will see a lack of loblolly pines growing there, and a presence of water, what appears to be water, from that 2006 aerial photograph, in that area.
Q. Okay. Now, as I understand, Exhibit 6 and 7 shows in this white area -- and we'll talk about the southeastern -- I keep saying south. I mean the southwestern tract, the one that is not labeled a parcel letter. Do you know, just in that tract, do you know how much of that white area -- how many acres is in that white area?
A. It's on one of your exhibit figures. If you will go to Exhibit Figure 1 -- I'm sorry, 5.
Q. 5? Yeah.
A. You can use mine, if you like.
Q. Okay.
A. On Exhibit 5.
Q. Right.
A. And we're only looking at the portion north of the overhead transmission line right-of-way.
Q. Okay.
A. We did, without doing any field reconnaissance, we did a wetland approximation based on soils, National Wetlands

Inventory information, and interpretation of the aerial photograph, and determined it to be approximately twenty-eight acres of wetlands.

Q. Okay. All right. Good. That answers my question. Now, let's talk about the portion in Parcel B that's shown on Exhibit Number 8, and as shown on Exhibits 6 and 7. That is, the one below, or I guess south of the transmission line on the pictures there. How many acres in that?

A. Well, if you compared figure Exhibit 5 ...

Q. Right.

A. ... to Exhibit 6 that you're looking at?

Q. Okay.

A. Exhibit 5 had twenty-eight acres of wetlands.

Q. Right.

A. Or say there's an additional acreage, which totals fifty. So twenty-eight from fifty, you've got twenty-two acres of wetlands, potentially.

Q. Twenty-one point seven, to be exact, right?

A. Well, there no exact. It's an approximate ...

Q. Well, you said fifty, more or less, so around -- around twenty-eight acres, then.

A. Around twenty-eight acres ...

Q. Excuse me.

A. ... in the upland piece.

Q. Twenty-two acres in the ...

A. Roughly twenty-two, yes.
Q. And Parcel B was, as shown on here, was forty-six point nine acres total?
A. That's what that certifies, yes.
Q. Yeah. And this plat shows, and the exhibit that you read from the Army Corps of Engineers indicated that Parcel B was without wetlands?
A. Yes.
Q. But you disagree with that?
A. Yes.
Q. And you say that the Army Corps of Engineers made a mistake?
A. Yes.
Q. How did they make a mistake?
A. By accepting this plat as accurate data.
Q. Okay. The plat that was done by Carolina Surveyors?
A. Correct.
Q. Do you know whether silvaculturing, as we've discussed it earlier, is a process by which a landowner can ditch land and drain it, so that it wetlands could potentially become uplands?
A. You cannot ditch wetlands to convert them to uplands.
Q. You can't?
A. Today. If you have ditches that were in ...
Q. Could you do it back then?

A. ... prior to the Clean Water Act, you can maintain those ditches and keep them functioning.
Q. Okay.
A. But you cannot go through a wetland, for silvacultural purposes, and dig a new ditch. That would be a violation.
Q. All right. When did the Clean Water Act ...
A. 1984, I think, is when the Clean Water Act started, when it took over.
Q. Right. There's been some talk about ditching, or doing something to silvaculture land so that it may become uplands from wetlands. Do you know what ...
A. Are you talking my comments earlier in this ...
Q. Yeah.
A. ... in this room?
Q. Uh-huh.
A. Those comments were relating to harvesting of the timber, opening the tract up.
Q. Okay.
A. And cleaning out existing ditches.
Q. Existing ditches. Okay. Do you know whether that was done or not?
A. I do not know whether it was done. Riding -- visually, from the highway, I cannot see that that was done or not.
Q. All right. But that is a way of making uplands from wetlands?

A. No, it is not. It is a way of taking a site that is wet to marginally wet, and potentially drying it out. There is no guarantee.
Q. I know. I know. But it could happen, is what I'm saying?
A. Potentially, yes, sir.
Q. Okay. If they want to wait long enough, and open up the canopy to let the land dry out, that could happen?
A. It could.
Q. Okay. Clean out existing ditches and cut whatever vegetation is there?
A. Providing that the existing ditches are sufficient to lower jurisdictional hydrology. In clay soils, I think NRCS actually has a document that at one time said that ditching should be spaced in fifty foot intervals to lower the hydrology in clay soils. Geechee is a clay soil. So provided there were a series of ditches throughout this property, and you went in and cleaned out those ditches, you potentially could have an impact.
Q. Do you recall whether or not there were any ditches on that tract?
A. As stated earlier, I have not walked that tract.
Q. Okay. That's right. You didn't walk it. When they came back and asked you to do this, did they ask you to do -- did they ask you to walk the tract, the southwestern tract, to -- and Parcel B to determine the wetlands?

A. They have not asked me to walk it. When I prepared Exhibit 5, which only shows the northern portion of the property line ...

Q. Yeah.

A. ... was when we discovered Parcel B was added inadvertently. My comment was, "We've got to go to the Corps and fix this. the Corps of Engineers and fix this. This is wrong." Their comment was, "Let's discuss it with the landowners and we'll get back with you, and by the you know, prepare a sketch on what it would be."

Q. Well, who told you that Parcel B was added inadvertently?

A. Well, it's outside of what I looked at.

Q. I understand.

A. I'm saying inadvertently, because it's nothing I walked, and it's nothing that I'm representing to the Corps of Engineers as being an accurate representation.

Q. Okay.

A. And in ...

Q. And in the two hundred and eighty acres, it was included?

A. Yes.

Q. And in the two hundred original acres, under the -- what we've seen in the contract, so was the southwestern portion of the entire tract we've been talking about?

A. Yes.

Q. And the only person that talked to you about taking those

out was Jamie McLain?
A. Correct.
Q. Mr. Creel never talked to you about that, did he?
A. I didn't know Mr. Creel was the landowner until well into the project.
Q. Okay. Let me see your notes -- my notes. Thank you. Did -- were you ever asked by Mr. Beverly, Randy Beverly, or Marshall Godwin, or Jamie McLain ...
MS. STEVENS-GRAZIANI: Not Marshall. Donald.
Q. Oh, Marshall. I mean Donald. Or Mr. McLain to hold off on getting the Army Corps of Engineers out there to do a delineation?
A. To hold off on getting the Corps of Engineers out to do a delineation?
Q. To check your delineation?
A. Not to my knowledge, no.
Q. All right. Let me ask you ...
A. My recommendation to them was to wait until the growing season.
Q. Okay. Let me ask you this. If the owner is Ben Creel, and the purchaser is Beverly and -- Randy Beverly and Donald Godwin, would or could Beverly and Godwin wait until the sale of these two tracts to them, and then to silvaculture, hoping to get it to be uplands?

MR. HUDSON: Object to the form.
Q. Or would Mr. Creel have to do that?
MR. HUDSON: Object to the form of the question. You can go ahead and answer.
A. You want me to answer?
MR. HUDSON: If you can, yeah.
A. Well, I'm kind of boggled. Can you please repeat that, because I didn't know what to do with the objection.
Q. All right. If somebody wants to silvaculture land for the purpose of trying to get it to be uplands, to clean out the ditches and make it dry out instead of being wetlands, could a buyer go in and get the Army Corps of Engineers -- would the Army Corps of Engineers approve the buyer to do that, or would it have to be done by the seller?
A. There's no ...
MR. HUDSON: Object -- object to the form of the question. Go ahead.
A. There's no approval process for silvacultural exemptions in the Corps of Engineers.
Q. Okay.
A. It's just strictly a forestry exemption. You can go, and you don't have to get permission to harvest timber on your property.
Q. Well, what I was asking, what I'm getting at here is -- wait a minute. Okay. I'm asking the question wrong.

A. Okay.
Q. If a buyer is a developer to develop land, not for agricultural purposes, can they silvaculture and try to get it to be uplands?
MR. HUDSON: Object to the form of the question.
A. So you're saying a buyer going into a piece of property, and ...
Q. Uh-huh. And he's going to develop the property for residential purposes or commercial purposes, and not be agriculture.
A. Okay.
Q. Can they do that silvaculture for the purpose of trying to get it to become uplands?
MR. HUDSON: Object to the form of the question.
A. If they are cleaning out ditches for the purpose of maintaining property, no matter what, there is a nationwide permit that is in place in the Corps of Engineers. It is a non-report permit, which is a Nationwide Permit Number 3, which gives you the ability to clean out ditches.
Q. Okay. Well, could a developer, as opposed to a developing -- excuse me. A purchaser who is a developer is going to go in there and develop these two tracts of land to make -- to build residences, get approval to silvaculture to make it become uplands?

MR. HUDSON: Object to the form of the question.

A. There is no approval process for silvaculture. You go in and do silvaculture. Silvaculture is just harvesting of trees.

Q. Okay. All right. Is there a definition somewhere of silvaculturing?

A. I'm sure Webster has got one.

Q. Okay. I mean, within the industry, silvaculture and ...

A. It's just an exemption of forestry practices, and those practices are typically outlined by the individual states' forestry services and BMP, which are best management practices. It's not law. It's a series of guidelines that foresters and loggers follow, but are held to by the mills. If you are not caught following BMPs, the mills can cut you off and not buy your timber. So foresters and loggers adhere to BMPs, which are part of that silvacultural line of work.

Q. Okay. All right. Now, let's go back to your financial file, your billing file.

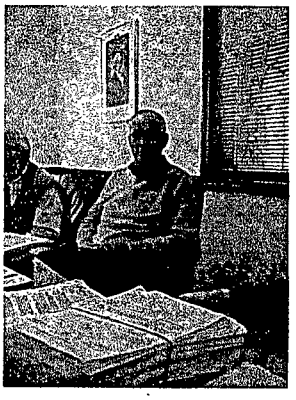
A. Okay.

Q. Exhibit Number 12. There is a check dated 9/22/06 in the amount of thirty-five hundred -- excuse me, thirty-seven hundred and fifty dollars from Yauhannah Development, LLC.

State of South Carolina	)	In the Court of Common Pleas
	)	15th Judicial Circuit
County of Horry	)	Case Number 09-CP-26-1909

Randy A. Beverly, LLC and Donald Godwin, LLC, Plaintiffs, -vs- Bucksville Farms, Inc., Defendant/3rd Party Plaintiff, -vs- Randy A. Beverly & Donald Godwin, 3rd Party Defendant and 4th Party Plaintiffs, -vs- Benjamin J. Creel, Individually and as Surviving Director of Bucksville Farms, Inc., 4th Party Defendants.	)	**Deposition of: RANDY A. BEVERLY**

COPY



The deposition of Randy A. Beverly was taken before Sarah B. Fry, a Notary Public in and for the State of South Carolina, at the Stevens Law Firm, 3341 Broad Street, Loris, South Carolina 29569 on the 13th day of December, 2011, commencing at 1:00 p.m.

ADVANTAGE COURT REPORTING
OF MYRTLE BEACH
7201 Enterprise Road, Myrtle Beach, S.C. 29588
843-650-6263

subject of this action, right?

A. Well, when you say initially, he approached me. I mean, I don't know if it was initially or not. I don't know who he'd talk to earlier. I don't know. But he did approach me about buying the property.

Q. Okay.

A. To see if Donald and I had any interest. And just like he said, we were developing a piece on 701 South, and wanted to know if we had any interest in it. But at the time, he was talking about taking the whole tract down like, you know, three hundred acres in one takedown. And that just was, you know, out of our budget.

Q. But he was telling you that he had not listed it yet, and wanted to give you the first shot at it, right?

A. Well, I know it hadn't been listed. I don't know if it was the first shot. I don't know if he talked to somebody else or not.

Q. And at first you told him you weren't interested, right?

A. That's correct.

Q. And then, after he listed it, you then became interested?

A. Well, not after -- not immediately after he listed it. I say that. I don't know how long it had been listed. It might have been the next day after it was listed. I don't know. But Benjamin called me and said they had another party that was interested in the property, and they were getting

A. I think it was fifty, I believe. But whatever the contract said.
Q. I thought that, too, but I read the contract, and it looked like it's forty acres.
A. It could be.
Q. Okay.
A. But I was thinking fifty the whole time, if you want to know the truth.
Q. Okay. It appears that when you did the first takedown, it was closer to fifty, anyway. But you -- if you went through and took fifty acres each of the three takedowns, you're going to have a great big tract of land to buy on the fourth takedown. Am I correct there?
A. The math would say yes.
Q. Okay. There's a total of about three hundred and seventeen acres?
A. No, I don't believe so.
Q. Okay.
A. I believe it's more like about two seventy-five.
Q. Okay.
A. Because Benjamin was retaining about forty acres of that tract, so it wasn't in our contract.
Q. Okay. When you looked at -- when you were reviewing all the documents, did you have a plat to look at?
A. Jimmy, I always get a copy. I don't particularly remember

Q. Now, this one has got Parcel A that you're pointing to.
A. Uh-huh.
Q. Did you take all of Parcel A in the ...
A. No.
Q. ... first takedown?
A. No, we did not.
Q. Can you just kind of put a dotted line in red about what you ...
A. About where I think it is?
Q. Yeah. So it would be -- that would be the first takedown, and you've written "first" on there. All right. Now, where was the second takedown?
A. It was the remainder of this tract, and there's a field in the corner here.
Q. Just dot that. Dot that for me. So that this -- above Shelly Farm Road -- write "second" on that one, too, so we'll know. All right. So what you're doing here is, you're going down 701, right?
A. That's correct.
Q. That's the first two. You're going down 701. Now, looking at these tracts back here, Parcel B, Parcel C, and Parcel D, was that part in the contract, also?
A. That's correct.
Q. Okay. So you went along, and you had the first two takedowns, and actually there was some wetlands on the

first takedown marked as "Wetland A" on parcel -- right at the top of the map. And did you know that that wetlands was there when you closed the first takedown?

A. I didn't know. I suspected there was some wetlands there, but I didn't know for sure. We were ...

Q. Okay. Was that ...

A. ... trying to accommodate Benjamin and close it quick, so we didn't get it certified. But ...

Q. Okay. Well ...

A. ... we weren't surprised it was there.

Q. Okay. Was that particular wetland given credit on the closing for the second takedown?

A. That's correct.

Q. Okay. All right. So you took -- so you did the first takedown without the wetlands delineation?

A. That's correct.

Q. And you did the second takedown without any wetlands delineation?

A. That's incorrect.

Q. All right. You did a wetlands delineation?

A. Yeah. That's how we found this.

Q. Okay. Who did that?

A. I'm thinking Chuck Oates. I mean, I couldn't swear to that, but I feel like Chuck did that as well.

Q. Do you remember when he did it?

A. (SHAKES HEAD)
Q. Okay. Who hired Chuck Oates?
A. Jamie would have been the one who dealt with him.
Q. Did you ...
A. But I can tell you, you know, Donald Godwin, LLC and Randy Beverly, LLC paid him.
Q. Okay. So essentially what happened was the two of your LLCs got Chuck Oates out there and did the wetlands delineation?
A. Or we saw to it he got out there.
Q. Okay.
A. I think Jamie's probably the one who got him out there.
Q. When you got him out there, did you get him out there to do the wetlands delineation on the whole tract that you ...
A. At some point, we did.
Q. Okay.
A. I don't know that we did this one. It could have been, but I don't think it was. I think it was ...
Q. When you say this one, you're talking about the first takedown?
A. Right.
Q. I think we've established it wasn't done by the first takedown.
A. Right. Right.
Q. All right. So as far as you know, on the first takedown,

the wetlands delineation wasn't important to you at that time?

A. Well, we had enough knowledge of wetlands that we -- I won't say it wasn't important, but we knew there were not significant wetlands on it.

Q. Oh, you did?

A. And that we could settle up on the second phase, if we needed to, and that's what we did do.

Q. Okay. And if there was any wetlands on the second phase, you were going -- and you didn't know about it at the time of the second takedown, you were going to ...

A. Well ...

Q. ... you were going to settle up on the third ...

A. No, no. No, we knew -- when we got this wetlands delineated, we got the whole -- both phases delineated at that time. So we knew there were no wetlands on the second phase.

Q. Okay.

A. Prior to closing, we knew that.

Q. Did you get all of the document -- you've seen all of the documents that Chuck Oates did in his deposition. You've read his deposition?

A. No.

Q. Well, you were there, weren't you?

A. Huh-uh.

A. That's correct.
Q. That deals with the property y'all were talking about, doesn't it?
A. That's correct.
Q. Okay. Now, do you recall talking to Mr. Creel about trying to do what is known as silviculture, or cleaning out the ditches and seeing whether or not the land could be dried up, so that you could get more uplands rather than wetlands on that 701 area?
A. Yeah. I remember us having a discussion about that, yes.
Q. Did you want to do that?
A. I wanted to have it done, because we get -- the more uplands we had, of course, the better off we were. We could develop more land. But ...
Q. Did y'all -- did y'all hire somebody to do that?
A. We ended up hiring somebody to do it. The agreement in the beginning was that, you know -- Benjamin had asked me in the very beginning to -- you know, he said, "Randy, y'all can start closing whenever you want to, but let's don't -- let's don't start on this end down here, because I've got some wetlands issues here that I want to work through." And so at that time, we started, you know, talking about the silviculture stuff, trying to do something that's legal, clean out some existing ditches and try to drain them up. And so Benjamin was going to take care of that issue there

while we were in the process of closing these other phases.

Q. So essentially what happened was, you -- do you know who you hired to do that?

A. Who we hired?

Q. To do the silviculture done on that ...

A. At a later day, I guess probably a year or so later, maybe a year and a half later, we hired a boy named Matt Johnson.

Q. Okay. What did he do when he went down there?

A. I think there's some existing ditches in the property. Now, exactly where they were, I do not remember. But there were some existing ditches that he cleaned out.

Q. Did he dig any more ditches or anything, that you know?

A. Not to my knowledge.

Q. Okay. Do you what silviculturing is?

A. Somewhat.

Q. And you ...

A. I mean, you know ...

Q. Are you are like me, and you just heard it?

A. Well, basically, you know, I mean, the practice of silviculture is just logging. I mean, that's cutting -- harvesting timber, is what silviculture is. But there are some exemptions in the wetlands act for the silviculture. We refer to that as silviculture, but I mean -- I mean, it's really, you know, trying to -- it's something that they

provide -- they let loggers do, that they won't let developers do.

Q. Okay. They -- the forester can't cut timber in wetlands, right?

A. Well, yeah they can.

Q. They can?

A. My daddy was a logger. That's what he did, log.

Q. Oh, really?

A. Yeah. They got tires on tractors as wide as desk right here.

Q. Is that legal?

A. Called swamp buggies. Oh, yeah. Yeah. And that's the thing about it. And you can't put bulldozers in there, but you can take one of them swamp buggies and -- I mean, and I've literally seen swamp buggies there the water was up to the driver's seat in a swamp buggy, pulling logs out of swamps. But they definitely log in the swamp. There ain't no question about that.

Q. When y'all first decided to buy this, and entered into the contract to buy it in four takedowns, what was your initial plan for that property? Were you going to develop it?

A. That's correct.

Q. Okay. Did that change for some reason?

A. Well, we still plan to develop it. I mean, we've got it engineered, and actually have finished the engineering I

would say probably in the last -- I'm estimating this, probably the last twelve months.

Q. I thought you sold it.

A. Huh-uh. We retained interest in it. We didn't sell it. I mean, you're looking at us as principal owners. We own as much of it as anybody else does.

Q. What are y'all going to do with it?

A. We're going to develop it.

Q. And put what on it?

A. Residential housing, which is what we know how to do.

Q. And so would you agree with Ben that it would be in both yours interest to see if you could dry up the area down below Shelly Farm Road?

A. Yes.

Q. Okay. That would give you more uplands to develop, and by the same token, give him more of a price?

A. More revenue, yeah.

Q. And let me ask you this. Do you recall, when you talked about allowing the land to dry out, that y'all were going to come in here and take some of the back area or what?

A. Do I recall what, now?

Q. Were you going to take this back here first, before you allowed the other ...

A. No, that's -- I mean, he had about two and a half years from the time we signed the contract till what would be

the third takedown to get some -- to practice some silviculture on this piece. But that was always our intent, was one, two, three, four, right on down.

Q. Okay. You intended it to go on -- but what if this hadn't dried up by then? What were you going to do then? Go back here and take this?

A. No. No, we would have had to ...

Q. Why not?

A. Well, we didn't -- we wanted our piece to be contiguous. I didn't want to end up with a hundred acres here and a hundred acres back here.

Q. Well, I mean, you had entered into a contract to buy all of it except the Creel tract there.

A. I had also entered into a lease with Mr. Creel to pay us twenty-one hundred dollars a month lease, and he didn't pay that. So I'm ...

Q. Just ...

A. My point is -- my point is -- you asked the question. My point is, because of some Mr. Creel's financial problems he's had in the past, we were not willing, and still would not be willing today, to jump back here and buy a fifty acre tract back here, and it not be contiguous. Because who knows, when we got ready to close this tract, he may not own it any more. And as it turns out, he doesn't own it any more.

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Q. Okay. Well, you decided not to buy it. That's why he doesn't own it any more. But ...

A. That's your opinion.

Q. Huh?

A. That's your opinion.

Q. Well, it is my opinion.

MR. HUDSON: I object to your opinion.

Q. Let's see what the facts turn out. But anyway, you -- it was your -- it was your plan not to take any of this back property until you'd taken all of the 701 property?

A. That's correct.

Q. Okay. Did you at any point in time plan to just take the 701 property and back out of the contract?

A. No, I have not. If I had have, I wouldn't have got all this -- as you see, I wouldn't have got all this wetland delineated. But we did. We incurred some cost to do that. Plus, we've already got -- and I guess it's still there. I haven't been back there. But -- and with Benjamin's permission, I called and talked to Benjamin ahead of time about storing some dirt right here. We've probably got a hundred thousand, maybe a hundred and fifty thousand dollars worth of very good dirt stockpiled right there, that we were going to use in developing particularly this -- what would have been the first three phases up here. This is some pretty poor soil up here, good soil back here. But we

stockpiled some dirt there. We had a development we were doing in Georgetown County and had some good dirt out of that project, and we stockpiled it somewhere right there. Probably a hundred, a hundred and fifty thousand dollars worth of dirt right there.

MS. GRAZIANI: Right there where?

A. Beg your pardon?

Q. You're referring to Parcel D, approximately at the intersection of Shelly Farm Road and Bucksville Road?

A. Bucksville Road, uh-huh.

Q. On Parcel D?

A. That's correct.

Q. All right. Now, when you started doing the wetlands delineation, did you tell Mr. Creel that you had done it?

A. I really don't remember if we did or not. I don't -- I don't know.

Q. When you wrote the letter -- when you backed out of the contract ...

MR. HUDSON: Object to the form of the question.

Q. ... and -- let me ask you this. Did you -- do you recall talking to Luther Barefoot?

A. Oh, I've talked to Luke a bunch.

Q. Okay.

A. I mean, a bunch.

Q. Do you recall telling -- Luther Barefoot telling you that

Mr. Creel had gone to Chuck Oates to do the wetlands delineation that y'all had asked him to do, and Mr. Oates telling him that, well, it had already been done, and you saying that the cat's -- "Well, I guess the cat's out of the bag"?

A. Well, I heard Mr. Creel make that comment earlier, but that's all I -- I mean, the delineation has not been done. I mean, that's incorrect. What we were asking Benjamin to do was delineate this third phase, which on this map -- I don't know how you want to -- do you want me to write "third" on here? But this right here, to this day, has not been delineated.

Q. You can write, "intended third."

A. But this phase here was what Mr. Creel should have gone and asked Chuck Oates to delineate. That's what we were asking him to delineate, this takedown here.

Q. Okay. You were going to take ..

A. And Mr. Creel -- wait a minute. I'm answering your question. Mr. Creel made the statement that Chuck Oates said they'd already been delineated. But now, to my knowledge, that has never been delineated right there.

Q. Are you talking about ...

A. I'm almost positive.

Q. Are you talking about the area where the third ...

A. The third phase. That's correct.

Q. Okay.

A. And that's what you just said. But I'm telling you, in my opinion, that's never been delineated.

Q. Okay. And would you agree that the reason it hasn't been delineated is that y'all were waiting on the silviculture to take effect?

A. Well, he'd had three years. I mean, we had waited all we were going to wait.

Q. It had three years?

A. Two and a half years from the time we'd signed the contract till we got ready to close the third phase. Somewhere around about two and a half years.

Q. And if there was wetlands down there, why didn't you go ahead and do the purchase of that? How many acres in that, that was uplands? Do you know?

A. I would guess one.

Q. One acre? That would have required that you go into the other part and make up the other forty acre requirement, wouldn't it?

A. Uh-huh.

Q. You'd have to take some of Parcel B, or some of Parcel C or D, right?

A. Uh-huh.

Q. Yes?

A. That's correct. That's correct, yes.

Q. All right. Well, why didn't you do that?
A. Because this had never been delineated. We didn't know how much wetlands was here.
Q. Well, you said there was only one acre.
A. No, I'm estimating. And that's what you asked me.
Q. Well, why didn't you just ...
A. In my opinion, but my opinion don't carry no weight with Conway National Bank when it comes to wetlands.
Q. Well, why didn't you go ahead and pay him for one acre? Tell him, "Ben, I'll pay for one acre, and we'll do a wetlands delineation to figure that out, and then we'll take it out in the fourth takedown," like you did on the second takedown?
A. Why didn't he offer to do that? I don't know why he didn't do that. I mean, that's something he could have offered us, but he never did. We did try to do some negotiating with him.
Q. Okay.
A. But he was not willing to negotiate anything. I mean, it was ...
Q. Now, would you show me the document that you sent to Ben Creel telling him which of those -- these areas, these remaining areas of land, you wanted to buy?
A. I'm not sure I understand that question.
Q. Well, you've got to tell him what you want to buy, right?

A. I don't know. I mean, I don't ...
Q. Huh?
A. I don't really remember when I saw it, but I remember that Benjamin brought a wetlands estimation on an infrared to my office sometime -- when that letter that we were referring to earlier, there was a copy of a wetlands estimation that Chuck Oates had done attached to that letter. I think y'all had it with that letter.
Q. Didn't you ...
A. And that's probably the first time I saw that. But all that is is an estimation. That's not ...
Q. Did you get all the documentation that you paid Chuck Oates to do?
A. I'm confident I got it, but I haven't reviewed it all.
Q. Did you want to buy wetlands on 701?
A. I really don't want to buy wetlands anywhere.
Q. Okay.
A. But our contract stipulated that we'd pay a thousand dollars an acre for wetlands. I mean, wherever that was, we'd pay that for it.
Q. It wasn't your intention to buy wetlands to develop, was it? You couldn't develop them, right?
A. There is some -- like I say, there is some value to it. I mean ...
Q. Not for you in development, is there?

A. Yeah. Yeah.
Q. What? How?
A. I mean ...
Q. Can you put a pool in it?
A. ... when you're getting ready to sell a lot -- no, you really can't do anything. You can walk on it. You can walk on it.
Q. Okay.
A. But a lot of the buyers do prefer to have a wetlands in their backyard, rather than somebody else's back yard, is what I'm saying. I mean, rather than sitting on their back porch and looking at somebody else's back porch, they'd rather sit out there and look at nature. So there is some value to it, but I mean, it isn't like you get -- you don't get a big premium more for a lot, but you get -- you can get a little more for a lot that backs up to a wetland than you can a lot that backs up to somebody else's backyard.
Q. But you can't sell it?
A. You can sell it. Oh, yes.
Q. I mean, you can't sell it in -- you can't develop it, though?
A. No, no, no, no.
Q. Right. When you ...
A. Well, when you say develop it, I mean, you can cut it up into a lot. You can't -- and I mean, you can -- with some mitigation, you can literally build a road through it. And

so I guess you can develop it. I mean, I probably didn't answer your question just right. Because what we've done over the years is we've deeded out wetlands. I mean, we don't -- we have no reason to retain it. So we -- I mean, the part of the lot that -- and I'm just using a hypothetical case here. The uplands part of a lot may only be a fourth of an acre, but we may deed the people an acre, and the remaining part of it be in the wetlands. So they feel like they're getting more -- and they are getting more property, and plus they've got privacy right behind them of nobody or nothing being there, other than animals.

Q. All right. On that particular tract that -- contiguous to the second takedown, that's on 701, how many acres is in that? There was less than fifty, wasn't there?

A. From looking at it, I would estimate there would be probably pretty close to fifty. But that's an estimation. I mean, I don't know.

Q. Okay. If there wasn't fifty in that remaining tract, where were you going to get the ...

A. The adjoining tract. Yeah, I mean, we'd come in ...

Q. And that's tract B?

A. Or what's labeled as tract B on this particular map here, yes, if there were not fifty here.

Q. All right. You did a wetlands delineation on tract B, didn't you?

Q. What?
A. We wanted to keep it contiguous. We ...
Q. Nothing other than your desires?
A. That's a -- well, we didn't want to end up back here with what's -- exactly what's happened, where we end up buying this C here, and Larry Paul ends up with all this other property right here, and here we've got a tract here, two tracts up here, that aren't even contiguous to each other. That was our fear. Our fear was what has happened.
Q. All right. The -- but there was nothing -- to answer my question, there was nothing to prevent you, other than your desire to have it contiguous, from going in and closing on Parcel C and Parcel D?
A. That's correct.
Q. And you talked about you were allowing the silviculture to try to dry up this, right?
A. Benjamin had asked us to give him some time to do that, and we gave him two and a half years. I mean, I felt like ...
Q. Okay.
A. And to be honest with you, where I'm coming from, Jimmy, I was -- I was aggravated with Benjamin, because he had taken absolutely no initiative to do anything. I mean, he just stayed out at his cabin out there, and I mean,

A. Conway National.
Q. Conway National.
A. Bill Benson. If you want a deposition, take him. By all means, bring Bill Benson in here. I mean, I've had conversation over and over to Bill Benson about this property out here.
Q. But the bottom line is that this contract that required that you close didn't -- was not contingent upon you getting financing from the bank?
A. That's exactly right.
Q. Okay. That's ...
A. But it is contingent upon Benjamin Creel providing me with a wetlands survey.
Q. Okay. All right.
A. That he did not do. And our attorney wrote him a letter and made it real clear. "Provide my clients with a certified copy of a Corps of Engineers wetlands delineation, and they will close."
Q. The letters will speak for themselves.
A. Well, you seem to forget it's in there.
Q. Huh?
A. You seem to forget that letter's there.
Q. I ain't forgetting it's there. You've seen my letter, too.
A. We put you all -- Benjamin and you on notice.
Q. We put you on notice, too.

receiving it.

Q. Okay. I want to staple that one. Now, let me make sure I understand. Did you sell the first two takedowns to someone?

A. We sold it to a group. We're a part of that group. Donald and I are a part of that group.

Q. Okay. Tell me who you sold it to.

A. The only guy I really know personally is Steve Sciaretta, and there are some other guys involved with Steve. But I think the name of the entity is 701 South -- no. Yeah, 701 South, LLC, I think is the name of the entity. And I own twenty-five percent of that. Donald owns twenty-five percent. And Steve Sciaretta and his group, which are up from Connecticut area, they own fifty percent.

Q. Is that the group that plans to do the development?

A. You're talking to the group that's planning on doing the development. If development's done, when it's done, we'll do that. I mean, those guys are in Connecticut.

Q. Okay. How much was the purchase price?

A. I really don't remember, but it was about three million bucks.

Q. And the purchase price went to you and Donald?

A. (NODS HEAD)

Q. Is that a yes?

A. Yes, sir. I'm sorry. I'm sorry. I'm not used to that yet.

State of South Carolina	)	In the Court of Common Pleas
	)	15th Judicial Circuit
County of Horry	)	Case # 09-CP-26-1909
Randy A. Beverly, LLC and Donald Godwin, LLC, Plaintiffs, -vs- Bucksville Farms, Inc., Defendant/3rd Party Plaintiff, -vs- Randy A. Beverly & Donald Godwin, 3rd Party Defendant and 4th Party Plaintiffs, -vs- Benjamin J. Creel, Individually and as Surviving Director of Bucksville Farms, Inc., 4th Party Defendants.	)	**Deposition of: BENJAMIN J. CREEL**



The deposition of Benjamin J. Creel was taken before Sarah B. Fry, a Notary Public in and for the State of South Carolina, at the Stevens Law Firm, 3341 Broad Street, Loris, South Carolina 29569 on the 13th day of December, 2011, commencing at 10:45 a.m.

ADVANTAGE COURT REPORTING
OF MYRTLE BEACH
7201 Enterprise Road, Myrtle Beach, S.C. 29588
843-650-6263

A. Yes, sir.
Q. Okay. All right. Okay. What's the name of that complex?
A. Kingston Pointe.
Q. Okay. And Mr. Stevens mentioned the fact that you have had hip surgery, and I believe that's your second hip surgery in a fairly short period of time.
A. That's correct.
Q. And that you might be under some medication and that type thing. Are you under any medication today?
A. Not today. No, sir.
Q. You're not?
A. I've not had any kind of pain medicine or anything like that.
Q. Okay. So basically just getting down to it, are you okay physically and mentally, to where you feel comfortable giving a deposition today, and that you won't have any problem recollecting facts and figures, and that type thing?
A. Yes, sir. I'm good to go.
Q. Okay. All right, great.
A. As I mentioned before we went on the record, I have difficulty sitting for extended periods of time. That's the only problem.
Q. All right. Well, whenever you want to take a break, just let us know. We'll certainly do that, and do that anytime, for any length of time that you want to do it. What is your

Q. I guess basically trying to shake it out to the bottom line, I'm trying to get what's your general monthly or yearly income, ever how you want to compute it, or how you receive it. Let's say monthly. What's your monthly income, since most people -- most folks send their bills monthly?

A. Well, it varies with -- our business is very seasonal, but for the last couple of years, it's been, I'd say, in the neighborhood of, oh, about seventy-five thousand dollars a year.

Q. Is any part of that any rental income from any businesses?

A. From time to time, I have had some rental income. But it's been sporadic.

Q. Do you have any rental income in the last -- well, since '07?

A. No, sir.

Q. No business rental income since '07?

A. No, sir.

Q. Okay. Let me ask you, before I forget. Are you still a member of the Bar? I know you're a lawyer, and you have practiced law at least in the past. Are you still ...

A. Yes, sir.

Q. ... a member of the Bar? Okay. When's the last time you actually practiced law?

A. Oh, Lord. It's been at least fifteen years since I have been

current on my CLEs.

Q. I'm not sure I understood you. It's been fifteen years since what?

A. Since I have been current on my CLE requirements, so therefore I have not practiced law to the public for fees in at least fifteen years.

Q. So you're not current on your CLEs?

A. That's correct.

Q. Okay. Well, I'm not sure what kind of ...

A. My Bar status has been inactive for at least fifteen years.

Q. Okay. So you went inactive so you wouldn't have to keep the CLE up. Is that ...

A. And so I wouldn't get appointed to ...

Q. Okay.

MR. STEVENS: To defend you.

Q. Right. Okay. I got you. All right. And when you practiced, how long did you practice?

A. Approximately three years, actively.

Q. And if my memory serves me correct, you practiced at least for a while with the Bellamy firm?

A. That's correct.

Q. All right. Did you practice with anyone else during those three years of practice?

A. After I left the Bellamy firm, I did a little bit of work, just me. I never hung out a shingle or anything like that, but it

was insignificant. I handled a couple of files after I had gone fulltime at the gas company.

Q. All right. So when you left Bellamy, you essentially went with Creel Oil Company. Is that right? Or Creel ...

A. That's correct.

Q. ... Oil and Gas, whatever?

A. That's correct.

Q. Okay. While you were with Bellamy, did you -- what areas did you practice in?

A. Primarily estate planning.

Q. Did you do any real estate work?

A. Only as it related to one or two estates that we were handling.

Q. Okay. And your father was Paul Creel?

A. That's correct.

Q. All right. And of course, everybody here at the table knew your daddy. He had extensive real estate holdings during his career and at the time of his death, I believe?

A. I don't know how you define significant. But yes, sir. He owned a fair amount of real estate.

Q. After he passed away -- well, let me ask you, before he passed away, were you handling his real estate matters for him?

A. I was certainly involved. He had the ultimate say.

Q. Right. But you were assisting him with the real estate

matters, buying and selling and leasing property. Is that a fair statement?

A. Yes, sir.

Q. Okay. All right. Okay. And after your daddy passed, did you continue to be involved with that, his holdings, at the time of his death, his real estate holdings as far as buying, selling, and leasing any of those properties?

A. Yes, sir.

Q. Okay.

A. (CELL PHONE RANG) Let me mute this. I'm sorry.

Q. Go ahead.

A. Let me just mute this. Sorry.

Q. You good? Okay. Well, just generally explain his holdings in real estate. You don't need to get too specific, but I'm just interested in the amount of real estate transactions and what they were, that you might have been involved with, both sometime immediately before your dad's passing and since he's passed. Just generally give me a good sampling of what all you've been involved in, in handling as an owner and attorney.

A. Daddy owned -- either him or his -- or via a corporation, we had several farms. At one time, we had ten convenience stores that we owned and operated ourselves. We had some service station locations, this type thing. And at one time -- well, up until his death, Daddy was also

a shareholder with Randy in Kingston Pointe, which we referred to earlier. And of course, you know, the farms were, you know, rented out for farm rent and that sort of thing.

Q. Okay. Well, basically ...

A. He had an investment -- he had a minority -- he was a minority shareholder in a project in Edisto. He was a minority shareholder in a project in -- down near Moncks Corner. At one time, he was a minority shareholder in a project near the back gate of the old Myrtle Beach Air Force Base. I think that probably answers your question.

Q. Yeah. That's good. I'm just -- so basically, you're dealing with a lot, both before and after your dad's death, you were dealing with a lot of real estate ownership interests and the associated buying, and selling, and leasing, and operation of those real estate interests. Would that be a fair statement?

A. Yes, sir.

Q. Okay. And of course, you were a lawyer, a member of the Bar at the time, and I guess passed your real estate portion of the Bar exam and all that sort of thing.

A. I guess so.

Q. So you're well experienced. Okay. Would you handle the real estate deeds, and leases, and agreements as they came up, both before and after your dad's death, yourself? Or

would you hire separate counsel, even though you are a lawyer?

A. From time to time, you know, I was certainly comfortable drafting a lease or something like that. I myself have never handled a real estate closing. I've never even done a closing statement. There was always -- anything like that would have been handled by outside counsel.

Q. As far as the actual closing and closing statements, you just deferred to somebody else to do that?

A. Yes, sir. And the deeds and all the other documents associated with a closing.

Q. Right.

A. But I would have been comfortable, like I say, drafting a lease or something along those lines.

Q. Right. Okay. Let's talk about this particular property. What is the status of the title in this particular property that's the subject of this lawsuit today? What is the status of the title, if you know?

A. Well, after Randy and Donald purchased the two tracts that they did, in fact, purchase, which were right at fifty, fifty-one acres each, I sold the remainder of the property to Mr. Larry Paul. And as far as I know, he still owns that.

Q. All right. And when did you sell the tract to Larry Paul?

A. Dwight, I don't remember exactly.

Q. How big was the tract? Or what was included in that

conveyance?

A. It was approximately two hundred and twenty acres.

Q. And what was the purchase price?

A. Much, much less than the arrangements that I had with Randy and Donald. It was a difference of about three million dollars. Pardon me.

Q. Do you need to take a break? If you do, just anytime is fine. I mean, don't hesitate, and I'll just leave that to you.

A. We were talking about knees earlier. I mean, we both -- we all know I've had my hips replaced, but I've got problems with my knees, too. But ...

Q. But just, no kidding, anytime you want to get up and walk around, or if you want to stand up rather than sit down, or whatever. Just whatever you want to do. Whatever's your comfort level. What was the consideration? You said maybe three million dollars. But at the time of the transaction with Larry Paul, did you owe him any money? Was there any exchange or trade?

A. I don't remember I owed him anything at that time, but there were -- that was not -- no, there was not any trade. He bought the property. It was a clean, neat transaction.

Q. Was there any type of buy-back provision involved?

A. No, sir.

Q. None? Was there anything else conveyed, other than the property in that transaction with Larry Paul, other than the

property which was subject to the agreement with Randy Beverly, LLC and Donald Godwin, LLC?

A. Actually, there was.

Q. What else was involved?

A. In the original agreement that I had with Randy and Donald, this entire farm was a total of approximately three hundred and twenty acres. In the original agreement that I had with Randy and Donald, I was reserving forty acres out of that three hundred and twenty acres. When I had to sell the remainder to Mr. Paul, he purchased everything that was left, including that forty acres that had been previously reserved.

Q. And there was no other consideration, other than the cash paid for the property? There was no other consideration involved?

A. No, none.

Q. So all the total consideration is the cash stated on the deed itself?

A. That's correct.

Q. Okay. And there's no options to repurchase that exist, either verbally or in writing?

A. No, sir.

Q. Okay. The -- what is the status of Bucksville Farms, Inc. now, and what was the status of it actually at the time of this agreement that's the subject of the lawsuit, the

contract?

A. I'm unclear as to what you mean by, "what is the status?"

Q. Well, was it a corporation in good standing with the State of South Carolina, or do you know?

A. There have -- I'm so glad you asked this question. There have been times when the corporation -- not just that corporation, but even some of my others have been administratively dissolved, because the folks in Columbia don't understand that -- there's some form called a PT100. I don't even know exactly what a PT100 is, but if you don't file one, then sometimes they will -- the folks at the Secretary of State's office will administratively dissolve the corporation for not filing this form, which I think has something to do with inventory tax, or something like that. Well, Bucksville Farms doesn't have any inventory. All it owns, all it's ever owned, is some farmland. So yes, there have been times when the corporation has been administratively dissolved. We get the letter or what have you. We make a telephone call or file a zero -- one of these PT100s. My accountant does it for me, and that's all there is to it.

Q. Okay. Who is your accountant?

A. Mr. Richard Jordan.

Q. Has -- was Mr. Jordan your accountant during all ...

A. Yes, sir.

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thing. In addition, at this time, I was still involved with the former North American Institute of Aviation. This letter was written in September of 2008. North American ended up filing bankruptcy in February of 2009.

Q. Okay. You were the principal stockholder in ...

A. That's correct.

Q. ... North American Aviation?

A. That's correct.

Q. And were you the sole stockholder?

A. No, sir. There were other minority shareholders, whom I've never met. But I owned ninety-eight percent of the stock in the corporation.

Q. And what type of bankruptcy was filed? Chapter 7?

A. Yes, sir.

Q. Can you tell me a little bit about your assets and debts, and the financial situation that led up to the bankruptcy of North American?

A. Well, that would take several days. But the corporation owns no real estate. It leased its facilities from the Horry County Department of Airports. It did have a fair amount of equipment. You know, furniture, fixtures. But the bulk of it would have been maintenance equipment and parts inventory, that sort of thing.

Q. What were the assets and what were the debts of the corporation in the bankruptcy?

A. The auction, which was, of course, administered by the bankruptcy trustee, netted, if I remember correctly, approximately seven hundred thousand dollars. And the debts were more than double that.

Q. All right. So you said the debts were about twice the assets in North American?

A. Yes, if I remember correctly, Dwight. The unsecured creditors got paid about forty cents on the dollar.

Q. Okay. Were any debts owed to my clients through any other business entities or anything, as a result of that bankruptcy?

A. Actually, I think there was, by virtue of the apartments, which were the -- the name of the complex was The Landing, LLC, if I remember correctly.

Q. Okay. Do you remember that figure?

A. No, sir. I do not.

Q. Or generally, approximately?

A. I don't remember if it was ...

Q. So you don't remember that debt at all?

A. I remember that it existed, but ...

Q. The range?

A. ... I can't remember. Thirty or forty thousand dollars, maybe. I'm not sure.

Q. Okay.

A. There's a whole chapter I'd like to forget about.

Q. Have you had any other financial situations or problems, other than North American Aviation, say in the last seven or eight years, ten years? Let's put it since your father passed away. Have you had any other financial difficulties and problems with debt and cash flow?

A. Well, Dwight, our business, like anybody else's, is cyclical, and I don't know anybody who could say the -- I don't know just about anybody who can say that the economy in the last five years hasn't presented challenges to them. But I would -- I guess the best way I can answer your question is that that whole situation was by far the greatest challenge.

Q. Okay. Well, what other situations that might not have been as great a challenge, but other financial problems? Have you had any other bankruptcies with business entities?

A. No, sir.

Q. All right. Have you had any other judgments, lawsuits, involved in -- for failure to pay debts?

A. As a result of some of the personal guarantees associated with North American, I have numerous judgments against me. And some of those situations are ongoing to this day, but as far as, you know, defaulting with a bank or anything along those lines, so far, I've been able to avoid that.

Q. Can you give me these other debt problems that you're

having as a result of these guarantees that you were talking about?

A. The company that bonded North American by the name of Selective Insurance, they have a judgment against me.

Q. If you can give me amounts, if you know, and just approximately?

A. Selective Insurance is -- well, with the accrued interest, I'm not certain. But several hundred thousand dollars. The gentleman who leased our aircraft to us, Christiansen Aviation, has a judgment against me for a hundred plus thousand dollars. Ford Motor Credit, thirteen or fourteen thousand dollars. It seems like there might be one other, but I'm -- it's not coming to mind at the moment.

Q. Okay. How about the IRS, as a result of estate taxes and the like, that -- as a result of your father's estate?

A. Well, there ...

Q. Has there been any liens, and is that paid off?

A. There were certainly challenges associated with that.

Q. If you could explain that? I'm not sure what you mean.

A. The total estate tax bill when my father passed away was somewhere in the neighborhood of one point two million dollars. And I don't know if you're familiar with Section 6166, which allows for small business owners or their heirs to pay their estate taxes over time. But in the administration of my father's estate, we elected to -- out of

necessity, to invoke the provisions of Section 6166 and pay the taxes over time. And ultimately, that entire bill has been paid, but it took about eight, nine years to do so.

Q. So you paid the entire estate tax on the ...

A. The estate tax has been paid, yes, sir.

Q. All right. And when was it finally paid?

A. Sometime last year.

Q. Last year?

A. Yeah. Maybe year before.

Q. Okay. You actually have -- I believe have had some real estate transactions and loans with my clients, Randy and Donald, but I think particularly Randy, since y'all are related ...

A. Yes, sir.

Q. ... by marriage. Can you tell me about those and the status of those?

A. No, we're blood relatives.

Q. Okay. Well, that's true, too. That's true. I guess that would be right. Excuse me.

MR. BEVERLY: He's my nephew in law.

Q. That's right. That's right. Okay. But go ahead and tell me the -- give me those transactions, to the best of your memory, just generally. Have they ever been in default? Are they current? The status of them during their lifespan?

A. Well, my company still operates a convenience store, one convenience store located at Main Street and 12th Avenue in Conway. We used to own it. Randy now owns it, and we lease it from him and operate the store. And the rent on it is current.

Q. Has it always been current?

A. No, sir. It's not always been current.

Q. Okay.

A. We got over a month behind at one time two months ago. Used to own a piece of property in Marion County, which I sold to Randy several years ago, with the option to repurchase. Was not able to exercise that option. I don't know if he still owns it or not. As far as I know, he does. And of course, there's the whole ball of wax here. I alluded earlier to my -- mine and my father's prior involvement in Kingston Pointe. Years ago -- I'd say it was probably ten years ago, approximately, after all that shook out, after my father passed away, and there was another gentleman involved in this, Raymond Smith. Anyway, when all the dust settled, Randy and I each owned fifty percent of Kingston Pointe, and I actually sold my interest in that corporation to Mr. Godwin eight or nine years ago, I think. I sold Randy part of one of my farms, with the option to buy back a few years ago, and I did exercise that option from the proceeds from one of the

closings that we had with regard to this matter. I think ...

Q. Is that about it?

A. I think so, yes, sir.

Q. Okay. All right.

A. I would be remiss -- I would be remiss if I forgot this. I had another part of that same farm come very, very close to being foreclosed upon several years ago, and Randy lent me the money in exchange for a deed on the property, to save it from being foreclosed. I was not able to get other financing, and as a result of that, he retained -- it was a total of about seventy acres. He retained about fifty-five of those seventy acres, including the Highway 501 frontage. And I retained the back portion of the property, where there's a house and some outbuildings.

Q. Was ...

A. And the owner of that was also Bucksville Farms, or was.

Q. And that came about as a result of you not being able to pay back the loan?

A. That's correct, or seek other financing.

Q. All right. Okay. Any others? I'm really turning the floor over to you.

A. Dwight, that's all I can think of at the time.

Q. Okay. Do you owe any other money to Larry Paul?

A. Yes, sir.

Q. Can you tell us about that, since he owns this property

now?

A. A couple of years ago, it was actually related to the North American bankruptcy. Anyway, I needed to borrow some money. Could not get bank financing. So Mr. Paul, at my request, of course, lent me two hundred and seventy-five thousand dollars, secured by another portion of what we refer to as the Four Mile Farm, which is the same one I've been talking about all along. Just for the sake of clarification, the property that is the subject of this lawsuit we refer to as the Bucksville Farm.

Q. Okay.

A. But Bucksville Farms, Incorporated owns other land, including a farm at Four Mile. That loan is secured by a portion of the farm at Four Mile, the same farm which, as I told you a few minutes ago, at one point I deeded another portion of it to Randy, with the option to repurchased, and I did exercise that option.

Q. Okay.

A. I know this is confusing.

Q. Is that loan current with Larry Paul?

A. No, sir.

Q. Well, how is ...

A. Well, actually, I think it's current. But it's -- I have no idea how I'm going to pay it back. But I think the interest payments are quarterly, and there's either one -- I think

there's an interest payment coming due soon, so I guess one could say, yes, it's current.

Q. Is that a mortgage to Larry Paul that also involves that Four Mile property that you retained, that portion of it, in addition to other property? Is that a mortgage or is there a deed with an option to ...

A. No, it's a mortgage.

Q. A mortgage?

A. Yes, sir.

Q. All right. What other property besides the Four Mile property, if I've got it right -- you tell me if I'm wrong. What other property's involved in the mortgage to Larry Paul, other than what you retained on the Four Mile property after the transaction with Randy Beverly?

A. That's the only one.

Q. That's the only piece of land?

A. Yes, sir.

Q. Is there any other loans on that property?

A. No, sir.

Q. All right. At the time of this contract that we're here today about, what kind of loans were on the property before the first takedown? What kind of loans were on the property?

A. Dwight, I can't remember, other than I think at that time there was still a federal estate tax lien on the property, which had to get released in order to effect the first

closing. But really ...

Q. A good question would be, just a history of the -- obviously, starting there at the time of the contract and the first takedown, right on up to the date -- or right on up to the time that you testified that you -- even though you weren't sure of the exact time, that you sold it to Larry Paul, the remaining part. All of the liens that had been on the property by Bucksville Farms?

A. Other than the federal estate tax lien, I don't recall there being any other liens.

Q. All right. No other money was owed Larry Paul at any time?

A. I didn't say that.

Q. I'm sorry. I'm sorry. That used this property as security?

A. Not that I remember, Dwight.

Q. All right. Okay.

A. You know, the -- I have done so many different transactions, and loans, and mortgages, and one thing and another, sometimes I can't keep them all straight in my head, but ...

Q. Yeah. Are there any -- or have there been any loans or use of this property, the subject property of the lawsuit, as security, maybe that's not evidenced by recorded documents, at any time during the history of this contract?

A. I'm sorry. Can you say that again?

several times. But the paragraph I was looking at was thirty-one. It's short and to the point, if we're looking at the same document.

MR. STEVENS: It's under the heading, "Breach of contract." Go ahead. Look at that one.

Q. I'm reading from the Answer, Counterclaim, and Third Party Complaint, paragraph thirty-one. That's -- you know, that's part of your allegations, even though that's not the only paragraph.

A. Yes, sir.

Q. But my question says -- you want to read it back to him? I can't even remember what it was exactly.

COURT REPORTER: I'm sorry. Read what back to him?

Q. Can you read the question that I asked him about ...

COURT REPORTER: Sure.

MR. STEVENS: I object to it. I didn't understand it.

Q. Okay. After all that.

(A PORTION OF THE RECORD WAS READ BACK)

Q. We'll start with that question, and ...

A. My understanding, Dwight, is that the parties to a contract are free to modify their contract by their words and or by their actions. And in this case, it is very clear to me, you know -- I'm sure Randy and Donald did not take those first two closings lightly. They commissioned the wetlands

surveys to be done in their letters, which they properly sent to me, notifying me of the first two closings that were about to take place. They referred to, you know, "We have done our wetlands survey," in both letters. There was a question that came up with the first closing, took place based upon a preliminary survey that had not yet been, if I understood correctly, completely certified by the Corps. Didn't think there was any wetlands in that tract. It came back there was, I think, point zero eight acres. We made an adjustment for that at the second closing. And you know, everything was going fine until the real estate market and the housing market started going into the toilet, if you'll pardon the expression. And we talked about that in the spring of 2008, when they first came to me, and we started negotiating the possibility of delaying the third and fourth closing, that that was the real reason that we were even having these discussions.

Q. The contract, I think, has been maybe amended by one addendum to the contract, dated October 2nd, 2005. But my information and observations are that that's the only addendum or amendment that might have been made to the contract. You're familiar with the contract?

A. Yes, sir.

Q. Okay. I want to show you the ...

A. I don't remember that addendum.

Paragraph twenty-seven A. I don't seem to have a page number on mine. And that's the -- actually, a typical paragraph, I believe, that you, as being a lawyer and familiar with real estate, as you testified earlier, both professionally and through personal business. But basically it states -- the last sentence in there, it's -- that's the entire agreement. It says no modification or amendment of the agreement shall be of any force or effect unless made in writing and executed by both purchaser and seller.

MR. STEVENS: Object to the form of the question.

Q. Are there any other -- other than that initial addendum, that I identified earlier and that you've identified, are there any other modifications or amendments in writing to this contract?

A. Not to my recollection.

Q. And you read the contract ...

A. Yes, sir.

Q. ... at the time you signed it?

A. Yes, sir.

Q. And I think the contract also calls -- and it's been cited in various pieces of correspondence, I think, that you, the seller, Bucksville Farms, will be responsible for delineating the wetlands in the transaction?

A. Yes, sir. That's what it says.

answer it.

A. During the spring and the summer of 2008, once again, the first time we had any kind of question come up was when Randy and Donald approached me in the spring of 2008 with a request to delay the schedule as set forth in the contract by one year. So we started doing some negotiating about that, and those possibilities, and I'm sure you've seen the correspondence. We had numerous meetings in Randy's office. But when the issue first came up about -- I'll call it the -- what we suspected were wetlands, and what I was under the impression, though they never told me specifically, what property was to be in the third takedown. But we knew that there was an area that had some amount of wetlands, and we had taken measures prior to this to legally minimize those wetlands.

Q. You say "we"?

A. Well, it was a very good idea. It was Randy's idea, and it was a very good idea, and potentially have been mutually beneficial to all of us, to do some silvicultural practices to minimize the wetlands legally, you know. We're not talking about filling them in, or anything like that.

Q. Right.

A. Cleaning out the ditches, and one thing and another. And Randy and Donald commissioned that work to be done.

Q. Now, wait a minute. Can you explain that? I'm not -- I

Hardwick. For whatever reason, he never called me back. In the meantime -- excuse me. And I don't know if this was back in '06 and '07. Over a period of fifteen months, I had seven major surgeries, almost died, had just a lot going on. But in any event, Mr. Hardwick never called me back. But when we got to the closing table for the second closing, which was in June of '07, on the closing statement there was a charge to me for approximately ten thousand dollars, where they had gone ahead and gotten that work done, and charged it to me.

Q. And specifically what work?

A. I don't know exactly, because I didn't commission it. But my understanding is that what the gentleman did was -- I don't know if he dug any additional ditches, or cleaned out the existing ditches, or exactly what he did.

Q. Okay. Well, during this time period in -- I don't need -- you don't need to get too detailed, but you said you had numerous surgeries. Generally, were you in the hospital most of this time, between the first and second takedowns?

A. I was not in the hospital most of the time, but I was in and out of the hospital a lot. And at one point, I was in the hospital for a twenty-eight day stretch. And after I lived, they told me that they didn't know that I was going to live. But in any event, by the grace of God, I did.

Q. Well, it sounds like -- was this both physically and

talk, or commission, or contract with anybody other than Truitt Hardwick to attend to the silviculture on the property?

A. As I said, Mr. Hardwick did not call me back. But I know from the closing statement that Randy and Donald got -- well, it shows up on the closing statement as Big Oak or something like that. But I now know that that's the young man named -- oh, he's Gene Johnson's son. Matt Johnson, I believe, is his name, that did the work at their behest.

Q. How about Chuck Oates? Did you ever have any conversations and or meetings with him to discuss the silviculture process?

A. Yes, sir.

Q. When and how many?

A. Well, the meeting that I just told you about a few minutes ago.

Q. Okay.

A. We were talking about the wetlands surveys and that sort of thing. But to my recollection, I only -- I've known Chuck for years, but -- and he has done work for me on -- with regard to other parcels of property. But I think I actually met with him with regard to this parcel twice, once at his office and once at a restaurant for lunch.

Q. And that would -- those two meetings would have been to discuss the silviculture process?

Godwin as opposed to your request? Is that your allegations?

A. We were all, as far as -- it was Randy's idea to institute these practices, that I now know is called silviculture. I'd never even heard of that word till I learned it from Chuck Oates. But it was to everybody's potential benefit to do that, and we were all in agreement that that was a good idea.

Q. Okay. And regardless of whose it was, whose idea it was, it was your -- it was Bucksville Farms' responsibility to pursue that?

MR. STEVENS: Object to the form of the question.

Q. Is that correct?

A. I don't know that there was any kind of responsibility assigned. Like I say, Randy and I had a conversation. We agreed that it was a good idea. And as I told you a few minutes ago, I said, "Well, I'll call Mr. Hardwick." He never called me back. And then I later learned that they had gotten the work done and charged it to me on the closing statement. I did not object to that charge on the closing statement. I don't know if that answers your question or not.

Q. I think so, and I think I asked you about any other efforts on silviculture, and you mentioned maybe meeting with Chuck Oates a time or two?

A. Correct.

Q. Okay. I might have asked you this earlier. If so, I apologize. But has the remaining portions of the tract -- and I should say, the tracts that were sold to Larry Paul, the rest of the property, have they ever -- had they -- did they ever have a wetlands delineation approved by the Corps of Engineers?

A. I don't know. I mean, I know that Randy and Donald got the wetlands survey done on the entire tract, with the exception of one area. But whether or not that was certified by the Corps, I don't know. They got it done. I didn't get it done.

Q. I believe the first two tracts, the first two takedowns, had very little wetlands really involved in those tracts. Is that correct?

MR. STEVENS: Object to the form of the question.

A. If I remember correctly, as previously stated, it turned out there was point zero eight acres in the first tract, and once again, if I remember correctly, there was none in the second tract.

Q. Okay. Based on your personal experience as a property owner in dealing in real estate, and also as an attorney, you would agree, would you not, that all lending institutions, before they loan money on property in Horry County and like counties, would want a wetlands

determination and delineation by the Corps of Engineers as part of their loan requirements?

MR. STEVENS: Object to the form of the question.

A. I think that's a common practice.

Q. All right. Are you familiar with Mr. Beverly and Mr. Godwin's business associates and partners from New Jersey in connection with the property that's the subject of the lawsuit here today?

A. Vaguely. I have not met them, for example. I don't know their names at the moment. But my understanding has been that they have dealt with some other investors, based upon some conversations that I have had with Randy in the past.

Q. Okay. The deposition of Steven -- I have trouble pronouncing his last name, but Sciaretta, I think, has been taken. You haven't read that deposition?

A. No, sir.

Q. Have you talked with Truitt Hardwick about this lawsuit anytime recently, or say the time you say they didn't meet you?

A. No, sir.

Q. Okay. You never called him to ask him why he didn't show up?

A. It wasn't that he didn't show up. He -- I don't know if he didn't get my message or what, but he just didn't call me

State of South Carolina	)	In the Court of Common Pleas
	)	15th Judicial Circuit
County of Horry	)	Case # 09-CP-26-1909
Randy A. Beverly, LLC and Donald Godwin, LLC, Plaintiffs, -vs- Bucksville Farms, Inc., Defendant/3rd Party Plaintiff, -vs- Randy A. Beverly & Donald Godwin, 3rd Party Defendant and 4th Party Plaintiffs, -vs- Benjamin J. Creel, Individually and as Surviving Director of Bucksville Farms, Inc., 4th Party Defendants.	)	Deposition of: Stephen R. Sciaretta



The deposition of Stephen R. Sciaretta was taken before Sarah B. Fry, a Notary Public in and for the State of South Carolina, at the Hudson Law Office, 1203 48th Avenue North, Myrtle Beach, South Carolina 29577 on May 9, 2010 commencing at 10:09 a.m.

COPY

ADVANTAGE COURT REPORTING
OF MYRTLE BEACH
7201 Enterprise Road, Myrtle Beach, S.C. 29588
843-650-6263

A. Stephen Sciaretta, S-T-E-P-H-E-N S-C-I-A-R-E-T-T-A. My residence is 303 Mendham Road, M-E-N-D-H-A-M Road, Bernardsville, New Jersey. That's B-E-R-N-A-R-D-S-V-I-L-L-E, New Jersey.

Q. And what's your occupation?

A. I am a principal of a construction and real estate development company in New Jersey.

Q. All right. Okay. And what's -- what is that organization?

A. They're under the generic name of the Claremont Companies, C-L-A-R-E-M-O-N-T Companies. Under that, we have a few different entities, the main one being Claremont Construction Group, Inc.

Q. All right. And what is your position with the Claremont Companies?

A. I am a vice president on the construction companies, and I'm president of the real estate companies, real estate development companies.

Q. All right.

A. And a fifty percent owner of the different entities.

Q. Can you kind of give us a brief -- or a description of what the Claremont Companies does in the construction industry?

A. Presently, we basically are general contractors in New Jersey, focusing now over the last several years on affordable housing in the urban areas of northern New

A. Sure.

MR. STEVENS: Just give me a -- yeah, that's good. I just need to see.

A. In that agreement, we had formed an LLC called 701 South, LLC, which was comprised of a Claremont entity, another entity of friends of ours in New Jersey called -- they were trading under the title Byram Land Development, Randy Beverly, LLC, and Donald Godwin, LLC. We formed that jointly, twenty-five percent interest for each of the parties. Under this contract, 701 South, LLC acquired the first two tracts that Godwin and Beverly were acquiring from Creel. At the same time -- which led to a closing in which 701 South, LLC acquired title to those two tracts, roughly a hundred acres. I think they were roughly fifty acres each. At the same time, 701 South, LLC entered into an option agreement. This one here, Mr. Stevens.

MR. STEVENS: Okay. Thanks.

A. Entered into an option agreement ...

Q. That is number ...

A. I'm sorry. Number 5.

Q. Number 5. All right.

A. In which 701 South, LLC was given an option to acquire to the remaining phases of the Creel property as Beverly and Godwin, LLC were acquiring that, in accordance with

their contract. And the option states the consideration that we would -- that 701 South, LLC would pay to Godwin and Beverly.

MR. STEVENS: Does that -- I've got six pages. How many pages? Is there another document in that?

A. No, I think there was attachments to it.

MR. STEVENS: Can you tell -- for the record, could you tell what attachments are to it? Is the agreement to buy and sell real estate in multiple closings between Bucksville Farms, Inc. and Beverly, LLC and Godwin, LLC ...

A. That's right.

MR. STEVENS: ... one of the attachments?

Q. That should be it, yeah.

A. That's right. The option has an attachment, which is the agreement between Beverly, Godwin, and Bucksville Farms.

MR. STEVENS: Okay. Give me one second. Let me see what else we've got here.

A. With an addendum to that contract.

MR. STEVENS: Okay.

A. And then there's an Exhibit A to the option. It looks like a deed description.

MR. STEVENS: That?

A. Correct.

Beverly and Godwin, what was the difference in what they paid for the property and what they sold it to your LLC?

A. Approximate -- I believe on this one, it was approximately eleven thousand dollars an acre differential.

Q. All right.

A. We paid for -- there was two tracts in this conveyance. One tract we purchased for twenty-eight thousand dollars an acre, and the other for twenty-nine thousand dollars an acre.

Q. All right. Great. Okay. All right. That's what I wanted to identify. You had gone onto the option.

A. Right.

Q. And tell me, if you would, and using the exhibits as we've pre-marked them, and refer to them by number, even though, again, they might not be in numerical sequence, the following transactions and documentation with Beverly and Godwin.

A. Okay. We had the contract of purchase. We had the option agreement and the deeds, which were May and June of 2007. In March of 2008, specifically March 20th, in accordance with the option agreement, I gave notice to the Godwin and Beverly LLCs that we were not going to exercise the options to acquire the balance of the tracts, we being 701 South, LLC.

MR. STEVENS: What exhibit number are you ...

A. I'm sorry. I apologize. That's Exhibit Number 3.

Q. Okay. Great. And that -- okay, and that -- and you just described what that letter, the purpose of that letter, the intent. And why was that prepared and generated? Why did you ...

A. It was after discussions, usually between me and Mr. Godwin. We just didn't -- at that point, the market had changed significantly between 2007 and 2008, and we just didn't feel it was a good investment to pay that differential between what they were paying, what Mr. Godwin and Mr. Beverly paid for the property versus what was in our option. So we elected not to proceed on that.

Q. What happened following that?

A. Following that, we continued to have discussions, because we liked the property. We were involved in the first hundred acres. And in May, May 14th in particular, following some conversations with Mr. Godwin and Beverly, we wrote a letter expressing our interest in pursuing the remaining property on 701 South, the remaining tracts, if we would go in as equal partners at the price they were paying Bucksville. In other words, I think it was about twenty thousand dollars an acre on the next closing. We were very interested in pursuing that, because it's supposed to be contiguous to our -- to the property we

were involved in already from the first closing in 2007. And then we took a -- and then we also suggested we would do an option, so we suggested we would get into the phase three, the fifty acres that was going to be phase three, and that we would also have an option to participate at their contract price on the balance of the property.

Q. All right. And is there any documentation reflecting what you've just told me?

A. Exhibit 2.

Q. Exhibit 2?

A. A letter of May 14th of 2008 from me to the Godwin -- well, to Donald Godwin, copies to our partners.

Q. All right. And what happened next, after -- did you reach that agreement based on the ...

A. Yes, we did.

Q. ... equal partnership?

A. We were assuming we were going to have a closing coming up, and -- but it did not occur.

Q. All right. And what's your understanding as to why it did not occur?

A. My understanding is that there wasn't a wetlands delineation performed that was required under the underlying contract.

Q. All right. To your knowledge, and in your negotiations with Mr. Beverly and Mr. Godwin, were Mr. Beverly and

now. Thank you, sir.

EXAMINATION BY MR. STEVENS:

Q. Let me make sure I've got your name. Sciaretta?

A. Sciaretta.

Q. Sciaretta. Okay. Now, as I understand, you're involved in the Claremont Companies, and that is an umbrella of several companies?

A. Yes.

Q. And what are the names of the companies within that umbrella?

A. Claremont Construction Group -- the ones that are active. Claremont Construction Group, Claremont Properties, Claremont SC Enterprises, which we formed for activities here in South Carolina. We have other investment companies. One's called Far Hills Capital.

Q. What now?

A. Far Hills, two words, Capital, LLC.

Q. Far Hill Capitals?

A. Far Hills Capital.

Q. Hills Capital. What is that?

A. That's just an investment company that we use. We funded it from proceeds from real estate sales.

Q. Okay.

A. We literally have a couple of dozen companies, so I don't think I'll be able to recall them all. Let me give you the

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO: 2009-CP-26-1909
Randy A. Beverly, LLC and Donald Godwin, LLC, Plaintiffs, vs. Bucksville Farms, Inc., Defendant & Third Party Plaintiff vs. Randy A. Beverly and Donald Godwin, Third Party Defendants & Fourth Party Plaintiffs, vs. Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc., Fourth Party Defendant.	*[PLAINTIFFS' PROPOSED]* **FINAL JUDGMENT PURSUANT TO RULE 53(e), *SCRCP***

This matter came before the Court on January 12-13, 2012 for a properly noticed and scheduled hearing by the parties' consent to an Order of Reference recorded on June 22, 2010 and pursuant to Rule 53 of the *South Carolina Rules of Civil Procedure,* for a for a final hearing with any appeal to the SC Supreme Court or the SC Court of Appeals as provided by the South Carolina Appellate Court Rules. Present at trial were Randy A. Beverly and Donald Godwin, as

principals of the Plaintiffs and individually as Third Party Defendants & Fourth Party Plaintiffs, together with their attorney, J. Dwight Hudson. [Hereinafter referenced as Beverly and/or Godwin or as Plaintiffs] Also present at trial was Benjamin J. Creel, individually and as surviving director or principal of Bucksville Farms, Inc. [Hereinafter referenced as Creel or Defendant] Based upon all of the testimony and evidence admitted at Trial, I find that Judgment should be entered in favor of Plaintiffs and against the Defendant.

Factual Findings

By way of overview, this action arises from a real estate sales agreement dated October 2, 2005 between the parties whereby the Plaintiffs agreed to buy and the Defendant agreed to sell an approximately 317.5 acre tract of land in Horry County, parts of which contained fairly substantial wetlands. (Defendant's Trial Exhibit 33) The agreement contemplated a series of four (4) closings or takedowns to take place approximately a year apart. (Defendant's Exhibit 33) Of the anticipated takedowns, two (2) occurred. (Defendant's Exhibit 28; Trial TS Day 1, p. 26, l. 16- p. 29, l. 1) The problems culminating in the filing of this action occurred after the second takedown and meant that takedowns three and four never occurred and the disputed part of the property was ultimately sold by the Defendant to a third party. (Defendant's Exhibit 28; Trial TS Day 1 p. 29, l. 23 - p. 30, l.2; Trial TS Day 2 p. 53, l. 4-25; Beverly Depo, p. 15, p. 27-28;)

Plaintiffs Beverly and Godwin have done ten (10) to twelve (12) residential developments together and they and their companies have worked in partnership for a long time. (Trial TS D1, p. 203, l.2-7) Godwin has not had prior business dealings with Defendant Creel, except for having bought Creel's interest in the Kingston Marina development through Beverly.

(Trial TS D1, p. 203, l.8-15) However, Beverly and Creel have a lifelong association, since Defendant Creel is Plaintiff Beverly's nephew, the son of Beverly's late sister, and thus Beverly has known Creel since his birth. (Trial TS D1, p. 17, l. 14 - p. 18, l. 1)

Creel is the son of the late Paul Creel who worked in real estate development during his lifetime and died owning fairly substantial real estate interests, including ten (10) convenience stores, interests in developments (Kingston Pointe and other projects near the back gate of the air base (now the Market Commons area) in Horry County, interests in developments in Edisto and Moncks Corner, and acreage in four (4) farms - including the acreage involved in this action which was part of Bucksville Farm. (Depo Creel, p. 10-12, p. 26) Creel is a lawyer, presently licensed but on inactive status and before and after his father's death, Creel dealt with many real estate matters -on behalf of his father, on behalf of his father's estate and on his own behalf since his father's death. (Depo. Creel, p. 8-9 and p. 12; Trial TS D2 p. 70, l. 2- p. 71, l. 19)

Creel has been having substantial financial difficulties dating back to around 2002, in part because of North American Aviation, a company of which he personally owned 98%. (Trial TS D2 p. 74, l. 13 - p. 77, l. 17; Depo Creel, p. 19, l. 1 - p. 23, l. 10;) Creel had also been dealing with an IRS tax lien of approximately 1.2 million dollars arising from taxes due on his late father's estate (Depo Creel, p. 19, l. 1 - p. 23, l. 10) North American filed bankruptcy in February of 2009 but Creel ended up with numerous judgments against him because of personal guarantees he signed on loans and other financial matters made to North American but not arising from personal default. (Depo Creel, p. 19, l. 1 - p. 23, l. 10)

Additionally, Creel had been borrowing money from Beverly since the late 1990s with these transactions structured as sales of property wherein Beverly would get a deed and Creel would have an option to repurchase the property, usually within 1-2 years. These option

deadlines were generally extended by Beverly at Creel's request and Creel borrowed money 2 or 3 times on 1 piece of Creel's property in that manner. Beverly ended up owning 3-5 pieces of Creel's property because of these sale/option loans, after Creel failed to buy the property back. (Trial TS D1 p. 20, l. 4 - p. 21, l. 9) At one point, Creel owed Beverly as much as 2 million dollars for these loans. (Trial TS D1 p. 40, l.13 - p. 41, l. 8)

As to the present 317.5 acre tract, around May of 2005 - about 6 months before the date of the present contract - Creel called Beverly because Creel knew that Beverly and Godwin were developing another piece of property in the Highway 701 area, and Creel advised Beverly that he was selling this land and wanted $18,000 to $20,000 an acre. (Trial TS D1 p. 24, l. 7-21; Depo Beverly, p. 6) Creel wanted to know if Beverly and Godwin were interested but Beverly advised that Creel's price was out of his "ballpark." (Trial TS D1 p. 24, l. 7-21) Between 4 and 6 months later Creel called Beverly again to advise that he had listed the property with realtor Chris Bethea who proposed breaking the sale down to about 50 acres a year over a 4 to 5 year period to make the land more affordable for smaller developers and Creel advised that another company was interested. Beverly replied that broken down into those increments he would be able to afford it, and the pair negotiated, agreeing to a sale of 50 acres per year for 4 years at a cost starting at $17,000 per acres, escalating $1,000 per acres per year. (Trial TS D1 p. 24, l. 23-p. 25, l. 19) **Creel agreed to take those terms to his lawyer, Gem McDowell at the McNair firm and Creel's attorney drafted the present contract, based upon or using as a guide a Contract originally prepared by attorney Lynn Gatlin for an offer made by Hall Development.** (Trial TS Day 1, p. 25, l. 19-22; Trial TS Day 2, p. 71, l. 20 - p. 72, l. 5)

Prior to the parties executing an agreement, Creel asked Beverly not to start the takedowns at the Southeastern corner of the property because that tract had such known wetlands

issues and Creel wanted time to do some silvaculture and ditching so that more of the land would be classified as uplands which would sell at a higher rate and would allow Beverly and Godwin to use the land for building. (Trial TS D1 p. 26, l.8 - p. 27, l.16) Beverly didn't suggest waiting on the takedown of the Southeastern corner piece because Beverly didn't know about the wetlands issues there at the time. (Trial TS D1, p. 104, l.14- p. 108, l.15)

The federal definition of a wetland is saturation to the surface. (Depo Oates, p. 11) At the time of these events, there was a three (3) part test under the Clean Water Act to determine whether or not property was a wetland and protected from most building or development. (Trial TS D1, p. 116, l. 5-7 and p. 119, l. 21-24) The three-part criteria are as follows: hydrophytic vegetation, whether the soils are hydric or non hydric and the groundwater hydrology. On a natural site, if all three components are present, then it is a wetland but if any of the components is missing, then the area is not considered a wetland. (Trial TS D1, p. 119, l. 15- p. 120, l. 14)

Under the Silviculture exemptions to the Act, landowners can perform certain acts to facilitate heavily wooded property with dense vegetation in drying out. These acts can not be performed by developers. (Depo. Beverly, p. 20-21) Specifically, landowners can harvest some of the timber, which thins the trees, and then after the logging is done, come in with a mulching machine and mulch the underbrush. (Trial TS D1, p. 139, l.6-25) On agricultural tracts, once that process is started, the clearing will reveal older, pre-existing ditches and the landowner can clean out those ditches to try and restore some water flow. The foregoing will frequently, over a bit of time, dry out some of the wetlands on property. (Trial TS D1, p. 139, l. 8-25)

As noted above, the contract between the parties was dated and signed on October 2, 2005 and is entitled "**Agreement To Buy And Sell Real Estate In Multiple Closings.**" (Defendant's Exhibit 28) It referenced the subject property as containing approximately 317.5

acres, but the amount of the whole tract involved in this sale was about 275 acres because Creel was keeping 40 acres. (Depo Beverly, p. 8; Defendant's Exhibit 28, paragraph 1) The sale was structured in four (4) takedowns, with one a year starting in 2006, at a price of $17,000.00 per upland acre, with that price increasing by $1,000.00 each year, so that the per acre price for upland acreage ranged between $17,000 and $20,000. The price for wetlands for all four (4) takedowns and throughout the contract period was $1,000 per acre, so there was a substantial price difference between upland acres and wetland acres. (Defendant's Exhibit 28, Paragraph 2)

The contract provided for an initial "feasibility period" slated to end at midnight on the 120th day following Creel's delivery of a "Boundary Survey and Wetlands Survey" by a professional surveyor licensed in SC and for purposes of the feasibility period, the seller was not required to have the wetlands permitted by the US Corps of Engineers. (Defendant's Exhibit 28, Paragraph 7) The agreement set the First Closing to occur within 15 days of the expiration of the feasibility period and was to "contain a minimum of 50 upland acres" and subsequent closings were governed by a later paragraph (22). (Defendant's Exhibit 28, Paragraph 6)

When read together, Paragraphs 6 and 22 of the subject Agreement provide that each of the first three (3) takedowns must contain a minimum of 50 upland acres and the fourth (4th) takedown would then include the remainder of the property. (Defendant's Exhibit 28, Paragraphs 6 and 22)

Among other terms and conditions, Paragraph 9 requires the seller, Creel, to furnish a boundary survey 'indicating the true and correct legal description thereof, delineating the boundary lines of said property and all wetlands and carving out the 40 acre parcel to be retained by the Seller." The purchaser, Beverly and Godwin, "shall obtain the Takedown surveys for the acquisition of each Takedown of the Property." When read together, Paragraphs 6 and 22 of the

subject Agreement provide that each of the first three (3) takedowns must contain a minimum of 50 upland acres and the fourth (4th) takedown would then include the remainder of the property. (Defendant's Exhibit 28, Paragraph 9)

The Contract between the parties, which was drafted by the Seller's Attorney, contains the following provision as to default and remedy:

> 20. Default and Remedy: If Purchaser has breached its covenants and agreements hereunder and has failed, refused or is unable to consummate the purchase and sale contemplated herein by the Closing Date, Seller shall be entitled to either: ***(i) retain the Earnest Money paid by Purchaser as and for Seller's liquidated damages for Purchaser's default or (ii) seek specific performance of this Agreement against the Purchaser***. Notwithstanding the aforesaid, nothing herein shall be deemed to limit Seller's remedies for indemnification under Section 11. If Seller has breached its covenants and agreement under this Agreement and has failed, refused or is unable to consummate the purchase and sale contemplated herein by any Closing Date, Purchaser shall be entitled to: (i) terminate this Agreement and receive a full refund of the Earnest Money, or (ii) seek specific performance of this Agreement against the Seller, or (iii) in the event of a willful or intentional breach by the Seller, Purchaser may pursue any other remedy at law or in equity.
>
> (Defendant's Exhibit 28, Paragraph 20)

The contract also contains a "Miscellaneous" provision which includes, in pertinent part, the following:

> (1) It provides that in the event of any "action or proceeding in court to enforce any provision hereof or for damages by reason of any alleged breach" that the ***prevailing party will be entitled to Attorney's fees and costs. (Defendant's Exhibit 28, Paragraph 27(l));***
>
> (2) It provides that the Agreement and the exhibits attached contain the entire agreement and it requires that the agreement ***may not be modified or amended unless it is done in writing and signed by both purchaser and seller. (Defendant's Exhibit 28, Paragraph 27(a));***

(3) It provides that any failure by the purchaser or ***the seller to insist upon or enforce any of their rights under the agreement "shall not constitute a waiver thereof."*** (Defendant's Exhibit 28, Paragraph 27(e))

(4) It provides that ***time is of the essence***; (Defendant's Exhibit 28, Paragraph 27(g));

(5) It provides that if any provision of the agreement is declared illegal, invalid or unenforceable under present or future laws, that such provision shall be fully severable and the remainder of the agreement should be construed and enforced as though such illegal, invalid or unenforceable provision had never comprised a part of the agreement and the remainder of the agreement should remain in full force and effect. (Defendant's Exhibit 28, Paragraph 27(h).

Creel was aware that the contract called for him/the seller/Bucksville Farms to be responsible for delineating the wetlands in the transaction. (Depo Creel, p.35, l. 21-25) And Creel testified that as a licensed attorney, he was aware that it was common practice for Horry County Banks to require a certification letter from the Corps of Engineers before loaning money on wetlands. (Depo Creel, p. 47, l. 1-4)

The first takedown was 50 acres of the 86 acre "parcel A" tract and was in the Northeastern corner of the property, right on Highway 701 in the section closest to Conway. (Trial TS Day1 p. 25, l.8- p. 26, l.2; Depo Beverly p. 13) That parcel was chosen for the first takedown because Creel had asked Beverly and Godwin not to start the takedowns at the Southeastern corner of the property because Creel knew he had serious wetlands issues there and he wanted to have time to dry it up by doing some Silvaculture so that more of the land would be classified as uplands, fetching a much higher price under the contract. (Trial TS Day 1, p. 26, l. 8 - p. 27, l. 16) The first takedown occurred fairly quickly because Beverly and Godwin were accommodating Beverly's nephew, Creel, who was having financial problems and Beverly and Godwin had the cash and wetlands were almost non-existent. At the time of that first takedown,

the parties didn't realize that there were some wetlands on the parcel and Beverly and Godwin were given credit for that with the second takedown. (Depo Beverly p. 13-14) The second takedown also occurred and consisted of the remaining 36 acres of the "parcel A" tract plus 14 acres on this side of Shelley Farm Road. (Trial TS Day 1, p. 28, l. 5- p. 29, l.1) It was after the second takedown that serious problems occurred, ultimately resulting in the instant action.

At the time of the first takedown, a wetlands delineation was not particularly important to the purchasers, because Beverly and Godwin knew that there were no significant wetlands on that tract. (Depo Beverly, p. 16) Even though under the Contract providing the wetlands delineation was Creel's responsibility - (Defendant's Exhibit 28, Paragraph 9) - Beverly and Godwin retained Charles Oates of S&ME (Soils & Material Engineering, an environmental and geotechnical engineering firm) to do a wetlands delineation of the first and second tracts before the second takedown. (Depo Oates, p. 5; Depo Beverly, p. 14-15) That wetlands delineation did not include the third takedown property because it was in an area with known wetlands and Creel had asked Beverly and Godwin to give him time to get those dried up, which would have to have been done before a wetlands delineation. (Trial TS Day 1, p. 32, l. 1-18) As noted above, a small area of wetlands (about .32 acres) was discovered on the first tract taken down and Beverly and Godwin were given credit for that in the pricing for the second takedown. (Depo Beverly, p. 13-14; Trial TS Day 1, p. 33, l. 8-14)

At the time of the first two takedowns the real estate market and general economy were better and Beverly and Godwin had cash for both of those closings, the first of which was expedited, as noted above, because of Beverly's awareness of his nephew Creel's financial difficulties. (Trial TS Day 1 p. 32, l. 2-18) Beverly and Creel had no cash to fund the third takedown, and needed a bank loan at that point. (Trial TS Day 1 p. 32, l. 1-18) The contract

requires Creel to provide a wetlands survey, so after the second takedown Beverly spoke to Creel and asked that Creel provide the contractually required wetlands survey so that the third takedown could be structured and scheduled. (Trial TS Day 1 p. 30, l. 13-5)

Beverly testified that there were two reasons for requiring a full wetlands delineation for the proposed third phase: (1) there were known and serious wetlands issues on the piece which Creel had earlier stated his intention to do some silvaculture to try to dry out and address and (2) prior to loaning any money on acreage in Horry County, the banks require a full wetlands survey and delineation, including a certification letter from the US Army Corps of Engineers. (Trial TS Day 1 p. 30, l. 11-18) Creel testified that he was aware of this requirement by lenders. (Depo Creel, p. 46, l. 21- p. 47, l. 4)

The wetlands survey process was explained by Charles Oates, of S&ME, who did the wetlands survey for Beverly and Godwin for the first two takedowns, as stated above. Mr. Oates testified that the process starts with gathering a number of maps which are mostly available through public records and include various vicinity maps, overlay maps, topographic surveys and soils maps, many of which are done as overlays. (Trial TS Day 1, p. 121 l. 15- p. 123, l. 3) All of this information is sometimes gathered and used by surveyors when they are asked to do an estimation of the wetlands on a tract, which was done in this case because initially, S&ME did such an estimation as to the whole tract at the request of one of Godwin's employees, James McLean in January of 2006. Later, around March of 2006, McLean came back to Oates and explained they wanted the full wetlands survey only done on the pieces taken down first and second because there were wetlands issues with the other pieces and Creel wanted time to try to do silvaculture and dry those out. (Depo Oates, p. 23-33; Trial TS Day 1, p. 184. l. 5- 12)

The next step in the wetlands survey process required Oates to physically go to the property and do field work, which he did for the first two tracts taken down on April 10, 2006. During the field work, the areas which his on site analysis and prior map and soil reviews shows to most likely contain wetlands are marked with pink flagging tape to show a wetland boundary or delineation. (Depo Oates, p. 33-34) After that, a submission package of the initial maps and the field work was composed and forwarded to the Corps of Engineers requesting that the Corps come out and concur with the results and issue a letter certifying the wetland delineation. (Depo Oates, p. 33-36) ***That letter from the Corps is often called a JD letter and is regarded as the "Rosetta Stone" by developers as that is the point when plats can get approved, engineering can start and banks will loan money. (Depo Oates p 16; Trial TS Day 1, p. 30, l. 16- p. 31, l. 7)***

The Submission package to the Corps on the tracts taken down first and second went out on April 19, 2005. (Depo Oates, p. 36) The Corps came to the property sometime later and their field work disagreed with Oates as to 1 section which was reclassified as wetlands and Oates added it to the full boundary survey. (Depo Oates p. 39-41) That plat was provided to the surveyors who came out and prepared a full and legal plat based on the flags and markings and that plat was provided to the Corps which issued a letter certifying the wetlands on November 27, 2007, which letter was good for 5 years. (Depo Oates p. 42; Exhibit 8) That wetlands letter should have only included the first two takedowns but later McLean came back in June of 2008 asking Oates to pull the maps and do an estimation of the wetlands on the tract previously excluded and at that time it was discovered that as a result of a mapping error in the submission process by Oates, the excluded tract had erroneously been certified as containing no wetlands, when in actuality Oates' June of 2008 estimate showed that tract as having 28.3 acres of wetlands out of a total acreage of 49.6 acres. McLean asked that the estimate be expanded to include 40

additional acres and at that point Oats estimated that roughly 50 acres would be designated as wetlands. (Depo Oates, p. 46-50)

In June of 2008 it was discovered that the Corps had erroneously certified wetlands on what likely would have been at least part of the proposed third takedown but Oates advised that this was a clear error; no field work had been done on the site and the Corps never looked at that area and the Corps would say it had not been legally delineated so that certification could not be used as a basis for any further activity and the work to do and submit it properly to the Corps would have to be done. (Depo Oates, p. 51- 57)

Therefore, Beverly spoke to Creel and asked him to have the Wetlands delineated as required by the Contract so that the third takedown could occur. (Trial TS Day 1 p. 30, l. 13-5) Instead of having a full survey and delineation done, Creel met with Oates in August of 2008 and during that meeting Oates gave Creel the "thumbnail sketch" he'd done earlier for Godwin via his employee McLean and Oates recommended that Creel do Silvaculture on the tract before having the survey work done. (Trial TS Day 1, p. 136, l. 21- p. 140, l. 17) Oates testified that to his knowledge Creel had not done the Silvaculture and never contacted S&ME to do the wetland delineation, boundary survey or the submission to the Corps. (Trial TS, Day 1, p. 144, l. 1-19)

Despite Creel's request from the beginning that the takedown of proposed tract 3 be delayed so that silvaculture could be done, nothing had been done, although Creel told Beverly that he had called Truitt Hardwick about getting it done and Creel testified that he called Hardwick in November of 2006 but that Hardwick never called him back. (Trial TS Day 1, p. 37, l. 4-9; Depo Creel, p. 41, 43, 103) Because nothing was being done by Creel, the landowner, regarding silvaculture, Beverly hired and paid Matt Johnson to go out with a backhoe and dump truck to clean out the existing ditches to at least try to start drying up the land and

Beverly had Creel reimburse this expense as part of the second takedown. (Trial TS p 37, l. 4- p. 38, l.2) There was never an agreement to change or modify the contract and Beverly and Godwin were just trying to get the process going so that the tract would be dried before the third takedown. (Trial TS p.38, l. 3-17)

The contract gave Beverly and Godwin the right to take down the tracts in the order they chose and they started on the opposite end to give Creel time to dry out the proposed tract 3, but they felt that they could not take tract 4 and then come back to take tract 3 for the following reasons: (1) they wanted the land to be contiguous so that one phase after another could be developed for a subdivision; (2) tract 4 did not adjoin tract 2; (3) the lift station had already been designed and engineered to go in right at tract 3; and (4) with Creel's financial difficulties, if Beverly and Godwin took tract 4 before tract 3, by the time they went back to take 3 Creel might not own it anymore and then Beverly and Godwin would be left with a subdivision designed around a vacant tract which is now the case with Creel's sale to Larry Paul in 2009 to pay off the July, 2008 mortgage of the subject property to Larry Paul. *(Trial TS Day 1, p. 40, l. 1-12)* Although Creel has suggested that Beverly and Godwin wanted to take the third tract before the fourth because the third tract or takedown would have included land fronting on Highway 701, Beverly disputes this contention. Beverly testified that land fronting on a major highway is a disadvantage or a negative instead of a positive because they were developing a residential subdivision and most people do not wish to live on land adjoining a busy highway. (Trial TS Day 1, p. 39, l.3-12) .

Creel never had the wetlands delineation and survey done and at one point brought Beverly the estimate Oates had done as referenced above as a "thumbnail" and left a note asking Beverly to close on that but Creel is a trained lawyer and knew enough about real estate to know

that the bank would never loan money on such a tract without a proper and official Corps letter certifying it. (Trial TS Day 1 p. 42, l. 1-p. 43, l. 19) Letters were written by Beverly and Godwin's prior counselors advising Creel via attorney Stevens that Beverly and Godwin would close on tract 3 if Creel would present a proper wetlands delineation and survey. (Trial TS Day 1 p. 45, l. 16 - p. 47, l. 7)

At no time did Creel ask his Uncle, Mr. Beverly, to get the wetlands survey done for tract 3. (Trial TS Day 1, p. 43, l. 23- p. 44, l. 12) Creel never indicated to Beverly that he thought Beverly and Godwin were responsible for the survey or delineation; Creel admitted that he was responsible for it according to the contract drafted by Creel's lawyer, and at no time did Creel ask that the Contract be amended or modified to make Beverly and Godwin responsible for the wetlands survey or delineation. (Trial TS Day 1, p. 47, l. 22- p. 48, l.13; p. 49, l. 7 - p.50, l.17; Depo Creel, p. 35, l. 21-25) Instead of making any effort to have the survey and delineation done, as he was obligated to do under his contract with Beverly and Godwin, Creel sold the land in question to Larry Paul, for a reduced price that Creel never offered to Beverly or Godwin. (Trial TS p. 47, l. 7-21)

Beverly and Godwin have now sold a partial interest in the tracts taken down from this property to a group known as 701, South, LLC. 701 includes entities headed by Stephen Sciaretta which is associated with the Claremont Companies, New Jersey citizens and limited liability companies. (Depo Sciaretta, p. 6) A Claremont entity, Byram Land Development, Claremont SC Enterprises, LLC, RB LLC and DG LLC each own 25% interest in the property. (Depo Sciaretta, p. 11-12) The Claremont Companies paid Beverly and Godwin about $11,000 per acre more than Beverly and Godwin paid Creel for the land. (Depo Sciaretta, p. 17) Beverly and Godwin netted about $1,082,680 above the purchase price. (Depo Sciaretta, p. 22)

Claremont had an option to participate in the third tract but wrote Beverly and Godwin declining to exercise that option at the prior purchase price based on the economy but then subsequently Sciaretta wrote Beverly and Godwin suggesting that they be allowed to participate in the purchase of tract 3 at the Contract price with Creel. That never came to fruition because the anticipated third closing never occurred because Creel never had the wetlands delineated as required by his underlying contract with Beverly and Godwin. (Depo Sciretta p. 17-p.19) Sciaretta testified that he often purchased and developed land via a bank loan and that in his experience banks invariably require full, formal wetlands delineations including Corps certification before they will loan money. (Depo Sciaretta, p. 22).

During the course of this matter, Beverly and Godwin hauled in and stored "quality" dirt hauled in from a development they were doing in Georgetown County on the land that would have been taken in the third takedown. Beverly and Godwin intended to use this "quality" dirt in developing the subject property. (Depo Beverly, p. 24-25). The dirt was still on the property when it was deeded to third party Larry Paul during the course of this litigation. (Trial TS p. 47, l. 7-21)

Paragraph 9 of the Parties Contract requires the seller, Creel, to furnish a boundary survey 'indicating the true and correct legal description thereof, delineating the boundary lines of said property and all wetlands and carving out the 40 acre parcel to be retained by the Seller." The purchasers, Beverly and Godwin, "shall obtain the Takedown surveys for the acquisition of each Takedown of the Property." When read together, Paragraphs 6 and 22 of the subject Agreement provide that each of the first three (3) takedowns must contain a minimum of 50 upland acres and the fourth (4th) takedown would then include the remainder of the property.

(Defendant's Exhibit 28, Paragraph 9) To date, Creel has never furnished the required survey and without it takedowns 2 and 3 could not have occurred.

Additionally, as noted, Creel sold the land comprising what would have been the third and fourth takedowns under the contract to a third party, Mr. Larry Paul. . (Trial TS p. 47, l. 7-21)

The instant action followed.

Procedural Findings

The instant action was filed by Randy A. Beverly, L.L.C. and Donald Godwin, L.L.C. against Bucksville Farms, Inc. on February 26, 2009 as a Declaratory Judgment action. In it, Beverly and Godwin alleged that the third takedown was to have occurred in or about June of 2008 but that it had not occurred because Bucksville had failed to provide a wetland delineation survey, which failure constituted a material breach of the parties contract. The Plaintiff L.L.C.'s alleged that this material breach entitled them to terminate the contract. As relief, the Plaintiff L.L.C.'s sought a determination that a material breach by the Defendant/seller had occurred entitling Plaintiff to terminate the contract. The only monetary relief sought was attorney's fees and costs for the filing of the DJ action. (See; Summons and Complaint)

Bucksville answered and entered a Third Party Complaint against Beverly and Godwin personally. In the pleading, Bucksville alleged the following defenses: modification of the contract, waiver, and estoppel and course of dealing. Bucksville also - by way counterclaim and/or cross complaint and/or third party complaint, alleged the following: breach of the alleged orally modified contract and breach of that contract accompanied by fraudulent act. This

pleading not only brought in Beverly and Godwin individually, but it also was the **first pleading to seek monetary damages other than attorney's fees and costs, with Creel's company seeking consequential and incidental damages, pre-judgment interest, attorney's fees, costs and Punitive Damages.** (See: Answer, Counterclaim and Third Party Complaint) *It is interesting to note that in this pleading Creel's company alleges that Beverly and Godwin, who the evidence establishes had been developing residential real estate in Horry County for many years, advised Creel that they intended to do Silvaculture on Bucksville's land but that they then* ***first discovered*** ***that Silvaculture could only be done by an individual landowner*** *and thereafter asked Creel to do the Silvaculture and that he agreed "so long as the completed purchase of all the real estate was consummated on or before the fourth takedown).*

Only after receiving this pleading, did Beverly and Godwin file an Answer/Amended Answer, Reply and Fourth Party Complaint which brought in Creel individually and as the sole surviving director of Bucksville Farms, Inc. and for the first time sought monetary relief beyond the fees and costs they had expended. In this pleading, Beverly and Godwin alleged the following defenses; Rule 8 and 12 defenses, unclean hands, offset, waiver, release, equitable estoppel, failure of consideration, mutual mistake, laches, accord and satisfaction, the Statute of Frauds, reservation of right to amend, failure to mitigate, unconstitutionality of punitive damages, incorporation of all other pleadings and incorporation of all defenses/motions by all parties. This pleading also made the following fourth party claims against Creel: incorporation of complaint/request for DJ, Attorneys fees and costs, breach of contract, breach of contract accompanied by fraudulent acts and breach of the covenants of good faith and fair dealing. Beverly and Godwin sought actual, proximate and consequential damages, lost value, lost profits, lost future profits and value and punitive damages.

Creel then filed an Answer and Counterclaim to the Fourth Party Complaint which essentially alleged the same defenses as in his prior pleading, and requested the same affirmative relief - for breach of contract and breach of contract with fraudulent acts.

In response, Beverly and Godwin filed a Reply to Defendant Creel's Answer and Counterclaim To the Fourth Party Complaint. It essentially alleged the same defenses as in their prior pleading.

Thereafter, the parties' consented to an Order of Reference which was signed by The Honorable Thomas W. Cooper and recorded on June 22, 2010. After the conclusion of discovery, this Court then took testimony and evidence at a properly noticed and scheduled hearing and this Order follows.

Conclusions of Law

While the facts of this case are somewhat complex, South Carolina law regarding issues of contracts and/or land sales contracts is clear, and application of the law to these facts leads to a clear verdict in favor of Beverly and Godwin and against Bucksville and Creel.

In this state, the foremost rule of contract interpretation is ascertaining and giving legal effect to the parties' intentions as determined by the language of the contract. McGill v. Moore, 381 SC 179, 672 SE2d 571 (2009) If the contract language is clear and unambiguous, that language determines the force and effect of the contract. Alexander's Land Company, L.L.C. v. M&M&K Corporation, 390 SC 582, 703 SE2d 207 (2010) Further, a contract is read as a whole so that pointing out a single sentence can not create an ambiguity if none exists. *Id* It is a question of law for the Court whether the language of a particular contract is ambiguous. *Id*

To recover for a breach of contract, a party must establish the existence of a binding contract, a breach of that contract and damages proximately resulting from the breach. Manlos v. Nelson, Mullins, Riley & Scarborough, LLP, 389 SC 126 697 SE2d 644 (Ct.App 2010) In this case, all parties agree that a binding contract existed between the parties. The issues relate to whether the binding contract still existed after the passage of the June, 2008 date when the 3rd takedown should have closed and to whether an actionable breach of the contract occurred. (See: Summons and Complaint, and pleadings, generally)

Any modification of a written contract is required to satisfy all requisites of a valid contract. Sterling Development v. Collins, 309 SC 237, 421 SE2d 402 (1992); Faulkner v. Millar, 319 SC 216, 409 SE2d 378 (1995) And in order to have a valid and enforceable contract the minds must meet as to all essential and material terms of the agreement. Player v. Chandler, 299 SC 101, 382 SE2d 891 (1989) As a licensed attorney, Creel read and understood the agreement.

In the present case, Paragraph 9 of the parties agreement requires the seller, Creel, to furnish a boundary survey 'indicating the true and correct legal description thereof, delineating the boundary lines of said property and all wetlands and carving out the 40 acre parcel to be retained by the Seller." (Defendant's Exhibit 28, Paragraph 9) Creel does not deny that the contract obliged him to furnish the boundary survey and wetlands delineation.

Creel contends that there are basically four (4) reasons that Beverly and not Creel should be held to have been responsible for providing the boundary survey and wetland delineation: (1) that the Plaintiffs entered a "course of dealing" with the Defendant as to the first two takedowns whereby the Plaintiffs obtained a boundary and wetlands survey and then charged it against the Defendant at closing; (2) that the contract was orally modified with the Plaintiffs agreeing to

engage in silvaculture whereby the proposed tract of land to be purchased would be maintained and ditched to create more uplands and provide the Plaintiff with more land to be developed; (3) that the actions of the Plaintiffs in obtaining the boundary and wetlands survey as to tracts 1 and 2 and in hiring someone to clear the ditches waived waived any rights they had under the written contract; and (4) that the Plaintiffs are now estopped to claim any breach by Creel. (See; Answer, Counterclaim And Third-Party Complaint)

The Statute of Frauds provides that contracts for an interest in land or agreements that are not to be performed within one year must be in writing and signed by the party against whom it is being enforced. *SC Code Ann §27-35-20, 1976, as amended.* A contract required to be in writing by the Statute of Frauds can not be modified orally. Windham v. Honeycutt, 279 SC 109, 302 SE2d 856 (1983). The only exception to the Statute of Frauds pled by Creel that could potentially operate as an alleged oral modification would be equitable estoppel. For equitable estoppel to apply, the party alleging estoppel must show a definite, substantive, detrimental change of position based on his reliance and the party asserting estoppel must show that he lacked knowledge of the truth as to the facts in question. Player v. Chandler, *supra; and* Dobyns v. SC Dept of Parks, 317 SC 353, 454 SE2d 347 (Ct. App. 1995) Under the present facts, Creel can't show a change of position based on his reliance nor can he show a lack of knowledge of the truth as to the facts in question because the boundary survey and wetlands delineation was an express term of the contract that Creel signed and admitted being aware of and because Beverly and Godwin wrote Creel to advise they were willing to close on tract 3 but awaited him providing the wetlands delineation. (See: Defendant's Exhibit 28, Paragraph 9; Trial TS Day 1 p. 45, l. 16 - p. 47, l. 7; Depo Creel, p. 35, l.21-25) The claim of equitable estoppel fails to any extent it was alleged because it was unequivocally in the Contract and therefore Creel was aware

of the provision. Dobyns v. SC Dept of Parks, supra. As to the silvaculture performance, the law provides that only the landowner can perform silvaculture and the Court will not enforce an an agreement - either written or oral - that would require the Court to enforce an agreement that a party do what he could not legally do. In addition, as noted above, a contract required to be in writing by the Statute of Frauds can not be modified orally. Windham v. Honeycutt, 279 SC 109, 302 SE2d 856 (1983)

As to Creel's course of dealings argument, Beverly and Godwin gave written notice of their intent to require strict compliance with the contract, and even without that written notice, for a course of dealings argument to succeed, it must be a long-continued course of dealings and even in those cases of a long continued course of dealings, the party need only give the other party reasonable notice of an intent to enforce the contract. Caulder v. Lewis, 287 SC 372, 338 SE2d 837 (1986). Again, Beverly and Godwin gave Creel notice of their intent to enforce the contract and that they required him to comply with the Contract and provide a wetlands delineation which he failed to do. (Trial TS Day 1 p. 45, l. 16 - p. 47, l. 7 and Defendant's exhibit 18)

Creel also contends that Beverly and Godwin's waiver of the contract term as to Creel providing the boundary survey and wetlands delineation should operate as an estoppel. In that regard, the Court is mindful of two cases: The first is Caulder v. Lewis, cited above, in which case a mortgagee accepted a couple of late payments on a purchase money note and mortgage after having advised the mortgagors in writing that future late payments would not be accepted. A provision in the loan agreement stated that if payments were late the entire principal and interest was due and payable without notice at the option of the holder and also provided that failure to exercise the option did not constitute a waiver of the right to exercise the option in the

future if other payments are late. *Id* The Trial Court held that the mortgagee had waived the right to declare a default and demand full payment of the principal and interest after a subsequent late payment because of her prior acceptance of a couple of late payments. In reversing the Trial Court, the SC Supreme Court noted that the mortgagee had given written notice to the mortgagor's that she would enforce the payment provision. Stating that the mortgagee gave that written notice in August, 1982 and it held that the "one or two payments accepted between August, 1982 and June 1983 do not establish a waiver. Caulder may exercise her option under the "acceleration" clause. *Id at p. 347* In so holding, the SC Supreme Court cited an Oregon case that stated, in part: "

> It has been our policy to encourage sellers of land to enforce their contracts in equity when the purchaser had defaulted in his performance. Our holding in this case is not inconsistent with that policy. The vendor who has, by a practice of accepting late payments, permitted the purchaser to rely on this course of conduct need only give reasonable notice that thereafter he will insist on strict performance of the contract. Further defaults would entitle him to his foreclosure remedy.
>
> Caulder v. Lewis, 287 SC 372, 338 SE2d 837 (1986) - *citing* Stinemeyer v. Wesco Forms, Inc., 200 Or. 109, 487 P2d 65 (1971)

The second case of which the Court is mindful is Dobyns v. SC Dept. of Parks, and it was also cited above. In Dobyns, a group of landowners held leases for lots on Hunting Island State Park pursuant to an agreement reached as part of the 1939 deed from Beaufort County to the SC Forestry Commission. The leases were for an original period of 20 years with the option of renewing for successive 10 year periods and could be renewed as often as the tenants wished. However, the lease contract provided that the leases could not be transferred or assigned.

Despite that provision, between 1939 and 1989 the manager of the property, the SC Department of Parks, Recreation and Tourism (PRT) approved transfer of the leases. However, PRT decided that it wanted to eventually end all private leases on Hunting Island and as part of that goal, PRT began denying approval of any transfers of leases. The leases could be renewed as long as the tenant survived, but at his or her death the lease could not be renewed by their heirs and during the tenants life it could not be transferred or assigned. By enforcing these provisions, eventually all private leases on the Island would end. The tenants filed an action seeking a DJ, asking the Court to establish their rights and obligations to renew, transfer and assign their leasehold interest and contending, in part, that PRT should be barred from denying transfer requests by estoppel and waiver . Dobyns v. SC Dept of Parks, 317 SC 353, 454 SE2d 347 (Ct. App. 1995)

In Dobyns, the case was referred to the Master who found in favor of the state's position and the tenants appealed. The Court of Appeals upheld the Master, finding that the Court's duty is to enforce the parties' contract and that by holding the parties' to the express terms of their agreement, it follows the majority rule. *Id* As to the estoppel/waiver argument, the Court of Appeals agreed with the Master who held that "PRT's previous liberal consent to transfers does not impose on PRT the duty to continue its policy." The Court ruled that for waiver to apply, evidence would have to show that PRT knowingly and intentionally waived its right to deny transfers or modified this explicit lease term and that no evidence established such a knowing and intentional waiver by PRT. Finally, the Court held that the tenants had not established an estoppel claim because "an essential element of such claim is that the party asserting estoppel lacks the knowledge of the truth as to the facts in question. (Citations omitted) The record shows that the anti-assignment clause unequivocally allowed PRT to deny transfers at its discretion and the Tenants were aware of this provision. Therefore, the estoppel claim fails." *Id*

The Court first finds that pursuant to Paragraph 20 of the parties' contract, if the purchasers, Beverly and Godwin, had defaulted, which the Court does not find, then ***Creel's remedies would be limited to retaining the earnest money as and for Creel's damages or seeking specific performance along with attorney's fees and costs. (See: Defendant's Exhibit 28, Paragraph 20)*** Because Creel sold this property to a third party, he can not seek specific performance. This Contract was signed by Creel, who is a licensed attorney in South Carolina, and would therefore constitute a waiver of his rights to seek any other damages or monetary relief. Therefore, despite all of Creel's claims, cross claims, counter claims and his Third Party Complaint, Creel's monetary damages would be limited to the $50,000.00 Earnest Money deposit along with attorney's fees and costs. However, the Court does not find that Creel is entitled to any relief or remedy in this case.

Applying the cases cited above to the present facts shows that Mr. Creel's argument can not prevail in this case and that the Court must rule in favor of Beverly and Godwin. The Contract in question clearly required Creel to perform the boundary survey and the wetlands delineation for all of the property. (See: Defendant's Exhibit 28, Paragraph 9) The fact that Beverly and Godwin had the survey and delineation done for the first two tracts in no way obligates them to have the survey and delineation done for any subsequent tracts, and that principal is well established by South Carolina law generally and the Dobyns case specifically. Further, Beverly and Godwin gave written notice to Creel that they would close on the third tract and awaited Creel providing a boundary survey and wetlands delineation. (Trial TS Day 1 p. 45, l. 16 - p. 47, l. 7 and Defendant's Exhibit 18) Under the principles of the Caulder case cited above, had Beverly and Godwin's prior performance in any way constituted a waiver or established a Course of Dealings - which I do **not find to be the case** - then Beverly and

Godwin's written notice that he would insist on strict compliance with the contract compelled Creel to obtain a boundary survey and wetlands delineation so that the third takedown could occur, which he did not do.

Construction of a clear and unambiguous contract presents a question of law for the Court. US Bank Trust National Association v. Bell, 385 SC 364, 684 SE2d 199 (Ct. App. 2009) Any ambiguity in an agreement must be resolved against the drafter. WDI Meredity & Co. v. American Telesis, Inc., 359 SC 474, 597 SE2d 885 (2004) In this case, Creel's attorney drafted the contract. . (Trial TS Day 1, p. 25, l. 19-22; Trial TS Day 2, p. 71, l. 20 - p. 72, l. 5) The Court finds that the provision requiring the seller, Creel, to perform the wetlands delineation (Paragraph 9) is unambiguous and the Court also finds that the "merger clause" (Paragraph 27(a) and the "no waiver clause" (Paragraph 27(e) are unambiguous and should be read and enforced as drafted. The Court finds that the Contract expresses the entire agreement of the parties, requires Creel to perform the wetlands delineation, and provides that Beverly and Godwin's acts in obtaining a wetlands delineation as to the first two tracts did not, per the contract, waive their right to insist that Creel obtain the wetlands delineation for the third takedown.

. The only potential ambiguity in the agreement overall would be whether the seller was required to have the wetlands delineation performed and certified by the Corps of Engineers, which Beverly and Godwin contend to be the case. Creel contends otherwise. The Court would construe any such ambiguity against Creel, as the drafter of the contract before the Court, and would rule with Beverly and Godwin that Corps certification would be required, but the Court does not make such a ruling, because the Court finds the issue moot. Creel had no formal wetlands delineation done at all and the most he ever did was to obtain a copy of an estimate that

Oates had done earlier for Beverly and Godwin. (Trial TS Day 1, p. 136, l. 21- p. 140, l. 17; p. 42, l. 1-p. 43, l. 19) At no time did Creel ask his Uncle, Mr. Beverly, to get the wetlands survey done for tract 3. (Trial TS Day 1, p. 43, l. 23- p. 44, l. 12) Creel never indicated to Beverly that he thought Beverly and Godwin were responsible for the survey or delineation; Creel never indicated that he didn't believe he was responsible for it according to the contract drafted by Creel's lawyer, and at no time did Creel ask that the Contract be amended or modified to make Beverly and Godwin responsible for the wetlands survey or delineation. (Trial TS Day 1, p. 47, l. 22- p. 48, l.13; p. 49, l. 7 - p.50, l.17) Instead of making any effort to have the survey and delineation done, as he was obligated to do under his contract with Beverly and Godwin, during this litigation Creel sold the land in question to Larry Paul, for a greatly reduced price that Creel never offered to Beverly or Godwin. (Trial TS p. 47, l. 7-21) Because Creel had NO DELINEATION DONE, as the Contract requires, it is moot whether Creel's delineation, if it had been done, would have sufficed per the Contract without Corps approval. The fact is that Creel had no delineation done, Corps approved or otherwise.

In this case, Beverly and Godwin stood ready to perform the contract and take down the third parcel upon receipt of a formal wetlands delineation, and one of their attorney's so advised Creel in writing. Defendant's Exhibit 18) When time passed and no wetlands delineation was forthcoming, Beverly and Godwin filed an action seeking to have the Court declare that the breach by Creel terminated the Contract and the only money they sought in that action was attorney's fees and costs for having to file the DJ. (See: Summons and Complaint) Creel responded by filing a pleading seeking substantial monetary damages and bringing in Beverly and Godwin individually. (See: Answer, Counterclaim and Third Party Complaint) Then, during the course of this litigation, Creel established that he would never comply with his

obligations under the contract with Beverly and Godwin by **selling the disputed property to a third party for a substantially lower price never offered to Beverly and Godwin and then seeking to recoup the remainder of the money from Beverly and Godwin as damages.** (Trial TS p. 47, l. 7-21)

The previous history of the parties shows that Creel frequently went to his Uncle, Randy Beverly, to solve his monetary problems. In this case, Mr. Creel breached the contract by failing to have a formal wetlands delineation performed and he compounded this breach by selling the property to a third party during the course of this litigation.

The Court rules in favor of Mr. Beverly and Mr. Godwin, as will be more specifically set out below.

ORDER OF THE COURT

BASED ON THE RECORD IN THIS CAUSE, UPON THE LAW OF THE STATE OF SOUTH CAROLINA AND UPON THE FOREGOING, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1) The Court declares that the **Agreement To Buy And Sell Real Estate In Multiple Closings** entered into by the parties hereto on October 2, 2005 is fully and completely terminated;

2) The Court finds that Bucksville Farms, Inc. and Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc. breached the said **Agreement** by failing to provide a boundary survey and wetlands delineation delineating the boundary lines and all wetlands

contained on the remainder of the subject property not taken down in the first and second closings, and particularly on the property to be taken down in the third closing;

3) As damages for the breach, the Court Orders that Bucksville Farms, Inc. and Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc. pay to Randy A Beverly, LLC, Donald Godwin, LLC and Randy A Beverly and Donald Godwin individually the following:

(a) Earnest Money in the amount of $50,000.00 (Fifty Thousand and no/100) Dollars together with all interest earned thereon which sum shall be paid by the McNair Law Firm, P.A. as Escrow Agent upon receipt of a clocked copy of this Order and the McNair Law Firm is ORDERED TO PAY this sum in a check written to Randy A Beverly, LLC, Donald Godwin, LLC and Randy A Beverly and Donald Godwin individually AND to their Attorney, J. Dwight Hudson or Hudson Law Offices. However, if the said Escrow Agent is not holding these funds, then the said McNair Law Firm shall full account to the parties hereto as to the same AND THEN, Bucksville Farms, Inc. and Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc shall make the payment of the sum of $50,000.00 in cash or certified funds to Randy A Beverly, LLC, Donald Godwin, LLC and Randy A Beverly and Donald Godwin individually AND to their Attorney, J. Dwight Hudson or Hudson Law Offices;

(b) Damages in the amount of $150,000 (One Hundred Fifty Thousand and no/100) Dollars, for the dirt which Beverly and Godwin stockpiled on the property which would have been the third takedown and which dirt was wrongfully conveyed to a third party along with the disputed property during the course of this litigation; (Depo Beverly, p. 24-25; Trial TS p. 47, l. 7-21)

(c) Attorney's Fees and Costs incurred by Beverly and Godwin in an amount to be determined at a subsequent hearing and decided by a subsequent Order after Plaintiff's counsel files and serves an acceptable Affidavit as to the same. Following receipt of such

Affidavit, the undersigned will work with the parties to set a hearing to address Attorney's Fees and Costs incurred by Beverly and Godwin and the amounts to be awarded regarding the same.

AND IT IS SO ORDERED.

The Honorable Ralph P. Stroman
Special Referee

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REPLY TO: MYRTLE BEACH OFFICE

RESEARCH NOTES

#1:

STANDARD OF REVIEW

HN1 **Declaratory judgment** actions are neither legal nor **equitable**; thus, the standard of review depends on the nature of the underlying issues. Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). HN2 Because this action involves the interpretation of a contract, it is an action at law. Barnacle Broad., Inc., v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000). In an action at law tried without a jury, "our scope of review extends merely to the corrections of **[***6]** errors of law." Id. Therefore, this court will not disturb the trial court's findings unless they are found to be without evidence that reasonably **[*547]** supports those findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

South Carolina Electric & Gas Company v. Linda A. Hartough, 375 S.C. 541; 654 S.E.2d 87; 2007 S.C. App. LEXIS 189 (Ct. App, 2007)

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#2:

CONTRACT INTERPRETATION - INTENT OF THE PARTIES

The **[***23]** cardinal rule of **contract** interpretation is to ascertain and give legal effect to the parties' intentions as determined by the **contract** language." *McGill,* 381 S.C. at 185, 672 S.E.2d at 574. "Where the **contract's** language is clear and unambiguous, the language alone determines the **contract's** force and effect." *Id.* "A **contract** is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." *Id.* "It is a question of law for the court whether the language of a **contract** is ambiguous." *Id.*

Alexander's Land Company, L.L.C.v. M&M&K Corporation, 390 S.C. 582; 703 S.E.2d 207; 2010 S.C. LEXIS 384 (2010)

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#3

DAMAGES - LOST PROFITS -- BURDEN OF PROOF

In claiming lost profits for a breach of **contract,** the degree of proof required is that of reasonable certainty. The proof must pass the realm of conjecture, speculation or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn.

Sterling Development v. Collins, 309 S.C. 237; 421 S.E.2d 402; 1992 S.C. LEXIS 192 (1992); Faulkner v. Millar, 319 SC 216, 409 SE2d 378 (1995)
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CONTRACT INTERPRETATION - MODIFICATION

#4

Any modification of a written **contract** must satisfy all requisites of a valid **contract.**

Sterling Development v. Collins, 309 S.C. 237; 421 S.E.2d 402; 1992 S.C. LEXIS 192 (1992); Faulkner v. Millar, 319 SC 216, 409 SE2d 378 (1995)

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#5

CONTRACT INTERPRETATION -
MODIFICATION
STATUTE OF FRAUDS
EXCEPTIONS TO STATUTE OF FRAUDS: PART PERFORMANCE, EQUITABLE ESTOPPEL, WRITINGS SATISFYING STATUTE

Any modification of written contract must satisfy all requisites of valid contract. **[*105]** *Bishop Realty and Rentals, Inc. v. Perk, Inc.*, 292 S.C. 182, 355 S.E. (2d) 298 (S.C. App. 1987), *cert. denied*, 293 S.C. 538, 362 S.E. (2d) 26 (1987). South Carolina common law requires that, HN3 in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement. *Hughes v. Edwards*, 265 S.C. 529, 220 S.E. (2d) 231 (1975). HN4 The *essential terms* **[**894]** *and conditions of a lease agreement include a definite agreement as to the extent and boundary of the property to be leased, the term of the lease, the rental as well as the time and manner of payment.* HN5 This "meeting of minds" required to **[***4]** make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. *McClintock v. Skelly Oil Co.*, 232 Mo. App. 1204, 114 S.W. (2d) 181 (Mo. Ap. 1938). The record before us evinces no meeting of the minds between William A. Chandler and William D. Player during their February 5, 1985, telephone conversation. There is no indication that essential terms were discussed, and the mere referral to the original lease is not sufficient.

Assuming that an agreement had been reached during the February 5th telephone conversation, such a lease modification would be outside the Statute of Frauds. HN6 Any contract for an interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced. South Carolina Code Ann. § 32-3-10(4). Failure to put such a contract in writing renders it void. South Carolina Code Ann. § 27-35-20 (1976). Moreover, a contract required to be in writing by the **[***5]** South Carolina Statute of Frauds cannot be orally modified. *Windham v. Honeycutt*, 279 S.C. 109, 302 S.E. (2d) 856 (1983) (court held evidence of oral modification of the real estate contract as violative of the Statute of Frauds).

Appellants assert three exceptions to the Statute of Frauds. First, appellants assert part performance as an exception. HN7 In order for part performance of an oral agreement to remove the agreement from operation of the Statute of Frauds and permit specific performance, the appellants must establish acts which relate clearly and unequivocally **[*106]** to the agreement, exclusive of any other relation between parties touching such agreement. *Aust v. Beard*, 230 S.C. 515, 96 S.E. (2d) 558 (1957); *Gibson v. Hrysikos*, 293 S.C. 8, 358 S.E. (2d) 173 (S.C. App. 1987). According to the terms of the 1980 lease, appellants were entitled to make improvements to the leased property as they desired. Thus, the construction of the Ghost Ship II does not relate clearly to the oral agreement exclusive of the original lease agreement.

Second, appellants assert that equitable estoppel takes the oral agreement out of the operation of the Statute of Frauds. HN8 In order to overcome statutory **[***6]** requirements that an agreement be in writing, the party asserting estoppel must show that he suffered a definite, substantive, detrimental change of position in reliance on such agreement and that no remedy except enforcement of the bargain is adequate to restore his former position.

The appellants fail to show any definite, substantial and detrimental change of position in reliance upon any oral agreement. Exercise of the full extension options under the lease would allow appellants to have the benefit of any improvements for an additional fifteen years beyond the initial lease term. The record reveals no substantive detrimental change in appellants' position sufficient to estop enforcement of the requirements of the Statute of Frauds. *Atlantic Wholesale Co., Inc. v. Solondz*, 283 S.C. 36, 320 S.E. (2d) 720 (S.C. App. 1984); 73 Am. Jur. (2d) *Statute of Frauds*, § 278 (1974).

Third, appellants assert that Exhibits Numbers 3 and 4 satisfy the memorandum requirement of the Statute of Frauds. HN9 A writing prepared by a party to a contract or by his agent may constitute a memorandum sufficient to satisfy the Statute of Frauds, although not delivered to the other contracting party and was **[***7]** neither intended for nor known to him, provided it is intended to evidence the contract of the **[**895]** parties and its contents are disclosed for that purpose. *Smith v. McClam*, 289 S.C. 452, 346 S.E. (2d) 720 (1986). The writing must reasonably identify the subject matter of the contract, sufficiently indicate a contract has been made between the parties, and state with reasonable certainty the essential terms of the agreement. Restatement (Second) of Contracts, § 131 (1981). Exhibit **[*107]** No. 3 is a letter to the respondents, written by Attorney C. C. Grimes, discussing the proposed amendments which he enclosed. Exhibit No. 3 does not indicate that an agreement had been reached and supports respondents' contention that negotiations were not complete.

Exhibit No. 4 is a letter written by respondent William A. Chandler to Mr. Grimes wherein he states that the terms of the proposed amendments were not acceptable. We hold that these

exhibits are insufficient to constitute a written memorandum of agreement under the Statute of Frauds.

Player v. Chandler, 299 S.C. 101; 382 S.E.2d 891; 1989 S.C. LEXIS 166 (1989)

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#6

CONTRACT INTERPRETATION - WAIVER

In *Rakestraw v. Dozier Associates, Inc.*, 285 S.C. 358, 329 S.E. (2d) 437 (1985), a mortgage contained a "balance due on sale" clause. We held the mortgagees, by accepting payments for 17 months, had waived the right to assert this provision.

The Lewises rely **[***4]** on *Stinemeyer v. Wesco Farms, Inc.*, 260 Or. 109, 487 P. (2d) 65 (1971), which applied a similar principle. This case held that a vendor who accepted late payments over a period of time had waived a **contract** provision making time of the essence. The purchaser was therefore entitled to notice of the vendor's intention to require strict **performance,** as well as an opportunity to bring delinquent payments current, before the vendor could accelerate the debt and foreclose.

However, *Stinemeyer* and similiar cases cited in Annotation, 97 A.L.R. (2d) 997 apply **waiver** only where a *long-continued* course of accepting late payments leads the debtor to rely justifiably on the creditor's willingness to accept payment late. The facts distinguish those cases from the one here.

HN3 In applying **waiver,** the Court in *Stinemeyer* stated:
It has been our policy to encourage sellers of land to enforce their **contracts** in equity when the purchaser had defaulted in his **performance.** [Citations omitted.] Our holding in this case is not inconsistent with that policy. The vendor who has, by a practice of accepting late payments, permitted the purchaser to rely on this **[*375]** course **[***5]** of conduct, need only give reasonable notice that thereafter he will **[**839]** insist on strict **performance** of the **contract.** Further defaults would entitle him to his foreclosure remedy.
487 P. (2d) at 68.

Here, Caulder gave notice in August, 1982, that she would foreclose if future payments were in default.

We hold that the one or two late payments accepted between August, 1982, and June, 1983, do not establish a **waiver.** Caulder may exercise her option under the "acceleration" clause.

Accordingly, the Order of the Circuit Court is
Reversed.

Caulder v. Lewis, 287 S.C. 372; 338 S.E.2d 837; 1986 S.C. LEXIS 247 (1986)

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#7

CONTRACT INTERPRETATION - WAIVER

Additionally, we find Scalise did not **waive** its right to object to this title defect. The **contract** does not provide that Scalise was required to notify the Appellants of all title objections prior to closing, or provide the Appellants the opportunity to cure any defects. In a letter to the Appellants' counsel, counsel for Scalise stated that "the **contract** between our respective clients does not require us to make objections to title at any time prior to closing. Accordingly, we reserve all rights regarding making title objections up to and including the day of closing." Pursuant to the **contract,** the Appellants were required to convey marketable title to at least 9.5 acres to Scalise. Because the Appellants did not hold title to the 1.16 acres of the Property below the mean high water mark, they were unable to convey marketable title to at least 9.5 acres.

Scalise Development, Inc, v. Tidelands Investments, 392 S.C. 27; 707 S.E.2d 440; 2011 S.C. App. LEXIS 20 (Ct. App., 2011)

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#8

GENERAL CONTRACT CONSTRUCTION

The construction of a clear and unambiguous contract presents a question of law for the court. *Ward v. West Oil Co.*, 379 S.C. 225, 238, 665 S.E.2d 618, 625 (Ct. App. 2008); *see also Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). We are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Finance Com.*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988). "A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC,* 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008).

U.S. Bank Trust National Association v. Bell, 385 S.C. 364; 684 S.E.2d 199; 2009 S.C. App. LEXIS 466 (Ct. App. 2009)

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#9

CONTRACT CONSTRUCTION -
CONDITIONS PRECIDENT
CONSTRUE DOUBT ABOUT CONSTRUCTION AGAINST DRAFTER

A condition precedent is "any fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of **[**817]** immediate performance by the promisor can arise." *Ballenger Corp. v. City of Columbia,* 286 S.C. 1, 5, 331 S.E.2d 365, 368 (Ct. App. 1985). "Words and phrases such as 'if,' 'provided that,' 'when,' 'after,' **[***7]** 'as soon as,' and 'subject to' frequently are used to indicate that performance expressly has been made conditional." *Cobb v. Gross,* 291 S.C. 550, 552, 354 S.E.2d 573, 574 (Ct. App. 1987). "Whether a stipulation in a **contract** constitutes a condition precedent is a question of **construction** dependent on the intent of the parties to be gathered from the language they employ." *Id.* If there is doubt about the **construction** of a writing, the doubt must be resolved against the **drafter** and in favor of the party to whom it was delivered. *Charles v. West,* 155 S.C. 488, 494, 152 S.E. 644, 646 (1930).

Springs & Davenport v. AAG, Inc, 385 S.C. 320; 683 S.E.2d 814 (Ct. App. 2009)

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10.

CONTRACT CONSTRUCTION - CONDITION PRECEDENT

A condition precedent is any fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance by the promisor can arise. L. P. Simpson, *Contracts* Section 144 at 300 ((2d) ed. 1965); 17 Am. Jur. (2d) *Contracts* Section 320 at 749 (1964). Whether a stipulation in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ. *Chirichella v. Erwin*, 270 Md. 178, 310 A. (2d) 555 (1973). Words and phrases such as "if," "provided that," "when," "after," "as soon as," and "subject to" frequently are used to indicate that performance expressly has been made conditional. *Id.* at 182, 310 A. (2d) at 557.

We think it clear that the notice **[***8]** to proceed in this case does not constitute a condition precedent. Here, its purpose is to fix the date for the completion of the project and nothing more. We therefore affirm the circuit court's order to the extent it impliedly held that the notice to proceed does not constitute a condition precedent.

Ballenger v. Columbia, 286 S.C. 1; 331 S.E.2d 365 (Ct. App., 1985)

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11.

CONTRACT CONSTRUCTION - RESOLVE AMBIGUITY AGAINST DRAFTER

As the drafter of the contract, WDI was in the best position to prevent confusion in the **contract's construction** and should be the party to suffer from its shortcomings. *See Williams v. Teran, Inc.*, 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976) (noting HN5 an ambiguity in an agreement must be resolved against its drafter).

WDI Meredith & Co v. American Telesis, Inc., 359 S.C. 474; 597 S.E.2d 885 (2004)

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#12

SUBSTANTIAL PERFORMANCE DOESN'T APPLY TO EXPRESS CONDITIONS:
Moreover, once it was stipulated the plaintiffs' fish contained a quantity of ice in its stomach, they were precluded, as a matter of law, from recovering damages for breach of contract. The rules of the tournament did not permit a fish to have foreign matter in its internal cavity. This constituted an express condition of the contract. Since the plaintiffs failed to comply with the condition, they had no right to enforce the contract. Lach v. Cahill, 138 Conn. 418, 85 A.2d 481 (1951). **[***6]** They cannot rely on substantial performance as a basis for recovery, because HN1 the doctrine of substantial performance does not apply to express conditions. Ram Development Corp. v. Siuslaw Enterprises, Inc., 283 Or. 13, 580 P.2d 552 (1978). Thus, any **[*67]** evidence they might have introduced to show they substantially performed the contract was immaterial.

Ahrens v. McDaniel, 287 S.C. 63; 336 S.E.2d 505 (Ct. App., 1985)

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13.

WRITTEN K CAN BE MODIFIED BY ORAL AGREEMENT UNLESS STATUTES REQUIRE A WRITING

"'A written contract may in the absence of statutory provisions requiring a writing, be modified by a subsequent oral agreement. * * * (MAG Note - In this case, however, the Statute of Frauds requires a writing.)

Evatt v. Campbell, 234 S.C. 1; 106 S.E.2d 447 (1959)

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14.

WAIVER IS A QUESTION OF FACT

The determination of whether Bradford's actions constituted waiver is a question of fact. *See Hobgood v. Pennington*, 300 S.C. 309, 314, 387 S.E.2d 690, 693 (Ct. App. 1989) ("Where time is not originally of the essence, it may be made so by one party giving notice to the other that he will insist on performance by a certain date, provided the time allowed by the notice is reasonable, which is a question of fact for the jury depending on the circumstances of the particular case."); *Atkinson v. Atkinson*, 279 S.C. 454, 455, 309 S.E.2d 14, 15 (Ct. App. 1983) (stating a finding of fact depends **[***8]** on a court's decision of "whether a certain event either did or did not occur or that a particular circumstance either did or did not exist.") Therefore, the issue before us is whether the trial court's finding, that Bradford's conduct waived strict compliance, is reasonably supported by evidence contained in the record. *Epworth Children's Home v. Beasley*, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). We find the record contains such support.

Madren v. Bradford, 378 S.C. 187; 661 S.E.2d 390 (Ct. App., 2008)

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15.

MUST SHOW PREJUDICE TO ASSERT WAIVER

A show of prejudice is required when waiver is asserted. It is not inconsistency, but the presence or absence of prejudice which is determinative.

Sentry Engineering & Const. v. Mariner's Cay: 287 S.C. 346; 338 S.E.2d 631 (1985)

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16.

WAIVER MUST BE ACTS SHOWING INTENTIONAL RELINQUISHMENT OF KNOWN RIGHT:

In order that waiver may work an estoppel, it must be an act or acts evincing an intentional relinquishment of a known legal right, * * *." And in the case of *Farmers' & Merchants' Bank v. Peoples First National Bank of Charleston,* 161 S.C. 286; 159 S.E. 617, 619, this Court said: "Waiver has been frequently defined as the voluntary relinquishment of a known right and may be express or implied. * * *"

Holly Hill Lumber Co v. Grooms, 198 S.C. 118; 16 S.E.2d 816 (1941).

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17.

A PREVIOUS ACT WAIVING A CONTRACTUAL PROVISION DOESN'T REQUIRE THAT THE WAIVER BE CONTINUED; AND FOR WAIVER TO OPERATE AS ESTOPPEL IF PARTY ASSERTING ESTOPPEL KNEW OF THE CONTRACTUAL TERM

FACTS; This is an appeal from a declaratory judgment action brought by Frank Dobyns and 39 other individuals (Tenants) who held 27 long-term leases on lots in Hunting Island State Park. The defendant in the action was the landlord, the South Carolina Department of Parks, Recreation and Tourism (PRT), which owns, manages and operates the Park. The Tenants asked the court to establish the rights, duties and liabilities of the parties with regard to their right to renew, transfer and assign their leases. [1] PRT counterclaimed seeking basically the same relief. [2] The case was referred with finality to the master-in-equity. The Tenants appeal from the resulting order. We affirm.

Finally, the Tenants argue PRT should be estopped to deny transfers or be held to have waived its right to deny transfers. The master specifically held that "[PRT's] previous liberal consent to transfers does not impose upon [PRT] the duty to continue its policy." We agree. PRT was simply exercising its unqualified, unambiguous right under the lease to grant or deny a transfer request [HN4]A waiver involves the voluntary and intentional abandonment **[***10]** of a known right **[**351]** *Janasik v. Fairway Oaks Villas Horizontal Property Regime,* 307 S.C. 339, 415 S.E.2d 384 (1992). There is no evidence

PRT knowingly and intentionally waived its right to deny transfers or modified this explicit lease term.

Similarly, the Tenants have not established an estoppel claim because HN5 an essential element of such claim is that the party asserting estoppel lack the knowledge of the truth as to the facts in question. *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990); *Landing Dev. Corp. v. City of Myrtle Beach,* 285 S.C. 216, 329 S.E.2d 423 (1985). The record shows the anti-assignment clause unequivocally allowed PRT to deny transfers at its discretion and the Tenants were aware of this provision. Therefore, the estoppel claim fails.

Dobyns v. SC Dept of Parks, 317 S.C. 353; 454 S.E.2d 347 (Ct. App., 1995)

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18.

DAMAGES - BREACH OF REAL ESTATE SALES CONTRACT

General damages are those which must necessarily result from the wrongful act upon which liability is based. It is not sufficient to show that the damages sought **[***2]** are the natural result of the breach. "Damages for losses that are the natural and proximate, but not the *necessary*, result of the injury may be recovered only when such special damages are sufficiently stated and claimed." (Emphasis **[*329]** added.) *Hobbs v. Carolina Coca-Cola Bottling Company*, 194 S.C. 543, 10 S.E. (2d) 25, 28 (1940). The law implies general damages. Special damages, however, are not implied by law because they do not necessarily result from the wrong. *Carolina Life Insurance Company v. Bank of Greenwood*, 217 S.C. 277, 60 S.E. (2d) 599 (1950). Special damages must be alleged in the complaint to avoid surprise to the other party. *Crozier v. Charleston & W.C. Railway Company*, 222 S.C. 121, 71 S.E. (2d) 800 (1952).

The buyers next assert error in awarding any damages at all, since the sellers subsequently obtained from a third party the same purchase price the buyers had agreed to pay. Buyers assert the sole **measure of damages** for breach of a **real estate** contract is the difference between the contract price and the fair market value, citing *Benya v. Gamble*, 282 S.C. 624, 321 S.E. (2d) 57 (Ct. App. 1984). HN2 General damages may be measured by the difference between the contract price and the fair market value of the property at the time of the breach. *Bannon v. Knauss*, 282 S.C. 589, 320 S.E. (2d) 470 (Ct. App. 1984). While a plaintiff may rely upon this measure of general damages, he is not precluded from proving the general damages he actually sustained as a result of the breach. See, *Morris Morgan Realty Inc. v, Johnson*, 228 S.C. 43, 339 S.E. (2d) 514 (Ct. App. 1985). **[***4]** This exception is without merit..

Sheek v. Lee, 289 S.C. 327; 345 S.E.2d 496 (1986)

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19.

BREACH OF CONTRACT - DAMAGES AND LOST PROFITS

Lost profits may be recovered in a **breach of contract** action under a three-prong test:

First, profits must have been prevented or lost as a natural consequence of the **breach of contract**. The second requirement is foreseeability; a breaching party is liable for those damages, including lost profits, which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made as a probable result of the breach of it. The crucial requirement in lost profits determinations is that they be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative.
Drews Co. v. Ledwith-Wolfe Assocs., 296 S.C. 207, 213, 371 S.E.2d 532, 535-36 (1988) (internal citations omitted). Damages must either flow as a natural consequence of the breach or have been reasonably within the parties' contemplation at **[***17]** the time of the contract. *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 595, 493 S.E.2d 875, 880 (Ct. App. 1997); *see S.C. Fin. Corp. of Anderson v. West Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 335-36 (1960) (stating "profits that have been prevented or lost as the natural consequence of a **breach [*140] of contract** are recoverable as an item of damages in an action for such breach").

In *Sterling Development Co. v. Collins,* the South Carolina Supreme Court stated:
In claiming lost profits, the degree of proof required is that of reasonable certainty. The proof must pass the realm of conjecture, speculation or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn.
309 S.C. 237, 242, 421 S.E.2d 402, 405 (1992) (internal citation omitted).

We find the trial court did not err in finding lost profits in this case were not in the contemplation of the parties. Although Hodge knew Manios and Rogers were pledging personal assets to fund the $ 1.6 million loan, this was the first time M&R had used Hodge in a transaction in which M&R was **[**652]** lending money to a third **[***18]** party. Furthermore, the Pinckney Retreat project was approximately three years after the $ 1.6 million loan was made. We conclude it was not foreseeable that Hodge would understand that by pledging personal assets on the $ 1.6 million loan, M&R would potentially lose future business opportunities.

Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126; 697 S.E.2d 644 (Ct. App., 2010)

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20.

BREACH OF CONTRACT - GENERAL PROOF REQUIREMENTS

To recover for a breach of contract, the plaintiff must prove the existence **[*34]** of: (1) a binding contract; (2) a breach of contract; and (3) damages proximately resulting from the breach." ***Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 697 S.E.2d 644, 655 (S.C. Ct. App. 2010)** (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (S.C. 1962)). A contract is formed by an offer, acceptance, and consideration. *Roberts v. Gaskins*, 327 S.C. 478, 486 S.E.2d 771, 773 (S.C. Ct. App.1997).

Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126; 697 S.E.2d 644 (Ct. App., 2010)

STATE OF SOUTH CAROLINA	)	**IN THE CIRCUIT COURT FOR THE**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**CIVIL ACTION NO. 2009-CP-26-1909**

Randy A. Beverly, LLC, and Donald Godwin, LLC,

Plaintiffs,

vs.

Bucksville Farms, Inc.,

Defendant and Third-Party Plaintiff,

vs.

Randy A. Beverly and Donald Godwin,

Third-Party Defendants and Fourth Party Plaintiffs,

vs.

Benjamin J. Creel, individually and As surviving director of Bucksville Farms, Inc.,

Fourth Party Defendant.

[CREEL'S PROPOSED]

ORDER FOR JUDGMENT

This matter came before me for trial on January 12 and 13, 2012, upon order of reference by Honorable Thomas Cooper dated July 14, 2011. Appearing as counsel for the Plaintiffs, Third Party Defendants and Fourth Party Plaintiffs was J. Dwight Hudson. Appearing as counsel for Defendant, Third Party Plaintiff, and Fourth Party Defendant were James P. Stevens, Jr., and Natalie S. Stevens-Graziani.

This litigation arises out of an agreement between the parties for the sale of a tract of 317.5 acres, which sale was to take place in four phases or "takedowns" (as referred to in the contract identified as Defendant's Exhibit # 33), each takedown to occur in one year intervals in 2006, 2007, 2008, and 2009. Each takedown was to include at least 50 acres

of uplands. The purchase price per acre for upland acreage was $17,000, $18,000, $19,000 and $20,000 respectively in 2006, 2007, 2008, and 2009. Wetlands were to be sold at $1,000 per acre regardless of the year purchased.

The agreement imposed certain duties upon the parties to the contract. Of significance to the issues in this case are paragraphs 7, 9, and 22 of the agreement.

The pertinent portion of paragraph 7 which relates to the issues in this case is as follows:

> 7. Feasibility Period. The Feasibility Period is the period ending at midnight on the date which is 120 days following the Seller's delivery of a Boundary Survey and Wetlands Survey made by a professional surveyor licensed in South Carolina (Seller is not required to have the wetlands permitted with the U.S. Corps. Of Engineers).....

The pertinent portion of paragraph 9 which relates to the issues in this case is as follows:

> 9. Survey. Seller shall furnish a Boundary Survey of the Property referenced in the attached Exhibit A indicating the true and correct legal description thereof delineating the boundary lines of said property and all wetlands and carving out the 40 acre parcel to be retained by the Seller. Purchaser shall obtain the Takedown surveys for the acquisition of each Takedown of the Property ("Takedown Survey")....

The pertinent portion of paragraph 22 which relates to the issues in this case is found in the last sentence of the paragraph and states as follows:

> 22. . . . Notwithstanding any of the foregoing, the parties agree that Purchaser will takedown the Southwest portion of the tract at the last closing which tract is more specifically delineated in Schedule "___" attached hereto.

During the negotiations between the parties, it was agreed that the Southwest portion of the entire tract contained considerable wetlands and that the tract should be "silvacultured" to allow the wetland to possibly dry out and become uplands as much as possible. The parties therefore agreed pursuant to paragraph 22 to make the Southwest portion of the tract the last tract of land to be purchased in the final and 4th takedown, which was scheduled for June of 2009. Twin Oaks was hired by Randy Beverly to perform the silvacuture. The cost of the same was deducted from the purchase price on the 2nd

takedown settlement sheet which states: "Reimburse Twin Oaks to Randy A. Beverly .. $10,322.50." (Defendant's Exhibit # 9).

After the agreement was signed by the parties on October 2, 2005, Defendant received a fax dated November 23, 2005, from Randy Beverly on Beverly Construction Co. Inc.'s letterhead and signed by Randy Beverly with attached proposals from Sean Williams of Carolina Land Surveyors, LLC, for a Boundary Survey and from Charles Oates of S&ME for a wetlands delineation of 280 acres. (Defendant's Exhibit # 2). Therefore, Defendant was thereby advised by Plaintiffs and Third Party Defendants that, although Defendant had the duty to provide a boundary and wetlands survey, the Plaintiffs and Third Party Defendants were assuming that duty and would deduct the cost of the same from each takedown purchase. Both proposals were sent to Jamie McLain (Mr. McLain), who was indentified as an employee of Donald Godwin. (Defendant's Exhibits # 1 & 2). The 280 acres referred to in both proposals would have included the Southwest portion of the tract. The proposal from SM&E which was furnished to Defendant in November of 2005 specifically included the southwestern portion of the tract. However, on March 8, 2006, unknown to the Defendant, the Plaintiffs and Third Party Defendants sent Mr. McLain to SM&E and instructed them to exclude from the wetlands delineation the Southwestern portion of the tract. (Charles Oates' deposition Exhibit # 1). The prior map provided by Charles Oates included the southwest portion of the tract (Charles Oates' Deposition Exhibit # 9 originally dated November of 2005); however, Charles Oates' Deposition Exhibit #1 has a notation: "Changed by Jamie McLain – 3/8/06." The map shows that the southwestern portion of said tract was excluded by Mr. McLain, who was the agent for the Plaintiffs and Third Party Defendants. Defendant was never given a copy of the changed map nor was he advised that the southwestern portion of the tract had been deleted from the boundary and wetlands survey. In fact, by letter dated April 18, 2006, from Donald Godwin and Randy Beverly to Benjamin Creel, they advised, in part, as follows:

> ..We have concluded our preliminary wetland evaluation and would like to close the portion of the tract closest to Conway along US Highway 701. Our preliminary wetland evaluation has been submitted to the US Army Corps of Engineers and is awaiting field audit. It is believed that this 50 acre portion of the tract contains no wetland, however if the US Army Corps of Engineers

> does not agree and the tract does contain wetlands, then we will take a credit on the next 50 acre closing for the monetary difference.

The 1st takedown survey was prepared on May 12, 2006, and thereafter provided by the Plaintiffs to the Defendant before the closing on June 8, 2006. (Defendant's Exhibit # 29).

By letter dated March 12, 2007, from Donald Godwin and Randy Beverly to Benjamin Creel (Defendant's Exhibit # 8), the 2nd takedown purchase was scheduled and the Plaintiffs advised the Defendant, in part, as follows:

> Our wetland evaluation has been submitted to the US Army Corps of Engineers and field audited. It was believed that the first 50 acre portion of the tract contains (sic) no wetland, however the US Army Corps of Engineers did not agree and the tract does contained (sic) approximately one acre of wetland. We would like to get a credit for the one acre on this second 50 acre closing for the monetary difference of $16,000. The surveyor has completed the map for this second 50 acre closing and you will find it enclosed.

On the first two takedowns, the Plaintiffs obtained and provided the Defendant with a takedown survey according to the terms of paragraph 9 of the agreement.

After the 2nd takedown and before the 3rd takedown scheduled for June 2008, the Plaintiffs/Third Party Defendants attempted to renegotiate the agreement by requesting a year's delay in the 3rd and 4th takedowns and to pay the Defendant partially with land and money. The only consideration the Plaintiffs would offer for the year's delay was $40,000 which was to be applied to the purchase price at the next takedown. Defendant rejected the Plaintiffs attempts to renegotiate the agreement. (Defendant's Exhibits # 15, 16, and 17).

The Plaintiffs/Third Party Defendants then, contrary to the terms of paragraph 22 of the agreement, asserted that the southwestern portion of the tract was to be purchased for the 3rd takedown in June of 2008. Plaintiffs/Third Party Defendants failed to give Defendant a "takedown survey" in violation of paragraph 9 of the Agreement.

On June 18, 2008, by letter from R. Allen Beverly, attorney for the Plaintiffs and Third Party Defendants to Benjamin Creel (Defendant's Exhibit # 18), Plaintiffs and Third Party Defendants asserted that Defendant had breached paragraph 9 of the agreement by not providing a boundary and wetlands survey. The Plaintiffs and Third Party Defendant

stated:

> Due to Bucksville Farms, Inc.'s breach by failing to provide said boundary survey and wetlands delineation, Randy A. Beverly, LLC and Donald Godwin, LLC do hereby declare the Contract forever null and void. (Defendant's Exhibit # 18).

Thereafter, between July 2, 2008, and October 30, 2008, the parties' attorneys exchanged letters concerning the obligations of the parties. (Defendant's Exhibits # 19, 20, 22, 23, and 24). Attorney for Defendant requested adequate assurances of performance by letter of July 15, 2008, and correctly pointed out the following:

(1) that Defendant was not obligated to provide a wetlands delineation certified by the US Army Corps of Engineers according to paragraph 7 of the agreement,

(2) that the US Army Corps of Engineers, by letter of November 27, 2007, had already certified the entire tract of land except the western half of the southwestern portion of the tract,

(3) that the southwestern portion of the tract was not to be purchased in the 3rd takedown, it being reserved to the 4th takedown according to paragraph 22 of the agreement, and

(4) that Plaintiffs/Third Party Defendants were obligated to proceed with closing the other portions of the tract which had already been certified by the US Army Corps of Engineers. (Defendant's Exhibit # 24).

Moreover, by letter dated September 2, 2008, from Benjamin Creel to Randy Beverly (Defendant's Exhibit # 21), Creel advised that he had not received the 3rd takedown survey.

The Plaintiffs/Third Party Defendants had concealed from the Defendant that they had received a full boundary and wetlands survey of the entire tract (with the exception of the southwestern portion of said tract) on October 16, 2007, approximately 8 months before the scheduled 3rd takedown. (Defendant's Exhibit # 28).

Also concealed by the Plaintiffs/Third Party Defendants was the fact that they paid for and received in October or November of 2007 a survey of the southwestern portion of the tract entitled "Boundary Survey of the two parcels split from TMS # 169-00-03-027 & Sketch of Estimated Wetlands .. for Donald Godwin." (Defendant's Exhibit # 12). In June

and August of 2008, Plaintiffs/Third Party Defendants had requested Charles Oates of SM&E to provide them with a sketch and estimation of the wetlands in the southwestern portion of the tract. (Deposition of Charles Oates Exhibit # 5, 6, and 7). These maps were also concealed from the Defendant. Said maps were obviously given to Carolina Land Surveyors which resulted in the plat described above. (Defendant's Exhibit # 12).

The maps from Charles Oates show that the southwest portion of the tract does not contain the required 50 of uplands necessary to meet the terms of the agreement. The maps from Charles Oates (Charles Oates Deposition Exhibits # 4, 5, and 6) reveal that the southwestern portion of the tract contained approximately 90 acres, including a 14.41 acre tract that was included in the 2nd takedown and already purchased. Therefore, the remaining portion of the southwestern tract consisted of approximately 75.59 acres. According to the maps provided by Charles Oates in June and August of 2008, wetlands totaled approximately 50 acres, leaving approximately 25.59 acres of uplands to purchase. Therefore, even if Defendant had agreed to allow Plaintiffs/Third Party Defendants to purchase the southwestern portion of the tract in the 3rd takedown, by the terms of the agreement, approximately 24.41 acres of uplands would have had to be purchased from the remaining portion of the tract which had already been surveyed and certified by the US Army Corps of Engineers.

It should be noted here that the Plaintiffs/Third Party Defendants also concealed from Defendant that they had received the maps from Charles Oates in June and August of 2008. When Plaintiffs/Third Party Defendants kept insisting that they needed a boundary and wetlands survey from the Defendant, he approached Charles Oates to do the survey. Charles Oates then informed Defendant that he had already done a wetlands delineation for the Plaintiffs/Third Party Defendants and gave him a map showing wetlands. Defendant then sent the map received from Charles Oates to Randy Beverly. Until Defendant approached Charles Oates, neither he nor Charles Oates knew the other was involved in the matter. Defendant then talked to an employee of Plaintiffs/Third Party Defendants, Luther Barefoot, who relayed to Randy Beverly that Defendant had talked to Charles Oates and learned that Plaintiffs/Third Party Defendants had hired Charles Oates

to do the wetlands delineation. Beverly's response to Mr. Barefoot was, "I guess the cat is out of the bag now."

Plaintiffs and Third Party Defendants refused to purchase and then declared the contract null and void by letter of their attorney dated June 18, 2008, to the Defendant.

The Plaintiffs filed a declaratory judgment action in February of 2009 (before the time for the 4th takedown) requesting essentially that the court rule that the contract was null and void.

Defendant answered the Complaint and counterclaimed against the Plaintiffs and cross claimed against the individual 3rd Party Defendants, Randy Beverly and Donald Godwin. Defendant alleged affirmative defenses of (1) modification of contract, (2) waiver and estoppel, and (3) course of dealing. The Defendant also counterclaimed against the Plaintiffs and cross-claimed against the individual Third Party Defendants for (1) breach of contract and (2) breach of contract accompanied by fraudulent acts.

The individual Third Party Defendants replied to the Counterclaims and Cross-Complaints and asserted a 4th Party Complaint against Benjamin J. Creel, individually. Benjamin J. Creel answered, asserted the same affirmative defenses, Counterclaims, and Cross-Complaints as did the Defendant.

Plaintiffs, Third Party Defendants, and 4th Party Plaintiff timely replied.

During the pendency of this litigation, Defendant mitigated his damages by selling the remaining unpurchased land for $490,000. (Defendant's Exhibit 34).

Defendant introduced a compilation of his calculated damages. (Defendant's Exhibit # 25a). According to the calculations, the 3rd takedown would have required the purchase of 50 acres of upland at $19,000 per acre and the 4th takedown would have required the purchase of 73 acres of upland at $20,000 per acre and 50 acres of wetlands at $1,000 per acre. The totals for the 3rd and 4th takedowns are $2,460,000. Deducting the mitigation of $490,000, Defendant's net loss is $1,970,000. Defendant submitted a request for statutory prejudgment interest at 8.75% in the amount of $457,432. Defendant therefore requests judgment against the Plaintiffs and Third Party Defendants in the total sum of $2,427,432.

Waiver and Estoppel:

Defendant pled as an affirmative defense that the Plaintiffs/Third Party Defendants waived their right to require Defendant to produce a boundary and wetlands survey.

I find that the Plaintiffs/Third Party Defendants/Fourth Party Plaintiffs have waived their right to require Defendant to produce a boundary and wetlands survey by (1) advising Defendant that they had hired Carolina Land Surveyors and SM&E to do the boundary and wetlands survey, (2) by forwarding to Defendant in November of 2005 documents showing that they were undertaking that task, and (3) by leading the Defendant to believe that they would accomplish those tasks and deduct the cost of the same from the purchase price and then doing so in the 2nd takedown.

Waiver is the voluntary and intentional relinquishment of a known right. Janasik v. Fairway Oaks Horizontal Property Regime, 307 S.C. at 344, 415 S.E.2d at 387. It may be implied from circumstances indicating an intent to waive. Bonnette v. State, 277 S.C. 17, 282 S.E.2d 597 (1981); Lyles v. BMI, Inc., 292 S.C. 153, 355 S.E.2d 282 (Ct. App. 1987). Acts that are inconsistent with the continued assertion of a right may also give rise to a waiver. Provident Life and Accident Ins. Co. v. Driver, 317 S.C. 471, 451 S.E.2d 924 (Ct. App. 1994). A default in the performance of a contract may be waived. Although intent is necessary to effect a waiver of a breach of contract, it need not be shown by direct evidence. The waiver of a breach of contract may be shown by an act which is so inconsistent with an intent to enforce the right which arises upon the breach as reasonably to induce a belief that the right has been relinquished. See Parker v. Parker, 313 S.C. 482, 443 S.E.2d 388 (1994); Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992); Hinds v. United Ins. Co., 248 S.C. 285, 149 S.E.2d 771 (1966); Maxwell v. Genez, 350 S.C. 563, 567 S.E.2d 496 (Ct. App. 2002), overruled on other grounds, 356 S.C. 617, 591 S.E.2d 26 (2003); Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999); Steele v. Self Serve, Inc., 335 S.C. 323, 516 S.E.2d 674 (Ct. App. 1999); Heritage Federal Sav. And Loan v. Eagle Lake and Golf Condominiums, 318 S.C. 535, 458 S.E.2d 561 (Ct. App. 1995); Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471, 451 S.E.2d 924 (Ct. App. 1994); Carolina

Amusement Co. v. Connecticut Nat'l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993).

I also find that the Plaintiffs/Third Party Defendants /Fourth Party Plaintiffs are estopped from claiming the failure of Defendant to produce a boundary and wetlands survey for the same reasons as set forth above. Additionally, I find that the Plaintiffs/Third Party Defendants/Fourth Party Plaintiffs are also estopped because of their silence and/or concealment that (1) they had already acquired the boundary and wetlands survey, (2) they had instructed SM&E, Inc. to delete the southwestern portion of the tract from the wetlands survey, and (3) they had received wetlands certification from the US Army Corps of Engineers.

As to the party claiming estoppel, the essential elements are: (1) lack of knowledge or the means of acquiring, with reasonable diligence, knowledge of the true facts; (2) reasonable reliance on the other party's conduct; and (3) a prejudicial change in position. *Id.* Unlike waiver, the estopped party need not intend to relinquish or change any existing right for estoppel to arise. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992); The reliance by the party claiming estoppel must be reasonable, and it must proceed in good faith. Southern Dev. Land & Golf Co. Ltd v. SCPSA, 311 S.C. 29, 426 S.E.2d 748 (S.C. 1993); Masonic Temple, Inc. v. Ebert, 199 S.C. 5, 18 S.E.2d 584 (1942). Estoppel by silence arises when the estopped party owes a duty to speak to the other party but refrains from doing so, thereby leading the other party to believe in an erroneous state of facts. Southern Dev., *supra.* 426 S.E.2d at 751. A "manifest intent" to mislead is not required for estoppel by silence; it arises when the silence is intended or has the effect of misleading the other party, provided the other party acts reasonably. *Id.* Provident Life and Accident Ins. Co. v. Driver, 317 S.C. 471, 451 S.E.2d 924 (Ct. App. 1994).

As succinctly stated by our Supreme Court in Palmer v. Sovereign Camp, W.O.W., 197 S.C. 379, 391, 15 S.E.2d 655, 661 (1941), "The principle of estoppel in equity stands upon the very foundations of right and fair dealing. It considers and weighs the conduct of men in their dealings with each other, and gives that effect ... to their actions which ...

justice dictate[s]." It arises when a person, in reliance on what another has done or said, changes position to his detriment and the other person then attempts to repudiate or evade the consequences of his action or speech. Russell v. Drivers Leasing Services, 282 S.C. 358, 318 SE2d 579 (Ct. App, 1984).

It is obvious from the evidence that Defendant, in reliance upon what Plaintiffs/Third Party Defendant did and said as described above, changed his position to his detriment and the Plaintiffs/Third Party Defendants then attempted to repudiate or evade the consequences of their actions and speech.

Individual Liability of Beverly and Godwin:

Defendant has also proven its case against the individual Third Party Defendants. All of the acts of omissions and commissions were either committed or directed by Randy Beverly and/or Donald Godwin. As such, each is responsible individually for their actions. Their actions go beyond solely being or acting member of their LLC's.

S.C. Code of Laws, § 33-44-303 provides, in part: "A member or manager is not personally liable for a debt, obligation, or liability of the company *solely by reason of being or acting as a member or manager.*" (Emphasis added).

Numerous courts, in interpreting their LLC statutes have interpreted the above italicized language and held that the LLC shield relates only to liability arising from a member's status as member and provides no protection when a member engages in actionable conduct. *If a member of an LLC engages in actionable conduct outside of just being a member, he is personally liable.* (Emphasis added). (see Equipoise PM LLC v. International Truck and Engine Corp., 2007 WL 2228621 (N.D. Ill. Ill. 2007); Weber v. U.S. Sterling Securities, Inc., 282 Conn. 722, 924 A.2d 816 (2007); Restoration Indus. Ass'n, Inc. v. Certified Restorers Consulting Group, LLC, 2007 WL 2898698 (D. Idaho 2007) (applying Idaho law); HOK Sport, Inc. v. FC Des Moines, L.C., 495 F.3d 927 (8th Cir. 2007) (applying Iowa law); Barone v. Perkins, 2008 WL 2468792 (Ky. Ct. App. 2008); Brophy v. Ament, 2008 WL 4821610 (D.N.M. 2008) (applying New Mexico law); Ditty v. CheckRite, Ltd., Inc., 973 F.Supp. 1320 (D. Utah 1997) (applying Utah law); Clement Contracting Group, Inc. v. Coating Systems, L.L.C., 881 So.2d 971 (Ala. 2003),

(a member of an LLC may become liable by reason of the member's own acts or conduct); Troutwine Estates Development Co., LLC v. Comsumb Design and Engineering, Inc., 888 N.E.2d 1288 (Ind. Ct. App. 2008), (an LLC member, manager, agent, or employee may be personally liable for the person's own acts or omissions. Thus, individuals associated with an LLC are not personally liable merely because of their ownership in the entity, while at the same time, association with an LLC does not preclude liability for one's own actions or omissions.); Gunnings v. Internet Cash Enterprise of Asheville, LLC, 2007 WL 1931291 (W.D. N.C. 2007) (applying North Carolina law) (an LLC member who is also a manager, director, executive, or any combination thereof might be a defendant and become personally liable by reason of his or her own acts or conduct.); Causey v. Dipak Lachmandes, 2005 WL 2000625 (applying Tennessee law) (held one exception exists where the member, holder, or agent is personally liable by reason of such person's own acts or conduct).

The "Comments" section of S.C. Code of Laws, § 33-44-303 of the South Carolina Uniform Limited Liability Company Act states: "A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity." Moreover, the annotations to that Code section cites Plantation A.D., LLC v. Gerald Builders of Conway, Inc. 386 S.C. 198, 687 S.E.2d 714 (Ct.App. 2009). In that case the Court of Appeals held that a genuine issue of material fact existed as to whether the president of corporation, which purchased property from the vendor, committed or participated in the commission of fraud or conversion of vendor's property, as would subject president to individual liability, precluding summary judgment for president in vendor's action against president and company arising out of memorandum between parties concerning property. The Court cited BPS, Inc. v. Worthy, 362 S.C. 319, 327, 608 S.E.2d 155, 160 (Ct.App. 2005)(quoting 19 Am.Jur. 2d Corporations, § 1382 (2004)):

> A director or officer of a corporation does not incur personal liability for its torts merely by reason of his official character; he is not liable for torts committed by or for the corporation unless he has participated in the

> wrong. Accordingly, directors not parties to a wrongful act on the part of other directors are not liable therefor. *If, however, a director or officer commits or participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby, and it does not matter what liability attaches to the corporation for the tort....* (Emphasis added).

Thus, the court held the president of a corporation was not shielded from direct liability in tort for his own actions and was personally liable for any tortuous acts he participated in or directed. *Id.* at 328, 608 S.E.2d at 160.

One of the primary advantages of an LLC is that it provides members with a liability shield. Drawing on the corporate concept of a separate entity, members in an LLC, like shareholders in a corporation, cannot be held personally liable for the debts and liabilities of the company. However, this statement is somewhat misleading. While the general tenet is that a member cannot be held personally liable for the LLC's liabilities, there are certain situations, existing under both common law and statutory law, in which the member will be held personally liable. "The LLC liability shield relates only to liability arising from a member's status as member. Accordingly, the shield provides no protection when a member engages in actionable conduct."

Regardless of one's status as a member of an LLC, that member cannot escape liability for his/her personal misconduct. The most obvious example is the commission of a tort. According to well-established tort law principles, "[a] tort is no less a tort for being committed in the service of a separate legal person." If a member commits a tort while in the course of LLC business, he/she may be held personally liable for that tort. The LLC limited liability shield cannot protect him/her. (*See* 47 A.L.R. 6th 1, (*Construction and Application of Limited Liability Company Acts—Issues Relating to Personal Liability of Individual Members and Managers of Limited Liability Company as to Third Parties); (See also* 44 UCLA L. Rev. 1541, (Limited Liability Companies: Issues In Member Liability).

Breach of Contract:

I find that the Plaintiffs/Third Party Defendants breached the agreement of the

parties in the following particulars:

(1) Refusing to consummate the purchase of property scheduled for the 3rd takedown.

(2) Insisting on purchasing the southwestern portion of the tract in violation of paragraph 22 of the agreement.

(3) Refusing to close the purchase of land in tract C and/or Tract D as shown on Defendant's Exhibit 28 in violation of paragraph 22.

(4) Failing to provide Defendant with the 3rd and 4th takedown surveys in violation of paragraph 9 of the agreement.

(5) Refusing to consummate the 3rd and 4th takedown purchases on the ground that Defendant did not provide a wetlands certification from the US Army Corps of Engineers in violation of paragraph 7 of the agreement.

(6) In concealing the fact that the boundary and wetlands survey had been completed and delivered to Plaintiffs/Third Party Defendants in October or November of 2007, approximately 7 to 8 months before the 3rd takedown.

(7) In concealing the fact that Plaintiffs/Third Party Defendants had instructed Mr. Oates to provide them with a wetlands estimation on the southwestern portion of the tract.

(8) In concealing the fact that they had received the wetlands certification from the US Army Corps of Engineers.

Actual Damages & Prejudgment Interest:

Because of the above actions, I find that the Defendant is entitled to actual damages for breach of contract in the amount of $1,970,000. I also find that the amount owed to the Defendant is a liquidated amount which entitles Defendant to prejudgment interest to the date of trial in the amount of $457,432. Therefore, I find that the Defendant is entitled to judgment against the Plaintiffs and the Third Party Defendants in the total sum of $2,427,432 actual Damages.

Breach of Contract Accompanied by Fraudulent Acts:

Having found that the Plaintiffs/Third Party Defendants breached the agreement with the Defendant and that the Defendant is entitled to actual damages, I now turn to

the issue of whether the Defendant has proven that the Plaintiffs/Third Party Defendants committed fraudulent acts accompanying the breach.

As stated above the Plaintiffs/Third Party Defendants engaged in the followings acts or omissions:

(1) The Plaintiffs/Third Party Defendants concealed from the Defendant that they had received a full boundary and wetlands survey of the entire tract (with the exception of the southwestern portion of said tract) on October 16, 2007, approximately 8 months before the scheduled 3rd takedown. (Defendant's Exhibit # 28).

(2) The Plaintiffs/Third Party Defendants concealed from the Defendant that they had received the US Army Corps of Engineers the wetlands certification on November 27, 2007 for the entire tract (excepting the southwestern portion) and refused to consummate the 3rd and 4th takedowns because Defendant didn't produce what they already had.

(3) The Plaintiffs/Third Party Defendants concealed from the Defendant that they had received the a boundary survey containing the wetlands delineation on October 16, 2007, for the entire tract (excepting the southwestern portion) and refused to consummate the 3rd and 4th takedowns because Defendant didn't produce what they already had.

(4) The Plaintiffs/Third Party Defendants concealed from the Defendant that they had deleted the southwestern portion of the tract from the wetlands delineation on March 18, 2006, and then breached paragraph 22 of the agreement by insisting on the purchase of the southwestern portion of the tract on the 3rd takedown.

(5) The Plaintiffs/Third Party Defendants also concealed from the Defendant the fact that they paid for and received in October or November of 2007 a survey of the southwestern portion of the tract entitled "Boundary Survey of the two parcels split from TMS # 169-00-03-027 & Sketch of Estimated Wetlands .. for Donald Godwin." (Defendant's Exhibit # 12).

(6) The Plaintiffs/Third Party Defendants also concealed from the Defendant the fact that they had requested from Mr. Oates and received in June and August of 2008 three sketches of the wetlands delineation on of the southwestern portion of the tract.

I find that the above acts and omissions constitute a breach of contract accompanied by fraudulent acts.

To recover punitive damages for breach of contract accompanied by a fraudulent act, the Plaintiff must prove three elements by clear and convincing evidence:

(1) A breach of contract;

(2) Fraudulent intent relating to the breaching of the contract and not merely to its making; such proof may or may not involve false representations; fraudulent intent is normally proved by circumstances surrounding the breach; and

(3) A fraudulent act accompanying the breach; a fraudulent act is one characterized by dishonesty in fact, unfair dealing; ... the fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character. (See Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002; Smith v. Canal Ins. Co., 275 S.C. 256, 269 S.E.2d 348 (1980); Van v. Nationwide Ins. Co., 257 S.C. 217, 185 S.E.2d 363 (1971); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. (1998); Lister v. NationsBank, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997); Minter v. GOCT, Inc., 322 S.C.525, 473 S.E.2d 67 (Ct. App. 1996); Ball v. Canadian American Express Co., 314 S.C. 272, 442 S.E.2d 620 (Ct. App. 1994); Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374 (Ct. App. 1986).

I find that the wrongful conduct as set forth above was motivated primarily by unreasonable financial gain and that the nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known, approved, committed and/or directed by the individual Defendants, Beverly and Godwin, individually and as members of the Plaintiffs as persons responsible for making policy decisions.

I therefore find that Defendant has proven its counterclaim against the Plaintiffs and its cross-claim against the Third Party Defendants by clear and convincing evidence and is therefore entitled to punitive damages in the sum of $_____.

Attorney Fees:

Paragraph 27(l) of the agreement provides as follows:

Attorneys' Fees: Should either party hereto institute any action or proceeding in court to enforce any provision hereof or for damages by reason of any alleged breach of any provision of this Agreement or for any other judicial remedy, the prevailing party shall be entitled to receive from the losing party all reasonable attorneys' fees and all court costs in connection with said proceeding at trial and through all appeals.

Finding that the Defendant is the prevailing party in this action, it is entitled to reasonable attorneys' fees. Taking into consideration the nature, extent, and difficulty of the issues and legal services rendered, the length of the trial of this case, the time consumed in preparing and conducting discovery, the professional standing of Defense Counsel, the fee customarily charged in this locality for similar legal services, and the beneficial results obtained for the Defendant by its counsel, I hereby aware the Defendant an attorneys' fee of 15 percent of the total verdict.

Plaintiffs' Declaratory Judgment Action:

For the above reasons, I find that the Plaintiffs have failed to carry their burden of proof and therefore dismiss their Declaratory judgment action.

Plaintiffs' and Third Party Defendants' Counterclaims against Defendant, Bucksville Farms and Cross-Complaints against Benjamin Creel:

This Court, as stated above, has found that the Plaintiffs and Third Party Defendants are liable to Defendant, Bucksville Farms, Inc., for Breach of Contract and Breach of Contract Accompanied by Fraudulent Acts. Moreover, I find that the Plaintiffs and the Third Party Defendants have failed to carry the burden of proving their counterclaims, their cross-complaints, or their affirmative defenses and the same are hereby dismissed against the Defendant, Bucksville Farms, Inc. and the Fourth Party Defendant, Benjamin Creel.

Claims Against Benjamin Creel, individually and as Surviving Director of Bucksville Farms, Inc.:

Randy Beverly, LLC, Donald Godwin, LLC and Beverly and Godwin individually make claim against Creel in his individual capacity and as surviving director of Bucksville Farms, Inc. because, at some point in time during the pendency of this action, it was administratively dissolved. However, Defendant introduced evidence that Bucksville Farms, Inc. had been reinstated by the Secretary of State and is presently in good standing. S.C.Code of Laws § 33-14-220(c) provides as follows:

33-14-220. Reinstatement following administrative dissolution.

(c) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.

Based upon the above statute and for the other reasons cited above, all claims against Creel individually and as surviving director of Bucksville Farms, Inc. are hereby dismissed.

Counterclaims and Cross-complaints of Benjamin Creel:

I find that the contract was with Bucksville Farms, Inc. and that, although an officer and stockholder of the corporation, Creel was not the party to the contract. Therefore, the claims for breach of contract and breach of contract accompanied by fraudulent acts were possessed by Bucksville Farms, Inc., not Creel. Therefore, the Counterclaims and Cross-complaints by Creel are hereby dismissed.

Therefore, for the above stated reasons, it is hereby

ORDERED as follows:

a. That the Complaint be dismissed;

b. That the Counterclaims and the Cross-Complaints of Third Party Defendant, Randy Beverly, LLC and Donald Godwin, LLC be dismissed;

c. That the Counterclaims and Cross-complaints of the Fourth Party Plaintiff, Randy Beverly and Donald Godwin, be dismissed; and

d. That the Counterclaims and Cross-complaints of the Fourth Party Defendant, Benjamin Creel, individually and as surviving director of Bucksville Farms, Inc., be dismissed.

IT IS FURTHER ORDERED that Defendant Bucksville Farms, Inc. have judgment against Plaintiffs Randy Beverly, LLC, Donald Godwin, LLC, Randy Beverly, individually, and Donald Godwin, individually, both jointly and severally as follows:

A. For actual damages in the full sum of One Million Nine Hundred Seventy Thousand ($1,970,000) Dollars;

B. For prejudgment interest in the full sum of Four Hundred Fifty-Seven Thousand, Four Hundred Thirty-Two ($457,432) Dollars;

C. For Punitive Damages in the full sum of $_____;

D. For reasonable Attorneys' Fees of 15% of the total sum above in the amount of $_____; and

E. For the costs and disbursements of this action.

_____
RALPH P. STROMAN, Special Referee

Dated:_____, 2012.

STATE OF SOUTH CAROLINA	)	**IN THE CIRCUIT COURT FOR THE**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**CIVIL ACTION NO. 2009-CP-26-1909**

Randy A. Beverly, LLC, and Donald Godwin, LLC,

Plaintiffs,

vs.

Bucksville Farms, Inc.,

Defendant and Third-Party Plaintiff,

vs.

Randy A. Beverly and Donald Godwin,

Third-Party Defendants and Fourth Party Plaintiffs,

vs.

Benjamin J. Creel, individually and As surviving director of Bucksville Farms, Inc.,

Fourth Party Defendant.

MOTION FOR RECONSIDERATION

HORRY COUNTY
12 MAY 24 PM 1:16
MELANIE BUDDIN-WARD
CLERK OF COURT

The Defendant/Third Party Plaintiff, Bucksville Farms, Inc., and Fourth Party Defendant, Benjamin J. Creel, respectfully (collectively referred to hereafter as Defendant) moves the Court to alter or amend the Order dated May 14, 2012, in the following ways:

1. The defendant respectfully moves the Court to vacate the Order and instead to issue an order finding that Section 20 of the sales agreement supplements the common law remedies of the seller but does not supplant those remedies. The Court should rule that the remedies granted to the seller by Section 20 are not exclusive because nothing in the sales agreement makes them exclusive.

Under these circumstances the seller is entitled to recover as damages the difference between the agreed sales price and fair market value at the time set for performance.

2. The defendant respectfully moves the Court to vacate the Order of May 4, 2012 inasmuch as the Order is contrary to the rule in South Carolina that a liquidated damages clause in a real estate sales agreement is not the exclusive remedy of the seller unless the agreement expressly limits the seller to that remedy. For example, in the case of *Bannon v. Knauss,* 282 S.C. 589, 320 S.E.2d 470 (Ct. App. 1984), the Court of Appeals stated the law which applies to the case at bar, as follows:

> In the absence of clear language in the contract to the contrary, a nonbreaching party may normally elect either to pursue a remedy specified in the contract or to sue for any other remedy available for the breach. The presence of a liquidated damages clause in a contract does not in itself limit the remedies available to the nonbreaching party. Rubinstein v. Rubinstein, 23 N.Y.2d 293, 296 N.Y.S.2d 354, 244 N.E.2d 49 (1968); Fletcher v. United States, 303 F.Supp. 583 (N.D.Ind.1967), aff'd, 436 F.2d 413 (7th Cir.1971). However, the parties may agree that the liquidated damages specified in the contract are the sole remedy for breach. Cooley v. Call, 61 Utah 203, 211 P. 977 (1922). If such a limitation is reasonable in the circumstances, the courts will enforce it. Id.; Curran v. Williams, 352 Mich. 278, 89 N.W.2d 602 (1958); cf., Tate v. LeMaster, 231 S.C. 429, 99 S.E.2d 39 (1957); Owens v. Hodges, 26 S.C.L. (1 McMul.) 106 (1841).
>
> In a contract for sale of real estate, a clause providing forfeiture of the earnest money if the purchaser defaults is ordinarily construed as giving the seller the election to disaffirm the contract and retain the earnest money or to affirm it and sue for the purchase price. First Trust & Savings Bank v. Pruitt, et al., 121 S.C. 484, 113 S.E. 469 (1922); Stewart v. Griffith, 217 U.S. 323, 30 S.Ct. 528, 54 L.Ed. 782 (1910); Biscayne Shores, Inc., to Use of New Biscayne Shores Co. v. Cook, 67 F.2d 144 (3d Cir.1933). If the seller affirms the contract and sues for damages, the earnest money becomes a fund out of which the damages may be partially paid if the proven damages exceed the amount of the earnest money. Southeastern Land Fund, Inc. v. Real Estate World, Inc., 237 Ga. 227, 227 S.E.2d 340 (1976).
>
> We find no language in the Bannons' contract which makes retention of the earnest money the seller's exclusive remedy. Nothing suggests the parties intended the forfeiture clause to limit the purchaser's liability for breach. On the contrary, the clause appears to be included for the benefit of the seller and the real estate agent, not the purchaser. We, therefore, see no reason to depart from the ordinary construction given to such clauses.

In the sales agreement at issue in the case at bar, there is no clear language — in fact, nothing at all — which suggests that the Section 20 remedies granted to the seller are exclusive.

The rule of law set forth in *Bannon v. Knauss* was reaffirmed by the Court of Appeals in the case of *Morris Morgan Realty, Inc. v. Johnson,* 288 S.C. 43, 339 S.E.2d 514 (Ct. App. 1985), where the Court stated:

> And in a contract of sale of real estate a clause providing forfeiture of the earnest money if the purchaser defaults, absent clear words to the contrary, is construed as giving the seller the election to disaffirm the contract and retain the earnest money or to affirm it and sue for the purchase price. If the seller affirms the contract and sues for damages, the earnest money becomes a fund out of which the damages may be partially paid if the proven damages exceed the amount of the earnest money. *Bannon v. Knauss,* 282 S.C. 589, 320 S.E.2d 470 (Ct.App.1984).

3. The defendant respectfully moves the Court to vacate the Order of May 4, 2012 inasmuch as the plaintiffs failed to contend that the remedies granted to the seller by Section 20 are exclusive. The Court should not have reached such a decision *sua sponte* where the parties benefitting from the decision did not raise the issue.

STEVENS LAW FIRM, P.C.

BY:_____

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Fourth Party Defendant

May 23, 2010

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO: 2009-CP-26-1909
Randy A. Beverly, LLC and Donald Godwin, LLC, Plaintiffs, vs. Bucksville Farms, Inc., Defendant & Third Party Plaintiff vs. Randy A. Beverly and Donald Godwin, Third Party Defendants & Fourth Party Plaintiffs, vs. Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc., Fourth Party Defendant.	**RETURN TO MOTION FOR RECONSIDERATION**

The Plaintiffs/Third Party Defendants and Fourth Party Plaintiffs, Randy A. Beverly LLC, Donald Godwin, LLC and Randy A Beverly and Donald Godwin (Hereinafter, "Beverly" and "Godwin"), hereby making RETURN to the Motion for Reconsideration filed by Defendant/Third Party Plaintiff Bucksville Farms, Inc. and the Fourth Party Defendant Benjamin J. Creel (Hereinafter, "Creel") would show unto this Honorable Court as follows:

1. The Agreement To Buy And Sell Real Estate In Multiple Closings and the remedies provision in that Agreement (Hereinafter, "the contract") is/are unambiguous AND the **contract was drafted by Creel's attorney**:

In considering the objections/issues raised by Creel's "Motion For Reconsideration," it is important to emphasize the fact that this Court found no ambiguities in the parties' contract. Construction of a clear and unambiguous contract presents a question of law for the Court. US Bank Trust National Association v. Bell, 385 SC 364, 684 SE2d 199 (Ct. App. 2009).

Had the Court found any ambiguities in the contract, those ambiguities must be resolved against the drafter of the contract. WDI Meredith & Co. v. American Telesis, Inc., 359 SC 474, 597 SE2d 885 (2004). (Trial TS Day 1, p. 25, l. 19-22; Trial TS Day 2, p. 71, l. 20 - p. 72, l. 5) "As the drafter of the contract, WDI was in the best position to prevent confusion in the contract's construction and should be the party to suffer from its shortcomings." WDI Meredith & Co. v. American Telesis, Inc., 359 SC 474, 597 SE2d 885 (2004) citing Williams v. Teran, Inc., 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976)

In this case, Creel's attorney drafted the contract. If there are any ambiguities about the availability of common law remedies to supplement Paragraph 20's "Default and Remedy" provisions or as being otherwise available to Creel under the contract, then those issues and ambiguities must be construed against Creel and this Court's Order should stand.

2. The contract's default and remedies provision is exclusive by virtue of the terms of the contract and common law remedies are not available to Creel pursuant to the terms of the **contract drafted by Creel's attorney- and are additionally not available because** CREEL BREACHED THE PARTIES' AGREEMENT:

Creel contends that the "Default and Remedy" provisions in Paragraph 20 of the contract are not the seller's exclusive remedy in this case. He claims that Paragraph 20 "supplements"

the common law remedies but does not supplant them because Paragraph 20 is not an exclusive remedy provision.

Creel attempts to support his contentions by citing to a South Carolina case that holds that if there is no clear language in a contract to the contrary, then a nonbreaching party can seek a remedy provided by the contract or can sue for any other remedy available for breach. Bannon v. Knauss, 282 SC 589, 320 S.E.2d 470 (Ct. App. 1984) Additionally, Creel cites to inapplicable portions of the same decision about "forfeiture" clauses as being usually interpreted to give a nonbreaching seller the right to disaffirm the contract and keep the earnest money or to affirm the contract and sue for the purchase price. *Id*

First, **Paragraph 20 of the subject contract, regarding "Default and Remedy, is an exclusive remedy under the contract and it contains "clear language" to the contrary of the general rule**, taking it out of the scope of the Bannon decision. Paragraph 20 provides that the **seller** for any breach by the purchaser would be entitled to either – (1) retain the Earnest Money "as and for Seller's liquidated damages for purchaser's default" or (2) to "seek specific performance." *PARAGRAPH 20 THEN GOES ON TO SAY that "Notwithstanding the aforesaid, nothing herein shall be deemed to limit Seller's remedies for indemnification under Section 11."* The paragraph goes on to give the **purchasers** the same remedies for a breach by the seller – and to add an additional remedy – **giving purchasers the right to pursue any other remedy at law or in equity if the seller committed an intentional or willful breach.**

A review of the "Default and Remedy" provision of Paragraph 20 shows that it is clearly intended to provide exclusive remedies to the parties. It gives the seller the right to either keep the Earnest Money or seek specific performance but goes on to say that the seller can also seek indemnification per a prior provision of the contract. Paragraph 11 provided that after the

contract was signed, the purchasers had an inspection period during which they could have surveys, inspections, environmental testing, delineations, market feasibility studies or any other investigation that the purchasers deemed reasonably necessary or desirable.

Paragraph 11 required the purchasers to indemnify and hold the seller harmless from any claims of any sort arising from these inspections or investigations and it stated that this right to indemnity would survive closing and the termination of the agreement. **There would be no reason for Paragraph 20 to refer to Paragraph 11 if Paragraph 20 were not intended to be an exclusive remedies provision. Yet, Mr. Creel's lawyer, who drafted the agreement,** said in Paragraph 20: "Notwithstanding the aforesaid" that the seller retained the right to indemnity given by Paragraph 11. Paragraph 11 already said that the right to indemnity would survive closing and/or termination – the only reason to bring it up in Paragraph 20 is that Paragraph 20 was intended to provide the exclusive remedies, so it had to refer back and incorporate Paragraph 11 because "indemnity" is a remedy.

Additionally, Mr. Creel's lawyer specifically gave the purchasers the right to "pursue any other remedy at law or in equity" if the seller committed a willful or intentional breach of the agreement. The inclusion of this language in the remedy section was a deliberate drafting choice. It means that no one had the right to seek any other remedy "at law or in equity" unless a breach was willful and intentional and then it only gave that right to the purchasers. From a common sense perspective, this makes sense. If the purchasers defaulted, the seller would have the land and the ability to sell it later, but if the seller defaulted, the purchasers would not have that cushion, so the agreement gave the purchasers additional security in the event of a willful breach by the seller. If the remedy provision was not meant to be exclusive, then there is no basis for conditioning the purchaser's right to seek those remedies outside the agreement on a willful

or intentional breach by the seller. **The fact that Paragraph 20 speaks to all of the otherwise available common law remedies and then only gives them to the purchasers and then conditions the availability of those remedies on a breach being "willful or intentional" means that the remedy provision of Paragraph 20 was intended to be exclusive.**

"The cardinal rule of **contract** interpretation is to ascertain and give legal effect to the parties' intentions as determined by the **contract** language. Where the **contract's** language is clear and unambiguous, the language alone determines the **contract's** force and effect." Alexander's Land Company, L.L.C. v. M&M&K Corporation, 390 S.C. 582; 703 S.E.2d 207; 2010 S.C. LEXIS 384 (2010) Based upon the plain language of Paragraph 20, the default and remedy provision was intended to be exclusive and does bar the parties from seeking any remedy not provided by the contract.

The Defendant cites to **Bannon v. Knauss, 282 SC 589, 320 S.E.2d 470 (Ct. App. 1984),** a South Carolina case which he claims provides that a liquidated damages clause is not an exclusive remedy unless the agreement expressly limits the party to that remedy. However, the Defendant's position misconstrues the Bannon holding. In Bannon, the purchaser in a real estate deal signed a "written offer on a standard form real estate contract" and the purchaser subsequently breached, refusing to close the deal. The seller sued for specific performance and then amended his complaint to seek damages after he sold the property for $17,300 less to a third party. The purchaser claimed that that the seller's remedy was limited by the clause in the standard contract providing for forfeiture of the Earnest Money to be divided between the seller and his agent. *Id* The trial court disagreed and damages were awarded to the seller.

The SC Court of Appeals upheld the trial court, finding that the remedy provision IN THE STANDARD REAL ESTATE CONTRACT SIGNED AT A REALTOR'S OFFICE was

not intended to be the exclusive remedy. The Court said that **"In the absence of clear language in the contract to the contrary"** that a nonbreaching parties' potential damage award was not limited to the Earnest Money damages. The Court went on to say that the parties could enter a contract that limited damages to the Earnest Money and if it was reasonable under the circumstances, the Court would enforce it. The Court of Appeals examined the contract and found no language that would have made the remedy clause exclusive.

In Bannon, the standard contract was not drafted by a lawyer for either party. **In the present case, the agreement between Creel and Beverly and Godwin contains "clear language to the contrary" and as to the reasonability of enforcing it against Creel (1) The Court's Order never held that Beverly and Godwin breached anything and in fact, Creel was the breaching party and (2) Creel's attorney drafted the contract and crafted the remedy clause so enforcing it against Creel is per se reasonable under South Carolina law.**

The Fourth Circuit discussed the Bannon decision in deciding an appeal in a contract action arising under South Carolina law. Richman Enterprises v. RB Pamplin as Trustee. 1996 U.S. App. LEXIS 4848; 42 ERC (BNA) 1621(4th Cir, 1996) [Unpublished; opinion attached]. In Richman, the parties entered a contract for the sale of commercial property, subject to the seller removing hazardous materials from the property. The contract between the parties specified that if the seller breached, the purchaser could either void the contract or proceed to closing and then sue for damages. After the seller failed to remove the hazardous material by the deadline, the purchaser sued for damages without proceeding to close first. *Id*

At trial in the District of SC, Anderson Division, the Court granted the seller's Motion for Summary Judgment made based upon the remedies provisions of the contract. The Fourth

Circuit affirmed the trial court, holding that under South Carolina law the purchaser could contract and limit its options upon the seller's breach. *Id.*

On appeal, the purchaser, FRI, argued that "under South Carolina law, "remedies provided in a contract are not the exclusive remedies available to the nonbreaching party unless specifically designated as such in the contract." FRI bases its proposition upon the case of Bannon v. Knauss, 282 S.C. 589, 320 S.E.2d 470 (S.C. 1984). And FRI cited a portion of the same passage from Bannon that Creel cites in his Motion For Reconsideration, Paragraph 2. The Fourth Circuit examined the provisions of the Richman contract, and said:

> The drafters clearly crafted section 4.1.1 to provide that the Contract's remedial provisions were not to be considered exclusive where the purchaser allegedly breached. However, it is significant that the drafters chose not to use comparable language when addressing the remedies available to the purchaser upon an alleged breach by the seller.
>
> Richman at p. 6-7, attached.

It is important to note, as discussed above, that in the present case, the contract between Beverly & Godwin and Creel also contained different language in the provisions dealing with remedies available to the buyer and the seller. The contract drafted by Creel's attorney only gave Beverly and Godwin the right to pursue remedies outside the contract, and then only if the seller committed a willful and intentional breach – a fairly high standard.

It is also important to note that in Richman, when the Fourth Circuit was construing the subject contract under South Carolina law after the Bannon decision, the Court stated as follows:

> The parties themselves may fix the remedy for breach in the contract through a liquidated damages provision. Often, the language of the liquidated damages clause is flexibly designed to preserve the option of the non-breaching party to use the liquidated damages remedy or to seek one of the normal remedies for breach. Occasionally, however, the language may tie the parties to the liquidated damages remedy as the exclusive remedy.

> Powell & Rohan, 6A Powell on Property, supra, at 81-215. The court concludes that the drafters did not "flexibly design" the language of section 4.2.2 to permit the purchaser to seek non-contractual remedies. **The court is not bothered by the absence of "magic words" such as, "The remedies enunciated herein shall be the exclusive remedies of the PURCHASER."**
>
> Accordingly, because the drafters knew how to provide for the nonexclusivity of remedies available to the seller for the purchaser's alleged breach, as set forth in section 4.1.1, but purposefully limited the remedies available to the purchaser and declined to include an express non-exclusivity provision, as set forth in section 4.2.2, the court is convinced that the district court correctly concluded that the purchaser was limited to the two remedial options set forth in section 4.2.2.
>
> Richman at p.7, attached.

Similarly, in the present case, Creel's attorney knew how to provide for the nonexclusivity of remedies and did provide that to Beverly and Godwin – in the case of a willful and intentional breach by Creel – but Creel's lawyer did not provide the same to Creel. So in the present case, as in Richman, the drafter of the subject contract didn't "flexibly design" the default and remedy provision to permit Creel to seek remedies outside the contract. And in this case, the drafter of the contract was Creel's attorney.

Additionally, common law remedies are not available to Creel because he breached the contract, which is Beverly and Godwin's position. This Court's Order certainly never held that Beverly and Godwin breached the contract.

For all of the foregoing reasons, this Court's Order was correct and should be affirmed.

3. The Plaintiff raised the issue of the applicability of the default and remedy provisions and that issue was NOT raised by the Court *Sua Sponte*:

The Defendant(s), Creel and Bucksville, also claim that the issues related to Paragraph 20 of the parties' contract were raised by the Court, *Sua Sponte*, and that the Court's Order should

be struck because the party benefitting from the issue did not raise it. This issue is blatantly false as the Plaintiff's Proposed Order raised Paragraph 20's "Default and Remedy" provisions repeatedly. The Proposed Order and/or Research Notes provided to the Court mentioned the provision/made the argument and discussed contract construction. On page 24 of the Proposed Order, the Plaintiff stated the following:

> The Court first finds that pursuant to Paragraph 20 of the parties' contract, if the purchasers, Beverly and Godwin, had defaulted, which the Court does not find, then ***Creel's remedies would be limited to retaining the earnest money as and for Creel's damages or seeking specific performance along with attorney's fees and costs. (See: Defendant's Exhibit 28, Paragraph 20)*** Because Creel sold this property to a third party, he can not seek specific performance. This Contract was signed by Creel, who is a licensed attorney in South Carolina, and would therefore constitute a waiver of his rights to seek any other damages or monetary relief. Therefore, despite all of Creel's claims, cross claims, counter claims and his Third Party Complaint, Creel's monetary damages would be limited to the $50,000.00 Earnest Money deposit along with attorney's fees and costs. However, the Court does not find that Creel is entitled to any relief or remedy in this case.

Hence, it is a matter of record that the Plaintiff's Proposed Order raised the Paragraph 20, "Default and Remedy" provisions limitations argument. The Court's Final Order finds that the Court requested and reviewed all proposed Orders submitted by counsel. The Plaintiff did not raise the Paragraph 20 arguments when the parties were taking testimony or at depositions, because the arguments apply to a remedy and until the testimony was concluded and the issue of the ultimate decision and the remedy was before the Court, the arguments were not particularly applicable. Certainly, the availability of common law damages to Beverly and Godwin was conditioned on a breach by Creel being "willful" and "intentional" and given that standard, a Motion for Summary Judgment would have been no more than a waste of the Court's time, as the Court would have, properly, held such issues to be issues of fact for trial.

However, as noted, Plaintiff did raise the "Default and Remedy" provision of the contract at the appropriate time and the provision certainly came as no surprise to the Defendant as the contract was in the possession of both parties, it was drafted by the Defendant's lawyer, and it was introduced at nearly every deposition and was certainly introduced at trial. Had the Plaintiff's counsel wished to make additional arguments about the Paragraph 20 issue, counsel could certainly have requested the right to do so from the Court. No such request was made by the Defendant whose attorney received the Plaintiff's Proposed Order at the same time, and by the same method that it was transmitted to the Court, as the Rules require. Plaintiff would note that the Special Referee hearing this matter gave the parties' and counsel great leeway, and there is nothing in the record to indicate that had the Defendant's attorney made a request for the right to submit an Amended or Supplemental Order or other material, that the Court would not have granted it. Throughout the process, the Court erred, if at all, on the side of inclusion rather than exclusion.

For all of the foregoing reasons, the Defendant's contention that the Paragraph 20 "Default and Remedy" argument was raised by the Court for the first time must fail. That argument was, as a matter of record, properly and timely made by the Plaintiff at the appropriate point in the proceedings.

3. The Court's Order never found that the Plaintiff(s) breached anything:

The Court's Order, in fact, found that the parties to this action have known each other for quite some time, and it noted the relationship between Beverly and Creel (Uncle and Nephew). On Page 3, the Court's Order states: " In the way of people who know each other well, for quite some time matters were arranged and conducted with more regard to their personal

circumstances than the terms of the agreement. The Court finds that neither the seller nor the buyer abided by the strict terms of the contract for quite some time."

Subsequently, the Court finds that none of the parties committed a willful or intentional breach, and on Page 6, the Order held that "both parties were under certain constraints imposed by a dwindling economy and a very difficult real estate market." In the "Order" provisions, on Page 7, the Court holds that no party under the present facts committed a willful or intentional breach of the subject contract or agreement.

Conclusion:

For all of the foregoing reasons, and for all reasons advanced in the Plaintiff's Proposed Order, which is incorporated herein by reference, this Court's Order should be AFFIRMED and the Defendant's Motion should be DENIED.

This motion will be based upon the record in this cause, including all depositions heretofore taken, upon such Affidavits as may be presented, upon the law of the State of South Carolina, and upon such other and further evidence as may be hereafter presented.

s/J. Dwight Hudson, Esquire

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Dated:
June 1, 2012



RICHMAN ENTERPRISES, LIMITED; FABRIC RESOURCES INTERNATIONAL, LIMITED, Plaintiffs-Appellants, v. R. B. PAMPLIN, in his capacity as Trustee of the R. B. Pamplin Corporation and Subsidiaries Pension Plan (previously known as the Mount Vernon Mills, Incorporated Pension Plan); MOUNT VERNON MILLS, INCORPORATED PENSION PLAN, in its capacity as Administrator of the R. B. Pamplin Corporation and Subsidiaries Pension Plan, Defendants-Appellees, and R. B. PAMPLIN CORPORATION AND SUBSIDIARIES PENSION PLAN, Defendant. RICHMAN ENTERPRISES, LIMITED; FABRIC RESOURCES INTERNATIONAL, LIMITED, Plaintiffs-Appellees, v. R. B. PAMPLIN, in his capacity as Trustee of the R. B. Pamplin Corporation and Subsidiaries Pension Plan (previously known as the Mount Vernon Mills, Incorporated Pension Plan); MOUNT VERNON MILLS, INCORPORATED PENSION PLAN, in its capacity as Administrator of the R. B. Pamplin Corporation and Subsidiaries Pension Plan, Defendants-Appellants, and R. B. PAMPLIN CORPORATION AND SUBSIDIARIES PENSION PLAN, Defendant.

No. 95-1142, No. 95-1216

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1996 U.S. App. LEXIS 4848; 42 ERC (BNA) 1621

December 4, 1995, Argued
March 19, 1996, Decided

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *79 F.3d 1141, 1996 U.S. App. LEXIS 13837.*

PRIOR HISTORY: Appeals from the United States District Court for the District of South Carolina, at Anderson. G. Ross Anderson, Jr., District Judge. (CA-93-3356).

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant property purchaser sought reversal of the summary judgment order issued by the United States District Court for the District of South Carolina, at Anderson, in favor of appellee seller in the purchaser's breach-of-contract lawsuit.

OVERVIEW: A property purchaser challenged a summary judgment favoring a seller in the purchaser's breach-of-contract lawsuit. The court affirmed. The parties had entered into a contract whereby the purchaser would purchase property from the seller, provided that the seller first removed hazardous materials from it. The contract had a clause under which the parties agreed that if the seller breached, the purchaser could either void the contract or proceed to closing and then sue for damages. When the seller failed to remove the hazardous materials from the property by the deadline specified in the contract, the purchaser sued for damages, even though it had not first proceeded to closing as the contract specified. A district judge granted the seller's summary judgment motion. On appeal, the court affirmed, holding that the purchaser could, if it desired limit, what otherwise would have been its available options upon the seller's breach, and the contract clause in question was unambiguous.

OUTCOME: The decision granting summary judgment to the seller was affirmed. The contract between the parties expressly stated that if the seller breached, the purchaser's remedies were limited to rescinding the contract

or proceeding to closing and then suing for damages. As the purchaser did neither, it therefore lacked a contractual remedy.

CORE TERMS: purchaser, seller, environmental, earnest money, hazardous materials, remedies available, liquidated damages, hazards, null and void, declare, testing, drafters, remedial, closing date, environmental conditions, negligent misrepresentation, inspection, refund, contractual, breached, brochure, matter of law, material fact, summary judgment, justifiably relied, disclose, vendor, breach of contract, remedy provided, genuine issue

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1] A federal appellate court reviews a federal district court's grant of summary judgment de novo. Summary judgment is appropriate, *Fed. R. Civ. P. 56(c)* specifies, if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The movant is entitled to summary judgment where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there being no genuine issue for trial. The nonmovant, however, is entitled to the most favorable inferences that may reasonably be drawn from the forecast evidence, but it cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.

Civil Procedure > Summary Judgment > Standards > General Overview
Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview
[HN2] The essence of the inquiry the court must make when it is confronted with a summary judgment motion is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Civil Procedure > Federal & State Interrelationships > Erie Doctrine
Torts > Business Torts > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview
[HN3] Pursuant to South Carolina law, an entity may bring a common law action in tort for negligent misrepresentation. A seller does have a duty to disclose an artificially created, and concealed, unstable condition.

Torts > Business Torts > Fraud & Misrepresentation > Negligent Misrepresentation > Elements
Torts > Business Torts > Fraud & Misrepresentation > Negligent Misrepresentation > Remedies
[HN4] If the damage alleged in a lawsuit is a pecuniary loss, the plaintiff must allege and prove the following essential elements to establish liability for negligent misrepresentation: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

Torts > Business Torts > Fraud & Misrepresentation > Negligent Misrepresentation > Elements
Torts > Negligence > Defenses > Contributory Negligence > Limits on Application > Intentional Torts
[HN5] In determining whether a plaintiff claiming negligent misrepresentation justifiably relied upon the representation, there is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence.

COUNSEL: ARGUED: Howard Jay Schwartz, PORZIO, BROMBERG & NEWMAN, Morristown, New Jersey, for Appellants.

James Henry Watson, Jr., LEATHERWOOD, WALKER, TODD & MANN, Greenville, South Carolina, for Appellees.

ON BRIEF: Diane Mulligan Siana, PORZIO, BROMBERG & NEWMAN, Morristown, New Jersey, for Appellants.

Michael J. Giese, Robert D. Moseley, Jr., LEATHERWOOD, WALKER, TODD & MANN, Greenville, South Carolina, for Appellees.

JUDGES: Before MURNAGHAN and MICHAEL, Circuit Judges, and MICHAEL, Senior United States District Judge for the Western District of Virginia, sitting by designation.

OPINION

PER CURIAM:

This matter comes before the court upon the appeal of an Order by the United States District Court for the District of South Carolina, Anderson Division, Judge G. Ross Anderson, Jr., finding that the appellants were not entitled to recover damages [*2] for an alleged breach of contract where the terms of a contract provide that if the appellees fail to fulfill certain contractual obligations, then the remedial provisions of the contract limit the appellants either to declare the contract null and void or to proceed to closing and sue for damages, and the appellants did not proceed to closing. We agree with the district court.

I.

The appellant, Fabric Resources International, Ltd. ("FRI"), is a textile manufacturer [1] with manufacturing facilities located in New Jersey and Rock Hill, South Carolina. In 1990, FRI decided to expand its operations and began to search for another facility in South Carolina. FRI was shown property located in Whitmire, South Carolina (the "Property"). The Property consisted of a one-story facility which had been used in the manufacturing sector for most of its thirty-year existence. The Property was then owned by the appellee, Mount Vernon Mills, Incorporated ("Mount Vernon"). [2] Mount Vernon provided FRI with a brochure outlining the characteristics and condition of the Property. FRI claims that the brochure failed to identify Cone Mills' ownership of the Property and that the brochure expressly stated: [*3] "ENVIRONMENTAL CONSIDERATIONS -- NO KNOWN OR EXPECTED ENVIRONMENTAL HAZARDS."

1 FRI manufactures greige -- a raw silk -- and other finished goods. The court assumes that FRI is either owned by, controlled by, or affiliated with the co-appellant, Richman Enterprises, Ltd. The court will refer to the appellants collectively as "FRI."

2 The Property had previously been owned by several manufacturing entities: Cone Mills built the property in 1962 and operated thereon until 1976; Riegel Textile Corporation owned the Property from 1976 until 1985; Mount Vernon acquired the property in 1985 and carried on business there until 1987; Kings Mill Realty acquired the Property in 1987, but Mount Vernon reacquired the Property by foreclosure in 1989.

On February 14, 1991, the parties executed a "Contract of Purchase and Sale" (the "Contract") to govern FRI's purchase of the Property. Because the court's analysis turns on the language of the contractual provisions at issue, the court will devote considerable space in [*4] setting forth the relevant provisions:

> 1.5: *Closing. Consummation of this Contract, hereinafter referred to as the "Closing," shall be held on April 1, 1991 . . .*
>
> 1.8.5: *PURCHASER to Inspect Property (Environmental Inspection).* PURCHASER, at PURCHASER'S expense, shall have the right to obtain an environmental inspection (which inspection may include on-site testing, procedures, and sampling to determine the identification of Hazardous Materials (as defined in Section 2.1.13) on or in close proximity to the Subject Property, the cost of removal of same, and the source of same) of the Subject Property by licensed professionals and contractors. In the event said inspection discloses the presence of any Hazardous Materials, notice of the presence of Hazardous Materials shall be given to SELLER or SELLER'S agent by PURCHASER in writing on or before Closing. Upon such notice, SELLER shall endeavor to remove from the Subject Property prior to Closing such Hazardous Materials in accordance with all federal, state, and local statutes, regulations, ordinances, and other laws. *If SELLER is unable to remove such Hazardous Materials to the reasonable satisfaction* [*5] *of PURCHASER within a reasonable time (not to exceed thirty days (30) after receipt of said notice), PURCHASER may declare this Contract null and void and receive a full refund of the Initial Payment and its Earnest Money in accordance with Section 4.2. If the Contract is declared null and void in accordance with this section, SELLER shall reimburse PURCHASER for one-half (1/2) of any and all reasonable fees, expenses, and costs, not to exceed Ten Thousand and no/100 Dollars ($ 10,000.00), incurred by PURCHASER regarding the environmental inspection(s) of the Subject Property.*

2.1: *SELLER'S Representations, Warranties, and Covenants.* As an inducement to PURCHASER to enter into this Contract, SELLER, after appropriate inquiry and investigation and with the knowledge that PURCHASER is purchasing the Subject Property in full reliance thereon, represents, warrants, and covenants that:

. . .

2.1.13: SELLER has not caused or permitted the Subject Property to be used to generate, manufacture, refine, transport, treat, store, handle, dispose, transfer, produce, or process Hazardous Materials, or other dangerous, regulated or toxic substances, or solid [*6] wastes, except in compliance with all applicable Federal, State, and local laws or regulations, and has not caused or permitted and has no knowledge of the release, as defined in the [CERCLA] of any Hazardous Materials, or other dangerous, regulated, or toxic substances, on or in close proximity to SELLER'S Subject Property. . . .

2.1.14: No representation or warranty in this agreement nor any statement or certificate furnished or to be furnished to the PURCHASER pursuant hereto, or in connection with this transaction contains or will contain any untrue statement of a material fact, or omits or will omit to state a material fact regarding SELLER or the Subject Property which would reasonably affect a prudent investor's decision to purchase any of the assets being sold to PURCHASER herein.

4.2.2: If, subsequent to the execution of this contract, SELLER breaches any of the provisions in Section 1 of this Contract or any of the SELLER'S representations and warranties contained in Section 2 of this Contract are proven false, *then the PURCHASER shall have the option to (i) declare this Contract to be null and void, receive a full refund of the Earnest* [*7] *Money with any accrued interest thereon, and enforce any additional remedies available to PURCHASER at law or in equity, or (ii) to proceed to Closing and reserve such rights and remedies as may be available to PURCHASER at law or in equity.*

4.3.1: *Default in Performance.* Without limiting any other rights PURCHASER may have at law or in equity, in the event of a material breach by SELLER in the performance of this Contract which is discovered by the PURCHASER *after the Closing*, PURCHASER shall be entitled to recover the payments theretofore made and to take any other action permitted at law or in equity for the enforcement of PURCHASER'S rights under said Contract.

5.12: *Governing Law.* This Contract shall be governed by and construed in accordance with the laws of the State of South Carolina, notwithstanding any choice-of-law rules thereof.

(emphasis added).

FRI retained Westinghouse Engineering and Geotechnical Services, Inc. ("Westinghouse") to conduct an environmental survey of the Property. The results of the Westinghouse tests revealed large quantities of certain hazardous materials (dichloroethene, tetrachloroethene, and trichloroethene). [*8] [3] Mount Vernon retained Sirrine Environmental Consultants ("Sirrine") to conduct a second survey of the groundwater on the Property. The Sirrine survey revealed higher levels of the same contaminants and additionally revealed the presence of tetrachloroethylene. The evidence suggests that the levels of these identified contaminants exceeded the permissible levels specified by relevant environmental laws, including the federal so-called "Safe Drinking Water Act," *42 U.S.C. §§ 300f et seq. (1986)*, the South Carolina so-called "Pollution Control Act," *S.C. Code Ann. § 48-1-10*, and the South Carolina Water Classifications and Standards, S.C. Code Regs. 61-68.

3 The parties do not appear to dispute that these materials constitute "hazardous materials" as that term is defined in the Contract.

The closing date specified in the Contract, April 1, 1991, elapsed without the parties effecting a closing and without the parties agreeing upon an extension. In May 1991, FRI notified Mount Vernon that FRI considered

Mount [*9] Vernon to be in breach of the Contract and that FRI intended to seek monetary damages. In October 1991, Mount Vernon returned the earnest money to FRI and characterized the Contract as "terminated by mutual assent." [4] On October 10, 1991, FRI responded that it was "incorrect for [Mount Vernon] to state that the parties have terminated the contract by mutual assent. It is also incorrect for [Mount Vernon] to imply that the purchaser's remedies are limited to refund of the deposit under these circumstances."

4 FRI accepted the return of the earnest money and endorsed the check, but noted on the check that its acceptance of the earnest money did not prejudice its right to pursue any other legal remedy provided by law, including breach of contract.

FRI filed suit seeking to recover compensatory damages under the theory that Mount Vernon breached the Contract by failing to deliver the Property in accordance with the provisions of the Contract relating to environmental conditions and by making certain false representations [*10] relating to the disposal and release of certain hazardous materials on the Property. FRI brought also a claim sounding in tort based upon negligent misrepresentation and nondisclosure. Mount Vernon moved the district court for summary judgment on all claims. [5] The district court granted Mount Vernons motion and concluded that FRI could not declare the contract void *and* sue for breach. The district court concluded also that FRI could not prove justifiable reliance upon the alleged negligent misrepresentation or nondisclosure of Mount Vernon and, consequently, granted Mount Vernon's motion for summary judgment on the tort claim. FRI now prosecutes this appeal.

5 The defendant had filed a counterclaim in the action but had agreed to a dismissal. Accordingly, Judge Anderson granted the plaintiffs' motion for summary judgment on the counterclaim.

II.

[HN1] We review the district court's grant of summary judgment *de novo*. *Farwell v. Un, 902 F.2d 282, 287 (4th Cir. 1990)*. Summary judgment is appropriate "if [*11] there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The movant is entitled to summary judgment "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there [being] no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp. , 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. The nonmovant, however, is entitled to the most favorable inferences that may reasonably be drawn from the forecast evidence, *Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985)*, but it "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another," *Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985)*. [HN2] The essence of the inquiry the court must make is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

A. *Contract Claims*

This case requires this court to make a threshold determination of what legal remedies are available [*12] to FRI pursuant both to the terms of the Contract and to the law of the State of South Carolina. The district court concluded that the Contracts remedial provisions limit FRI to two alternative remedies: either (1) to declare the Contract null and void and a return of the earnest money or (2) to affirm the Contract, proceed to the closing and sue for damages. We agree.

The court finds it helpful to summarize its understanding of the interplay between the relevant provisions of the contract. Pursuant to section 1.8.5, FRI could conduct environmental testing. If the testing revealed levels of hazardous materials in excess of the levels allowed by applicable environmental regulations, then the FRI must notify Mount Vernon. Within thirty days of FRI's notification, Mount Vernon must reduce the levels of hazardous materials to levels allowable pursuant to these regulations and reasonably satisfactory to FRI. If Mount Vernon cannot reduce the levels accordingly, then FRI *may* declare the contract null and void, receive its earnest money (and any interest thereon as allowed under section 4.2), and receive reimbursement from Mount Vernon for one-half of its fees incurred in conducting [*13] the environmental testing, up to a limit of $ 10,000.00.

Pursuant to sections 2.1.13 and 2.1.14, Mount Vernon may make certain representations concerning the characteristics or condition of the Property. If any material representation is subsequently proven false, then FRI has two options under section 4.2.2: (1) to declare the contract null and void and receive any earnest money and interest thereon, or (2) to close the purchase and seek its remedy at law or in equity.

FRI argues that the district court erred in holding that FRI was not entitled to seek money damages, as opposed to exercising what FRI characterizes as "non-exclusive" contractual remedies. FRI claims that under South Carolina law, "remedies provided in a con-

tract are not the exclusive remedies available to the nonbreaching party unless specifically designated as such in the contract." FRI bases its proposition upon the case of *Bannon v. Knauss, 282 S.C. 589, 320 S.E.2d 470 (S.C. 1984)*. FRI recites the following passage from *Bannon*:

> In the absence of clear language in the contract to the contrary, a nonbreaching party may normally elect either to pursue a remedy specified in the contract or to sue for any other [*14] remedy available for the breach. The presence of a liquidated damages clause in a contract does not in itself limit the remedies available to the nonbreaching party.

320 S.E.2d at 472 (citations omitted). FRI, however, fails to account for the first sentence of the very next paragraph of the *Bannon* opinion: "In a contract for sale of real estate, a clause providing for forfeiture of the earnest money if the purchaser defaults is ordinarily construed as giving the seller the election to disaffirm the contract and retain the earnest money or to affirm it and sue for the purchase price." *Id.* (citing *First Trust & Savings Bank v. Pruitt, et al., 121 S.C. 484, 113 S.E. 469 (S.C. 1922); Stewart v. Griffith, 217 U.S. 323, 54 L. Ed. 782, 30 S. Ct. 528 (1910); Biscayne Shores, Inc. to Use of New Biscayne Shores Co. v. Cook, 67 F.2d 144 (3d Cir. 1933))*; [6] *see generally* Richard R. Powell & Patrick J. Rohan, 6A *Powell on Real Property: Vendors and Purchasers P 822[2] at 81-214 (1995) ("Upon breach by one of the parties, [either] the remedy of specific performance or the alternative remedy of rescission and restitution will more typically be chosen rather than settling for a judgment that recognizes the breach* [*15] *but awards only nominal damages as compensation for the breach."). Even where it is the purchaser* which seeks to recover upon the alleged breach by the *seller*, we are unable to perceive the necessity of departing from this well established premise of South Carolina law, especially where, as here, the contractual terms reflect that well-established premise. [7]

6 In Bannon, the seller initially sought specific performance of the contract, but later mitigated damages by selling the property at a price less than that contemplated by the parties' contract and then sought damages for the difference between the contract price and the actual price received. The court held that the seller was entitled to pursue damages. The court concluded that there was no provision in the contract that made "retention of the earnest money the seller's exclusive remedy" and that "nothing suggested that the parties intended the forfeiture clause to limit the purchaser's liability for breach." *Id.* Thus, the seller in *Bannon* had expressly affirmed the contract and was properly entitled to pursue damages.

[*16]

7 *See generally* Powell & Rohan, 6A *Powell on Real Property: Purchaser and Vendor, supra*, P 882[2] at 81-223 ("Although the liquidated damages agreement can apply to a breach of contract by either the purchaser or the seller, usually the liquidated damages clause is intended to function only in the case of the purchaser's breach.") In the instant case, however, the drafters departed from the "usual" application of the liquidated damages clause, and expressly provided a liquidated damages clause applicable to an alleged breach of contract by the seller.

FRI argues also that the court erred in concluding that the remedies provided pursuant to section 4.2.2 of the Contract are *exclusive*. FRI relies upon the evolutionary history related to section 4.1.1 to prove its point. FRI's argument proves too much however. Section 4.1.1 provides that

> If, subsequent to the execution of this Contract, PURCHASER breaches [the Contract] . . . SELLER shall have the right to declare this Contract to be null and void and retain from the Earnest Money its actual damages caused by PURCHASER, [*17] *but shall not be precluded from pursuing any other rights SELLER might have at law or in equity.*

As an initial matter, the court notes that the remedial provision of section 4.1.1 is triggered when it is the *purchaser* who has allegedly breached the Contract. Of course, in the instant action it is the *seller* who has allegedly breached the Contract, and, therefore, section 4.1.1 is inapplicable to the substantive issue of this case. However, the court is influenced by the inclusion of section 4.1.1 in the Contract. The drafters clearly crafted section 4.1.1 to provide that the Contract's remedial provisions were not to be considered exclusive where the purchaser allegedly breached. However, it is significant that the drafters chose not to use comparable language when addressing the remedies available to the purchaser upon an alleged breach by the seller. [8]

8 The court finds it inherently proper to closely scrutinize the language of these respective provisions:

> The parties themselves may fix the remedy for breach in the contract through a liquidated damages provision. Often, the language of the liquidated damages clause is flexibly designed to preserve the option of the non-breaching party to use the liquidated damages remedy or to seek one of the normal remedies for breach. Occasionally, however, the language may tie the parties to the liquidated damages remedy as the exclusive remedy.

Powell & Rohan, 6A *Powell on Property*, *supra*, at 81-215. The court concludes that the drafters did not "flexibly design" the language of section 4.2.2 to permit the purchaser to seek non-contractual remedies. The court is not bothered by the absence of "magic words" such as, "The remedies enunciated herein shall be the exclusive remedies of the PURCHASER."

[*18] Accordingly, because the drafters knew how to provide for the nonexclusivity of remedies available to the seller for the purchaser's alleged breach, as set forth in section 4.1.1, but purposefully limited the remedies available to the purchaser and declined to include an express non-exclusivity provision, as set forth in section 4.2.2, the court is convinced that the district court correctly concluded that the purchaser was limited to the two remedial options set forth in section 4.2.2. [9] The court now turns its attention to which of these two remedial options FRI chose.

9 Similarly, section 4.3.1 is inapplicable yet instructive. Section 4.3.1 provides that the purchaser shall be entitled to recover all payments tendered *and* may take any other action permitted at law or in equity for an alleged breach by the seller which is discovered by the purchaser *after the Closing*. Section 4.3.1 is inapplicable to the instant action because FRI did not proceed to closing. However, section 4.3.1 is instructive because it is again apparent to the court that the drafters of the contract knew how to specify whether contractual remedies were to be nonexclusive.

[*19] The district court stated that FRI "has already taken its remedy in the contract." This court assumes that the district court concluded that FRI took its remedy in the Contract by accepting the proffered refund of its earnest money. The district court obviously concluded that the FRI's acceptance of its earnest money evinced its intention of rescinding the Contract and taking the applicable remedy as provided by the Contract -- "a full refund of the Earnest Money." FRI argues, however, that it "never declared the Contract null and void." FRI argues that when it became apparent that Mount Vernon could not remedy the environmental condition of the Property, then FRI "declared a breach and advised Mt. Vernon that FRI would seek to recover all damages caused by the breach." The court is called upon to determine which remedial option of section 4.2.2 -- rescission or affirmation of the Contract -- is implicated by FRI's behavior.

The court agrees with the district court that FRI rescinded the Contract. In order to recover monetary damages for a breach of the Contract, FRI was required to "proceed to Closing and reserve such rights and remedies as may be available to PURCHASER at law or [*20] in equity." Section 1.5 of the Contract specified April 1, 1991, as the Closing date. It is undisputed that the parties did not close on April 1, 1991, and there is no evidence in the record that the parties expressly extended the closing date. Additionally, section 5.6 of the Contract provided that "time is of the essence." However, the court acknowledges that parties may waive a "time is of the essence" provision expressly by modifying the terms of the contract or implicitly by extending the time of performance. *See generally 77 Am. Jur. 2d: Vendor and Purchaser, § 80* at 266 (1975). Accordingly, the court discounts the binding effect of the "time is of the essence" provision because the parties may have implicitly extended the time of performance by continuing to negotiate after the stipulated closing date of April 1, 1991. Thus, while the closing date of April 1, 1991, elapsed without the parties effecting the closing and while there was a "time is of the essence" provision resident in the Contract, the court concludes that FRI did not necessarily elect to rescind the Contract by failing to proceed to closing on April 1, 1991.

However, FRI did expressly decline to effect [*21] the closing at a later date. By letter dated July 26, 1991, Mount Vernon's representative, E. G. Cochrane II ("Cochrane"), wrote to counsel for FRI:

> Please let us know at once whether your client wishes to proceed to closing. We would like to have the closing on or before Tuesday, August 20, 1991. If your client does not want to do this, and desires to get out of the purchase contract, we

> have no objection, and we will refund the deposit (with its accrued interest).

By letter dated June 17, 1991, [10] counsel for FRI responded: "This law firm is studying the remedies available to Purchaser. In the interim, we wanted to inform you that *Purchaser has no intention 'to proceed to closing'* as provided in your letter of July 26, 1991." (emphasis added). Accordingly, by examining the totality of FRI's conduct during the period from February 14, 1991 to sometime after July 26, 1991 -- (1) the elapsing of the closing date without effecting a closing; (2) the May 15, 1991 declaration that FRI considered Mount Vernon to be in breach; and (3) the post-July 26, 1991 explicit refusal "to proceed to closing" -- the court concludes that FRI rescinded the Contract between it and [*22] Mount Vernon because FRI expressly elected not to avail itself of its only alternative remedy: "to proceed to Closing and reserve such rights and remedies as may be available to PURCHASER at law or in equity."

> 10 The court notes the obviously incorrect date of June 17, 1991. The letter dated June 17, 1991, recites the date of Mount Vernon's letter -- July 26, 1991.

B. *Tort Claims*

FRI appeals also the district court's denial of its claim sounding in tort for negligent misrepresentation or nondisclosure. The district court concluded that FRI could not demonstrate that it justifiably relied upon the representations of Mount Vernon concerning the environmental condition of the Property in deciding to pursue the purchase. Again, we agree.

[HN3] Pursuant to South Carolina law, an entity may bring a common law action in tort for negligent misrepresentation. *Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (S.C. 1990)*; *Winburn v. Insurance Co. of North America, 287 S.C. 435, 339 S.E.2d 142 (S.C. Ct. App. 1985)*. "A seller does [*23] have a duty to disclose 'an artificially created, and concealed, unstable condition.'" *Greenwood Mills, Inc. v. Russell Corp., 981 F.2d 148, 150 (4th Cir. 1992)* (quoting *Lawson v. Citizens & S. Nat'l Bank of S.C., 259 S.C. 477, 193 S.E.2d 124, 128 (S.C. 1972)*); *see also Lawson, 193 S.E.2d at 128* ("Where material facts are accessible *to the vendor only*, and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser, the vendor is bound to disclose such facts and make them known to the purchaser.") (emphasis added). In *AMA Management Corp. v. Strasburger, 309 S.C. 213, 420 S.E.2d 868, 872 (1992)*, the Court of Appeals of South Carolina set forth the requisite elements of a claim of negligent misrepresentation:

> [HN4]
>
> If the damage alleged is a pecuniary loss, the plaintiff must allege and prove the following essential elements to establish liability for negligent misrepresentation: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant [*24] breached that duty by failing to exercise due care; (5) *the plaintiff justifiably relied on the representation*; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

Id. (emphasis added). [HN5] In determining whether the plaintiff justifiably relied upon the representation, "there is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." *Id.*

In the instant action, the court can ascertain only two possible instances of alleged misrepresentation. First, FRI claims that Mount Vernon did not disclose in the brochure that Cone Mills had previously owned the Property. Second, FRI claims that Mount Vernon made several misrepresentations concerning the environmental condition of the Property. FRI claims that a false statement -- "ENVIRONMENTAL CONSIDERATIONS -- NO KNOWN OR EXPECTED ENVIRONMENTAL HAZARDS" -- was purposefully included in the brochure to induce FRI to purchase the property. FRI claims also that Cochrane advised FRI that "there were no environmental problems with the Property." The court cannot conclude [*25] that FRI has demonstrated that it justifiably relied upon either of these two representations to its detriment.

First, the matter of Cone Mills' prior ownership of the property was a fact that should have been readily discovered by FRI if it had exercised due diligence in checking certain public records. Second, although Mount Vernon represented that there were no known environmental hazards or problems, the evidence clearly suggests that FRI did not rely upon this representation to its

detriment. Indeed, section 1.8.5 of the Contract indicates that the drafters anticipated that there may exist concealed environmental problems, unknown to either party, that could be revealed only upon detailed environmental inspection. The Contract provided the mechanism by which FRI could "conduct a thorough environmental investigation and avoid the losses it might well have sustained if it had prematurely entered into a purchase agreement." *Greenwood Mills, 981 F.2d at 150.* If FRI had relied completely upon Mount Vernon's representations of environmental condition, then presumably FRI would not have bargained for the inclusion of section 1.8.5 in the Contract and would not have incurred the [*26] costs of independent environmental testing. Additionally, the court notes that FRI, like Russell Corporation in *Greenwood Mills*, is a textile manufacturer and should have been aware that latent environmental hazards could exist on the Property and that such environmental hazards may be unknown to the present owner. Accordingly, we will affirm the district court because we find, as a matter of law, that FRI has failed to demonstrate that it justifiably and detrimentally relied upon the alleged misrepresentations of Mount Vernon.

III.

Under the circumstances of this case, the court is convinced, as apparently was the district court, that FRI received exactly that for which it bargained. Mount Vernon made certain representations concerning the environmental condition of the Property; however, the terms of the Contract anticipated that there may exist latent environmental hazards. Accordingly, the Contract provided FRI with an "escape" if subsequent environmental testing revealed hazards which Mount Vernon could not remedy within thirty days. If Mount Vernon could not remedy the revealed environmental hazards, then FRI was entitled either to rescind the Contract and receive its earnest [*27] money *or* to proceed to Closing and reserve its rights and remedies available at law or in equity. The purchase scenario unfolded consistent with the contingencies contemplated in the Contract: the environmental testing revealed hazards that Mount Vernon could not satisfactorily remedy within thirty days; FRI did not proceed to close on the established closing date and expressly declined to close at a later date; and, Mount Vernon considered FRIs refusal to Close as a rescission of the Contract and accordingly returned FRI's earnest money plus interest. FRI has taken its remedy contemplated by the Contract. FRI cannot now look to the courts to provide an extra-contractual remedy for which it did not bargain. Accordingly, the judgment of the district court shall be, and it hereby is,

AFFIRMED.

S&ME

November 21, 2005

Southern Asphalt
Post Office Box 1549
Conway, South Carolina 29528

Attention: Mr. Jamie McLain

Reference: **Proposal for Wetland Delineation**
280 Acre Highway 701 South Tract
Horry County, South Carolina
S&ME Proposal No. 1633-0550-05

Dear Mr. McLain:

S&ME, Inc. is pleased to submit this proposal for a wetland delineation related to the referenced project. This proposal outlines the description of the property, our proposed scope of services, as well as a schedule and fee for these services.

Background Information

Based on the information (aerial photograph with property boundaries depicted) you delivered to our office on November 21, 2005, we understand that the subject property is approximately 280 acres, and is located east of and adjacent to SC Highway 701 South in Horry County, South Carolina (see Figure 1).

Scope of Services

S&ME will conduct a wetland determination / delineation for the proposed project site. The purpose of the wetland determination / delineation is to identify the presence and location of jurisdictional and non-jurisdictional wetland areas within the boundaries of the proposed project

S&ME, Inc.
231 Labonte Street
Conway, South Carolina 29526

(843) 347-7800
(843) 347-7848 fax
www.smeinc.com

DEFENDANT'S EXHIBIT 1

area. Jurisdictional wetlands are regulated by the U.S. Army Corps of Engineers (USACE). Our approach to performing the approximation includes:

1. Assess and document site conditions as to the presence and/or absence of wetland areas. Wetland areas will be determined utilizing the three parameter approach (hydric soils, hydrophytic vegetation and wetland hydrology), using the most current regional indicators of jurisdictional hydrology set forth in the 1987 United States Army Corps of Engineers (USACE) Wetland Delineation Manual.
2. Delineate wetland areas using pink flagging marked with "WETLAND BOUNDARY" in black.
3. Identify and map the approximate upland/wetland boundaries.
4. Identify and map areas that are considered to be waters of the United States (i.e. streams, creeks and jurisdictional ditches) under the jurisdiction of the USACE.
5. Provide map showing approximate location of wetland areas to surveyors.
6. Meet USACE agent on site to verify delineation.
7. Prepare and submit a wetland determination report of findings to the USACE Charleston District for approval.

Please note that the final wetland determination is contingent upon USACE approval. Clearing, site preparation or construction activities should not begin prior to the receipt of the USACE wetland certification letter.

Services outside of the scope of this proposal include:

- **Project boundary and wetland boundary surveying by R.L.S.**
- **Wetland permitting**
- **Mitigation design**
- **Threatened & endangered species surveys**

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Work Schedule

The estimated time frame for completion of the fieldwork and USACE submittal is two to three weeks. Due to scope and personnel outside of S&ME, the time frame associated with surveying and USACE approval can not be determined. However, the typical time frame for the USACE Certification is approximately four weeks after submittal of the Registered Land Surveyor's (RLS) wetland delineation and boundary plat.

Compensation for Services

S&ME, Inc. will provide the environmental services related to the determination / delineation of the wetland areas associated with the referenced project for the fixed fee price of **$3,750.00**. Our proposal cost includes all personnel time, travel, expenses and materials needed to complete the services outlined in the proposal and is based on our current knowledge of the site. We request payment be provided at the time of authorization if possible.

Proposal Acceptance

Agreement for Services, Form Number AS 041 is attached and is incorporated as a part of this proposal. Please indicate your acceptance of our proposal by signing the back of both copies of the form and returning one copy to our office.

If you elect to accept our proposal by issuing a purchase order, then please specifically reference this proposal number and date. Your purchase order will be an acceptance of our Agreement of Services and an authorization to proceed with the performance of our services. However, the terms and conditions included in any purchase order shall not apply, as our Agreement is for services which are not compatible with purchase order agreements.

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Closure

S&ME appreciates this opportunity to provide this proposal for environmental services related to this project. If you have any questions or require additional information, please do not hesitate to contact us at (843) 347-7800 with any questions.

Sincerely,

S&ME, Inc.

Charles Oates
Natural Resources Project Manager

Thomas C. Still, P.E.
Branch Manager

Attachments: Agreement for Services Form AS-041

0618



SCALE:	NTS
SOURCE: NAPP AERIAL PHOTOGRAPH	
SOURCE DATE:	1999
DATE:	November, 2005

S&ME
ENVIRONMENTAL SERVICES
ENGINEERING • TESTING

SITE AERIAL PHOTOGRAPH
280 Acre Hw 701 South Property
Horry County, South Carolina

PROPOSAL NO. 1633-0550-05 0619

FIGURE NO
1

S&ME

AGREEMENT FOR SERVICES

Form AS-041

Date: November 21, 2005	Job Number:
S&ME, Inc. (hereafter Consultant)	Client Name: Southern Asphalt (hereafter Client)
Address: 231 Labonte Street City: Conway State: South Carolina Zip: 29526	Address: Post Office Box 1549 City: Conway State: SC Zip: 29528
Telephone: (843) 347-7800 Fax: (843) 347-7848	Telephone: (843) 347-7263 Fax: (843) 347-9467

PROJECT

Project Name: 280 Acre Highway 701 South Property / Wetland Delineation

Project location: (Street Address) Highway 701 South

City: Conway State: SC Zip:

SERVICES TO BE RENDERED

Proposal Number: 1633-0550-05 dated: November 21, 2005 is incorporated into this Agreement For Services. This Agreement For Services is incorporated into the above Proposal.

WITNESSETH: WHEREAS, Client desires to contract with Consultant to furnish Services to Client's project identified above.

WHEREAS, Consultant is engaged in the business of providing Services and related labor, materials, and equipment. (Herein individually and collectively referred to as Services.)

NOW, THEREFORE, in consideration of the Mutual Covenants and Promises included herein, Client and Consultant agree as follows:

1. **OFFER ACCEPTANCE:** Client hereby accepts Consultant's offer to provide Services as described in Consultant's proposal for Services referenced under "SERVICES TO BE RENDERED" and agrees that such Services and any additional Services authorized by Client shall be governed by this Agreement. **If Client requests Consultant to start performing Services prior to receipt of this Agreement, Client agrees that Consultant's beginning of performance is based on reliance that Client will accept and execute this Agreement for Services. If Client requests Consultant to start performing Services prior to the execution of this Agreement For Services by the Client, then such request is an acceptance of this Agreement for Services to the same extent as if Client had executed this Agreement.** Should Client choose to accept this Agreement for Services through the use of a Purchase Order, all preprinted terms and conditions on Client's purchase order are inapplicable to this Agreement as this Agreement is for Services that are not compatible with purchase order agreements. Unless this offer is previously accepted, it will be withdrawn automatically at 5:00 pm EST, ninety (90) days from the date of issue.

2. **CONTRACT DOCUMENTS:** "Contract Documents" shall mean this document as well as the proposal listed under "SERVICES TO BE RENDERED" each of which is incorporated into the other.

3. **PAYMENT:** Client will pay Consultant for Services and expenses in accordance with the Contract Documents. If prices for Services are not established under SERVICES TO BE RENDERED then the current fee schedule in effect for the location providing the Services shall be used as the amount to be paid by Client for Services provided. Consultant will submit progress invoices to Client monthly and a final invoice upon completion of its Services. Payment is due upon receipt of the invoice unless otherwise agreed to in writing prior to the submittal of the invoice. Invoices are past due 30 calendar days after the date of the invoice. Past due amounts are subject to a late payment fee of one and one-half percent per month (18 percent per annum) or the highest amount allowed by applicable law on the outstanding balance, whichever is less. Attorney's

fees and other costs incurred in collecting past due amounts shall be paid by Client. The Client's obligation to pay under this Agreement is in no way dependent upon the Client's ability to obtain financing, payment from third parties, approval of governmental or regulatory agencies, or upon the Client's successful completion of the Project.

Consultant shall be paid in full for all Services rendered under this Agreement, including any additional Services authorized by Client in excess of those stated in this Agreement. However, if Client objects to all or any portion of any invoice, Client shall so notify Consultant in writing of the objection within fifteen (15) days from date of invoice, give reasons for the objection, and pay that portion of the invoice not subject to Client's objection. Client and Consultant will informally discuss Client's objections to the invoice and attempt to reach a resolution mutually acceptable to Client and Consultant. If Client or Consultant determine that an informal resolution is not possible then that party shall so state in writing to the other party and initiate a final resolution pursuant to the Dispute Resolution provisions of this Agreement for Services. If the Client does not object in writing to all or a portion of the invoice within fifteen (15) calendar days from date of invoice then the full amount of the invoice is due and payable and all objections are waived.

Without incurring any liability to the Client, Consultant may either suspend or terminate this Agreement if Client fails to pay any undisputed invoice amounts within 60 calendar days of the invoice date, or if Client states its intention not to pay forthcoming invoices. Such suspension or termination will not waive any other claim Consultant may have against Client. Following such suspension or termination, Consultant may resume work by mutual agreement with Client after payment by Client of all outstanding invoiced amounts and collection expenses. In case of such suspension or termination, Client waives all claims for damages or delay as a result of such suspension or termination.

Any invoices that are not paid within thirty (30) calendar days of Client's receipt of letter from Consultant demanding payment of the invoices or a collection action notification by an attorney or collection agency shall constitute a release of Consultant by Client from any and all claims whatsoever, including, but not limited to, tort or contractual claims which Client may have against Consultant for Services performed under said invoice(s).

4. **STANDARD OF CARE:** Consultant and its agents, employees and subcontractors shall endeavor to perform Services for Client using that degree of care and skill ordinarily exercised, under similar circumstances, by others ordinarily providing Services in the same or similar locality as the project at the time Services are provided. In the event any portion of the Services fails to substantially comply with this standard of care obligation and Consultant is promptly notified in writing prior to one year after completion of such portion of the Services, Consultant will re-perform such portion of the Services, or if re-performance is impractical, Consultant will refund the amount of compensation paid to Consultant for such portion of the Services. **THE REMEDIES SET FORTH HEREIN ARE EXCLUSIVE.** This **STANDARD OF CARE** is in lieu of all other warranties and standards of care. No other warranty or standard of care, expressed or implied, is made or intended by this Agreement, or by the proposal, by oral communications, or by any representations made regarding the Services included in this Agreement.

5. **LIMITATION OF LIABILITY: CONSULTANT AND CLIENT MUTUALLY AGREE THAT THE SERVICES PROVIDED PURSUANT TO THIS AGREEMENT INVOLVE RISKS OF LIABILITY WHICH CANNOT BE ADEQUATELY COMPENSATED FOR BY THE PAYMENTS CLIENT WILL MAKE UNDER THIS AGREEMENT. THEREFORE, THE TOTAL CUMULATIVE LIABILITY OF CONSULTANT, ITS AGENTS, EMPLOYEES, AND SUBCONTRACTORS WHETHER IN CONTRACT, TORT INCLUDING NEGLIGENCE (WHETHER SOLE OR CONCURRENT), PROFESSIONAL ERRORS OR OMISSIONS, BREACH OF WARRANTY (EXPRESS OR IMPLIED), NEGLIGENT MISREPRESENTATION, AND STRICT LIABILITY, OR OTHERWISE ARISING OUT OF, CONNECTED WITH, OR RESULTING FROM THE SERVICES PROVIDED PURSUANT TO THIS AGREEMENT SHALL NOT EXCEED THE TOTAL FEES PAID BY CLIENT OR FIFTY THOUSAND DOLLARS, WHICHEVER IS GREATER. CLIENT AGREES THAT PAYMENT OF THE LIMIT OF LIABILITY AMOUNT IS THE SOLE REMEDY TO THE EXCLUSION OF ALL OTHER REMEDIES AVAILABLE FOR THE TOTAL CUMULATIVE LIABILITY OF CONSULTANT, ITS AGENTS, EMPLOYEES, AND SUBCONTRACTORS ARISING OUT OF, CONNECTED WITH OR RESULTING FROM THE SERVICES PROVIDED PURSUANT TO THIS AGREEMENT. AT ADDITIONAL COST, CLIENT MAY OBTAIN A HIGHER LIMIT OF LIABILITY PRIOR TO COMMENCEMENT OF SERVICES. THE ADDITIONAL COST IS COMPENSATION TO CONSULTANT FOR INCREASING THE CONSULTANT'S LIMIT OF LIABILITY. THE ADDITIONAL COST IS NOT AN INSURANCE COST. THE HIGHER LIMIT OF LIABILITY APPLIES ONLY IF MUTUALLY AGREED TO IN WRITING BY CONSULTANT AND CLIENT AT THE TIME CLIENT ACCEPTS THIS AGREEMENT FOR SERVICES AND THE ADDITIONAL COST PAID WITHIN SEVEN DAYS OF THE DATE OF THE MUTUAL AGREEMENT TO INCREASE THE LIMIT OF LIABILITY. CLIENT MAY AT THE TIME OF EXECUTION OF THIS AGREEMENT ELECT TO INCREASE THE LIMIT OF LIABILITY AMOUNT TO FIVE HUNDRED THOUSAND DOLLARS UPON THE PAYMENT OF FIVE HUNDRED DOLLARS OR TO ONE MILLION DOLLARS UPON THE PAYMENT OF ONE THOUSAND DOLLARS IN ADDITIONAL COST AS CONSIDERATION FOR THE HIGHER LIMIT OF LIABILITY. CONSULTANT'S CONSIDERATION TO CLIENT FOR THIS LIMIT OF LIABILITY IS SPECIFICALLY REFLECTED IN CONSULTANT'S FEES FOR SERVICES UNDER THIS AGREEMENT AS SUCH FEES ARE LESS THAN CONSULTANT WOULD BE PAID FOR SERVICES UNDER THIS AGREEMENT WITHOUT A LIMITATION OF LIABILITY. CLIENT MUST ELECT THE HIGHER LIMIT OF LIABILITY BY CHECKING AND INITIALING BELOW:**
I HEREBY AGREE TO PAY ☐ $500.00 TO INCREASE THE LIMIT OF LIABILITY TO $ 500,000. _____ (INITIAL)
I HEREBY AGREE TO PAY ☐ $1000.00 TO INCREASE THE LIMIT OF LIABLITY TO $ 1,000,000 _____ (INITIAL)
CLIENT IS CAUTIONED THAT THIS IS A LIMITED LIABILITY AGREEMENT LIMITING THE LIABILITY OF CONSULTANT; THEREFORE, CLIENT IS ADVISED TO CAREFULLY REVIEW CLIENT'S RISKS OF LIABILITY RELATED TO THIS CONTRACT AND ADDRESS SUCH RISKS THROUGH CLIENT'S INSURANCE OR OTHER MEANS.

6. **DISCLAIMER OF CONSEQUENTIAL DAMAGES:** In no event shall Consultant or Client be liable to the other for any special, indirect, incidental or consequential loss or damages, including, but not limited to, lost profits and loss of use arising from or related to Services provided by Consultant.

7. **REPORTS:** In connection with the performance of the Services, Consultant shall deliver to Client one or more reports or other written documents reflecting Services provided and the results of such Services. All reports and written documents delivered to Client are Instruments reflecting the Services provided by Consultant pursuant to this Agreement and are made available for Client's use subject to the limitations of this Agreement. Instruments of Service provided by Consultant to Client pursuant to this Agreement are provided for the exclusive use of Client, and Client's agents and employees for the Project and are not to be used or relied upon by third parties or in connection with other projects. Subject to the authorized use of Client, and Client's agents, and employees, all Instruments of Service, other written documents, all original data gathered by Consultant and work papers produced by Consultant in the performance of or intrinsic to the Services included in the Services are, and shall remain, the sole and exclusive property of Consultant. Unless a shorter period is stated in the Instrument of Service, all Instruments of Service provided pursuant to this Agreement will be valid for a period of three years from the date of this Agreement after which the Instruments of Service are void and can no longer be used or relied upon by anyone for any purpose whatsoever. The period for which an Instrument of Service is valid may be extended by mutual written consent of the Consultant and Client.

   Documents that may be relied upon by Client are limited to the printed copies (also known as hardcopies) that are signed or sealed by Consultant. Files in electronic media format of text, data, graphics or of other types that are furnished by Consultant to Client are only for the convenience of Consultant and Client. Any conclusion or information obtained or derived from such electronic files will be at the Client's or other user's sole risk. Data stored in electronic format can deteriorate or be modified inadvertently or otherwise. Consultant shall not be responsible to maintain documents stored in electronic media. When transferring documents in electronic media format, Consultant makes no representations as to long-term compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by Consultant.

   Consultant shall not be responsible for any alterations, modifications, or additions made in the electronic data by the Client or any reuse of the electronic data by the Client or any other party for this project or any other project without Consultant's written consent. Client shall indemnify, and hold Consultant harmless against any claims, damages or losses arising out the reuse of the electronic data without Consultant's consent or arising out of alterations, modifications, or additions to the electronic data made by anyone other than Consultant.

   Any Instruments of Service, including reports, generated as part of this Agreement are intended solely for use by Client and shall not be provided to any other person or entity without Consultant's written authorization. To the fullest extent permitted by law, Client shall indemnify and hold harmless Consultant from and against any action or claim brought by any person or entity claiming to rely on the information or opinions contained in the Instrument of Service without Consultant's written authorization.

8. **SAFETY:** Consultant will maintain a safety program for its employees. Consultant specifically disclaims any authority or responsibility for general job safety and for the safety of persons who are not employed by Consultant. Should Client, or third parties, be conducting activities on the Site, then each shall have responsibility for their own safety and compliance with applicable safety requirements.

   Field Personnel: The presence of Consultant's field personnel, either full-time or part-time, may be for the purpose of providing project administration, assessment, observation or field testing of specific aspects of the project as authorized by Client. Should Client retain the Services of a Contractor(s) for the project, Consultant is not responsible in any way whatsoever for the supervision or direction of the work of the Contractor(s), its' employees or agents. The presence of Consultant's field personnel for project administration, assessment, observation or testing shall not relieve the Contractor(s) of his responsibility for performing work in accordance with the project plans and specifications.

   If a Contractor (not a subcontractor of Consultant) is involved in the project, Client agrees, in accordance with generally accepted construction practices, that the Contractor will be solely responsible for working conditions on the jobsite, including safety of all persons and property during performance of the work, and compliance with OSHA regulations. These requirements will apply continuously and will not be limited to normal working hours. It is agreed that Consultant will not be responsible for job or jobsite safety on the project, other than for Consultant's employees and subcontractors, and that Consultant does not have the duty or right to stop the work of the Contractor.

9. **CONFIDENTIALITY:** Subject to any obligation Consultant may have under applicable law or regulation, Consultant will endeavor to release information relating to the Services only to its employees and subcontractors in the performance of the Services, to Client's authorized representative(s) and to persons designated by the authorized representative to receive such information.

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10. **SAMPLES:** Unless otherwise requested, test specimens or samples will be disposed of immediately upon completion of tests and analysis. Upon written request, Consultant will retain samples for a mutually acceptable storage charge and period of time. In the event that samples contain or may contain hazardous materials, Consultant shall, after completion of testing and at Client's expense, return such samples to Client or make samples available for disposal by Client's agent. Client recognizes and agrees that Consultant is acting as a bailee and at no time assumes title to said samples.

11. **INVENTIONS:** Any and all inventions or discoveries relating to the Services, including improvements and modifications to existing products or processes made or conceived by Consultant or its employees during the term of this Agreement are and shall remain the sole and exclusive property of Consultant.

12. **REPRESENTATIONS OF CLIENT:** Client warrants and covenants that sufficient funds are available or will be available upon receipt of Consultant's invoice to make payment in full for the Services rendered by Consultant. Client warrants that all information provided to Consultant regarding the project and project location are complete and accurate to the best of Client's knowledge.

13. **CLIENT OBLIGATIONS:** Client agrees to furnish Consultant, its agents, employees, and subcontractors a right-of-entry and any authorizations needed for Consultant to enter onto the project site to perform the Services included in this Agreement. Consultant will take reasonable precautions to minimize damage to the Project Site from Consultant's activities and use of equipment. Client recognizes that the performance of the Services included in this Agreement may cause alteration or damage to the site. Client accepts the fact that this is inherent in the work and will not look to Consultant for reimbursement or hold Consultant liable or responsible for any such alteration or damage. Should Client not be owner of the property, then Client agrees to notify the owner of the aforementioned possibility of unavoidable alteration and damage and to indemnify, and hold harmless Consultant against any claims and claims related costs including attorney's fees by the owner or persons having possession of the site through the owner which are related to such alteration or damage.

14. **UTILITIES:** Client agrees to disclose the identity of all utilities serving the Project Site and the presence and accurate location of hidden or obscure man-made objects known to Client relative to field tests or boring locations. Client agrees to indemnify and hold harmless Consultant from all claims, suits, losses, personal injuries, death, and property liability including costs and attorney's fees resulting from damage or injury to utilities or subterranean structures (pipes, tanks, etc.) arising from the performance of Consultant's Services when the existence of such are not called to Consultant's attention or the location not correctly identified in information furnished Consultant.

15. **CERTIFICATIONS:** Client agrees not to require that Consultant execute any certification with regard to work performed, tested or observed under this Agreement unless : 1) Consultant believes that it has performed sufficient work to provide a sufficient basis to issue the certification; 2) Consultant believes that the work performed, tested or observed meets the criteria of the certification; and 3) Consultant has reviewed and approved in writing the exact form of such certification prior to execution of this Agreement. Any certification by Consultant is limited to an expression of professional opinion based upon the Services performed by the Consultant, and does not constitute a warranty or guarantee, either expressed or implied.

16. **FAILURE TO FOLLOW RECOMMENDATIONS:** The Client agrees that it would be unfair to hold the Consultant liable for problems that may occur if the Consultant's recommendations are not followed. Accordingly, the Client waives any claim against the Consultant, and agrees to indemnify, and hold harmless the Consultant from any claim or liability for injury or loss that results from failure to implement the Consultant's recommendations or from implementation of the Consultant's recommendations in a manner that is not in strict accordance with them.

17. **TERMINATION:**

For Convenience - Upon written notice, Client or Consultant may terminate the performance of any further Services included in this Agreement if the terminating party determines termination is in the terminating party's interest. Upon dispatch or receipt of the termination notice, Consultant shall stop work on all Services included in this Agreement and deliver any Instruments of Service complete at that time to Client and Client shall pay Consultant within 30 days for all Services performed up to the dispatch or receipt of the termination notice. Upon Termination for Convenience, Consultant and Client shall have no further rights or remedies other than those included in this paragraph.

For Cause –In the event of material breach of this Agreement, the party not breaching the Agreement may terminate it upon 10 days written notice delivered or mailed to the other party, which notice must identify the material breach. The Agreement may not be terminated for cause if the breaching party cures the breach within ten days of receipt of the written notice. Upon Termination for Cause, Consultant shall stop work on all Services included in this Agreement and deliver any instruments of service complete at that time to Client and Client shall pay Consultant within 30 days for all Services performed up to the termination. Upon Termination for Cause, Consultant and Client shall have no further rights or remedies other than those included in this paragraph.

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18. **UNFORESEEN CONDITIONS OR OCCURRENCES:** If, during the performance of service hereunder, any unforeseen hazardous substance, material, element or constituent or other unforeseen conditions or occurrences are encountered which, in Consultant's judgment significantly affects or may affect the services, the risk involved in providing the Services , or the recommended scope of Services , Consultant will notify Client thereof. Subsequent to that notification, Consultant may: (a) If practicable, in Consultant's judgment and with approval of Client, complete the original scope of Services in accordance with the procedures originally intended in the Proposal; (b) Agree with Client to modify the scope of Services and the estimate of charges to include the previously unforeseen conditions or occurrences, such revision to be in writing and signed by the parties and incorporated herein; or (c) Terminate the Services effective on the date of notification pursuant to the terms of TERMINATION FOR CONVENIENCE. Client is responsible for reporting any releases of hazardous substances to appropriate government agencies as required by law. Client waives any claim against Consultant and will indemnify and hold Consultant harmless from any claim, injury or loss arising from the discovery of unforeseen hazardous substances.

19. **FORCE MAJEURE:** Neither party shall be deemed in default of this Agreement to the extent that any delay or failure in the performance of an obligation (other than the payment of money) results from any causes beyond its reasonable control and without its fault or negligence. For this purpose, such acts or events shall include, but are not limited to, storms, floods, unusually severe weather, epidemics, civil disturbances, war, riot, strikes, lockouts or other industrial disturbances, and inability within reasonable diligence to supply personnel, information or material to the project. In the event that such acts or events occur, it is agreed that both parties shall attempt to overcome all difficulties arising and to resume as soon as reasonably possible the normal pursuit and schedule of the Services covered by this Agreement. The time for performance shall be extended for a period equal to the delay.

20. **INSURANCE:** Consultant shall maintain at its own expense the following insurance subject to normal industry exclusions: (1) Worker's Compensation Insurance and Employer's Liability Insurance. (2) Commercial Automobile Liability Insurance with limits of $1,000,000.00. (3) Commercial General Liability Insurance with limits of $1,000,000.00. (4) Professional Liability Insurance. Certificates can be issued upon request identifying details and limits of coverage.

21. **INDEMNITY:** Client agrees to indemnify, and save harmless Consultant, its agents, employees, and subcontractors from and against any and all losses, liabilities, and costs and expenses of every kind (including cost of defense, investigation, settlement, and reasonable attorney's fees), which Consultant, its agents, employees, and subcontractors may incur, become responsible for, or pay out as a result of bodily injuries (including death) to any person, damage to any property, or both, to the extent caused by Client's negligence or willful misconduct.

    Subject to the Limitation of Liability in Article 5, Consultant agrees to indemnify, and save harmless Client from and against any and all losses, liabilities, and costs and expenses of every kind (including cost of defense, investigation, settlement, and reasonable attorney's fees) which Client may incur, become responsible for, or pay out as a result of bodily injuries (including death) to any person, damage to any property, or both, to the extent caused by Consultant's negligence or willful misconduct.

    Subject to the Limitation of Liability in Article 5, Client and Consultant shall, in the event of liability arising out of their joint negligence or willful misconduct indemnify, and save harmless each other in proportion to their relative degree of fault.

22. **DISPUTE RESOLUTION:** Consultant may in Consultant's sole discretion pursue collection of past due invoices by litigation in a court of competent jurisdiction. Other than Consultant's collection of past due invoices, in the event of a dispute between Consultant and Client with regard to any matter arising out of or related to this Agreement, the Parties will use their best efforts to resolve the dispute amicably within fifteen (15) calendar days. If the dispute cannot be settled amicably, the Parties agree that the dispute shall be subject to mediation in accordance with the mediation rules of the American Arbitration Association or similar Dispute Resolution organization. Mediation in good faith shall be a condition precedent to the institution of legal or equitable proceedings by either party. Once a party files a request for mediation with the other party and with the American Arbitration Association, or similar Dispute Resolution organization, the parties agree to commence such mediation within thirty (30) days of the filing of the request. The costs of such mediation shall be borne equally by both parties. If the dispute is not resolved after such mediation, then the dispute shall be resolved by litigation in a court of competent jurisdiction.

23. **CAPTIONS AND HEADINGS:** The captions and headings throughout this Agreement are for convenience and reference only, and the words contained therein shall in no way be held or deemed to define, limit, describe, modify, or add to the interpretation, construction, or meaning of any provision of or scope or intent of this Agreement.

24. **SEVERABILITY:** If any provision of this Agreement, or application thereof to any person or circumstance, shall to any extent be invalid, then such provision shall be modified if possible, to fulfill the intent of the parties as reflected in the original provision, the remainder of this Agreement, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and each provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

25. **ASSIGNMENT AND SUBCONTRACTS:** Neither party may assign this Agreement, in whole or in part, without the prior written consent of the other party, except for an assignment of proceeds for financing purposes. Consultant may subcontract for the Services of others without obtaining Client's consent if Consultant deems it necessary or desirable to have others perform Services.

26. NO WAIVER: No waiver by either party of any default by the other party in the performance of any provision of this Agreement shall operate as or be construed as a waiver of any future default, whether like or different in character.

27. LAW TO APPLY: The validity, interpretation, and performance of this Agreement shall be governed by and construed in accordance with the laws of the state in which the project is located.

CONSULTANT HEREBY ADVISES CLIENT THAT ITS PERFORMANCE OF THIS AGREEMENT IS EXPRESSLY CONDITIONED ON CLIENT'S ASSENT TO THE TERMS AND CONDITIONS DETAILED HEREIN.

ENTIRE AGREEMENT – This Agreement represents the entire understanding and agreement between the parties hereto relating to the Services and supersedes any and all prior negotiations, discussions, and Agreements, whether written or oral, between the parties regarding same.

TO THE EXTENT that any additional or different Provisions conflict with the Provisions of this Agreement, the Provisions of this Agreement shall govern. No amendment or modification to this Agreement or any waiver of any provisions hereof shall be effective unless in writing, signed by both parties.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representative.

CLIENT: Southern Asphalt	**S&ME, Inc.**
BY: _____ (Signature)	**BY:** TStill (Signature)
_____ (Print Name / Title)	Thomas C. Still / Branch Manager (Print Name / Title)
DATE: _____	**DATE:** 4/22/05
PROPOSAL NUMBER : 1633-0550-05	

Client's FAXED or DIGITAL signature to be treated as original signature.

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FAX COVER SHEET

BEVERLY CONSTRUCTION CO INC.

601 JOUSTING COURT
CONWAY, SC 29526
Phone (843) 347-6333
Fax (843) 347-4688

Date: 23 November 2005
Attention: Ben Caul
Fax Number: 397-3776
248-2583
From: Beverly Construction Co. Inc.
Number of Pages: 6 total

Additional Comments: Ben, this is one proposal for survey work and one for wetland delineation. Jamie said he now thought it would be Monday before he ~~received~~ Receives the othe bids
Have a nice Thanksgiving

Randy

DEFENDANT'S EXHIBIT

Carolina Land Surveyors, LLC
3083 Unit B Hwy 701 N Conway, SC 29526
PO Box 1377 Conway, SC 29528
(843) 365-1975 Fax 365-1945

Proposal for Land Surveying Services

Requested By: Jamie McLain

Project Name: TMS #169-00-03-027 (+/- 280 ACRES)

Project Location: Hwy 701 S

Owner of Record: Bucksville Farms Inc

Owner Address: PO Box 259 Conway, SC 29528

Services :

Boundary Survey

Fee:

$ 10,400.00

Sean T. Williams
11/23/05

April 18, 2006

Mr. Benjamin Creel
PO Box 289
Conway, South Carolina 29528

Re: Highway 701 Tract
Horry County, South Carolina
TMS # 169-00-03-027

Dear Mr. Creel:

This letter will serve as notice that our intention is to close on the first 50 acre portion of property within 30 days from the date of this letter. We have concluded our preliminary wetland evaluation and would like to close the portion of the tract closest to Conway along US Highway 701. Our preliminary wetland evaluation has been submitted to the US Army Corps of Engineers and is awaiting a field audit. It is believed that this 50 acre portion of the tract contains no wetland, however if the US Army Corps of Engineers does not agree and the tract does contain wetlands; then we will take a credit on the next 50 acre closing for the monetary difference. The surveyor is working on the separating this 50 acre tract and as soon as we have a map we will provide it to you. This 30 day notification is part of the agreement made between Donald Godwin & Randy Beverly (Buyers) and Benjamin Creel (Seller). Should you have any questions or require further information, please contact me at (843) 347-6333.

Sincerely,

Donald Godwin & Randy Beverly

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Regulatory Division – Charleston District – Corps of Engineers 69-A Hagood Avenue, Charleston, SC 29403

REQUEST FOR WETLAND DETERMINATION

Date: 4/19/06 County: Horry Total Acreage ofTract: 230 Ac
Project Name (if applicable): Highway 701 South Tract

Property Owner (name, address, phone):	Agent/Developer/Engineer (name, address, phone):
Southern Asphalt PO Box 1549 Conway, S.C. 29528	Charles Oates S&ME Inc. 1330 Highway 501 Business Conway, SC 29526 (843) 347-7800

Status of Project (check one):
☐ On-going site work for development purposes
☒ Development in planning stages
☐ No specific development plans at this time

Project Type – Indicate the proposed use of the land in question of, if no specific work is planned at present, indicate the current zoning or land use at the site. (check one)
☒ Residential ☐ Commercial ☐ Mixed Use (Residential + Commercial)
☐ Industrial ☐ Agriculture ☐ Public Works
☐ Silivculture ☐ Aquaculture ☐ Other:

Information Required to Accompany Request – Check the items submitted – forward as much information as is available. At a minimum, the first two items must be forwarded:

☒ Accurate Location Map (from County Map, USGS Quad Sheet, etc.)
☐ Survey Plat of Tax Map of Property in Question
☒ Soil Survey Sheet (from USDA-NRCS) or Aerial Photo (from County Assessor's Office or other source). Property boundaries should be shown on the soil survey/photo.
☒ Topographic Survey
☐ Conceptual Site Plan for the Overall Development

Endangered Species Evaluation:
Has the site been evaluated for the presence of federally protected (endangered, threatened, or proposed) species and/or any proposed or designated critical habitat for such species? ☐ YES ☒ NO

If YES, has this evaluation been coordinated with the US Fish and Wildlife Service (FWS)? ☐ YES ☒ NO

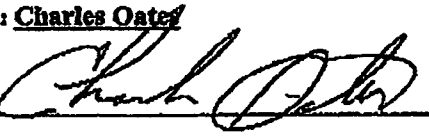
If coordination has occurred, please provide the FWS Log number and enclose a copy of the report:
FWS Log Number: N/A
Copy of Report enclosed: ☐ YES ☒ NO

If the evaluation has not been coordinated with the US FWS, enclose a copy of your report findings.

IMPORTANT NOTE: Legible printed name and signature required. The person signing this form must be the present property owner or have the specific authority of the property owner to authorized Corps of Engineers employees or their agents to enter onto the property for on-site investigations if such is deemed necessary. Do not sign this form unless you are the owner, or have the specific authority of the property owner.

DEFENDANT'S EXHIBIT

PRINTED NAME of person signing this form, below: Charles Oates

Signature of property Owner or Authorized Agent: 

0629 Copies of this form may be obtained from the Charleston District web site at: http://www.sac.usace.army.mil/permits/form_JDRequest.pdf

FILE COPY

DATA FORM

ROUTINE WETLAND DETERMINATION
(1987 USACE Wetlands Delineation Manual)

Project Site:	Highway 701 South Tract	Date:	4/10/06
Applicant/Owner:	Applicant: Southern Asphalt	County:	Horry
Investigator:	Charles Oates (S&ME,Inc.)	State:	SC
Do normal circumstances exist on the site?	Yes☒ No☐	Community ID:	Upland Forest
Is the site significantly disturbed (Atypical Situation)?	Yes☐ No☒	Transect ID:	
Is the area a potential problem area? (if needed, explain on reverse)	Yes☐ No☒	Plot ID:	1

VEGETATION (Note those species observed to have morphological adaptations to wetlands with an *)

Dominant Plant Species	Stratum	Indicator	Dominant Plant Species	Stratum	Indicator
1. Pinus taeda	Tree	FAC	9.		
2. Quercus nigra	sap	FAC	10.		
3. Quercus virginiana	sap	FACU	11.		
4. Quercus falcata	sap	FACU	12.		
5. Cornus florida	sap	FACU	13.		
6. Prunus serotina	Tree	FACU	14.		
7. Sassafras albidium	Sap.	FACU	15.		
8. Ptredium aquilinum	Herb	FACU	16.		

Percent of Dominant Species that are OBL, FACW or FAC: (except FAC-)
Include species noted (*) as showing morphological adaptations to wetlands.

Describe Morphological Adaptations: N/A

Remarks: Hydrophytic vegetation was not present.

HYDROLOGY

☐ Recorded Data (Describe in Remarks)
- ☐ Stream, Lake or Tide Gage
- ☐ Aerial Photograph
- ☐ Other

☐ No Recorded Data Available

Field Observations:

Depth of Surface Water: _____ (in.)

Depth to Free Water in Pit: _____ (in.)

Depth to Saturated Soil: >30 (in.)

Wetland Hydrology Indicators: N/A

- ☐ Inundated
- ☐ Saturated in Upper 12 Inches
- ☐ Water Marks
- ☐ Drift Lines
- ☐ Sediment Deposits
- ☐ Drainage Patterns in Wetlands
- ☐ Oxidized Root Channels in Upper 12 Inches
- ☐ Water-Stained Leaves
- ☐ Local Soil Survey Data
- ☐ Other (Explain in Remarks)

Remarks: Jurisdictional hydrology was not present.

DEFENDANT'S EXHIBIT 5

ROUTINE WETLAND DETERMINATION
(1987 USACE Wetlands Delineation Manual)

Project Site:	Highway 701 South Tract	Date:	4/10/06
Applicant/Owner:	Applicant: Southern Asphalt	County:	Horry
Investigator:	Charles Oates (S&ME,Inc.)	State:	SC
Do normal circumstances exist on the site?	Yes☒ No☐	Community ID:	Wetland
Is the site significantly disturbed (Atypical Situation)?	Yes☐ No☒	Transect ID:	
Is the area a potential problem area? (if needed, explain on reverse)	Yes☐ No☒	Plot ID:	3

VEGETATION (Note those species observed to have morphological adaptations to wetlands with an *)

	Dominant Plant Species	Stratum	Indicator
1.	Taxodium distichum	Tree	OBL
2.	Nyssa slyvatica	Tree	FACW
3.	Liriodendron tulipefera	Tree	FAC
4.	Persea borbonia	Tree	FACW
5.	Acer rubrum	Tree	FAC
6.	Ilex glabra	Shrub	FACU
7.	Lyonia lucidia	Shrub	FACW
8.	Cyrilla racemiflora	Shrub	FACW
9.			
10.			
11.			
12.			
13.			
14.			
15.			
16.			

Percent of Dominant Species that are OBL, FACW or FAC: (except FAC-) 100%
Include species noted (*) as showing morphological adaptations to wetlands.

Describe Morphological Adaptations: Buttressed and multi-stemed trunks.

Remarks: Hydrophytic vegetation criteria was met.

HYDROLOGY

Recorded Data (Describe in Remarks)
- ☐ Stream, Lake or Tide Gage
- ☐ Aerial Photograph
- ☐ Other

☐ No Recorded Data Available

Field Observations:

Depth of Surface Water: _____ (in.)

Depth to Free Water in Pit: _____ (in.)

Depth to Saturated Soil: +/- 2 (in.)

Wetland Hydrology Indicators: N/A

- ☐ Inundated
- ☒ Saturated in Upper 12 Inches
- ☒ Water Marks
- ☒ Drift Lines
- ☐ Sediment Deposits
- ☒ Drainage Patterns in Wetlands
- ☒ Oxidized Root Channels in Upper 12 Inches
- ☒ Water-Stained Leaves
- ☒ Local Soil Survey Data
- ☐ Other (Explain in Remarks)

Remarks:Hydrology criteria was met.

DEFENDANT'S EXHIBIT 6

OMB NO. 2502-0265

A.

U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT

SETTLEMENT STATEMENT

B. TYPE OF LOAN

1. ☐ FHA 2. ☐ FmHA 3. ☐ CONV. UNINS. 4. ☐ VA 5. ☐ CONV. INS.

6. FILE NUMBER: GODWIN 19838

7. LOAN NUMBER:

8. MORTGAGE INS CASE NUMBER:

C. *NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(POC)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.*

1.0 388 (GODWIN 19838.PFD/GODWIN 19838)

D. NAME AND ADDRESS OF BUYER	E. NAME AND ADDRESS OF SELLER	F. NAME AND ADDRESS OF LENDER
DONALD D. GODWIN, LLC RANDY A. BEVERLY, LLC 51.08 ACRES, BUCKS TWP HORRY COUNTY, SC 29526	BUCKSVILLE FARMS, INC.	

G. PROPERTY LOCATION	H. SETTLEMENT AGENT 57-0544617	I. SETTLEMENT DATE
51.08 ACRES, BUCKS TWP HORRY COUNTY, SC 29526 Horry County, South Carolina	RICHARD N. BOOTH PLACE OF SETTLEMENT 300 BEATY STREET CONWAY, SC 29526	June 8, 2006

J. SUMMARY OF BUYER'S TRANSACTION		K. SUMMARY OF SELLER'S TRANSACTION	
100. GROSS AMOUNT DUE FROM BUYER:		**400. GROSS AMOUNT DUE TO SELLER:**	
101. Contract Sales Price	850,000.00	401. Contract Sales Price	850,000.00
102. Personal Property		402. Personal Property	
103. Settlement Charges to Buyer (Line 1400)	2,715.50	403.	
104.		404.	
105.		405.	
Adjustments For Items Paid By Seller in advance		*Adjustments For Items Paid By Seller in advance*	
106. City/Town Taxes to		406. City/Town Taxes to	
107. County Taxes to		407. County Taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. GROSS AMOUNT DUE FROM BUYER	852,715.50	*420. GROSS AMOUNT DUE TO SELLER*	850,000.00
200. AMOUNTS PAID BY OR IN BEHALF OF BUYER:		**500. REDUCTIONS IN AMOUNT DUE TO SELLER:**	
201. Deposit or earnest money	50,000.00	501. Excess Deposit (See instructions)	
202. Principal Amount of New Loan(s)		502. Settlement Charges to Seller (Line 1400)	71,688.00
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204. EXCHANGE MONEY BEVERLY	410,733.44	504. Payoff of first Mortgage	
205. EXCHANGE MONEY GODWIN	370,584.88	505. Payoff of second Mortgage	
206.		506. Deposit retained byseller	50,000.00
207.		507. RELEASE FEE to LARRY W. PAUL/BUCKSVILLE F	250,000.00
208.		508.	
209.		509.	
Adjustments For Items Unpaid By Seller		*Adjustments For Items Unpaid By Seller*	
210. City/Town Taxes to		510. City/Town Taxes to	
211. County Taxes to		511. County Taxes to	
212. Assessments to		512. Assessments to	
213.		513.	
214. FINDER FEE	17,000.00	514. FINDER FEE	17,000.00
215.		515.	
216.		516.	
217.		517. #73942277 - RELEASE to CONWAY NATIONAL BA	75,000.00
218.		518. #80035077 to CONWAY NATIONAL BANK/BUCKS	25,000.00
219.		519.	
220. TOTAL PAID BY/FOR BUYER	848,318.32	*520. TOTAL REDUCT. AMT DUE SELLER*	488,688.00
300. CASH AT SETTLEMENT FROM/TO BUYER:		**600. CASH AT SETTLEMENT TO/FROM SELLER:**	
301. Gross Amount Due From Buyer (Line 120)	852,715.50	601. Gross Amount Due To Seller (Line 420)	850,000.00
302. Less Amount Paid By/For Buyer (Line 220)	(848,318.32)	602. Less Reductions Due Seller (Line 520)	(488,688.00)
303. *CASH (X FROM) (TO) BUYER*	4,397.18	603. *CASH (X TO) (FROM) SELLER*	361,312.00

0632

DEFENDANT'S EXHIBIT

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L. SETTLEMENT CHARGES

	PAID FROM BUYER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
700. TOTAL COMMISSION Based on Price $ 850,000.00 @ 8.0000 % 68,000.00		
Division of Commission (line 700) as Follows:		
701. $ 68,000.00 to BETHEA, TALBOTT & CO AGENCY		
702. $ to		
703. Commission Paid at Settlement		68,000.0
704. to		
800. ITEMS PAYABLE IN CONNECTION WITH LOAN		
801. Loan Origination Fee % to		
802. Loan Discount % to		
803. Appraisal Fee to		
804. Credit Report to		
805. Lender's Inspection Fee to		
806. Mortgage Ins. App. Fee to		
807. Assumption Fee to		
808.		
809.		
810.		
811.		
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE		
901. Interest From to @ $ /day (days %)		
902. MIP Totlns. for LifeOfLoan months		
903. Hazard Insurance Premium 1.0 years		
904.		
905.		
1000. RESERVES DEPOSITED WITH LENDER		
1001. Hazard Insurance months @ $ per month		
1002. Mortgage Insurance months @ $ per month		
1003. City/Town Taxes months @ $ per month		
1004. County Taxes months @ $ per month		
1005. Assessments months @ $ per month		
1006. months @ $ per month		
1007. months @ $ per month		
1008. months @ $ per month		
1100. TITLE CHARGES		
1101. Settlement or Closing Fee to		
1102. Abstract or Title Search to PALMETTO STATE TITLE	275.50	
1103. Title Examination to		
1104. Title Insurance Binder to PALMETTO STATE TITLE		
1105. Document Preparation to RICHARD N. BOOTH		500.00
1106. Notary Fees to		
1107. Attorney's Fees to RICHARD N. BOOTH	900.00	
(includes above item numbers:)		
1108. Title Insurance to PALMETTO STATE TITLE	1,500.00	
(includes above item numbers:)		
1109. Lender's Coverage $		
1110. Owner's Coverage $ 850,000.00 1,500.00		
1111.		
1112.		
1113.		
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES		
1201. Recording Fees: Deed $ 10.00; Mortgage $; Releases $	10.00	
1202. City/County Tax/Stamps: Deed 3,145.00; Mortgage		3,145.00
1203. State Tax/Stamps: Revenue Stamps ; Mortgage		
1204. RECD $ RELEASES to PALMETTO STATE TITLE		18.00
1205.		
1300. ADDITIONAL SETTLEMENT CHARGES		
1301. Survey to		
1302. Pest Inspection to		
1303. REIMB PLAT RCD/PLAT APPROVAL to PALMETTO STATE TITLE	30.00	
1304. EXPRESSPROCESS FEE to PALMETTO STATE TITLE		25.00
1305.		
1400. TOTAL SETTLEMENT CHARGES (Enter on Lines 103, Section J and 502, Section K)	2,715.50	71,688.00

By signing page 1 of this statement, the signatories acknowledge receipt of a completed copy of page 2 of this two page statement

Certified to be a true copy.

0633

RICHARD N. BOOTH
Settlement Agent

March 12, 2007

Mr. Benjamin Creel
PO Box 289
Conway, South Carolina 29528

Re: Highway 701 Tract
Horry County, South Carolina
TMS # 169-00-03-027

Dear Mr. Creel:

This letter will serve as notice that our intention is to close on the second 50 acre portion of the above referenced property on or before June 9, 2007; this being the anniversary date of the first closing. We would like to close the portion of the tract closest to our existing 50 acre tract and continue along US Highway 701. Our wetland evaluation has been submitted to the US Army Corps of Engineers and field audited. It was believed that the first 50 acre portion of the tract contains no wetland, however the US Army Corps of Engineers did not agree and the tract does contained approximately one acre of wetland. We would like to get a credit for the one acre on this second 50 acre closing for the monetary difference of $16,000.00. The surveyor has completed the map for this second 50 acre closing and you will find it enclosed. This minimum of 30 day notification is part of the agreement made between Donald Godwin & Randy Beverly (Buyers) and Benjamin Creel (Seller) executed and signed October 2, 2005. Should you have any questions or require further information, please contact me at (843) 997-5384 (Randy) or (843) 385-7283 (Donald).

Sincerely,

Donald Godwin & Randy Beverly

0634



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OMB NO. 2502-0265

A.

U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT

SETTLEMENT STATEMENT

B. TYPE OF LOAN
1. ☐ FHA 2. ☐ FmHA 3. ☐ CONV. UNINS. 4. ☐ VA 5. ☐ CONV. INS.

6. FILE NUMBER: GODWIN 20659
7. LOAN NUMBER:
8. MORTGAGE INS CASE NUMBER:

C. *NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(POC)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.*

1.0 3/98 (GODWIN 20659/GODWIN 20659/30)

D. NAME AND ADDRESS OF BUYER	E. NAME AND ADDRESS OF SELLER	F. NAME AND ADDRESS OF LENDER
DONALD D. GODWIN, LLC RANDY A. BEVERLY, LLC P.O. BOX 1549 CONWAY, SC 29528	BUCKSVILLE FARMS, INC. P.O. BOX 289 CONWAY, SC 29528 TIN: 57-0784098	

G. PROPERTY LOCATION	H. SETTLEMENT AGENT 57-0544817	I. SETTLEMENT DATE
50.88 ACRES, BUCKS TWP HORRY COUNTY, SC 29526 Horry County, South Carolina	RICHARD N. BOOTH PLACE OF SETTLEMENT 1905 NORTH MAIN STREET CONWAY, SC 29526	June 1, 2007

J. SUMMARY OF BUYER'S TRANSACTION			K. SUMMARY OF SELLER'S TRANSACTION		
100. GROSS AMOUNT DUE FROM BUYER:			**400. GROSS AMOUNT DUE TO SELLER:**		
101. Contract Sales Price			401. Contract Sales Price		915,840.00
102. Personal Property			402. Personal Property		
103. Settlement Charges to Buyer (Line 1400)			403.		
104.			404.		
105.			405.		
Adjustments For Items Paid By Seller in advance			*Adjustments For Items Paid By Seller in advance*		
106. City/Town Taxes	to		406. City/Town Taxes	to	
107. County Taxes	to		407. County Taxes	to	
108. Assessments	to		408. Assessments	to	
109.			409.		
110.			410.		
111.			411.		
112.			412.		
120. GROSS AMOUNT DUE FROM BUYER			*420. GROSS AMOUNT DUE TO SELLER*		915,840.00
200. AMOUNTS PAID BY OR IN BEHALF OF BUYER:			**500. REDUCTIONS IN AMOUNT DUE TO SELLER:**		
201.			501. Excess Deposit (See Instructions)		
202. Principal Amount of New Loan(s)			502. Settlement Charges to Seller (Line 1400)		77,373.40
203. Existing loan(s) taken subject to			503. Existing loan(s) taken subject to		
204.			504. Payoff of first Mortgage to CONWAY NATIONAL BA		26,302.23
205.			505. Payoff of second Mortgage to CONWAY NATIONAL		25,000.00
206.			506.		
207.			507. RELEASE FEE to LARRY W. PAUL/BUCKSVILLE F		219,513.72
208.			508.		
209.			509.		
Adjustments For Items Unpaid By Seller			*Adjustments For Items Unpaid By Seller*		
210. City/Town Taxes	to		510. City/Town Taxes	to	
211. County Taxes	to		511. County Taxes	to	
212. Assessments	to		512. Assessments	to	
213.			513.		
214.			514. FINDER FEE		18,316.80
215.			515.		
216.			516.		
217.			517. REIMBURSE TWIN OAKS to RANDY A. BEVERLY		10,322.60
218.			518.		
219.			519.		
220. TOTAL PAID BY/FOR BUYER			*520. TOTAL REDUCT. AMT DUE SELLER*		376,828.65
300. CASH AT SETTLEMENT FROM/TO BUYER:			**600. CASH AT SETTLEMENT TO/FROM SELLER:**		
301. Gross Amount Due From Buyer (Line 120)			601. Gross Amount Due To Seller (Line 420)		915,840.00
302. Less Amount Paid By/For Buyer (Line 220)	(	)	602. Less Reductions Due Seller (Line 520)	(	376,828.65)
303. CASH (X FROM) (TO) BUYER			*603. CASH (X TO) (FROM) SELLER*		539,011.35

0635

DEFENDANT'S EXHIBIT

9

HUD-1 (3-88) RESPA, NB4305.2

L. SETTLEMENT CHARGES

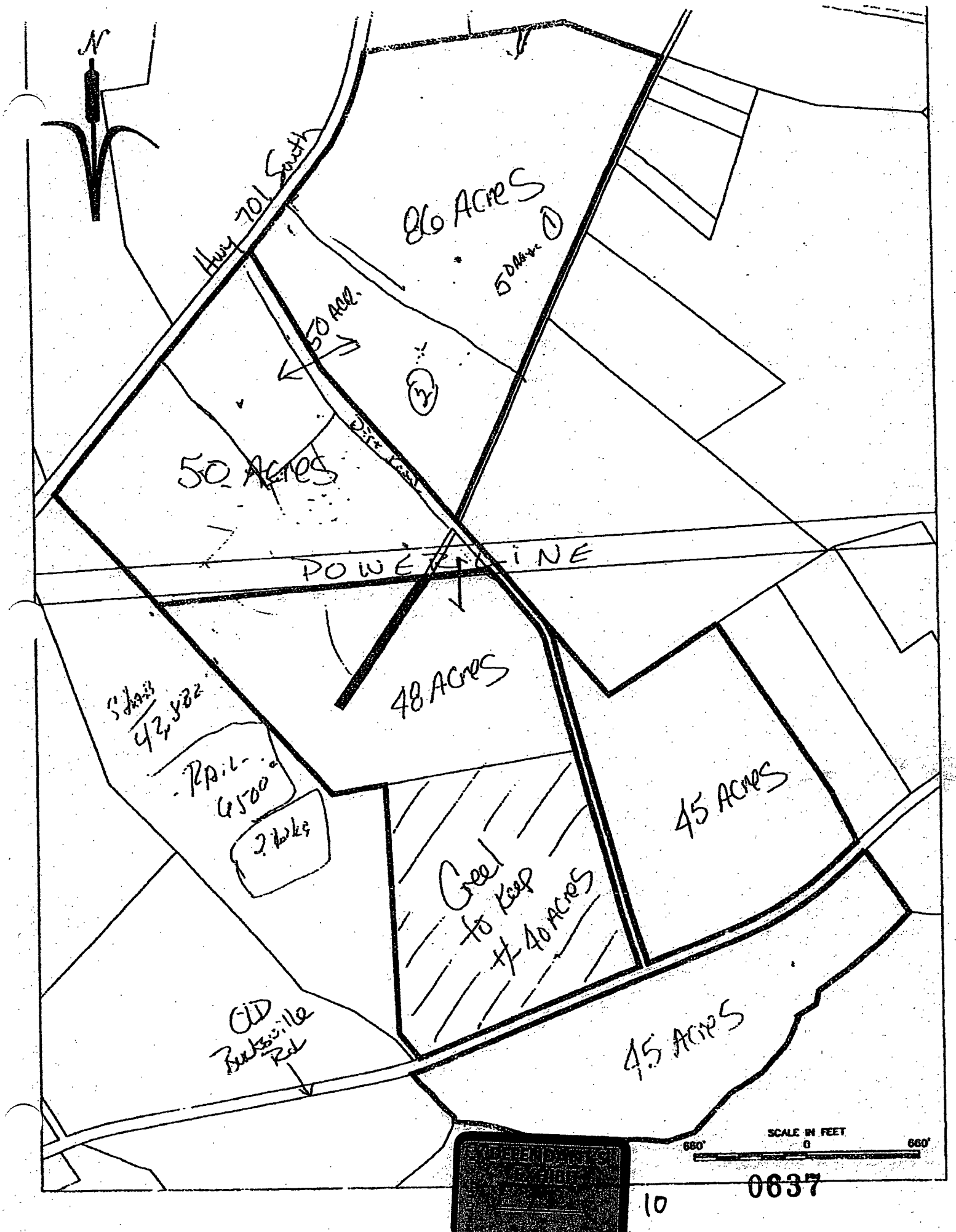
	PAID FROM BUYER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
700. TOTAL COMMISSION Based on Price $ 915,840.00 @ 8.0000 % 73,267.20		
Division of Commission (line 700) as Follows:		
701. $ 73,267.20 to BETHEA, TALBOTT & CO AGENCY		
702. $ to		
703. Commission Paid at Settlement		73,267.20
704. to		
800. ITEMS PAYABLE IN CONNECTION WITH LOAN		
801. Loan Origination Fee % to		
802. Loan Discount % to		
803. to		
804. to		
805. to		
806. to		
807. to		
808.		
809.		
810.		
811.		
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE		
901. Interest From to @ $ /day (days %)		
902. MIP Tolns. for LifeOfLoan months		
903. Hazard Insurance Premium years		
904.		
905.		
1000. RESERVES DEPOSITED WITH LENDER		
1001. Hazard Insurance @ $ per		
1002. Mortgage Insurance @ $ per		
1003. City/Town Taxes @ $ per		
1004. County Taxes @ $ per		
1005. Assessments @ $ per		
1006. @ $ per		
1007. @ $ per		
1008. @ $ per		
1100. TITLE CHARGES		
1101. Settlement or Closing Fee to		
1102. Abstract or Title Search to		
1103. Title Examination to		
1104. Title Insurance Binder to		
1105. Document Preparation to RICHARD N. BOOTH		350.00
1106. Notary Fees to		
1107. Attorney's Fees to		
(includes above item numbers:)		
1108. Title Insurance to		
(includes above item numbers:)		
1109. Lender's Coverage $		
1110. Owner's Coverage $		
1111. to		
1112.		
1113.		
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES		
1201. Recording Fees: Deed $; Mortgage $; Releases $		
1202. City/County Tax/Stamps: Deed 3,389.20; Mortgage		3,389.20
1203. State Tax/Stamps: Revenue Stamps ; Mortgage		
1204. RECD 2 RELEASES/CL MTG. to PALMETTO STATE TITLE		17.00
1205. to		
1300. ADDITIONAL SETTLEMENT CHARGES		
1301. Survey to CAROLINA LAND SURVEYORS		350.00
1302. Pest Inspection to		
1303.		
1304.		
1305.		
1400. TOTAL SETTLEMENT CHARGES (Enter on Lines 103, Section J and 502, Section K)		77,373.40

By signing page 1 of this statement, the signatories acknowledge receipt of a completed copy of page 2 of this two page statement.

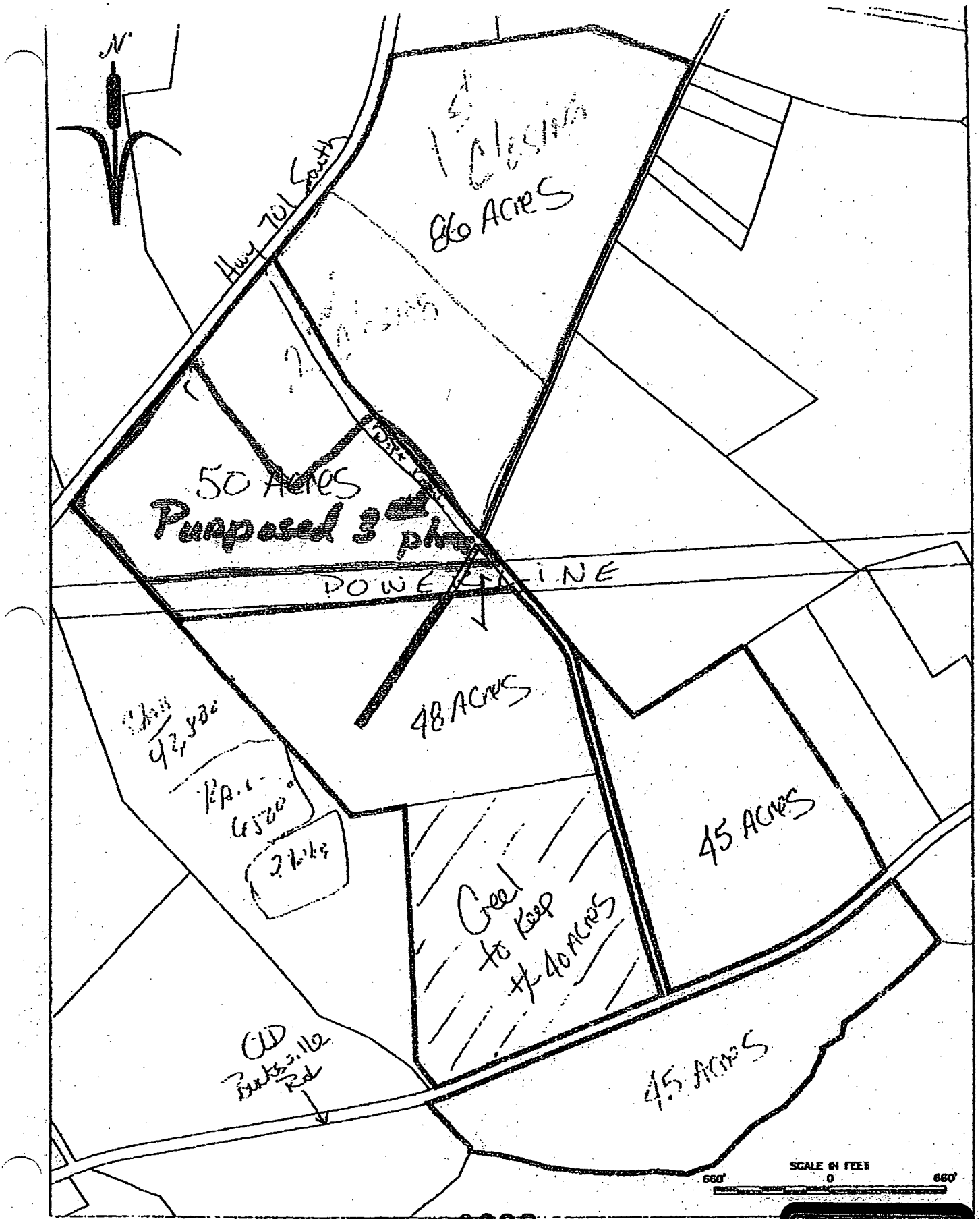
Certified to be a true copy.

0636

RICHARD N. BOOTH
Settlement Agent


N
Hwy 101 South
86 ACRES
50 ACRES
50 Acc.
Dirt Road
POWERLINE
48 ACRES
45 ACRES
45 ACRES
Good to Keep +/- 40 ACRES
OLD Bucksville Rd
SCALE IN FEET
660'
0
660'

0637



DEFENDANT'S EXHIBIT

Carolina Land Surveyors, LLC

P.O. Box 1377
Conway, SC 29528
(843) 365-1975

Invoice

Date	Invoice #
11/5/2007	1769

Bill To

Donald Godwin
P. O. Box 1549
Conway, S. C. 29528

TMS#	JOB #	LOCATION	COUNTY
169-00-03-027	06-014	Hwy 701 S	Horry

Description	Amount
Wetland Survey of Creel Tract on Hwy 701 S @ Shelly Farm Road	750.00

Hwy 701 South LLC

OK

Thank you for your business!

P. 21708 Dept 1004

Total	$750.00
Balance Due	$750.00

0639

DEFENDANT'S EXHIBIT 13

DEPARTMENT OF THE ARMY
CHARLESTON DISTRICT, CORPS OF ENGINEERS
69A Hagood Avenue
CHARLESTON, SOUTH CAROLINA 29403-5107

REPLY TO ATTENTION OF

Creel Farm

November 27, 2007

Regulatory Division

Southern Asphalt
c/o S&ME, Inc
Mr. Charles Oates
1330 Highway 501 Business
Conway, South Carolina 29528

Re: SAC 2006-00995-3JH
Horry County

Dear Mr. Oates:

This is in response to your letter of April 19, 2006, requesting a wetland determination, on behalf of Southern Asphalt, for a 222.77 acre tract located east of and adjacent to U.S. Highway 701 South, Bucks Township, Horry County, South Carolina. The project area is depicted as Parcel A, B, C, and D on the survey plat you submitted which was prepared by Carolina Land Surveyors, dated October 16, 2007, and entitled "WETLAND SURVEY OF 4 PARCELS/ BEING PORTIONS OF TMS #169-00-03-027/ BUCKS TOWNSHIP/ HORRY COUNTY, SOUTH CAROLINA/ FOR/ DONALD GODWIN".

This plat depicts surveyed boundaries of wetlands or other waters of the United States as established by your office. You have requested that this office verify the accuracy of this mapping as a true representation of wetlands or other waters of the United States within the regulatory authority of this office. The property in question contains 2.32 acres of federally defined jurisdictional freshwater wetlands or other waters of the United States subject to the jurisdiction of this office. The location and configuration of these areas are reflected on the plat referenced above.

Based on an on-site inspection and a review of aerial photography and soil survey information, it has been determined that the surveyed jurisdictional boundaries shown on the referenced plat are an accurate representation of jurisdictional areas within our regulatory authority. This office should be contacted prior to performing any work in these areas. Enclosed is a form describing the basis of jurisdiction for the areas in question. You should also be aware that these areas may be subject to restrictions or requirements of other state or local governmental entities.

If a permit application is forthcoming as a result of this delineation, a copy of this letter, as well as the verified survey plat, should be submitted as part of the application. Otherwise, a delay could occur in confirming that a delineation was performed for the permit project area.

Please be advised that this determination is valid for five (5) years from the date of this letter unless new information warrants revision of the delineation before the expiration date. All actions concerning this determination must be complete within this time frame, or an additional delineation must be conducted. This approved jurisdictional determination is an appealable action under the Corps of Engineers administrative appeal procedures defined at 33 CFR 331. The administrative appeal options, process and appeals request form is attached for your convenience and use.

DEFENDANT'S EXHIBIT

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In future correspondence concerning this matter, please refer to SAC 2008-00995-3JH. You may still need state or local assent. Prior to performing any work, you should contact the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management. A copy of this letter is being forwarded to them for their information.

If you have any questions concerning this matter, please contact Rob Huff at 843-365-1726.

Sincerely,

Tommy Fennel
Chief, Northeast Branch

Enclosures:
Approved Jurisdictional Determination Form
Notification of Appeal Options

Copy Furnished:

South Carolina Department of Health
and Environmental Control Office of
Ocean and Costal Resource Management
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405

0641

May 9th, 2008

Certified Mail
#7099 3400 0020 8038 3585 - as to Beverly
#7099 3400 0020 8038 2663 - as to Godwin

Randy Beverly
P.O. Box 512
Conway, SC 29528

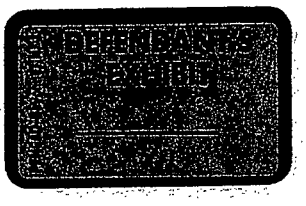
Donald Godwin
115 Woodmont Lane
Pawley's Island, S.C. 29585

Dear Randy and Donald:

I am writing to you in regards to our real estate contract dated October 2, 2005. I am writing in accordance with Paragraph 25 thereof.

As to our recent discussions, it is my understanding that you wish to delay the last two closings under our contract, 50 acres at $19,000 per acre currently scheduled to close June 6, 2008, and the remaining approximately 130 acres at $20,000 per acre currently scheduled to close June 6, 2009. For this delay, you have offered me 30, then 40 thousand dollars to be applied to the purchase price at the next closing. If one runs the numbers and applies a little common sense, you are, in effect, offering me nothing if that money is to be applied to the purchase price. If it were not so applied, you would be offering me one percent interest on my money. Frankly, I do not think that is a fair or reasonable offer. The lowest interest rate that I am currently paying anyone is 6%, which, if applied to our numbers, results in $213,000 not to be applied to the purchase price. This is not an offer, merely a demonstration.

Insofar as you have repeatedly said the 40,000 is the most you are "willing to do," and insofar as you have repeatedly said, verbally, and via the "specific performance" provision in paragraph 20 of our agreement, i.e. that you could and would perform, I hereby put you on formal notice that I expect you to close on this property in accordance with its terms. In other words, I simply expect you to do what you promised to do. Otherwise, I will have no choice other than, as much as I do not want to have to do this, take legal action to compel your performance and to seek legal fees in accordance with paragraph 27 (l) of our agreement.



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Please make any response to this letter in writing to me at P.O. Box 289, Conway, S. C. 29528 with a copy to Jim Stevens, Stevens Law Firm, P.O. Drawer 127, Loris, S.C. 29569.

Sincerely,

Benjamin J. Creel

Benjamin J. Creel
President
Bucksville Farms, Inc.

Xc: Jim Stevens

May 29, 2008

Benjamin J. Creel
P.O. Box 289
Conway, SC 29528

Dear Benjamin,

After receiving your letter dated May 9th of this year, we must express a combined sense of misunderstanding. A more recent offer on the referenced property was previously proposed; unfortunately, that particular offer was not acknowledged in your latest correspondence.

On May 1st, 2008 in the office of Beverly Construction Company, we proposed to you the following purchasing offer for the 50 acre tract located on Highway 701 South:

$200,000 and 21.5 acres of property located on Highway 501

If memory serves correctly, you once stated that the Hwy 501 property was worth at least $700,000 to $800,000; such an estimate would value our total offer at approximately $900,000 to $1,000,000. It is our feeling that this is a very viable proposal for the referenced property.

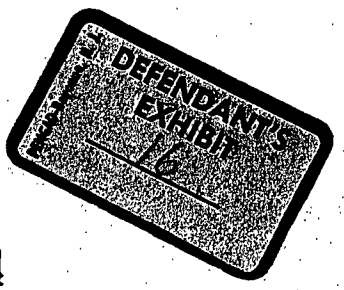
We apologize for any delay in response to your letter. It was our understanding that you were recently traveling abroad for a number of weeks. The two of us look forward to your reply.

Sincerely,

Donald D. Godwin, LLC

Randy A. Beverly, LLC

Cc: Jim Stevens



June 12, 2008

Randy Beverly
P. O. Box 512
Conway, SC 29528

Donald Godwin
115 Woodmont Lane
Pawleys Island, SC 29585

Via Hand Delivery

Dear Randy and Donald,

I am in receipt of your recent correspondence regarding our discussions to rectify your breach of our contract on the Bucksville property.

The last time we met at Randy's office, I came to the realization that I can neither compel nor convince you to do anything close to what I think is reasonable regarding the 501 property. I also came to the realization that you can neither compel nor convince me to do anything close to what you think is reasonable regarding that property. I offered to double your money; you said the least you would accept was to quintuple your money. My opinion is that we can talk and write back and forth about this until we are "blue in the face," to no avail. As a much older wise friend of mine put it, "They've already [screwed] you on that deal, stick to the contract in hand."

I have decided to take his advice by doing what I can compel you to do, that being to perform on our contract, pay my damages, and pay my attorney's fees. I am regretful that you are forcing me to do this, but I do not see that I have a choice. I estimate that I have already incurred $3000 in fees because of your breach, and, as of June 14, I will have incurred a $10,875 mortgage penalty because of your breach. If you wish to avoid a minimum of $20,000 more in attorney's fees, please advise me of your intention to "make me whole" under the terms of our contract by Friday, June 20, 2008. Otherwise litigation will commence.

Sincerely,

Benjamin J. Creel

Benjamin J. Creel
President
Bucksville Farms, Inc.

Cc: Jim Stevens

DEFENDANT'S EXHIBIT 17

GREGORY K. MARTIN, P.C.
ATTORNEY AT LAW
900 C Main Street
P.O. Box 736
Conway, South Carolina 29528-0736

Gregory K. Martin

Telephone: 843-248-2089 • Fax: 843-248-9653
GKMILAW@sccoast.net

R. Allen Beverly, Jr.

June 18, 2008

Benjamin J. Creel
PO Box 289
Conway, SC 29528

RE: Contract Dispute on that certain "Agreement to Buy and Sell Real Estate in Multiple Closings" dated October 2nd, 2005.

Dear Benjamin:

I have been retained by Randy A. Beverly, LLC and Donald Godwin, LLC to render an opinion on that certain Contract dispute with Bucksville Farms, Inc. After reviewing the Contract cited above, I would like to divert your attention to paragraph 9 of the Contract which states, "Seller shall furnish a Boundary Survey of the Property referenced in the attached Exhibit A indicating the true and correct legal description thereof, delineating the boundary lines of said property and all wetlands and carving out the 40 acre parcel to be retained by the Seller." Because of Bucksville Farms, Inc. failure to comply with this paragraph by never providing such boundary and wetlands survey; it is our position that Bucksville Farms, Inc. has been in breach of the contract in question. Due to Bucksville Farms, Inc.'s breach by failing to provide said boundary survey and wetlands delineation, Randy A. Beverly, LLC and Donald Godwin, LLC do hereby declare the Contract forever null and void.

Should Bucksville Farms, Inc. dispute this position and feel the need to bring an action in a court of law; Randy A. Beverly, LLC and Donald Godwin, LLC will vigorously defend said suit to the end.

Please govern yourself accordingly.

Sincerely, I remain,

Yours truly,
R. Allen Beverly Jr.
R. Allen Beverly, Jr.
Attorney at Law

DEFENDANT'S EXHIBIT 12

Cc: Stevens Law Firm
Attn: Jim Stevens, Esq.
PO Drawer 127
Loris, SC 29569

STEVENS LAW FIRM, P.C.

JAMES P. STEVENS, JR.*
NATALIE S. STEVENS

*Certified as Civil Trial Advocate
National Board of Trial Advocacy
*Certified Civil Mediator

ATTORNEYS AT LAW
3341 Broad Street
Post Office Drawer 127
Loris, South Carolina 29569-0127

Established 1952

Telephone: 843.756.7552
Telefax: 843.756.3785
E-Mail: stevenslawfirm@aol.com
E-Mail: natyhampton@aol.com

July 2, 2008

Mr. R. Allen Beverly, Jr.
Gregory K. Martin, P.C.
Post office Box 736
Conway, South Carolina 29528-0736

Re: Bucksville Farms, Inc. (Agreement to Buy & Sell Real Estate in Multiple Closings)

Dear Mr. Beverly:

Please be advised that I have been retained by Benjamin J. Creel, as President of Bucksville Farms, Inc., to correspond with you concerning the above Agreement to Buy and Sell Real Estate in Multiple Closings dated October 2, 2005.

As I understand, Randy A. Beverly, LLC, and Donald Godwin, LLC, agreed to purchase (buy down) four separate tracts of land in increments one year apart. I understand they purchased a tract in 2006 and 2007 respectively; however, they have advised Mr. Creel that they do not intend to complete the agreement and have refused to close on the sale of the third tract in June 2008. They also have advised that they do not intend to purchase the final tract due to be paid for in June of 2009.

I have reviewed the contract with Mr. Creel and discussed the matter with him and it appears that failure to close on the sale of the properties in 2008 and 2009 would be a breach of contract and would entitle Mr. Creel, not only to actual damages, but also to consequential and incidental damages because of the breach. In addition, Mr. Creel would be entitled to reasonable attorney fees pursuant to the contract, and prejudgment interest at the rate of 8¾ per cent.

Consequential and incidental damages incurred because of the breach would include, but not be limited to, real estate commissions, time lost to re-market the property, costs related to marketing the property, extra expenses of closing, interest on loans related to the property, etc. These types of damages can add up quickly.

DEFENDANT'S EXHIBIT 19

The purpose of this letter is to advise you that Mr. Creel will wait until July 15, 2008 to get adequate assurances, in writing, that your clients will perform according to the contract and will purchase the property as previously agreed upon. If he has not received this assurance of performance in writing by July 15, 2008, he will commence marketing the property and will hold your clients responsible for the difference in the sales prices on re-sale, consequential and incidental damages, prejudgment interest and reasonable attorney fees.

If you wish to avoid litigation, please respond within the time period listed above.

Please advise.

Sincerely,

James P. Stevens, Jr.

JPSjr/pk

cc: Mr. Benjamin J. Creel

TOTAL P.02

GREGORY K. MARTIN, P.C.
ATTORNEY AT LAW
900 C Main Street
P.O. Box 736
Conway, South Carolina 29528-0736

Gregory K. Martin R. Allen Beverly, Jr

Telephone: 843-248-2089 • Fax: 843-248-9653
GKMLAW@sccoast.net

July 11, 2008

James P. Stevens, Jr., *Esq.*
Stevens Law Firm, PC
PO Drawer 127
Loris, SC 29569

RE: Contract dispute (Agreement to Buy & Sell Real Estate in Multiple Closings dated October 2nd, 2005)

Dear Mr. Stevens:

I am in receipt of your letter dated July 2nd and have discussed its contents with my clients. My clients, Donald Godwin, LLC and Randy A. Beverly, LLC do hereby agree to close on the 3rd takedown property of 50 acres provided that your client, Bucksville Farms, Inc. meets its condition in the Contract; namely the condition to provide a wetlands delineation on the remaining property. The next fifty (50) acres to be purchased has substantial wetlands on it and my clients will not purchase the property without a certified Army Corps of Engineers wetlands delineation. I will again refer you to paragraph nine (9) of the contract which states.

> ..... **Seller shall furnish a Boundary Survey of the Property in the attached Exhibit A indicating the true and correct legal description thereof delineating the boundary lines of said property and all wetlands and carving out the 40 acre parcel to be retained by the Seller.....**

This condition is clear and this condition as not been met by your client. Please advise whether or not your client intends to meet his condition and obligation that is clearly spelled out in the contract. If not; we have no alternative but to declare that your client is in breach by failing to meet a specific condition in the contract and rescind the contract and/or sue for specific performance, consequential damages, incidental damages and attorney fees.

Sincerely, I am,

Truly Yours,
R. Allen Beverly, Jr.
Attorney at Law

DEFENDANT'S EXHIBIT 20

September 2, 2008

Randy,

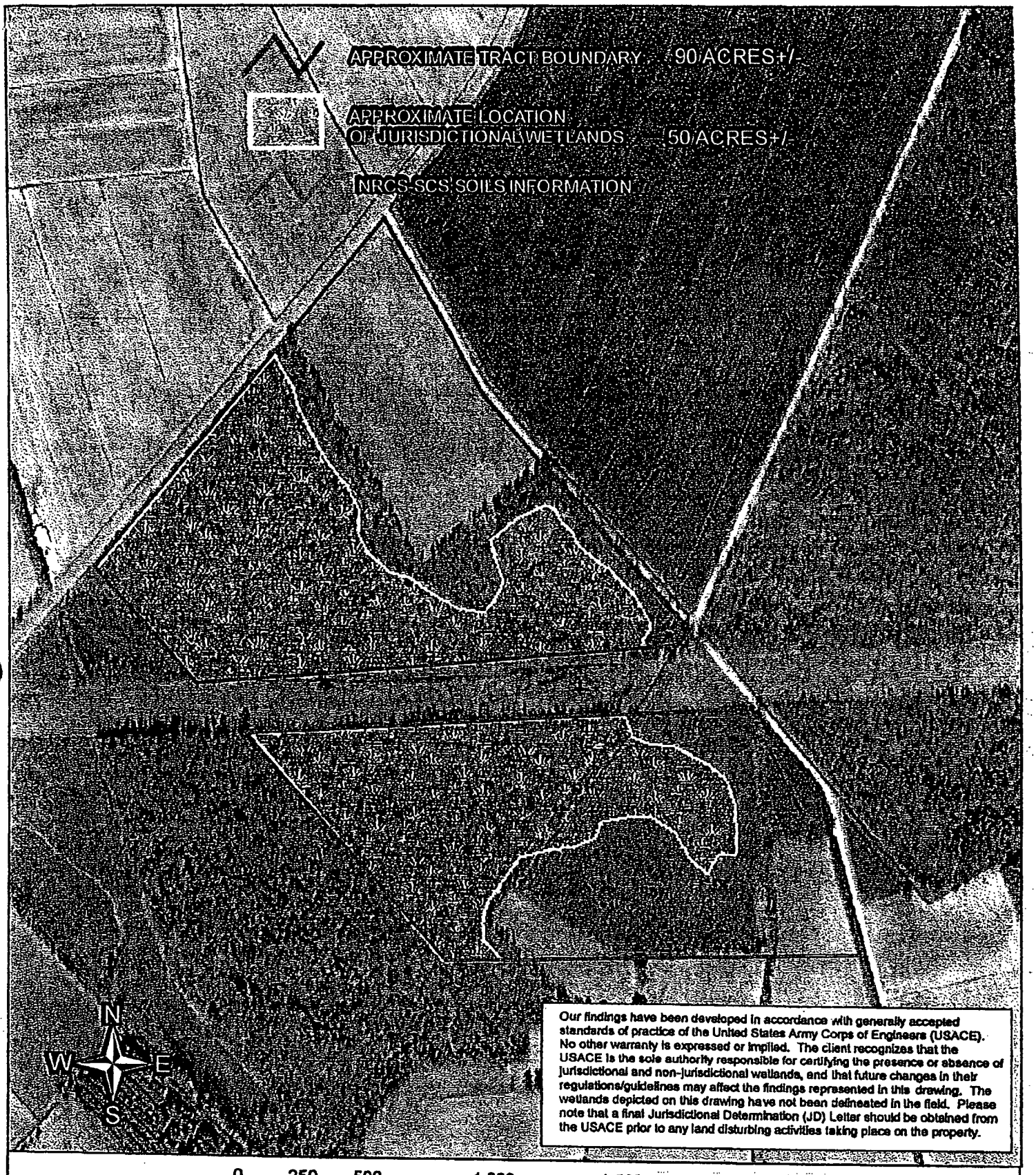
This was prepared by Chuck Oates, who, I understand, did the work on the first two tracts. He also said that he chose the area surveyed from maps provided to him by Southern Asphalt. I would note that this wetlands survey includes/covers the field adjacent to 701, which y'all have already purchased, so please take that into account.

Chuck's recommendation is that this portion of the property receive further ditching and time. As you know, I am in a cash crunch, and would like to close, either on this property or another portion, as soon as possible. Please let me know how you wish to proceed. I look forward to receiving a survey of what y'all do wish to purchase at this time in the near future.

Sincerely,

Benjamin

DEFENDANT'S EXHIBIT 21



SCALE: 1"= 500'	S&ME Environmental Services Engineering • Testing	SITE AERIAL PHOTOGRAPH PORTION OF TMS# 169-00-03-027	FIGURE # 1
SOURCE: SCDNR GIS DEPT.	0652		
SOURCE DATE: 2006			
DATE: AUGUST 2008		HORRY COUNTY, SC	

STEVENS LAW FIRM, P.C.

JAMES P. STEVENS, JR.*
NATALIE S. STEVENS

*Certified as Civil Trial Advocate
National Board of Trial Advocacy
*Certified Civil Mediator

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Established 1952

Telephone: 843.756.7652
Telefax: 843.756.3785
E-Mail: stevenslawfirm@aol.com
E-Mail: natybumpolaw@aol.com

September 16, 2008

Mr. R. Allen Beverly, Jr.
Gregory K. Martin, P.C.
Post Office Box 736
Conway, South Carolina 29528-0736

Re: Bucksville Farms, Inc. (Agreement to Buy & Sell Real Estate in Multiple Closings)

Dear Mr. Beverly:

My client has advised me that he delivered the wetland survey to your clients a couple of weeks ago. We have not heard back from you or your clients, and we would like clarification on how your clients intend to proceed.

Please inform me within the next ten days whether your clients intend to proceed with the purchase of this portion of tract or another portion of the tract. If they intend to proceed with another portion of the tract, please so advise as to which one they intend to purchase.

Please advise.

Sincerely,

James P. Stevens, Jr.

JPSjr/pk

cc: Mr. Benjamin J. Creel

0653

DEFENDANT'S EXHIBIT

000026

STEVENS LAW FIRM, P.C.

JAMES P. STEVENS, JR.*
NATALIE S. STEVENS
*Certified as Civil Trial Advocate
National Board of Trial Advocacy
*Certified Civil Mediator

ATTORNEYS AT LAW
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Telefax: 843.756.3785
E-Mail: stevenslawfirm@aol.com
E-Mail: natybumpolaw@aol.com

September 16, 2008

Mr. R. Allen Beverly, Jr.
Gregory K. Martin, P.C.
Post Office Box 736
Conway, South Carolina 29528-0736

Re: Bucksville Farms, Inc. (Agreement to Buy & Sell Real Estate in Multiple Closings)

Dear Mr. Beverly:

My client has advised me that he delivered the wetland survey to your clients a couple of weeks ago. We have not heard back from you or your clients, and we would like clarification on how your clients intend to proceed.

Please inform me within the next ten days whether your clients intend to proceed with the purchase of this portion of tract or another portion of the tract. If they intend to proceed with another portion of the tract, please so advise as to which one they intend to purchase.

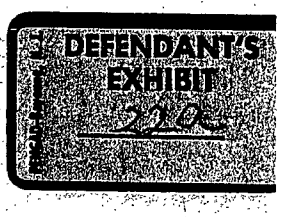
Please advise.

Sincerely,

James P. Stevens, Jr.

JPSjr/pk

cc: Mr. Benjamin J. Creel



Nothing official what was submitted was a wetlands estimation by Chuck Oats of SME and no survey has been done. Bank does not loan money on wetlands estimation. What is needed is a certified Army Corp. of Engineers wetland's delineation.

0654

GREGORY K. MARTIN, P.C.
ATTORNEY AT LAW
900 C Main Street
P.O. Box 736
Conway, South Carolina 29528-0736

Gregory K. Martin

Telephone: 843-248-2089 • Fax: 843-248-9653
GKMILAW@sccoast.net

R. Allen Beverly, Jr.

October 8, 2008

James P. Stevens, Jr., Esq.
Post Office Drawer 127
Loris, SC 29569

RE: Bucksville Farms, Inc. (Agreement to Buy & Sell Real Estate in Multiple Closings)

Dear Mr. Stevens:

I am in receipt of your letter dated September 16th, 2008 and I apologize for the delayed response but due to the circumstances of Gregory K. Martin's death I have been extremely overwhelmed. I believe we have some confusion about exactly what kind of wetland's survey that needs to be provided. My clients insist that they will not proceed with the closing unless your client provides an official certified Army Corps of Engineer wetlands delineation. Your client provided an unofficial wetlands estimation from a non-governmental body that could change substantially from the final Army Corps of Engineers official wetlands determination.

Sincerely, I am,

Yours truly,
R. Allen Beverly Jr.
R. Allen Beverly, Jr.

DEFENDANT'S EXHIBIT 23

STEVENS LAW FIRM, P.C.

JAMES P. STEVENS, JR.*
NATALIE S. STEVENS
*Certified as Civil Trial Advocate
National Board of Trial Advocacy
*Certified Civil Mediator

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Established 1952

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Telefax: 843.756.3786
E-Mail: stevenslawfirm@aol.com
E-Mail: natybumpolaw@aol.com

344-1684

October 30, 2008

Mr. Allen Beverly, Esq.
P O Box 736
Conway, SC 29528-0736

RE: Contract Dispute with Bucksville Farms, Inc.

Dear Mr. Beverly:

I received your letter stating that there was confusion as to what type of wetland's survey that needs to be provided to your clients by Mr. Creel. It has become apparent that the Buyers' response to my letter and requests are for the purposes of delay and amounts to a breach of the implied covenant of good faith and fair dealing. The assertion that the buyers are waiting on the seller to provide a wetland delineation certified by the US Army Corps of Engineers is unfounded. Please see the enclosed letter from the Army Corps of Engineers dated November 27, 2007, which has been provided to your clients for a sufficiently reasonable time - well before June of this year.

The only portion of the property contracted to buy/sell that has not been delineated by the Corps is the Southern frontage on Hwy. 701 which is not to be the property subject to the third closing. There was discussion and determination by the parties to this contract that it would be beneficial to make the Southern frontage on Hwy. 701 the property subject to the forth closing because it has questionably more wetland and there are methods that could change that over time using silvacultural practices. Buyers are aware of appropriate silvacultural practices that can be implemented to reduce the amount of land that is delineated as wetlands. In fact, Buyers have proceeded with performing this method on the Southern frontage on Hwy. 701 and charged the seller.

Another reason for waiting until after these silvacutrual practices have been utilized is that if closing moves forward now the buyers, a developer, will not be able to use these practices after purchase and the land delineated as wetland may very well forever remain wetland. However, if the silvacultural practices are used and sufficient time is given for these practices to work; there is potential that the land may dry and more land will not be delineated as wetland. As the property stays in the Sellers name, these practices may be implemented. This is beneficial for the buyers in the long run and the Seller in the purchase price, therefore both parties discussed this and agreed that would be the plan.

Moreover, there has been no agreement to wait on the next closing that was required to be performed four months ago. In fact, buyers have been notified that this delay is unacceptable and in breach of the contract. In response, the buyers attempt to mislead the seller into obtaining something that is already in the buyers' possession.

DEFENDANT'S EXHIBIT 24

By this letter, Seller, without waiving any claim that he may have to a breach of contract against buyers, requests that Buyers proceed with the third closing as soon as possible on the property for which Buyers have the wetland delineation certified by the US Army Corps of Engineers. If this closing is not completed by the end of 2008, I have been instructed to commence litigation. If you would like to discuss modification of the fourth closing, Mr. Creel is open for discussion but will request that all agreements be reduced to writing and signed by the parties.

I request a yes or no response regarding whether the Buyers will close on the said property this year. Please let me know Buyers' response by November 19, 2008.

Sincerely,

James P. Stevens, Jr.

cc: Benjamin J. Creel
enclosures

DAMAGES

Original acreage	-	317.50 acres	50 x 19,000 = 950,000
First takedown	-	51.08 acres	98 x 20,000 = 1,960,000
Second takedown	-	50.88 acres	
Reserved by seller	-	42.54 acres	
Property left for 3rd And 4th takedown		173.00 acres	
Liberal estimate on wetlands		25.00 acres -	
Upland acreage		148.00 acres	

I. Third takedown:
$19,000/acre x 50 acres = $ 950,000 [June 1008]

II. Fourth takedown:
$20,000/acre x 98 acres = 1,960,000 [June 2009]

III. Wetlands:
$1,000/acre x 25 acres = 25,000 [June 2008]

Total $2,935,000

IV. Mitigations:
[deed for remaining 173 acres] = $ 490,000-

NET DAMAGES $2,445,000 + $703,763 = $3,148,763

Prejudgment Interest @ 8 ¾%:

I. 3rd takedown [June 2008] $950,000 x .0875 = $ 83,125
June 2008 – Nov. 2011 = 3.4167 years x $83,125 = $ 284,013

II. 4th takedown [June 2009] $1,960,000 x .0875 = $ 171,500
June 2009 – Nov 2011 = 2.4167 x 171,500 = $ 414,464

III. Wetlands [June 2009] $25,000 x .0875 = $ 2,187
$2,187 x 2.4167 = $ 5,286

TOTAL PREJUDGMENT INTEREST $ 703,763



DAMAGES

Original acreage	-	317.50 acres
First takedown	-	51.08 acres
Second takedown	-	50.88 acres
Reserved by seller	-	42.54 acres
Property left for 3rd And 4th takedown		173.00 acres
Liberal estimate on wetlands		- 50.00 acres
Upland acreage		123.00 acres

I. Third takedown:
$19,000/acre x 50 acres = $ 950,000 [June 2008]

II. Fourth takedown:
$20,000/acre x 73 acres = 1,460,000 [June 2009]

III. Wetlands:
$1,000/acre x 50 acres = 50,000 [June 2009]

Total $2,460,000

IV. Mitigation:
[deed for remaining 123 acres] = $ 490,000-
[to Larry Paul October 2009]

NET DAMAGES $1,970,000 **$1,970,000**

V. Prejudgment Int. 8 ¾% prior to date of mitigation (Oct 2009):

A. 3rd takedown [June 08] $950,000 x .0875 = $ 83,125
June 08 – Oct 09 = 1.33 yrs x $83,125 = $27,431 **$ 27,431**

B. 4th takedown [June 09] $1,460,000 x .0875 = $ 127,750
June 09 – Jan 12 = .33 yrs x $127,750 = $ 42,157 **$ 42,157**

VI. Prejudgment Int. 8 ¾ % after date of Mitigation of $490,000
(Oct 2009 – Jan 2012)

A. $950,000 (3rd Takedown) + $1,460,000 (4th takedown)
+ $50,000 (wetlands) less mitigation = $1,970,000 x .0875 =
$172,375 x 2.25 yrs (Oct 09 – Jan 12) = $387, 844 **$ 387,844**

TOTAL PREJUDGMENT INTEREST **$ 457,432** **$457,432**

DEFENDANT'S EXHIBIT

TOTAL DAMAGES & PREJUDMENT INTEREST: **$2,427,432**

Stephen R. Sciaretta

Claremont SC Enterprises, LLC
49 Route 202
P.O. Box 808
Far Hills, New Jersey 07931
Tel. 908.658.3900
Fax 908.658.3944
Sender's email: steve@clarecon.com

March 20, 2008

Donald Godwin, LLC
Randy A. Beverly, LLC
PO Box 1549
Conway, SC 29528
Via email and Regular Mail

Re: 701 South, LLC
Option

Dear Donald and Randy:

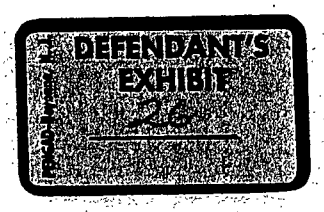
This will confirm our discussion on my last visit to South Carolina that the Mahans (Byram Land Development, LLC) and we (Claremont SC Enterprises, LLC) have elected, and, therefore, 701 South, LLC has elected, not to exercise the option for the remaining land on 701 South as more particularly described in the contract between you and 701 South, LLC dated May 31, 2007.

Please advise if you should need anything further with respect to this matter.

Best regards,

Stephen R. Sciaretta

cc: T. Carton (Mahan Group) via email



Ex #3

Stephen R. Sciarretta

Claremont Companies
49 Route 202
P.O. Box 808
Far Hills, New Jersey 07931
Tel. 908.658.3900
Fax 908.658.3944
Sender's email: steve@claremont.com

May 14, 2008

Mr. Donald D. Godwin
Donald D. Godwin, LLC
PO Box 1549
Conway, SC 29528
Via fax (843) 347-7283 and email: dgodwin@sccoast.com

Re: Highway 701

Dear Donald:

Confirming our conversation last week, please be advised that I have spoken to the Mahans, and they, as well as my brother and I, would agree to participate in the next phase closing for the 701 / Creel property on an equal basis with you and Randy. It is our understanding that this closing is on 50 acres, contiguous to the 100 acres we closed on last year, and that the price is $20,000 per acre. Therefore, we will purchase the property in the name of 701 South, LLC, and each of the members (Donald D. Godwin, LLC, Randy A. Beverly, LLC, Claremont SC Enterprises, LLC and Byram Land Development, LLC) will contribute $250,000 for the purchase, plus the pro rata share of incidental closing costs, title insurance, etc.

In addition, we will enter into an option agreement to purchase the final two phases under the same terms as your present contract with Creel, which we understand is at the same per acre price as stated above plus $1,000 per acre each year between now and closing. We would provide you with at least four months notice of our intent to exercise each of the options, which we understand will be for closings in June of 2009 (approximately 50 acres) and June of 2010 (approximately 80 acres).

If this is your and Randy's understanding, perhaps Faye could prepare a simple option agreement for the last two installments, as well as an assignment (or whatever document she feels is appropriate) from your and Randy's LLCs to 701 South, LLC for next month's closing.

Ex #2

DEFENDANT'S EXHIBIT 27

Thank you for the opportunity to participate in the balance of this project, and we very much look forward to working with you on it.

I'll let you know when I'll next be in S.C., probably the last week of May or first part of June.

Best regards,

Stephen R. Sciaretta

Cc: T. Carton via email

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

AGREEMENT TO BUY AND SELL REAL ESTATE IN MULTIPLE CLOSINGS

This Agreement to Buy and Sell Real Estate in Phases ("Agreement") is made this 2nd day of October, 2005 (the "Effective Date") by and between **BUCKSVILLE FARMS, INC.** (the Seller), and **RANDY A. BEVERLY, LLC** and **DONALD GODWIN, LLC** (the "Purchaser").

WITNESSETH:

WHEREAS, the Seller is an owner of that certain tract or parcel of land located in Horry County, South Carolina, containing approximately 317.5 acres, which is more particularly described on Exhibit A attached hereto and incorporated herein by reference (the "Land");

WHEREAS, Purchaser desires to purchase from Seller the Land and Seller desires to sell, transfer and convey the same to Purchaser in phases pursuant to the terms of this Agreement.

NOW, THEREFORE, in consideration of the promises and mutual covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Sale/Purchase. Seller agrees to sell in phases and Purchaser agrees to purchase in one or more takedowns the Land and all easements and other rights and interests appertaining to the Land, together with all improvements thereon and also together with all and singular the tenements and hereditaments, rights and appurtenances now or hereinafter belonging thereto (the "Property") less that certain 40 ± acres located on southern portion of the Property containing the pond and bordering Shelley Farm Road and Old Bucksville Highway to be more accurately identified on the Boundary Survey to be provided by Seller pursuant to Section 9 hereinbelow.

2. Purchase Price. The purchase price (the "Purchase Price") at each takedown of the Property shall be determined as follows:

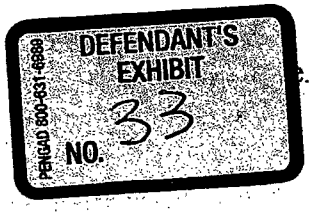
a. Seventeen Thousand and 00/100 ($17,000.00) Dollars per upland acre of the Property purchased in the First Takedown Closing (as defined below) or before the first anniversary of the First Takedown Closing; plus

b. Eighteen Thousand and 00/100 ($18,000.00) Dollars per upland acre of the Property purchased between the first anniversary of the First Takedown Closing (as defined below) and the second anniversary of the First Takedown Closing ; plus

c. Nineteen Thousand and 00/100 ($19,000.00) Dollars per upland acre of the Property purchased between the second anniversary of the First Takedown Closing and the third anniversary of the First Takedown Closing; plus

d. Twenty Thousand and 00/100 ($20,000.00) Dollars per upland acre of the Property purchased between the third anniversary of the First Takedown Closing and the fourth anniversary of the First Takedown Closing; plus

e. One Thousand and 00/100 ($1,000.00) Dollars per wetland acre of the Property, regardless of when purchased.



3. Earnest Money. Upon execution of this Agreement, Earnest Money in the amount of Fifty Thousand and no/100 ($50,000.00) Dollars (the "Earnest Money") shall be paid to the McNair Law Firm, P. A. ("the Escrow Agent"), 2411 Oak Street, Suite 206, Myrtle Beach, SC 29577. The Escrow Agent shall deposit the Earnest Money into an interest bearing trust account maintained by the Escrow Agent for such purposes. The Earnest Money and any interest earned thereon shall be held and applied pursuant to terms of this Agreement.

4. Disbursement of Earnest Money. The Earnest Money shall be disbursed as follows:

(a) Application of Earnest Money at Closing of the last remaining acreage of the Property. If Purchaser does not terminate this Agreement as provided herein, the Escrow Agent shall pay to Seller the Earnest Money at the closing of the first Takedown Property and the Purchaser shall receive a credit against the Purchase Price in an amount equal to the amount thereof.

(b) Application of Earnest Money in the Event of a Default. In the event of a default under the terms of this Agreement the Escrow Agent shall pay the Earnest Money to Seller or Purchaser as provided in this Agreement.

5. Cash at Closing. At the First Takedown, the Purchase Price, (and at the subsequent closings of each Takedown tract of the Property, the relevant Takedown Purchase Price), shall be paid by Purchaser to Seller in United States currency by way of Federal Wire Transfer, Cash, certified funds or other immediately available funds, adjusted to reflect the prorations provided for in this Agreement.

6. First Closing. The First Takedown shall contain a minimum of 50 upland acres. The purchase and sale for the First Takedown Property shall be consummated on or before a day which is fifteen (15) days after the expiration of the Feasibility Period (the "First Takedown Closing Date"). The closing herein shall be held at the offices of The McNair Law Firm, P.A., Founders Centre, Suite 206, 2411 Oak Street, Myrtle Beach, South Carolina, 29577 or such other convenient location as the parties may mutually agree upon. Seller agrees to deliver possession of the Property to Purchaser at the relevant closing by General Warranty Deed (the "Deed") in proper form for recording with all deed recording fees (as set forth in Section 10 (b) in the proper amount) or credited to the Purchaser. Subsequent phase closings shall be in accordance with Section 22.

7. Feasibility Period. The Feasibility Period is the period ending at midnight on the date which is 120 days following the Seller's delivery of a Boundary Survey and Wetlands Survey made by a professional surveyor licensed in South Carolina (Seller is not required to have the wetlands permitted with the U. S. Corps. of Engineers). This date shall be evidenced in a writing signed by each party. During the Feasibility Period, Purchaser shall investigate the development and feasibility of the Property for the use intended by Purchaser, including market analysis, development approvals and construction, to determine, in Purchaser's sole discretion, if the Property is suitable to Purchaser. This Contract shall automatically terminate at the expiration of the Feasibility Period, unless prior to the expiration of such period, Purchaser delivers written notice to Seller of Buyer's intent to waive the feasibility termination right and continue this agreement in full force and effect. Upon termination, neither party shall have any further rights or

obligations hereunder (unless same are specifically noted to survive closing) and all Earnest Money shall be returned to Purchaser.

8. Conditions Precedent to Purchaser's Obligation to Close. The following shall be conditions precedent to the Purchaser's obligations to purchase at any Takedown of the Property. Unless otherwise specified in this Section 8, if any of the conditions precedent set forth below are not satisfied as of the closing date for each Takedown of the Property, unless waived by the Purchaser, this Agreement shall terminate and Purchaser shall be entitled to a return of the Earnest Money and except for the Purchaser's obligation for indemnification set forth in Section 11 neither the Purchaser nor the Seller shall have any further obligations to the other herein.

(a) Seller's Representations. The representations, warranties, covenants and agreements of Seller set forth herein shall be materially true and in full force and effect as of the Closing Date for each phase of the Property.

9. Survey. Seller shall furnish a Boundary Survey of the Property referenced in the attached Exhibit A indicating the true and correct legal description thereof, delineating the boundary lines of said property and all wetlands and carving out the 40 acre parcel to be retained by the Seller. Purchaser shall obtain the Takedown surveys for the acquisition of each Takedown of the Property ("Takedown Survey"). The costs of all Takedown Surveys will be paid for by Purchaser and Seller in equal proportions.

10. Closing Costs. The closing costs shall be allocated as follows:

(a) Each party shall pay its own attorneys fees;
(b) Seller shall pay for the preparation of it's deed, the costs to cancel any mortgage or other lien of record and the Deed recording fees pursuant to Section 12-24-10, et seq. SC Code of Laws;
(c) The parties shall share the costs for the Boundary Survey equally;
(d) Purchaser shall pay all costs for title examinations, title insurance premiums, all costs related to it's financing and all costs related to its inspection of the Property.
(e) Real Property Taxes and special assessments, if any, shall be prorated as of the Closing Date based on the latest available information provided by the Horry County Assessor's Office and/or Auditor's Office. Apportionment shall be computed by the 365 day method with each day representing 1/365th of the annual charge. If the amount of taxes is not known at closing, proration of taxes will be made upon the basis of the previous years taxes with Purchaser receiving a credit against the portion of the Purchase Price payable to Seller for Sellers share thereof. Should the actual assessment for the year of closing be more or less than the amount used as a basis for proration at closing, then as an obligation of the parties which shall survive closing, Purchaser and Seller promptly upon receipt by any of them of the notice or bill for taxes will make the proper adjustment so that such proration will be accurate based upon the actual amount of taxes and payment will be made promptly to the appropriate Seller or

Purchaser, whichever shall be entitled to such payment, by the other party.

(f) Purchaser shall pay any "Roll-back" taxes or similar taxes, if any, based upon any change in use of the Property whether such taxes are assessed before or after closing. The provisions of this section shall survive closing.

(g) Impact fees and other charges and fees, including, but not limited to water and sewer fees, storm water fees, impact fees and charges payable for police, fire, safety, traffic, education and recreation and any other charges and fees required to be paid, or work required to be performed, whether on site or off site, as a condition to the permitting and construction of Purchaser's intended use for the Property, shall be incurred by, and shall be the sole responsibility of Purchaser. The provisions of this section shall survive closing. In the event Seller is required to pay any such fees, Purchaser agrees to reimburse Seller at the next closing under this Agreement.

(h) Any and all other costs of settlement or closing shall be allocated between Seller and Purchaser as is customary in Horry County, South Carolina.

(i) Purchaser shall pay for the Phase Surveys.

(j) The parties shall share the cost of the Takedown Surveys and Wetlands Survey equally.

11. Purchaser's Inspection. Following the execution of this Agreement, Purchaser and its experts shall have a right to inspect the Property. Such inspection may include but not be limited to Purchaser's right to make such surveys, wetlands delineation, inspections, analysis, soil tests, environmental assessments and tests, appraisals, engineering reports, market feasibility studies, and other investigations of the Property as Purchaser deems reasonably necessary or desirable. Purchaser shall indemnify and hold Seller harmless from and against any claim, loss, damage, liability, or expense (including reasonable attorneys fees and court costs), which are suffered or incurred by Seller as a direct result of such inspections. Such indemnification shall survive closings or termination of this Agreement.

12. OMITTED

13. Seller's Representations, Warranties and Covenants. In order to induce Purchaser to enter into this Agreement and to purchase the Property in addition to the warranties, representations, covenants and undertakings contained elsewhere in this Agreement, Seller hereby makes the following representations, warranties and covenants, each of which is material and is relied upon by Purchaser:

(a) Title. Seller is the sole owner of good and marketable fee simple title to the Property.

(b) Standing and Authority of Seller. The Seller has the right, power and authority to enter into this Agreement and to sell the Property in accordance with the terms and conditions hereof. This Agreement, when executed and delivered by Seller, will be valid and binding obligation of the Seller in accordance with its terms.

(c) No Other Agreements. No options or other contracts have been granted or entered into which are still outstanding and which give any party a right to purchase any interest in the Property or any part thereof.

(d) No Condemnation. To the best of Seller's knowledge, there is no condemnation or eminent domain proceedings pending or contemplated against the Property or any part thereof and the Seller has received no notice, oral or written, of the desire of any public authority or other entity to take or to use the Property or any part thereof.

(e) Environmental Matters. To the best of Seller's knowledge the Property has not been previously used as a landfill or dump for garbage refuse and no Hazardous Materials are or have been located, used, stored or disposed of on the Property.

i. "Hazardous Materials" shall mean any substance which is or contains (i) any "hazardous substance" as now or hereafter defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9601 et seq.) ("CERCLA") or any regulations promulgated under or pursuant to CERCLA; (ii) any "hazardous waste" as now or hereafter defined in the Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.) ("RCRA"); (iii) any substance regulated by the Toxic Substances Control Act (15 U.S.C. § 2601 et seq.), (iv) gasoline, diesel fuel, or other petroleum hydrocarbons; (v) asbestos and asbestos containing materials, in any form, whether friable or nonfriable; (vi) radon gas; and (vii) any additional substances or materials which are now or hereafter classified or considered to be hazardous or toxic under Environmental Requirements (as defined hereinafter) or the common law, or any other applicable laws relating to the Property. Hazardous Materials shall include, without limitation, any substance, the presence of which on the Property, (A) require reporting, investigation or remediation under Environmental Requirements; (B) causes or threatens to cause a nuisance on the Property or threatens to pose a hazard to the health or safety of persons on the Property, or (C) which, if it emanated or migrated from the Property, could constitute a trespass.

ii. "Environmental Requirements" shall mean all laws, ordinances, statutes, codes, rules, regulations, agreements, judgments, orders, and decrees, now or hereafter enacted, promulgated, or amended, of the United States, the states, the counties, the cities, or any other political subdivision, agency or instrumentality exercising jurisdiction over the owner of the Property, or the use of the Property relating to pollution, the protection or regulation of human health, natural resources, to the environment, or the emission, discharge, release of threatened release of pollutants, contaminants, chemicals, or industrial, toxic or hazardous

substances or waste or Hazardous Materials into the environment (including without limitation, ambient air, surface water, ground water or land or soil).

(f) No Archaeologically Significant Matters. To the best of Seller's knowledge, no archaeologically significant ruins or artifacts are located on the Property.

(g) Litigation. Seller has no knowledge of nor has Seller received any notice of any actual or threatened action, litigation or proceeding by an organization, person, individual or governmental agency, including governmental actions under any condemnation authority.

(h) FIRPTA Withholding. Each of the persons consisting of the Seller is not a "foreign person" as that term is defined in the Internal Revenue Code, Section 1445 (F)(3), nor is the sale of the Property subject to any withholding requirements imposed by the Internal Revenue Code (including but not limited to, Section 1445 thereof, or any withholding requirements imposed by the tax laws of the State of South Carolina.)

(i) No Bankruptcy/Dissolution Event. No "Bankruptcy/Dissolution Event" hereinafter defined) has occurred with respect to any person comprising the Seller. "Bankruptcy/Dissolution Event" means the occurrence of any of the following: (a) the commencement of a case under Title 11 of the U.S. Code, as now constituted or hereafter amended, or under any other applicable federal or state bankruptcy law or other similar law; (b) the appointment of a trustee or receiver of any property interest; (c) an assignment for the benefit of creditors; (d) an attachment, execution or other judicial seizure of a substantial property interest; (e) the taking of, or failure to take, or submission to any action indicating an inability to meet its financial obligations as they accrue; or (f) a dissolution or liquidation.

14. Purchaser's Representations, Warranties and Covenants. In order to induce Seller to enter into this Agreement and to sell the Property, in addition to the warranties, representations and undertaking contained elsewhere in this Agreement, Purchaser hereby makes the following representations, warranties and covenants, each of which is material and is relied upon by Seller:

(a) Authority of Purchaser. Purchaser has the right, power and authority to enter into this Agreement and to purchase the Property in accordance with the terms and conditions hereof. This Agreement, when executed and delivered by Purchaser, will be a valid and binding obligation of the Purchaser in accordance with its terms and will not violate any agreement, Order, decree or judgment to which Purchaser is bound or subject.

(b) No Bankruptcy/Dissolution Event. No "Bankruptcy/Dissolution Event" has occurred with respect to Purchaser.

15. Title.

(a) Title to the Property shall be good and marketable and shall be conveyed by general warranty deed in fee simple, free and clear of all liens and encumbrances and shall be insurable by a nationally recognized ALTA title insurance company ("the Title Company") which shall be reasonably acceptable to Purchaser.

16. Deliveries at Closing. In addition to other conditions precedent set forth elsewhere in this Agreement, Seller and Purchaser shall deliver to the other at each closing contemplated herein the documents and items set forth hereunder, the delivery and accuracy of which shall further condition the obligations of the party to whom such are delivered to consummate the purchase and sale hereunder contemplated.

a. Seller's Deliveries at Closing. At each of the respective Closings set forth herein, Seller shall deliver the following to Purchaser:

(i) Deed. General warranty deed in recordable form, duly executed by the Seller conveying to Purchaser good, marketable and insurable fee simple title to the Phase tract at the relevant closing.

(ii) Easements. If the roads providing access to Property from a public street have not been dedicated at Closing, an easement in recordable form duly executed by the Seller granting to Purchaser a nonexclusive and insurable easement for ingress and egress. Also, Seller shall grant unto Purchaser the right to drain storm water into the pond on the 40 acre parcel providing that the storm water drainage will not materially increase the size and level of the pond waters.

(iii) Owner's Affidavit. An owner's affidavit sufficient to remove the mechanic's lien exception from Purchaser's title insurance policy.

(iv) Residency Affidavit. An affidavit of Seller providing the Seller's federal identification number and certifying that this transaction is not subject to withholding taxes in accordance with South Carolina Revenue Ruling 90-3.

(v) Authority. Such documents as may be reasonably necessary to establish Seller's authority to enter into such documents.

(vi) Settlement Statement. A settlement statement setting forth the amounts paid by or on behalf of and/or credited to each of Purchaser and Seller pursuant to this Agreement.

(vii) Foreign Person Affidavit. An affidavit of Seller certifying that Seller is not a "foreign person" as defined in the Federal Foreign Investment in Real Property Tax Act of 1980 and in the 1984 Tax Reform Act, as amended.

(viii) Other Documentation. Such other documents as may be reasonable in the opinion of Purchaser or their counsel to consummate and close the transaction contemplated herein pursuant to the terms and conditions of this Agreement.

b. Purchaser's Deliveries at Closing. At each of the respective Closings set forth herein, Purchaser shall deliver the following to Seller:

(i) Purchase Price and Other Costs. The Purchase Price as set forth in Section 2 by way of cash, certified check, federal wire transfer or other immediately available funds.

(ii) Settlement Statement. A settlement statement setting forth the amounts paid by or on behalf of and/or credited to each of Purchaser and Seller pursuant to this Agreement.

(iii) Takedown Survey. A survey defining the portion of the Property to be purchased at the respective closing.

(iv) Other Documentation. Such other documents as may be reasonable in the opinion of Purchaser or their counsel to consummate and close the transaction contemplated herein pursuant to the terms and conditions of this Agreement.

17. Risk of Loss and Condemnation. The risk of loss to the Property shall be borne by the Seller until the Purchaser has closed the respective phases of the Property. In the event of material (as reasonably determined by the Purchaser) casualty loss to the Property occurring prior to the date of closing on the Property, but after the execution of this Agreement, Seller shall promptly notify Purchaser in which case Purchaser shall have the option of consummating the transactions set forth herein or terminating this Agreement in which case the Purchaser shall be entitled to a return of the Earnest Money.

In the event of condemnation or receipt of notice of condemnation or the taking of a material portion of the Property, by any governmental authority after the execution of this Agreement, Seller shall promptly notify Purchaser in which case Purchaser shall have the right to terminate this Agreement and shall be entitled to a return of the Ernest Money or to continue in accordance with this Agreement with all rights under and proceeds of such condemnation being transferred from Seller to Purchaser as further set forth above. Notwithstanding, in the event the Purchaser properly terminates the Agreement pursuant to the terms herein, Purchaser shall reassign and transfer all such rights and proceeds of such condemnation of such portion of the Property which the Purchase has yet to acquire from the Seller under this Agreement.

18. Real Estate Commissions. Except for Bethea, Talbot & Co. ("Broker") the parties represent and warrant to each other that no advisor, broker, sales person or finder has been employed or consulted in connection with the sale and purchase of the Property and each party hereto agrees to indemnify and hold harmless the other from and against any claims of any real estate broker or agent which such party has engaged or dealt with in connection with this transaction. The representations, warranties, and agreements as set forth in this section shall survive the termination of this Agreement

and the respective closing dates set forth herein. The Seller shall pay all commissions to Bethea Talbot & Co. pursuant to separate agreement between the Seller and Broker. Seller acknowledges that the principals of the Broker may be members of the Purchaser.

19. "As Is" Except where otherwise expressly set forth in this Agreement to the contrary, Purchaser hereby understands and agrees that Purchaser is purchasing the Property in its "as is" condition with no warranties except as set forth herein.

20. Default and Remedy. If Purchaser has breached its covenants and agreements hereunder and has failed, refused or is unable to consummate the purchase and sale contemplated herein by the Closing Date, Seller shall be entitled to either: (i) retain the Earnest Money paid by Purchaser as and for Seller's liquidated damages for Purchaser's default or (ii) seek specific performance of this Agreement against the Purchaser. Notwithstanding the aforesaid, nothing herein shall be deemed to limit Seller's remedies for indemnification under Section 11. If Seller has breached its covenants and agreements under this Agreement and has failed, refused or is unable to consummate the purchase and sale contemplated herein by any Closing Date. Purchaser shall be entitled to: (i) terminate this Agreement and receive a full refund of the Earnest Money, or (ii) seek specific performance of this Agreement against the Seller. or (iii) in the event of a willful or intentional breach by Seller, Purchaser may pursue any other remedy at law or in equity.

21. Agreement to Cooperate. Seller agrees to cooperate with Purchaser in good faith in the development of the Property and approval development plans or zoning approvals at no cost to Seller.

22. Property Takedowns. Purchaser shall be entitled to purchase the Property in multiple closings over a forty-eight (48) month period after the First Takedown Closing Date (the "Takedown Period"). The Property shall be divided into Takedown Parcels which parcel numbers represent the sequence for Purchaser's acquisition of the Takedown Property as follows (all Parcels may be collectively referred to as the "Takedown Property"):

a. The Second Takedown Parcel must be purchased on the date which is no more than one (1) year after the First Takedown Closing Date and said Second Takedown must contain a minimum of 50 upland acres.

b. The Third Takedown Parcel must be purchased on the date which is no more than two (2) years after the First Takedown Closing Date and said Third Takedown must contain a minimum of upland 50 acres.

c. The Forth Takedown Parcel must be purchased on that date which is no more than three (3) years after the First Takedown Closing Date and said Forth Takedown shall be all remaining portions of the Property.

NOTE: The Purchaser may elect to Purchase any Takedown Parcel in multiple closings during that year provided at each closing the Purchaser acquires no less than 25 upland acres and purchases a minimum of 50 upland acres during the Takedown Period.

During the Feasibility Period the parties shall agree on a Takedown Schedule. However, during the Takedown Period. Purchaser shall have a continuing right. at its option. to purchase any one or more Takedown Parcels, in the order to be determined by the Takedown Schedule, at any time prior to the above scheduled time for performance. An early purchase will not affect the time table for future purchases of Takedown Property except at the option of the Purchaser pursuant to the terms of this Agreement. If the purchase of a Takedown Parcel is accelerated it shall be priced according to the Purchase Price calculation for that Takedown Period.

The Purchaser shall have the right to configure the Takedown Property to be acquired at the closings subject to Sellers approval. which is not to be unreasonably withheld. Said configuration will not unreasonably restrict or impact the un-purchased portion of the Property such that access or utility service would be impaired.

If Purchaser does not acquire the required acreage within the required time periods (as set forth herein). the Seller shall be entitled to declare the Purchaser in default and exercise the remedies set forth herein.

The closing of the Phase Property shall be in accordance with other terms and conditions of this Agreement applicable for the Property.

Notwithstanding any of the foregoing, the parties agree that Purchaser will takedown the Southwest Portion of the tract at the last closing. which tract is more specifically delineated in Schedule "__" attached hereto.

23. Reserved Easements. Purchaser herein acknowledges that in the deeds for the Phase tracts of the Phase Property. Seller shall reserve easements across the road right of ways and in utility corridors, located or to be located on the Property to the remainder of the unsold Property for purposes of ingress. egress and the installation of utilities. The easement shall be shown on the Survey and Seller shall use reasonable efforts to coordinate its location with Purchaser's development plan. Upon the Purchaser's purchase of all the Property. the parties agree to terminate such easements. Purchaser shall have the opportunity to review and reasonably approve such reserved easement language as to form prior to the Closing of the Property and as to the location prior to each applicable closing of the Property. This covenant shall survive all closings.

24. Assignability. The Purchaser's rights or obligations and interest in this Agreement may be transferred or assigned in whole or in part with prior written consent of the Seller. unless said transfer or assignment is to be made to a limited liability company of which the Purchasers are the principals ("Permitted Assigns"). Purchasers shall execute a personal guarantee upon any assignment and shall remain liable under all of the terms and conditions of this agreement.

25. Notices. Any notice, request, demand, instruction or other communication to be given to either party hereunder. except those required to be delivered at the relevant closing. shall be in writing, and shall be deemed to be delivered (a) upon receipt, if delivered by facsimile or if hand delivered. (b) upon receipt. if delivered by a national overnight air courier service such as FedEx or

UPS Next Day Air or DHL Worldwide, or (c) upon receipt or first refusal thereof, by registered or certified mail, return receipt requested, postage prepaid, addressed as follows:

Seller:

Bucksville Farms, Inc.
c/o Beniamin Creel
P.O. Box 289
Conway, South Carolina 29526
Telephone: (843) 248-9113
Fax: (843) 248-2583

With a copy to:

McNair Law Firm, P.A.
2411 Oak Street, Suite 206
Myrtle Beach, South Carolina 29577
Attn.: George E. McDowell, Jr.
Telephone: 843.443.3018
Fax: 843.444.3962

Purchaser:

Randy A. Beverly, LLC
601 Tanstaig Court
Conway, S.C. 29526
Telephone: (843) 347-6333 (Cell) 997-5384
Fax: (843) 347-4688

With copy to: _____

_____

_____

Telephone: _____
Fax: _____

Purchaser:

Donald Godwin, LLC
115 Woodmont Lane
Pawleys Island S.C.
Telephone: 843-237-2804
Fax: 843-347-9467

With copy to: _____

_____

_____

_____

Telephone: (843) _____
Fax: (843) _____

Any party shall have the right from time to time to change the address to which notice to it shall be sent by giving to the other party or parties at least five (5) days prior notice of the change of address.

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26. Escrow Agent. In performing its duties as Escrow Agent and holding the Earnest Money as provided in this Agreement, the Escrow Agent shall not incur any liability to anyone for damages, losses or expenses, except for willful default or breach of trust and it shall not incur any such liability with respect to (a) any action taken or omitted in good faith upon advice of its counsel, or (b) to any action taken or omitted in reliance upon any instrument, including written notice or instructions provided for in this Agreement, not only as to its due execution and validity and effectiveness of its provisions, but also as to the truth and accuracy of any information contained therein, which Escrow Agent shall in good faith believe to be genuine, to have been signed or presented by a proper person or persons, and to conform with the provisions of this Agreement. In the event of a dispute between any of the parties hereto sufficient in the discretion of Escrow Agent to justify its doing so, Escrow Agent shall be entitled to tender into the registry or custody of any court of competent jurisdiction, all Earnest Money held under this Agreement, together with such legal proceedings as it deems appropriate, and thereupon the discharge from all further duties and liabilities under this Agreement. Any such legal action shall be brought in such court as Escrow Agent shall determine to have jurisdiction thereof. All costs of such proceedings, together with any reasonable attorney's fees and costs incurred by Escrow Agent and the successful party or parties in connection therewith, shall be paid by the unsuccessful party or parties to such proceeding.

27. Miscellaneous.

(a) Entire Agreement. This Agreement and the exhibits attached hereto contain the entire agreement between the parties. No modification or amendment of this Agreement shall be of any force or effect unless made in writing and executed by both Purchaser and Seller.

(b) Counterparts; Execution by Facsimile. This Agreement may be executed in any number of counterparts which together shall constitute the agreement of the parties. For purposes of executing this Agreement, a document signed and transmitted by facsimile machine or telecopier shall be treated as an original document. The signature of any party thereon shall be considered an original signature, and the document transmitted shall be considered to have the same binding legal effect as an original signature on an original document. At the request of either party, any facsimile or telecopy document shall be re-executed by the parties in original form. No party hereto may raise the use of a facsimile machine or telecopier or the fact that any signature was transmitted through the use of a facsimile or telecopier machine as a defense to the enforcement of this Agreement or any amendment executed in compliance with this subparagraph.

(c) Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

(d) Survival of Warranties. Unless otherwise provided herein, it is the express intention and agreement of the parties to this Agreement that all covenants, agreements, statements, representations and warranties made by Seller and Purchaser in this Agreement shall merge into the deed and other instruments executed at closing.

(e) Waiver. Failure by Purchaser or Seller to insist upon or enforce any of its rights hereunder shall not constitute a waiver thereof

(f) Governing Law. This Agreement shall be governed by and construed under the laws of the State of South Carolina.

(g) Time of Essence. TIME IS OF THE ESSENCE IN THIS AGREEMENT; however, if the final date of any period which is set out in any provision of this Agreement falls on a Saturday, Sunday or legal holiday under the laws of the United States or the State of South Carolina, then, in such event, the time of such period shall be extended to the next day which is not a Saturday, Sunday or legal holiday.

(h) Invalid Provision. If any provision of this Agreement is held to be illegal, invalid, or unenforceable under present or future laws, such provision shall be fully severable. This Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of this Agreement, and the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by such illegal, invalid, or unenforceable provision or by its severance from this Agreement.

(i) Section/Paragraph Headings. The section and paragraph headings as herein used are for convenience of reference only, and shall not be deemed to vary the content of this Agreement or the covenants, agreements, representations or warranties herein set forth or limit the provisions or scope of any section or paragraph.

(j) Pronouns. All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine, neuter, singular or plural, as the identity of the person or entity may require.

(k) Records. Purchaser shall not file this Agreement or any memorandum hereof in any public records.

(l) Attorneys' Fees. Should either party hereto institute any action or proceeding in court to enforce any provision hereof or for damages by reason of any alleged breach of any provision of this Agreement or for any other judicial remedy, the prevailing party shall be entitled to receive from the losing party all reasonable attorneys' fees and all court costs in connection with said proceeding at trial and through all appeals.

(m) Termination of Agreement. In the event this Agreement is terminated for any reason under the terms of this Agreement, the parties shall have no further right and shall be released from all further obligation hereunder, except for any obligations that expressly state that they will survive any termination hereof all of which shall survive any such termination. If Purchaser terminates this Agreement or fails to purchase the Property for any reason, Purchaser shall return to Seller those items which Seller submitted to Purchaser for Purchaser's review.

(n) Construction. As used in this Agreement, the words "herein," "hereof," and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular article, section, paragraph or other subdivision.

(o) Schedules, Etc. All exhibits and schedules annexed hereto are expressly made a part of this Agreement as though fully set forth herein and all references to this Agreement or in any such exhibits or schedules shall refer to and include all such exhibits and schedules.

(p) Due Execution. Seller and Purchaser each represents and warrants to the other that the execution and delivery of this Agreement; the sale of the Property by Seller; and the purchase of the Property by Purchaser have been duly authorized by all required actions and that the party signing this Agreement on behalf of Seller and Purchaser is duly authorized to do so.

(q) No Agency or Joint Venture. This Agreement shall not be construed as in any way establishing a partnership, joint venture, express or implied agency, special confidential relationship or employer-employee relationship or as establishing any fiduciary obligations between Seller and Purchaser.

28. Engineering Plans and Studies. Purchaser shall be entitled to obtain from Seller any recent soil reports and engineer's inspections, wetlands delineations, environmental audits, archaeological audits, if any exist following the execution of this Agreement.

29. Purchaser's Engineering Plans and Studies In the event the Purchaser rightfully or wrongfully terminates this Agreement, Purchaser shall furnish Seller with copies of all studies, environmental audits, surveys and other plans prepared for Purchaser in connection with the Property.

[Remainder of page left intentionally blank.]

IN WITNESS WHEREOF, the parties hereby have executed this Agreement as of the date first written above

WITNESSES:

SELLER:

Bucksville Farms, Inc.

By: Benjamin J. Creel
Benjamin Creel

Its: President

PURCHASER:

Randy A. Beverly, LLC

By: Randy A. Beverly

Its: Manager

and

Donald Godwin, LLC

By:

Its: Manager

EXHIBIT A

ADDENDUM TO CONTRACT

WHEREAS, the undersigned have entered into an Agreement to Buy and Sell Real Estate in Multiple Closings dated even date herewith; and

WHEREAS, the parties wish to supplement their Agreement by this Addendum.

NOW THEREFORE, in consideration of these premises and the mutual covenants and agreements herein contained, the parties agreed as follows:

1. If the Seller desires to effect a tax free exchange with regard to the sale of the Property, then Purchaser agrees that it will reasonably cooperate with Seller in Seller's efforts to effectuate a tax deferred like kind exchange under Section 1031 of the Internal Revenue Code. Such cooperation shall include approval of Seller's use of a qualified intermediary, and Seller's assignment to the qualified intermediary of Seller's rights to the sales proceeds, provided Purchaser shall not be required to release Seller from any liability under this Agreement or to receiving a deed from anyone other than the Seller. Further, the Purchaser shall not incur any additional expense or assume any liability greater than that contemplated by this Contract as a result of Seller's election.

2. The Purchaser agrees that it will allow the Seller to tie into any utilities that Purchaser has constructed on the Property in order to service the 40 acre parcel retained by Seller. Purchaser's agreement is contingent on Seller submitting the plans for such connection to Purchaser for approval so that Purchaser can determine compatibility with existing systems and insure minimal interference with Purchaser's property. The costs of this connection by Seller shall be borne solely by the Seller and Seller shall also be responsible for any upgrades to existing lines or pumping stations that may be required by Seller's intended use of the retained parcel.

Dated this 2nd day of October, 2005.

WITNESS:

BUCKSVILLE FARMS, LLC

By: Benjamin J. Creel

Its: President

RANDY A. BEVERLY, LLC

By:

Its: Member

DONALD GODWIN, LLC

By:

Its:

0679

Instrument#: 2009000105741, DEED BK: 3423 PG: 1280 DOCTYPE: 001 10/01/2009 at 01:28:04 PM, 1 OF 7 COUNTY STAMPS: $539.00 STATE STAMPS: $1274.00 BALLERY SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

TMS Number correct 1690003027

A TRUE COPY, ATTEST
HORRY COUNTY REGISTER OF DEEDS
Ballery V. Skipper, Dir. - Dep.

Prepared by: John C. Thomas, P.A.
107 Lewis Street
Conway, SC 29526

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

DEED

WHEREAS, Bucksville Farms, Inc., was administratively dissolved by the South Carolina Secretary of State on or about January 30, 2008, and has not been reinstated;

WHEREAS, the execution of this deed is necessary to wind up and liquidate the corporation's business and affairs pursuant to section 33-14-210(d), South Carolina Code of Laws, as amended.

KNOW ALL MEN BY THESE PRESENTS,

That **Bucksville Farms, Inc.**, for and in consideration of the sum of **Four Hundred Ninety Thousand and 00/100 ($490,000.00) Dollars** to it paid by **Larry W. Paul**, in the State aforesaid (Receipt whereof is hereby acknowledged), has granted, bargained, sold and released; and by these presents does grant, bargain, sell and release unto the said **Larry W. Paul**, his heirs and assigns, the following described real property, to-wit:

SEE ATTACHED EXHIBIT A FOR LEGAL DESCRIPTION.

Derivation: This being a portion of the property conveyed to the grantor herein by deed of G. J. Creel & Sons, Inc., recorded November 29, 1983, in Deed Book 835 at Page 826, Horry County Register of Deeds.

DEFENDANT'S EXHIBIT NO. 34

Instrument#: 2009000105741, DEED BK: 3423 PG: 1281 DOCTYPE: 001 10/01/2009 at 01:28:04 PM, 2 OF 7 COUNTY STAMPS: $539.00 STATE STAMPS: $1274.00 BALLERY SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

A TRUE COPY, ATTEST
HORRY COUNTY REGISTER OF DEEDS
Ballery V. Skipper, Director — Ballery V. Skipper

Tax map number: 169-00-03-027

Grantee's address: P.O. 289, Conway, SC 29528

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 premises before mentioned unto the said **Larry W. Paul**, his heirs and assigns, forever.

And the Grantor herein binds itself, its Heirs, Successors, Executors or Administrators, to warrant and forever defend all and singular the said premises unto the said **Larry W. Paul**, his heirs and assigns, against itself and its successors, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

Witness the execution hereof by grantor this 30th day of September, in the year of our Lord two thousand nine and in the two hundred thirty-fourth year of the Sovereignty and Independence of the United States of America.

Instrument#: 2009000105741, DEED BK: 3423 PG: 1283 DOCTYPE: 001 10/01/2009 at 01:28:04 PM, 4 OF 7 COUNTY STAMPS: $539.00 STATE STAMPS: $1274.00 BALLERY SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

A TRUE COPY, ATTEST
HORRY COUNTY REGISTER OF DEEDS
Ballery V. Skipper, Director — Ballery V. Skipper

EXHIBIT A

TRACT 1: ALL AND SINGULAR, all that certain piece, parcel or tract of land situate, lying and being in Bucks Township, Horry County, South Carolina, containing Ten (10.00) Acres, more or less, and shown as the S.C. Morris Tract on a map of 543.85 Acres of land in Bucks Township, Horry County, South Carolina, owned by Canal Wood Corporation, dated April 11, 1969, and prepared by S. D. Cox Surveyors, Inc., reference to which is craved as forming a part of these presents. The said tract is more particularly described on said map as follows:

Commencing at Stake N on the northwest margin of the Old Port Harrelson and Conway Road on the dividing line separating the within tract from Tract B-1 and running along the northwest margin of said road in a northeasterly direction to a stake at a pine tree, as shown on said map; thence cornering and running North 38 deg. 15 min. West for a distance of 415 feet to a stake; thence South 45 deg. 25 min. West 613 feet to a stake; thence South 86 deg. 45 min. West for a distance of 173 feet to a stake, thence cornering and running South 38 deg. 15 min. East for a distance of 729 feet to the point of beginning.

Bounded on the southeast by the Port Harrelson-Conway Road; and on the northeast, northwest and southwest by lands of Canal Wood Corporation and formerly of James Missroon.

The said tract is further shown on a plat of 10 acres prepared by S. D. Cox, Surveyor, and dated July 24, 1926.

TRACT 2: ALL AND SINGULAR, all those certain parcels or tracts of land, together with improvements thereon, situate, lying and being in Bucks Township, Horry County, South Carolina, in High School District No. 1, containing in the aggregate 317.56 Acres, more or less, being more particularly bounded now or formerly as follows:

North by lands of Buck, Sarvis, Joe McCray and Singleton, et al, East by Old Port Harrelson and Conway Road, lands of S.C. Morris, Joe McCray, and Singleton, et al; South by lands of S.C. Morris, Waccamaw River Swamp, Paul Hodges and Leila S. Hodges; West by Paul Hodges, Leila S. Hodges, Joe McCray and U.S. Highway 701 between Conway and Georgetown, South Carolina.

There is excepted from the above described tract of land that certain parcel of land containing 8.76 acres conveyed by Canal Industries, Inc. to the South Carolina Public Service Authority by Deed dated August 31, 1972, which parcel of land is shown on the South Carolina Public Service Authority's Drawing No. D-2241, revised June 27, 1972; however, the grantor herein conveys unto the grantee those certain rights reserved in the aforesaid deed from Canal Industries, Inc., which rights were conveyed to the grantor herein under Deed from Canal Industries, Inc., recorded in Deed Book 476 at Page 463.

Instrument#: 2009000105741, DEED BK: 3423 PG: 1284 DOCTYPE: 001 10/01/2009 at 01:28:04 PM, 5 OF 7 COUNTY STAMPS: $539.00 STATE STAMPS: $1274.00 BALLERY SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

A TRUE COPY, ATTEST
HORRY COUNTY REGISTER OF DEEDS
Ballery V. Skipper, Director — Patty V. Wiggins

The land conveyed is shown on map of 543.85 acres made for Canal Wood Corporation by S.D. Cox Surveyors, Inc. dated April 11, 1969, and recorded in the Clerk of Court's Office for Horry County in Plat Book 54 at Page 32, which land is all located on the eastern side of U.S. Highway 701 leading from Conway to Georgetown, South Carolina.

This conveyance is made subject to existing easements and rights-of-way across this property.

LESS AND EXCEPTING: that certain 51.08 acres, more or less, conveyed to Donald D. Godwin, LLC and Randy A. Beverly, LLC by Deed recorded June 9, 2006, in the office of the ROD for Horry County, in Deed Book 3110 at Page 656.

LESS AND EXCEPTING: that certain 50.88 acres, more or less conveyed to Donald D. Godwin, LLC and Randy A. Beverly LLC by Deed recorded June 1, 2007, in the office of the ROD for Horry County, in Deed Book 3249 at Page 2028.

LESS AND EXCEPTING: ALL AND SINGULAR, that certain piece, parcel or tract of land situated in Bucks Township, Horry County, South Carolina, containing 42.54 acres, more or less, and shown on a plat prepared for Bucksville Farms, Inc., by Coastal Land Surveyors, Inc., dated July 21, 2005, and being more specifically described as follows:

Beginning at a point IPS at the southwest corner of the intersection of Shelley Farm Road, an unpaved public road, and S.C. Highway #475, and running in a southerly direction along the northern boundary of the said S.C. Highway #475, South 72 deg. 51 min. 33 sec. West a distance of 1293.75 feet to a point IPS; thence turning and running with a radius of 1797.44 feet, a chord of 84.85 feet, and a chord bearing South 74 deg. 12 min. 42 sec. West 84.86 feet to a point IPS; thence turning and running North 28 deg. 21 min. 01 sec. West 207.97 feet to a point IPS; thence turning and running North 01 deg. 38 min. 59 sec. West 1422.00 feet to a point IPS; thence turning and running North 88 deg. 32 min. 03 sec. East 1148.63 feet to a point IPS; thence turning and running along the western boundary of Shelley Farm Road South 10 deg. 29 min. 02 sec. East 1250.31 feet to the beginning point.

Bounded on the North by other lands of Bucksville Farms, Inc., now or formerly; on the East by Shelley Farm Road; on the South by S.C. Highway #475; and on the West by lands of Charles A. Wentworth, et al., now or formerly. This being the identical property being conveyed by deed of Bucksville Farms, Inc., to Larry W. Paul, recorded simultaneously herewith.

Instrument#: 2009000105741, DEED BK: 3423 PG: 1285 DOCTYPE: 001 10/01/2009 at 11:28:04 PM, 6 OF 7 COUNTY STAMPS: $539.00 STATE STAMPS: $1274.00 BALLERY SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

A TRUE COPY, ATTEST
HORRY COUNTY REGISTER OF DEEDS
Ballery V. Skipper, Director — Ballery V. Skipper

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

AFFIDAVIT FOR TAXABLE OR EXEMPT TRANSFERS

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.

2. The property being transferred is located at/known as: bearing Horry County Tax Map Number 169-00-03-027 was transferred by Bucksville Farms, Inc. to Larry W. Paul on September 30, 2009.

3. Check one of the following: The deed is
   (a) ____xx____ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth. $490,000.00
   (b) _____ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
   (c) _____ exempt from the deed recording fee because (See Information section of affidavit): consideration is less than $100.00.

(If exempt, please skip items 4 -7, and go to item 8 of this affidavit.)
If exempt under exemption #14 as described in the Information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty? Check Yes _____ or No __X___

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit.):
   (a) ____xx___ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of $490,000.00
   (b) _____ The fee is computed on the fair market value of the realty which is $_____.
   (c) The fee is computed on the fair market value of the realty as established for property tax purposes which is $_____.

5. Check Yes _____ or No ___xx_ to the following: A lien or encumbrance existed on the land tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes," the amount of the outstanding balance of this lien or encumbrance is :
   _____

6. The deed recording fee is computed as follows:
   (a) Place the amount listed in item 4 above here: $490,000.00
   (b) Place the amount listed in item 5 above here: $_____
   (If no amount is listed, place zero here.)
   (c) Subtract Line 6(b) from Line 6(a) and place result here: $490,000.00

Instrument#: 2009000105741, DEED BK: 3423 PG: 1286 DOCTYPE: 001 10/01/2009 at 01:28:04 PM, 7 OF 7 COUNTY STAMPS: $539.00 STATE STAMPS: $1274.00 BALLERY SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

A TRUE COPY, ATTEST
HORRY COUNTY REGISTER OF DEEDS
Ballery V. Skipper, Director — Ballery V. Skipper

7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is: $1,813.00

8. As required by Code Section 12-24-70, I state that I am a responsible person connected with this transaction as: Seller.

9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Responsible Person Connected with the Transaction:

By: Benjamin J. Creel

Bucksville Farms, Inc.

SWORN to before me this 30th day of September, 2009

Notary Public for SC
My Commission Expires: 2-25-16

Instrument#: 2009000105742, DEED BK: 3423 PG: 1287 DOCTYPE: 001 10/01/2009 at 01:28:05 PM, 1 OF 6 COUNTY STAMPS: $121.00 STATE STAMPS: $286.00 BALLERY W. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

TMS Number correct 1690003027

A TRUE COPY, ATTEST
HORRY COUNTY REGISTER OF DEEDS
Ballery V. Skipper, Director

Prepared by: John C. Thomas, P.A.
107 Lewis Street
Conway, SC 29526

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

DEED

WHEREAS, Bucksville Farms, Inc., was administratively dissolved by the South Carolina Secretary of State on or about January 30, 2008, and has not been reinstated;

WHEREAS, the execution of this deed is necessary to wind up and liquidate the corporation's business and affairs pursuant to section 33-14-210(d), South Carolina Code of Laws, as amended.

KNOW ALL MEN BY THESE PRESENTS,

That **Bucksville Farms, Inc.**, for and in consideration of the sum of **One Hundred Ten Thousand and 00/100 ($110,000.00) Dollars** to it paid by **Larry W. Paul**, in the State aforesaid (Receipt whereof is hereby acknowledged), has granted, bargained, sold and released; and by these presents does grant, bargain, sell and release unto the said **Larry W. Paul**, his heirs and assigns, the following described real property, to-wit:

SEE ATTACHED EXHIBIT A FOR LEGAL DESCRIPTION.

Derivation: This being a portion of the property conveyed to the grantor herein by deed of G. J. Creel & Sons, Inc., recorded November 29, 1983, in Deed Book 835 at Page 826, Horry County Register of Deeds.

DEFENDANT'S EXHIBIT NO. 35
PEE DEE COURT REPORTING - 843-607-4888

Instrument#: 2009000105742, DEED BK: 3423 PG: 1288 DOCTYPE: 001 10/01/2009 at 01:28:05 PM, 2 OF 6 COUNTY STAMPS: $121.00 STATE STAMPS: $286.00 BALLERY SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

A TRUE COPY, ATTEST
HORRY COUNTY REGISTER OF DEEDS
Ballery V. Skipper, Director — B. V. Skipper

Tax map number: 169-00-03-027

Grantee's address: **P.O. 289, Conway, SC 29528**

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 premises before mentioned unto the said **Larry W. Paul**, his heirs and assigns, forever.

And the Grantor herein binds itself, its Heirs, Successors, Executors or Administrators, to warrant and forever defend all and singular the said premises unto the said **Larry W. Paul**, his heirs and assigns, against itself and its successors, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

Witness the execution hereof by grantor this 30th day of September, in the year of our Lord two thousand nine and in the two hundred thirty-fourth year of the Sovereignty and Independence of the United States of America.

Instrument#: 2009000105742, DEED BK: 3423 PG: 1289 DOCTYPE: 001 10/01/2009 at 01:28:05 PM, 3 OF 6 COUNTY STAMPS: $121.00 STATE STAMPS: $286.00 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

A TRUE COPY, ATTEST
HORRY COUNTY REGISTER OF DEEDS
Ballery V. Skipper, Director — Ballery V. Skipper

Signed, Sealed, and
Delivered in the
Presence of

1st witness

Notary signs here as
2nd witness and notarizes
below

BUCKSVILLE FARMS, INC.

Benjamin J. Creel (L.S.)
BENJAMIN J. CREEL, PRESIDENT

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

ACKNOWLEDGMENT
(SC Code Section 30-5-30)

I, the undersigned Notary Public for the State of South Carolina, do hereby certify that the within named Bucksville Farms, Inc., by and through its duly authorized agent, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 30th day of September, 2009.

(L.S.)
Notary Public for SC
My commission expires: 2-25-13

Instrument#: 2009000105742, DEED BK: 3423 PG: 1290 DOCTYPE: 001 10/01/2009 at 01:28:05 PM, 4 OF 6 COUNTY STAMPS: $121.00 STATE STAMPS: $286.00 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

A TRUE COPY, ATTEST
HORRY COUNTY REGISTER OF DEEDS
Ballery V. Skipper, Director — Ballery V. Skipper

EXHIBIT A

ALL AND SINGULAR, that certain piece, parcel or tract of land situated in Bucks Township, Horry County, South Carolina, containing 42.54 acres, more or less, and shown on a plat prepared for Bucksville Farms, Inc., by Coastal Land Surveyors, Inc., dated July 21, 2005, and being more specifically described as follows:

Beginning at a point IPS at the southwest corner of the intersection of Shelley Farm Road, an unpaved public road, and S.C. Highway #475, and running in a southerly direction along the northern boundary of the said S.C. Highway #475, South 72 deg. 51 min. 33 sec. West a distance of 1293.75 feet to a point IPS; thence turning and running with a radius of 1797.44 feet, a chord of 84.85 feet, and a chord bearing South 74 deg. 12 min. 42 sec. West 84.86 feet to a point IPS; thence turning and running North 28 deg. 21 min. 01 sec. West 207.97 feet to a point IPS; thence turning and running North 01 deg. 38 min. 59 sec. West 1422.00 feet to a point IPS; thence turning and running North 88 deg. 32 min. 03 sec. East 1148.63 feet to a point IPS; thence turning and running along the western boundary of Shelley Farm Road South 10 deg. 29 min. 02 sec. East 1250.31 feet to the beginning point.

Bounded on the North by other lands of Bucksville Farms, Inc., now or formerly; on the East by Shelley Farm Road; on the South by S.C. Highway #475; and on the West by lands of Charles A. Wentworth, et al., now or formerly.

Instrument#: 2009000105742, DEED BK: 3423 PG: 1291 DOCTYPE: 001 10/01/2009 at 01:28:05 PM, 5 OF 6 COUNTY STAMPS: $121.00 STATE STAMPS: $286.00 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

A TRUE COPY, ATTEST
HORRY COUNTY REGISTER OF DEEDS
Ballery V. Skipper, Director — Ballery V. Skipper

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

AFFIDAVIT FOR TAXABLE OR EXEMPT TRANSFERS

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.

2. The property being transferred is located at/known as: bearing Horry County Tax Map Number 169-00-03-027 was transferred by Bucksville Farms, Inc. to Larry W. Paul on September 30, 2009.

3. Check one of the following: The deed is
   (a) ____xx____ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth. $110,000.00
   (b) _____ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
   (c) _____ exempt from the deed recording fee because (See Information section of affidavit): consideration is less than $100.00.

(If exempt, please skip items 4 -7, and go to item 8 of this affidavit.)
If exempt under exemption #14 as described in the Information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty? Check Yes _____ or No __X___

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit.):
   (a) ____xx___ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of $110,000.00
   (b) _____ The fee is computed on the fair market value of the realty which is $_____.
   (c) The fee is computed on the fair market value of the realty as established for property tax purposes which is $_____.

5. Check Yes _____ or No ___xx_ to the following: A lien or encumbrance existed on the land tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes," the amount of the outstanding balance of this lien or encumbrance is :
   _____

6. The deed recording fee is computed as follows:
   (a) Place the amount listed in item 4 above here: $110,000.00
   (b) Place the amount listed in item 5 above here: $_____
   (If no amount is listed, place zero here.)
   (c) Subtract Line 6(b) from Line 6(a) and place result here: $110,000.00

Instrument#: 2009000105742, DEED BK: 3423 PG: 1292 DOCTYPE: 001 10/01/2009 at 01:28:05 PM, 6 OF 6 COUNTY STAMPS: $121.00 STATE STAMPS: $286.00 BALLERY W. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

A TRUE COPY, ATTEST
HORRY COUNTY REGISTER OF DEEDS
Ballery V. Skipper, Director — Ballery V. Skipper

7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is: $407.00

8. As required by Code Section 12-24-70, I state that I am a responsible person connected with this transaction as: Seller.

9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Responsible Person Connected with the Transaction:

By: Benjamin J. Creel

Bucksville Farms, Inc.

SWORN to before me this 30th day of September, 2009

Notary Public for SC

My Commission Expires: 2-25-18

South Carolina
Secretary of State
Mark Hammond

BUCKSVILLE FARMS, INC.

Note:This online database was last updated on 1/4/2010 6:01:39 PM.
See our Disclaimer.

DOMESTIC / FOREIGN:	Domestic
STATUS:	Good Standing
STATE OF INCORPORATION / ORGANIZATION:	SC Profit

REGISTERED AGENT INFORMATION

REGISTERED AGENT NAME:	BENJAMIN J CREEL
ADDRESS:	708 12TH AVE CONWAY SC
CITY:	
STATE:	
ZIP:	
SECOND ADDRESS:	

FILE DATE:	11/15/1983
EFFECTIVE DATE:	11/15/1983
DISSOLVED DATE:	/ /

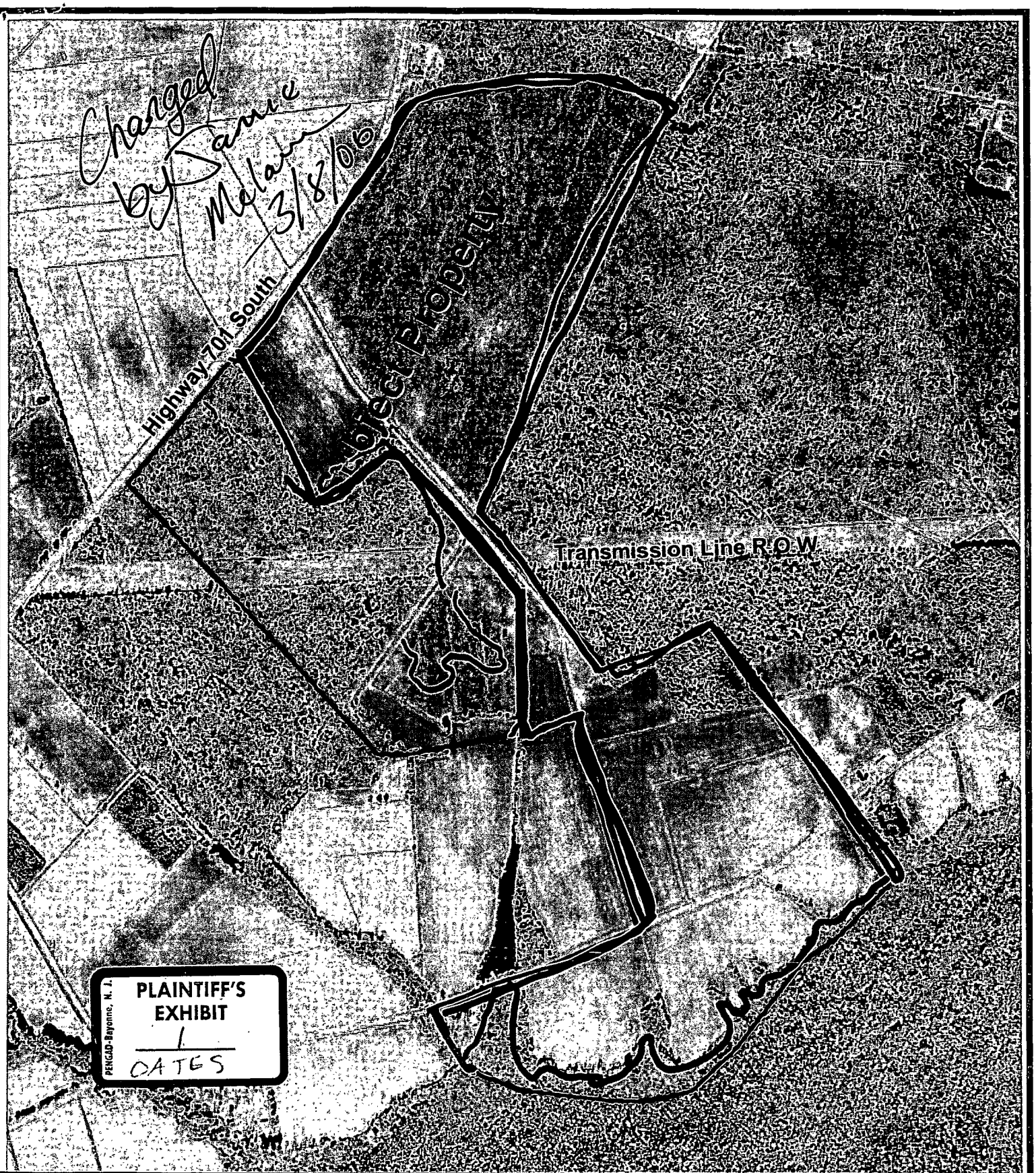
Corporation History Records

CODE	FILE DATE	COMMENT	Document
Forfeiture In Error	10/21/2009	FORFEITURE IN ERROR BY DOR	
Forfeiture	01/30/2008	ADMIN DISSOLUTION #2	
Reinstatement	08/05/2004	REINSTATEMENT	
Forfeiture	08/20/1998	FORFEITURE #2	Image
Agent	09/30/1992	CH AGT FROM-J R TERRELL	Image
Incorporation	11/15/1983	ART	Film

Disclaimer: The South Carolina Secretary of State's Business Filings database is provided as a convenience to our customers to research information on business entities filed with our office. Updates are uploaded every 48 hours. Users are advised that the Secretary of State, the State of South Carolina or any agency, officer or employee of the State of South Carolina does not guarantee the accuracy, reliability or timeliness of such information, as it is the responsibility of the business entity to inform the Secretary of State of any updated information. While every effort is made to insure the reliability of this information, portions may be incorrect or not current. Any person or entity who relies on information obtained from this database does so at his own risk.

0692





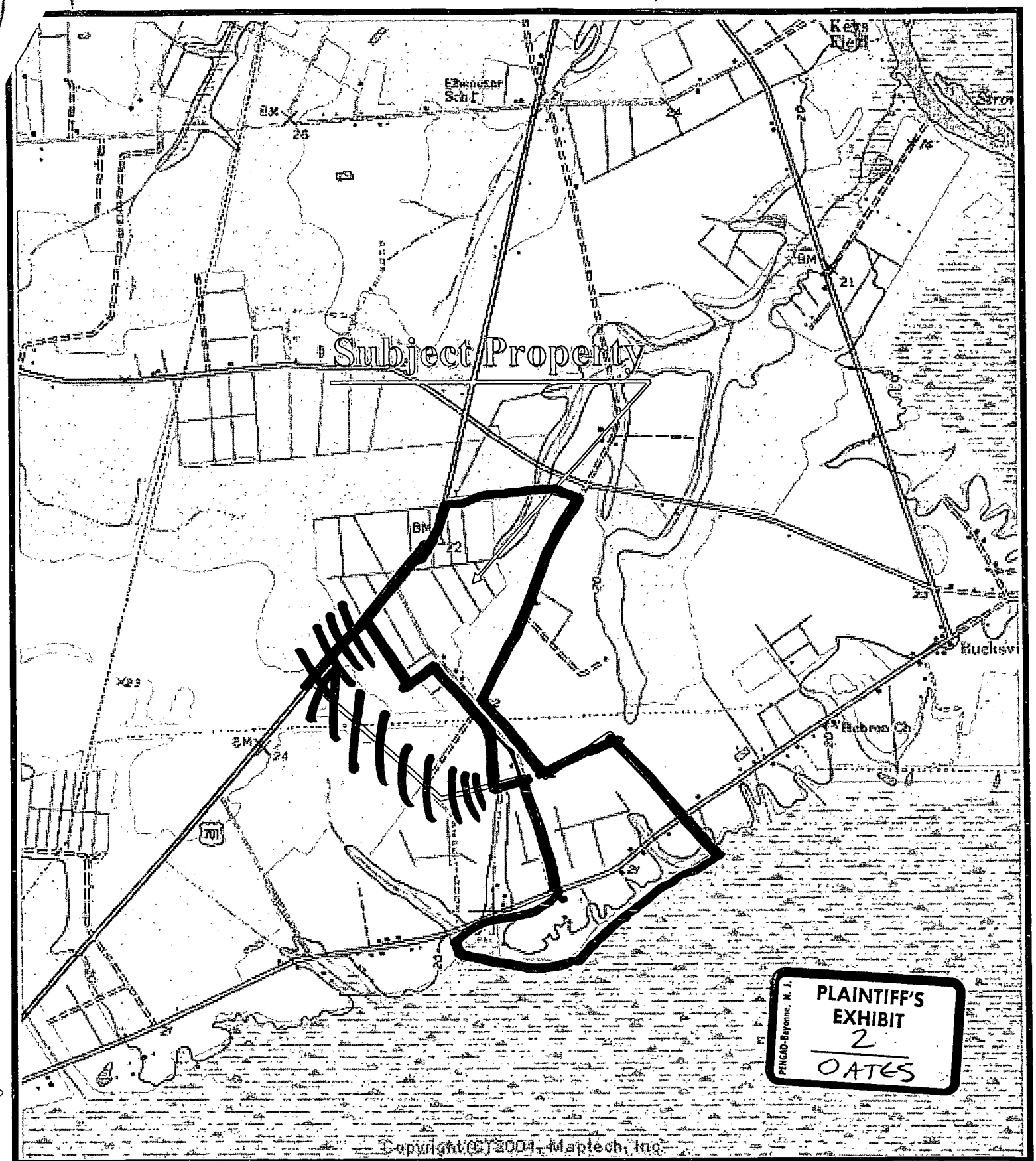
SCALE:	NTS
SOURCE: NAPP AERIAL PHOTOGRAPH	
SOURCE DATE:	1999
DATE:	January, 2006

S&ME
ENVIRONMENTAL SERVICES
ENGINEERING•TESTING

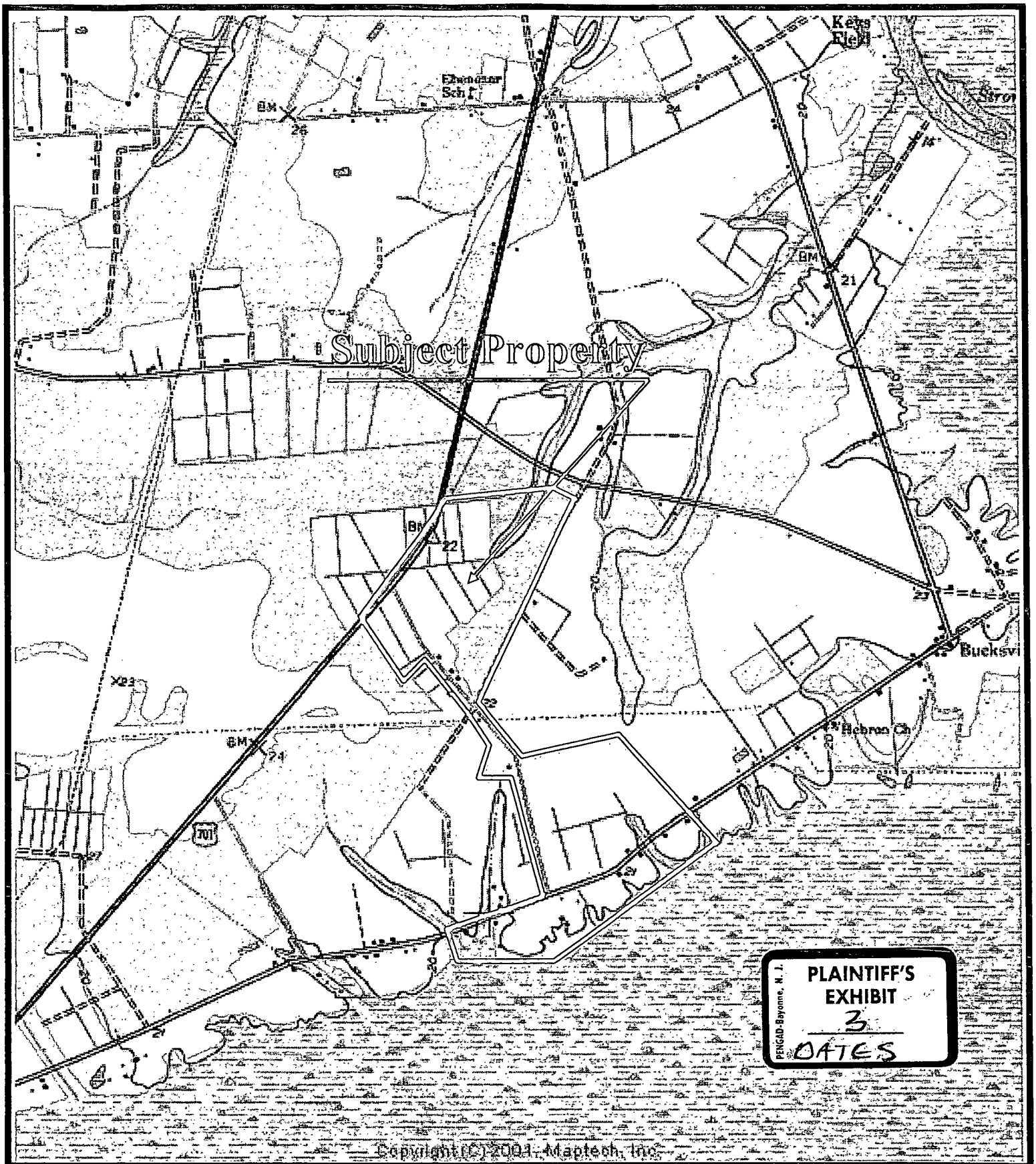
SITE AERIAL PHOTOGRAPH
280 Acre Hw 701 South Property
Horry County, South Carolina

PROPOSAL NO. 1634-06-376 0603

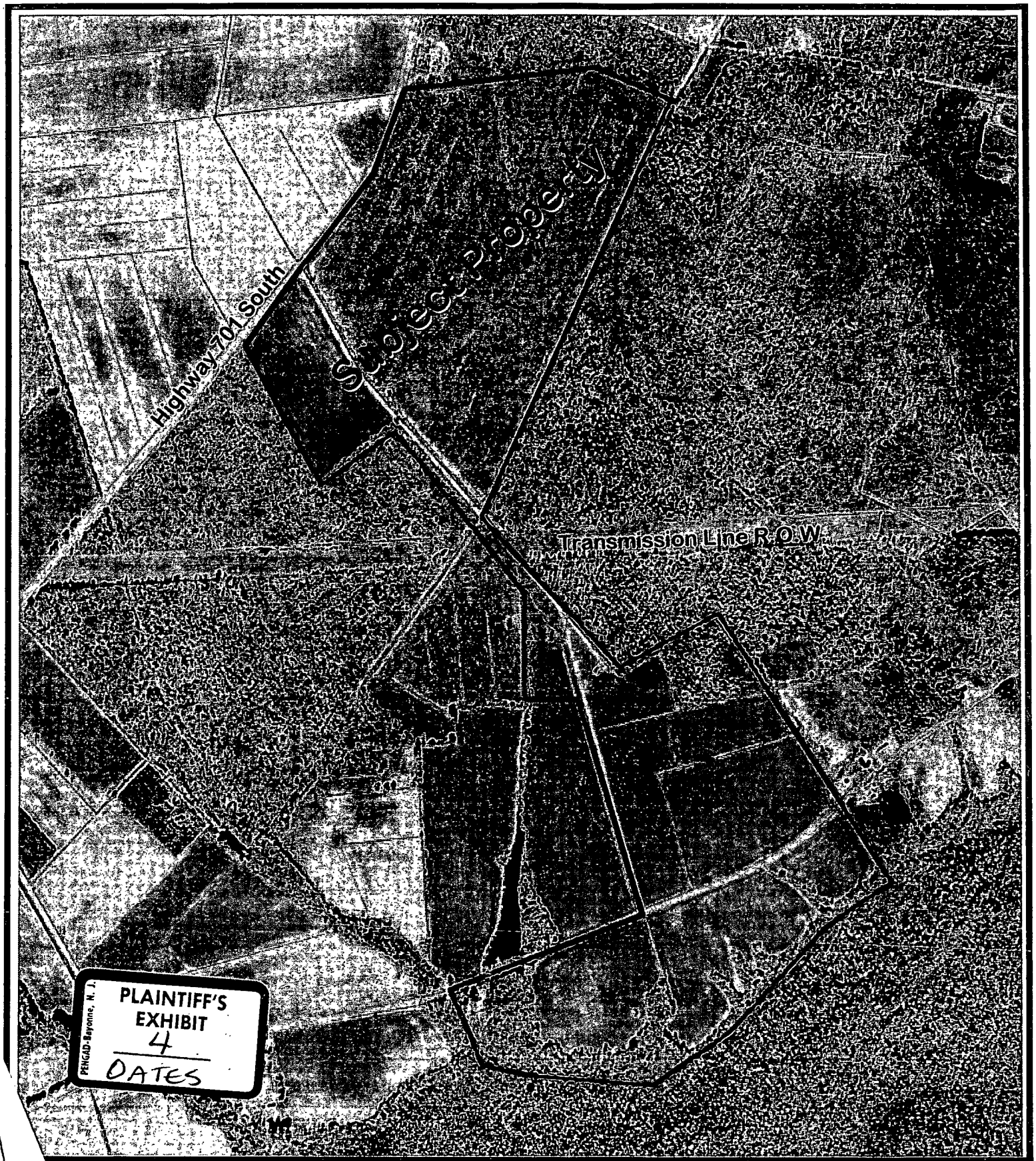
FIGURE NO
3



SCALE: NTS	S&ME ENVIRONMENTAL SERVICES ENGINEERING•TESTING	SITE TOPOGRAPHIC MAP 280 Acre Highway 701 South Property Horry County, South Carolina	FIGURE NO 2
SOURCE: USGS 7.5 Min Bucksville Quadrangle			
SOURCE DATE: 1973			
DATE: January, 2006		JOB NO. 1634-06-376 0694	



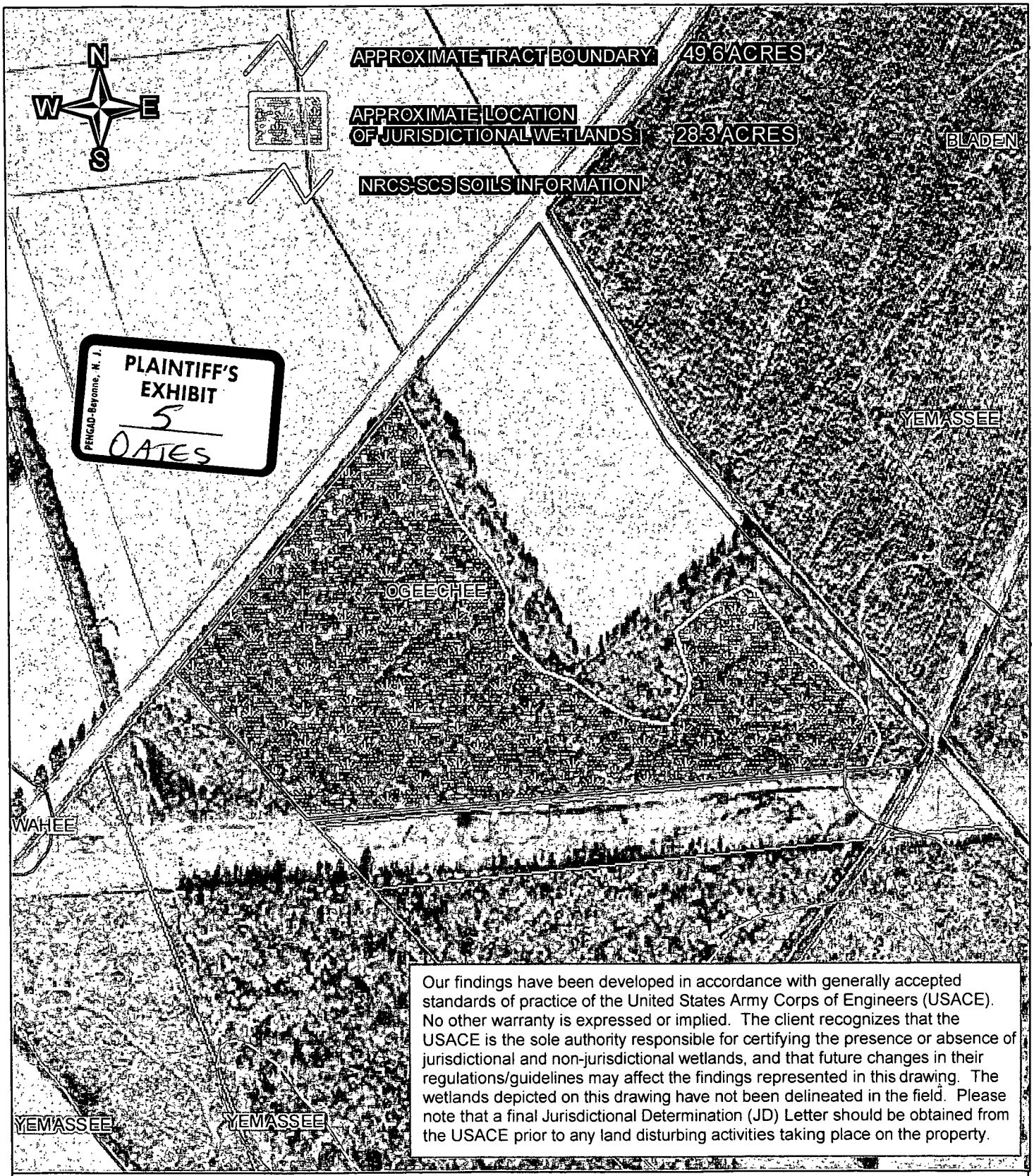
SCALE: NTS	S&ME ENVIRONMENTAL SERVICES ENGINEERING•TESTING	SITE TOPOGRAPHIC MAP 280 Acre Highway 701 South Horry County, South Carolina	FIGURE NO 2
SOURCE: USGS 7.5 Min Bucksville Quadrangle			
SOURCE DATE: 1973			
DATE: January, 2006		JOB NO. 1634-06-376	0695



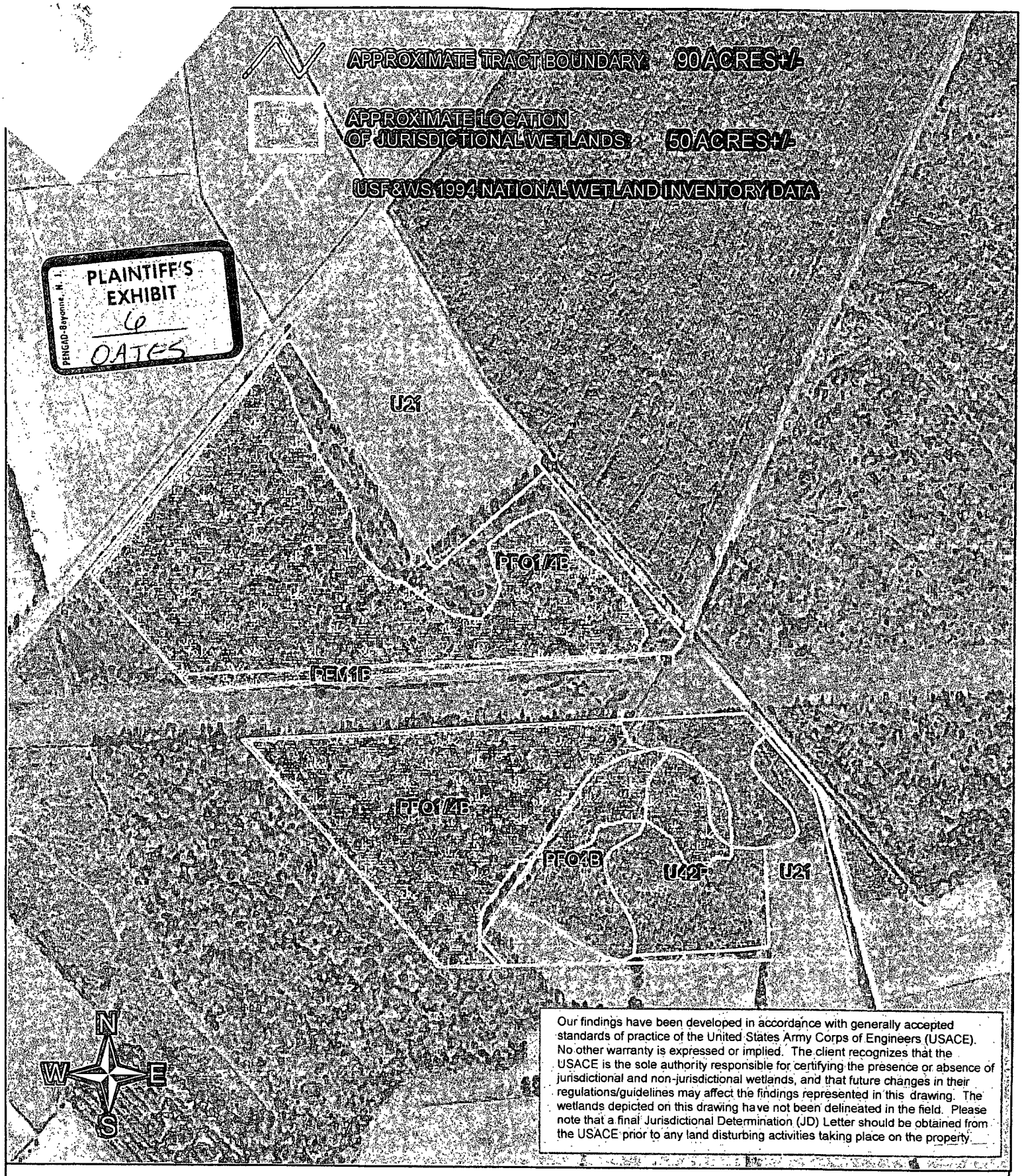
PLAINTIFF'S EXHIBIT 4 DATES

PENGAD-Bayonne, N. J.

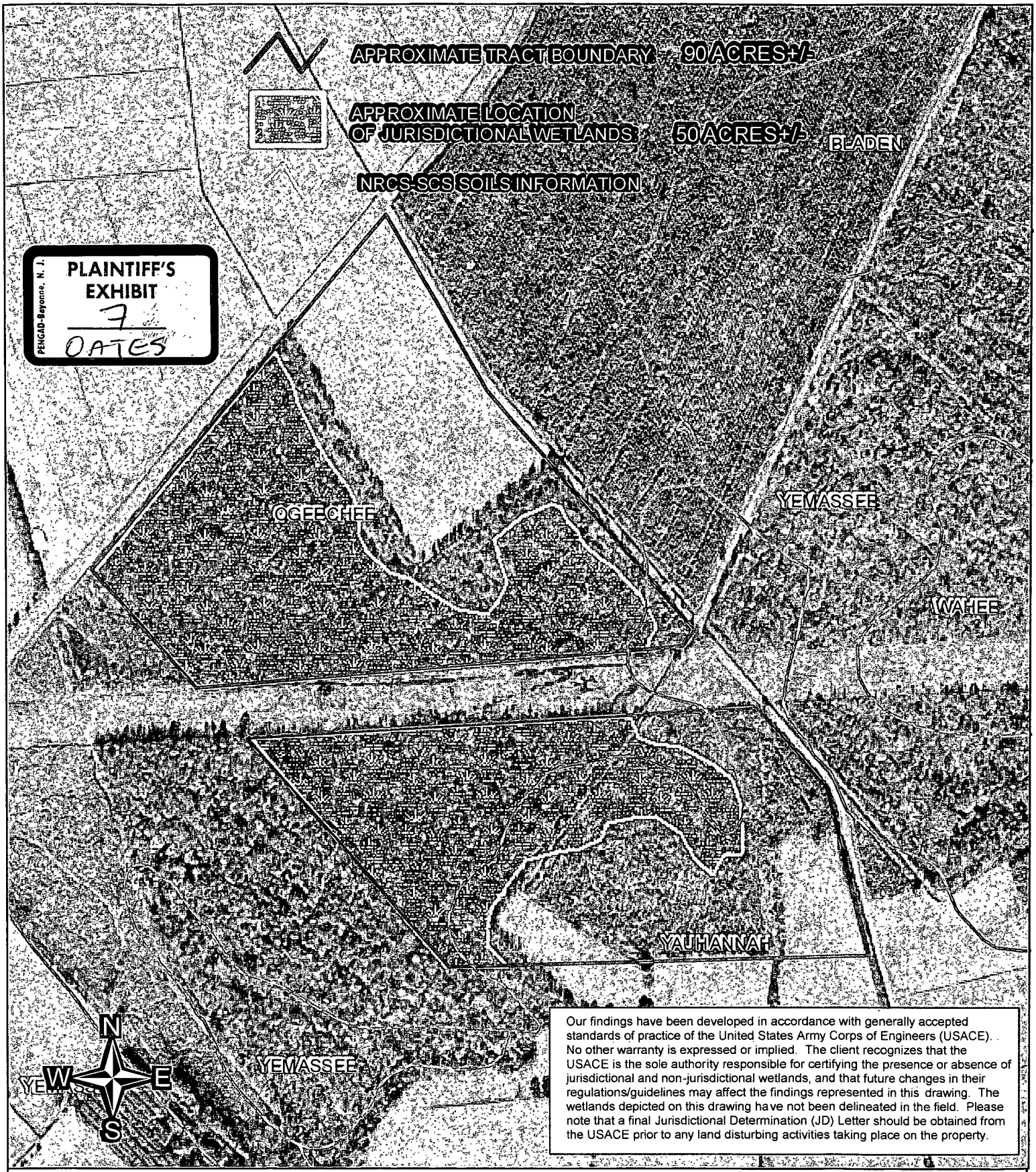
NTS NAPP AERIAL PHOTOGRAPH ATE: 1999 January, 2006	S&ME ENVIRONMENTAL SERVICES ENGINEERING•TESTING	SITE AERIAL PHOTOGRAPH 280 Acre Hw 701 South Property Horry County, South Carolina PROPOSAL NO. 1634-06-376 0696	FIGURE NO 3



SCALE: 1"= 400'	S&ME Environmental Services Engineering • Testing	**SITE AERIAL PHOTOGRAPH** **PORTION OF TMS# 169-00-03-027**	FIGURE #
SOURCE: SCDNR GIS DEPT.			1
SOURCE DATE: 2006			
DATE: JUNE 2008		HORRY COUNTY, SC	



SCALE: 1"= 500'	S&ME	**SITE AERIAL PHOTOGRAPH**	FIGURE #
SOURCE: SCDNR GIS DEPT.		**PORTION OF**	
SOURCE DATE: 2006	0698 Environmental Services	**TMS# 169-00-03-027**	2
DATE: AUGUST 2008	Engineering • Testing	HORRY COUNTY, SC	

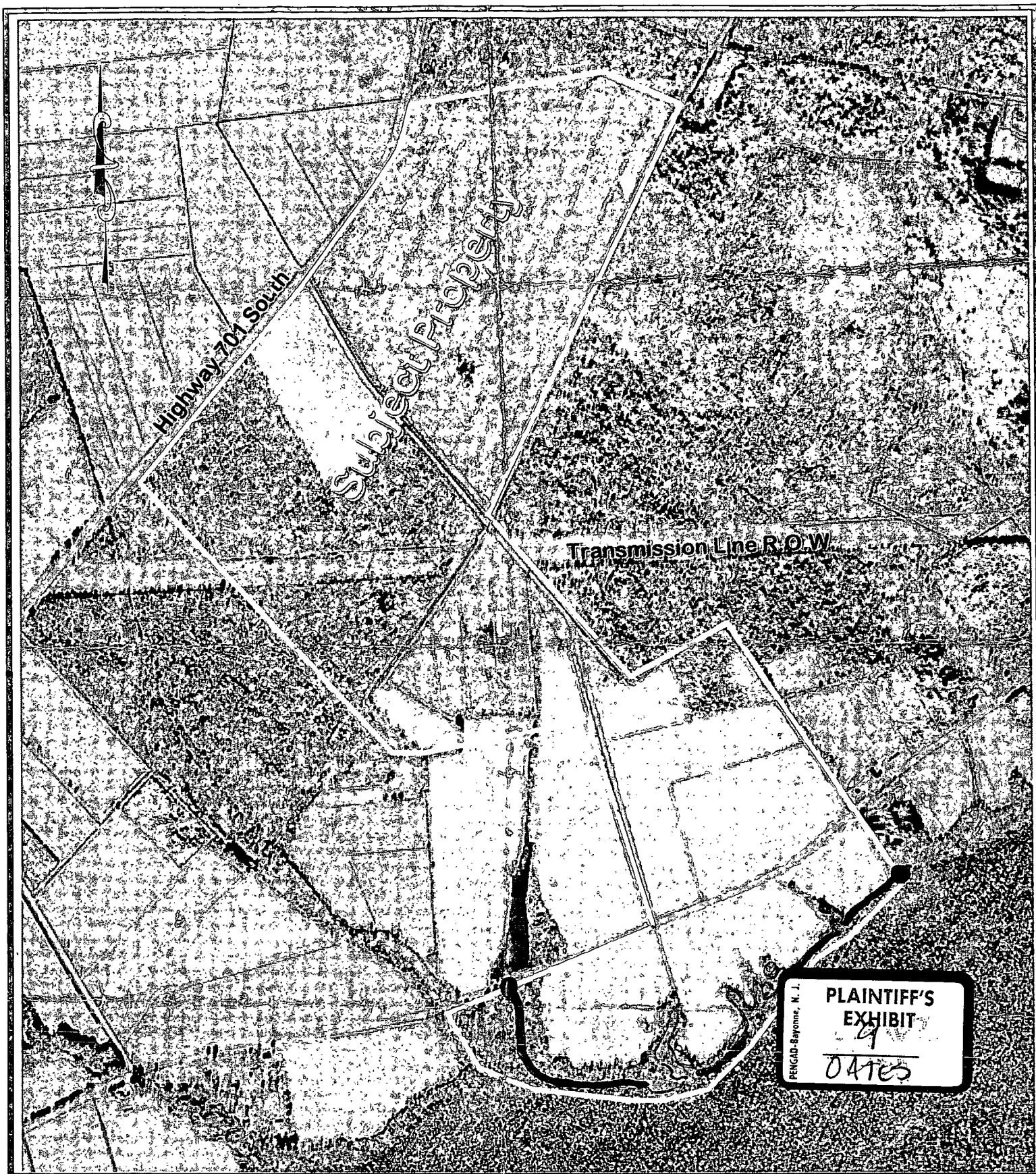


PLAINTIFF'S EXHIBIT 7 OATES

PENGAD-Bayonne, N. J.

0 250 500 1,000 1,500 2,000 Feet

SCALE: 1"= 500'	S&ME 0699 Environmental Services Engineering • Testing	SITE AERIAL PHOTOGRAPH PORTION OF TMS# 169-00-03-027	FIGURE # 1
SOURCE: SCDNR GIS DEPT.			
SOURCE DATE: 2006			
DATE: AUGUST 2008		HORRY COUNTY, SC	



SCALE: NTS	S&ME 0700 ENVIRONMENTAL SERVICES ENGINEERING•TESTING	SITE AERIAL PHOTOGRAPH 280 Acre Hw 701 South Property Horry County, South Carolina	FIGURE NO 1
SOURCE: NAPP AERIAL PHOTOGRAPH			
SOURCE DATE: 1999			
DATE: ~~November 2005~~		PROPOSAL NO. ~~1633-0560-05~~	

January, 2006

1634-06-376

Regulatory Division – Charleston District – Corps of Engineers 69-A Hagood Avenue, Charleston, SC 29403

REQUEST FOR WETLAND DETERMINATION

Date: 4/19/06 **County:** Horry **Total Acreage ofTract:** 230 Ac
Project Name (if applicable): Highway 701 South Tract

Property Owner (name, address, phone):	**Agent/Developer/Engineer** (name, address, phone):
Southern Asphalt PO Box 1549 Conway, S.C. 29528 _____	Charles Oates S&ME,Inc. 1330 Highway 501 Business Conway, SC 29526 (843) 347-7800

Status of Project (check one):
☐On-going site work for development purposes
☒Development in planning stages
☐No specific development plans at this time

Project Type – Indicate the proposed use of the land in question of, if no specific work is planned at present, indicate the current zoning or land use at the site. (check one)

☒Residential	☐Commercial	☐Mixed Use (Residential + Commercial)
☐Industrial	☐Agriculture	☐Public Works
☐Silivculture	☐Aquaculture	☐Other:

Information Required to Accompany Request – Check the items submitted – forward as much information as is available. At a minimum, the first two items must be forwarded:

☒Accurate Location Map (from County Map, USGS Quad Sheet, etc.)
☐Survey Plat of Tax Map of Property in Question
☒Soil Survey Sheet (from USDA-NRCS) or Aerial Photo (from County Assessor's Office or other source). Property boundaries should be shown on the soil survey/photo.
☒Topographic Survey
☐Conceptual Site Plan for the Overall Development

PLAINTIFF'S EXHIBIT 10 OATES PENGAD-Bayonne, N. J.

Endangered Species Evaluation:
Has the site been evaluated for the presence of federally protected (endangered, threatened, or proposed) species and/or any proposed or designated critical habitat for such species? ☐YES ☒NO

If YES, has this evaluation been coordinated with the US Fish and Wildlife Service (FWS)? ☐YES ☒NO

If coordination has occurred, please provide the FWS Log number and enclose a copy of the report:
FWS Log Number: N/A
Copy of Report enclosed: ☐YES ☒NO

If the evaluation has not been coordinated with the US FWS, enclose a copy of your report findings.

IMPORTANT NOTE: Legible printed name and signature required. The person signing this form must be the present property owner or have the specific authority of the property owner to authorized Corps of Engineers employees or their agents to enter onto the property for on-site investigations if such is deemed necessary. Do not sign this form unless you are the owner, or have the specific authority of the property owner.

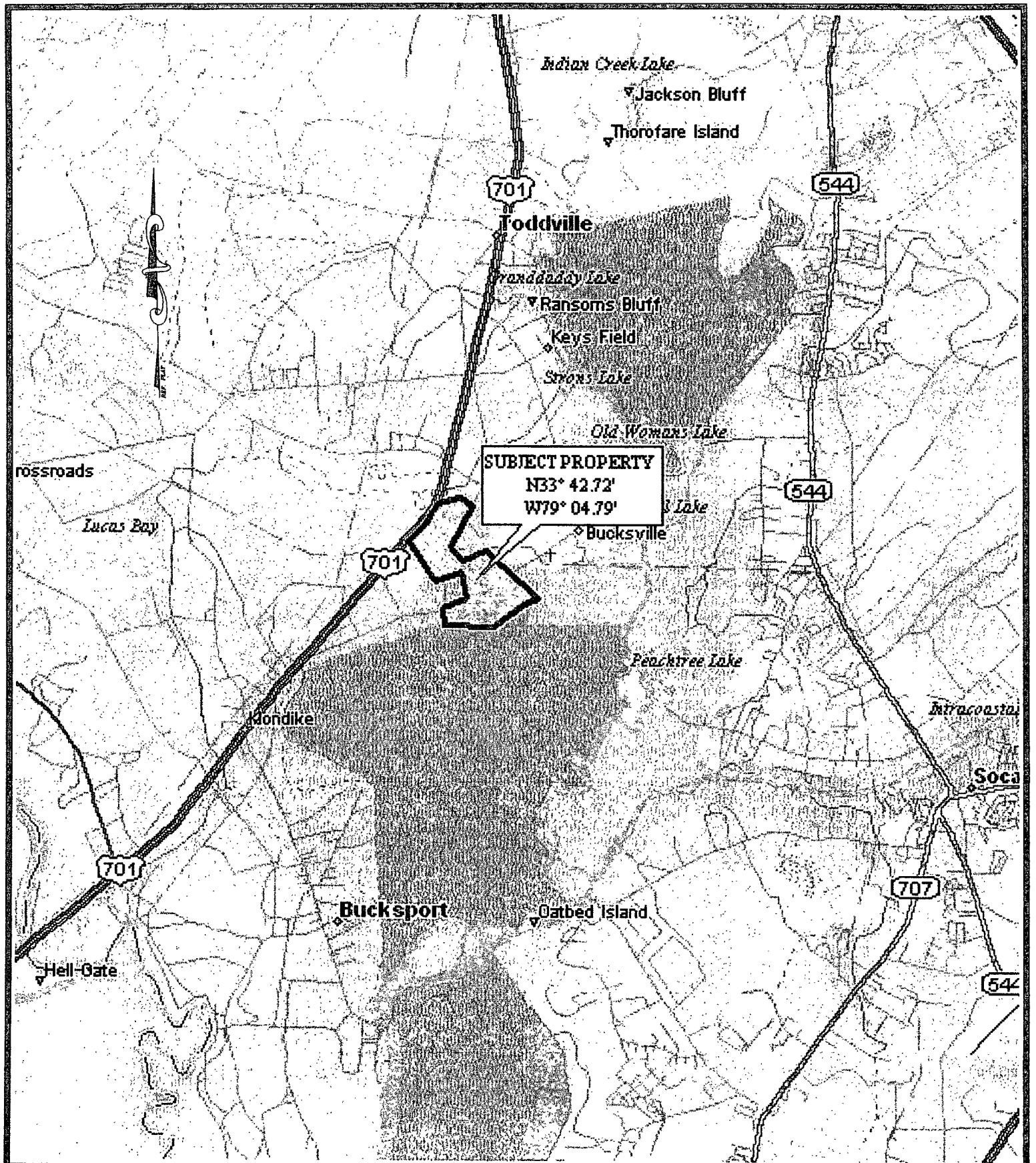
PRINTED NAME of person signing this form, below: Charles Oates

FILE COPY

Signature of property Owner or Authorized Agent: _____

0701

Copies of this form may be obtained from the Charleston District web site at:
http://www.sac.usace.army.mil/permits/form_JDRequest.pdf



SCALE:	NTS
SOURCE: DeLORME Street Atlas	
SOURCE DATE:	1999
DATE:	April, 2005

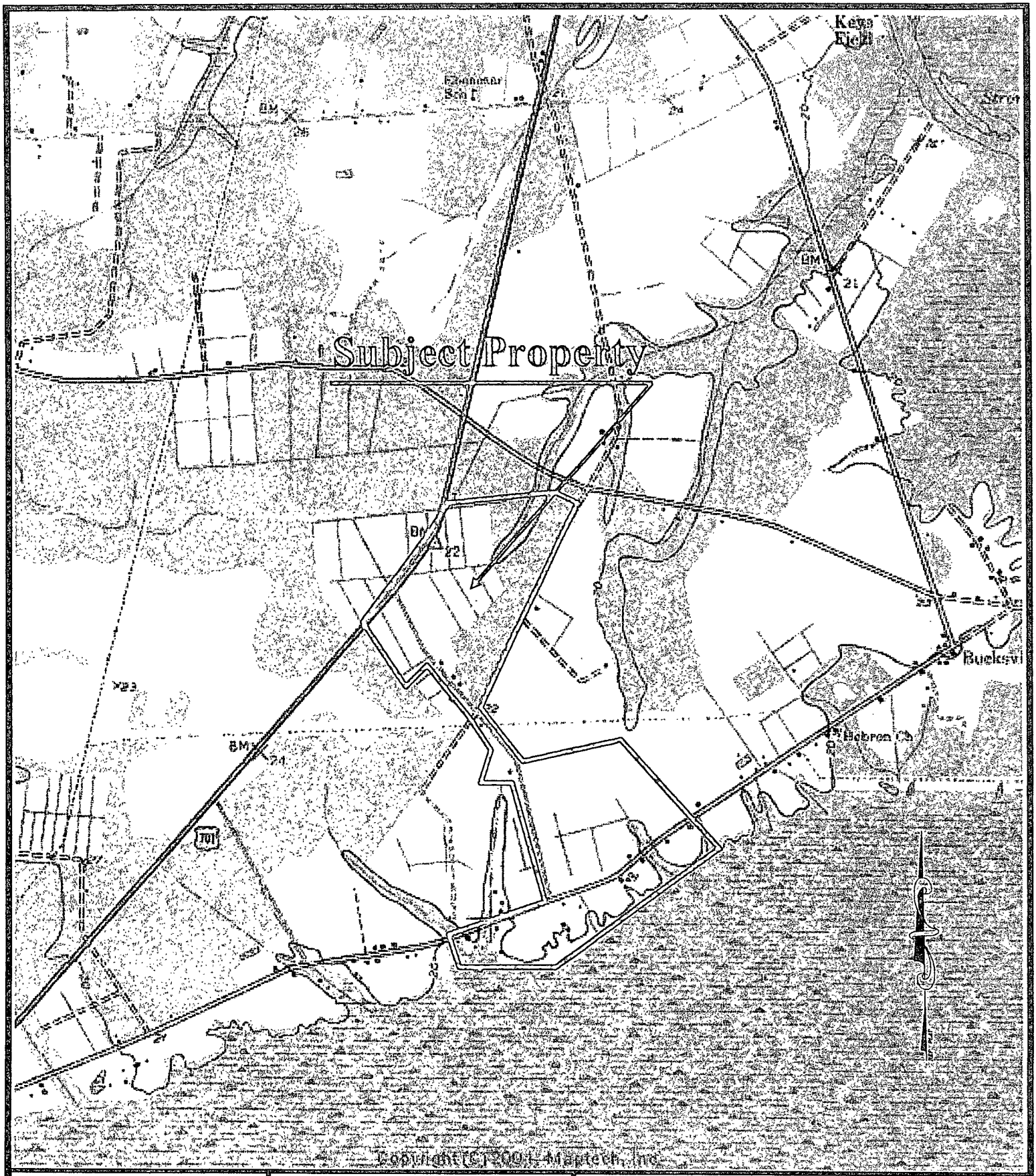
0702

S&ME
ENVIRONMENTAL SERVICES
ENGINEERING•TESTING

SITE VICINITY MAP
Highway 701 South Tract
Horry County, South Carolina

JOB NO. 1634-06-376

FIGURE NO
1



Copyright (C) 2001 Maptech, Inc.

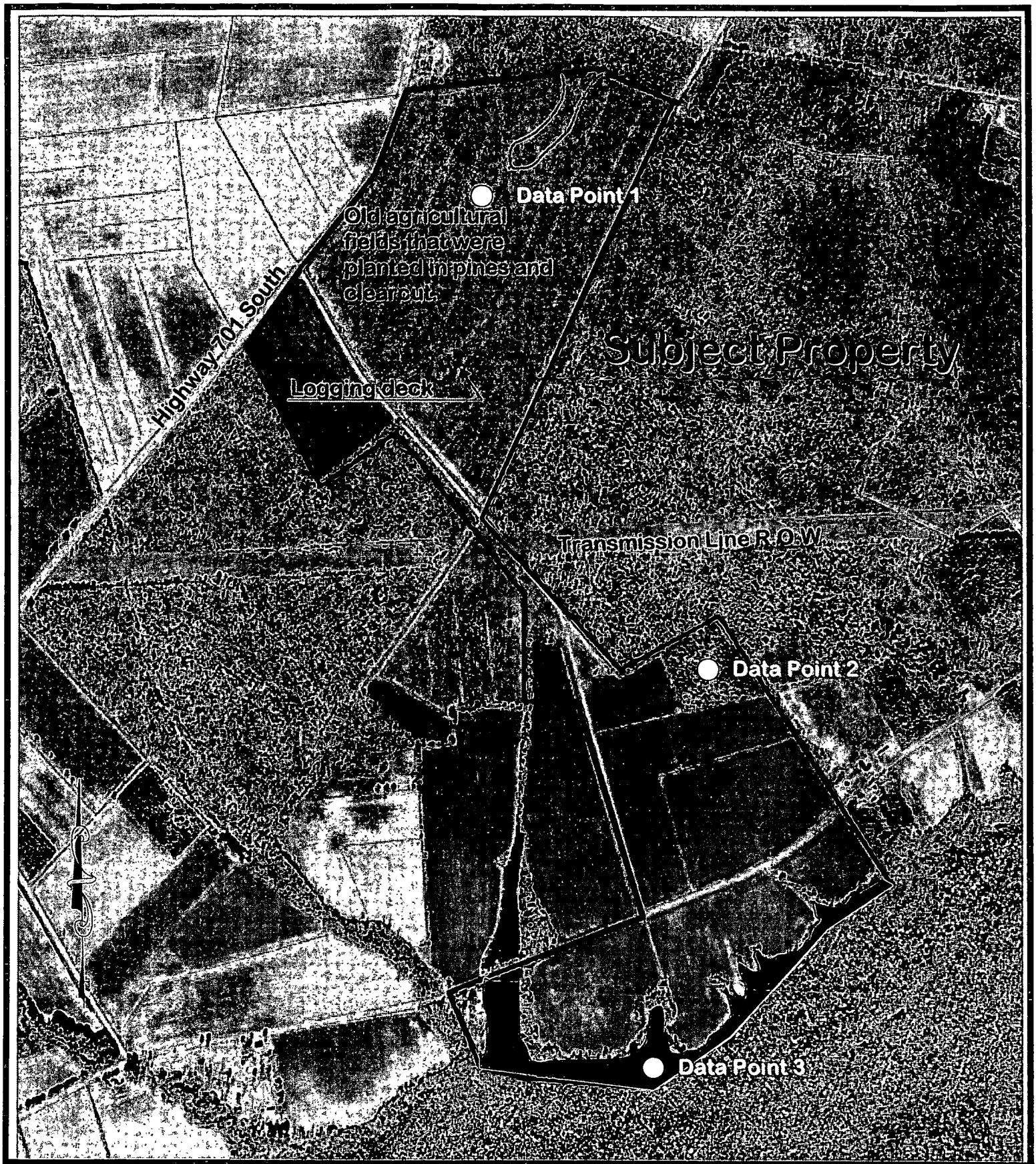
SCALE:	NTS
SOURCE: USGS 7.5 Min Bucksville Quadrangle	
SOURCE DATE:	1973
DATE:	April, 2006

0703 S&ME ENVIRONMENTAL SERVICES ENGINEERING•TESTING

SITE TOPOGRAPHIC MAP
Highway 701 South Tract
Horry County, South Carolina

JOB NO. 1634-06-376

FIGURE NO
2



SCALE:	NTS
SOURCE: NAPP AERIAL PHOTOGRAPH	
SOURCE DATE:	1999
DATE:	April, 2006

S&ME
0704 ENVIRONMENTAL SERVICES
ENGINEERING•TESTING

SITE AERIAL PHOTOGRAPH
Highway 701 South tract
Horry County, South Carolina

PROPOSAL NO. 1634-06-376

FIGURE NO
3

S&ME

AGREEMENT FOR SERVICES

Form AS-041

Date: September 19, 2005	Job Number:
S&ME, Inc. (hereafter Consultant)	Client Name: Bethea Talbot & Company (hereafter Client)
Address: 231 Laborite Street City: Conway State: South Carolina Zip: 29526	Address: 950 48th Avenue North City: Myrtle Beach State: SC Zip: 29577
Telephone: (843) 347-7800 Fax: (843) 347-7848	Telephone: (843) 448-7910 Fax: (843) 448-3795

PROJECT

Project Name: 317 Acre Highway 701 South Tract

Project location: (Street Address) SC Highway 701 South

City: Conway State: SC Zip:

SERVICES TO BE RENDERED

Proposal Number: 1633-0443-05 dated: September 19, 2005 is incorporated into this Agreement For Services. This Agreement For Services is incorporated into the above Proposal.

WITNESSETH: WHEREAS, Client desires to contract with Consultant to furnish Services to Client's project identified above.

WHEREAS, Consultant is engaged in the business of providing Services and related labor, materials, and equipment. (Herein individually and collectively referred to as Services.)

NOW, THEREFORE, in consideration of the Mutual Covenants and Promises included herein, Client and Consultant agree as follows:

1. **OFFER ACCEPTANCE:** Client hereby accepts Consultant's offer to provide Services as described in Consultant's proposal for Services referenced under "SERVICES TO BE RENDERED" and agrees that such Services and any additional Services authorized by Client shall be governed by this Agreement. **If Client requests Consultant to start performing Services prior to receipt of this Agreement, Client agrees that Consultant's beginning of performance is based on reliance that Client will accept and execute this Agreement for Services. If Client requests Consultant to start performing Services prior to the execution of this Agreement For Services by the Client, then such request is an acceptance of this Agreement for Services to the same extent as if Client had executed this Agreement.** Should Client choose to accept this Agreement for Services through the use of a Purchase Order, all preprinted terms and conditions on Client's purchase order are inapplicable to this Agreement as this Agreement is for Services that are not compatible with purchase order agreements. Unless this offer is previously accepted, it will be withdrawn automatically at 5:00 pm EST, ninety (90) days from the date of issue.

2. **CONTRACT DOCUMENTS:** "Contract Documents" shall mean this document as well as the proposal listed under "SERVICES TO BE RENDERED" each of which is incorporated into the other.

3. **PAYMENT:** Client will pay Consultant for Services and expenses in accordance with the Contract Documents. If prices for Services are not established under SERVICES TO BE RENDERED then the current fee schedule in effect for the location providing the Services shall be used as the amount to be paid by Client for Services provided. Consultant will submit progress invoices to Client monthly and a final invoice upon completion of its Services. Payment is due upon receipt of the invoice unless otherwise agreed to in writing prior to the submittal of the invoice. Invoices are past due 30 calendar days after the date of the invoice. Past due amounts are subject to a late payment fee of one and one-half percent per month (18 percent per annum) or the highest amount allowed by applicable law on the outstanding balance, whichever is less. Attorney's

fees and other costs incurred in collecting past due amounts shall be paid by Client. The Client's obligation to pay under this Agreement is in no way dependent upon the Client's ability to obtain financing, payment from third parties, approval of governmental or regulatory agencies, or upon the Client's successful completion of the Project

Consultant shall be paid in full for all Services rendered under this Agreement, including any additional Services authorized by Client in excess of those stated in this Agreement. However, if Client objects to all or any portion of any invoice, Client shall so notify Consultant in writing of the objection within fifteen (15) days from date of invoice, give reasons for the objection, and pay that portion of the invoice not subject to Client's objection. Client and Consultant will informally discuss Client's objections to the invoice and attempt to reach a resolution mutually acceptable to Client and Consultant. If Client or Consultant determine that an informal resolution is not possible then that party shall so state in writing to the other party and initiate a final resolution pursuant to the Dispute Resolution provisions of this Agreement for Services. If the Client does not object in writing to all or a portion of the invoice within fifteen (15) calendar days from date of invoice then the full amount of the invoice is due and payable and all objections are waived.

Without incurring any liability to the Client, Consultant may either suspend or terminate this Agreement if Client fails to pay any undisputed invoice amounts within 60 calendar days of the invoice date, or if Client states its intention not to pay forthcoming invoices. Such suspension or termination will not waive any other claim Consultant may have against Client. Following such suspension or termination, Consultant may resume work by mutual agreement with Client after payment by Client of all outstanding invoiced amounts and collection expenses. In case of such suspension or termination, Client waives all claims for damages or delay as a result of such suspension or termination.

Any invoices that are not paid within thirty (30) calendar days of Client's receipt of letter from Consultant demanding payment of the invoices or a collection action notification by an attorney or collection agency shall constitute a release of Consultant by Client from any and all claims whatsoever, including, but not limited to, tort or contractual claims which Client may have against Consultant for Services performed under said invoice(s).

4. **STANDARD OF CARE**: Consultant and its agents, employees and subcontractors shall endeavor to perform Services for Client using that degree of care and skill ordinarily exercised, under similar circumstances, by others ordinarily providing Services in the same or similar locality as the project at the time Services are provided. In the event any portion of the Services fails to substantially comply with this standard of care obligation and Consultant is promptly notified in writing prior to one year after completion of such portion of the Services, Consultant will re-perform such portion of the Services, or if re-performance is impractical, Consultant will refund the amount of compensation paid to Consultant for such portion of the Services. **THE REMEDIES SET FORTH HEREIN ARE EXCLUSIVE.** This **STANDARD OF CARE** is in lieu of all other warranties and standards of care. No other warranty or standard of care, expressed or implied, is made or intended by this Agreement, or by the proposal, by oral communications, or by any representations made regarding the Services included in this Agreement.

5. **LIMITATION OF LIABILITY: CONSULTANT AND CLIENT MUTUALLY AGREE THAT THE SERVICES PROVIDED PURSUANT TO THIS AGREEMENT INVOLVE RISKS OF LIABILITY WHICH CANNOT BE ADEQUATELY COMPENSATED FOR BY THE PAYMENTS CLIENT WILL MAKE UNDER THIS AGREEMENT. THEREFORE, THE TOTAL CUMULATIVE LIABILITY OF CONSULTANT, ITS AGENTS, EMPLOYEES, AND SUBCONTRACTORS WHETHER IN CONTRACT, TORT INCLUDING NEGLIGENCE (WHETHER SOLE OR CONCURRENT), PROFESSIONAL ERRORS OR OMISSIONS, BREACH OF WARRANTY (EXPRESS OR IMPLIED), NEGLIGENT MISREPRESENTATION, AND STRICT LIABILITY, OR OTHERWISE ARISING OUT OF, CONNECTED WITH, OR RESULTING FROM THE SERVICES PROVIDED PURSUANT TO THIS AGREEMENT SHALL NOT EXCEED THE TOTAL FEES PAID BY CLIENT OR FIFTY THOUSAND DOLLARS, WHICHEVER IS GREATER. CLIENT AGREES THAT PAYMENT OF THE LIMIT OF LIABILITY AMOUNT IS THE SOLE REMEDY TO THE EXCLUSION OF ALL OTHER REMEDIES AVAILABLE FOR THE TOTAL CUMULATIVE LIABILITY OF CONSULTANT, ITS AGENTS, EMPLOYEES, AND SUBCONTRACTORS ARISING OUT OF, CONNECTED WITH OR RESULTING FROM THE SERVICES PROVIDED PURSUANT TO THIS AGREEMENT. AT ADDITIONAL COST, CLIENT MAY OBTAIN A HIGHER LIMIT OF LIABILITY PRIOR TO COMMENCEMENT OF SERVICES. THE ADDITIONAL COST IS COMPENSATION TO CONSULTANT FOR INCREASING THE CONSULTANT'S LIMIT OF LIABILITY. THE ADDITIONAL COST IS NOT AN INSURANCE COST. THE HIGHER LIMIT OF LIABILITY APPLIES ONLY IF MUTUALLY AGREED TO IN WRITING BY CONSULTANT AND CLIENT AT THE TIME CLIENT ACCEPTS THIS AGREEMENT FOR SERVICES AND THE ADDITIONAL COST PAID WITHIN SEVEN DAYS OF THE DATE OF THE MUTUAL AGREEMENT TO INCREASE THE LIMIT OF LIABILITY. CLIENT MAY AT THE TIME OF EXECUTION OF THIS AGREEMENT ELECT TO INCREASE THE LIMIT OF LIABILITY AMOUNT TO FIVE HUNDRED THOUSAND DOLLARS UPON THE PAYMENT OF FIVE HUNDRED DOLLARS OR TO ONE MILLION DOLLARS UPON THE PAYMENT OF ONE THOUSAND DOLLARS IN ADDITIONAL COST AS CONSIDERATION FOR THE HIGHER LIMIT OF LIABILITY. CONSULTANT'S CONSIDERATION TO CLIENT FOR THIS LIMIT OF LIABILITY IS SPECIFICALLY REFLECTED IN CONSULTANT'S FEES FOR SERVICES UNDER THIS AGREEMENT AS SUCH FEES ARE LESS THAN CONSULTANT WOULD BE PAID FOR SERVICES UNDER THIS AGREEMENT WITHOUT A LIMITATION OF LIABILITY. CLIENT MUST ELECT THE HIGHER LIMIT OF LIABILITY BY CHECKING AND INITIALING BELOW:**
I HEREBY AGREE TO PAY ☐ $500.00 TO INCREASE THE LIMIT OF LIABILITY TO $ 500,000. _____ (INITIAL)
I HEREBY AGREE TO PAY ☐ $1000.00 TO INCREASE THE LIMIT OF LIABLITY TO $ 1,000,000 _____ (INITIAL)
CLIENT IS CAUTIONED THAT THIS IS A LIMITED LIABILITY AGREEMENT LIMITING THE LIABILITY OF CONSULTANT; THEREFORE, CLIENT IS ADVISED TO CAREFULLY REVIEW CLIENT'S RISKS OF LIABILITY RELATED TO THIS CONTRACT AND ADDRESS SUCH RISKS THROUGH CLIENT'S INSURANCE OR OTHER MEANS.

6. **DISCLAIMER OF CONSEQUENTIAL DAMAGES:** In no event shall Consultant or Client be liable to the other for any special, indirect, incidental or consequential loss or damages, including, but not limited to, lost profits and loss of use arising from or related to Services provided by Consultant.

7. **REPORTS:** In connection with the performance of the Services, Consultant shall deliver to Client one or more reports or other written documents reflecting Services provided and the results of such Services. All reports and written documents delivered to Client are instruments reflecting the Services provided by Consultant pursuant to this Agreement and are made available for Client's use subject to the limitations of this Agreement. Instruments of Service provided by Consultant to Client pursuant to this Agreement are provided for the exclusive use of Client, and Client's agents and employees for the Project and are not to be used or relied upon by third parties or in connection with other projects. Subject to the authorized use of Client, and Client's agents, and employees, all Instruments of Service, other written documents, all original data gathered by Consultant and work papers produced by Consultant in the performance of or intrinsic to the Services included in the Services are, and shall remain, the sole and exclusive property of Consultant. Unless a shorter period is stated in the Instrument of Service, all Instruments of Service provided pursuant to this Agreement will be valid for a period of three years from the date of this Agreement after which the Instruments of Service are void and can no longer be used or relied upon by anyone for any purpose whatsoever. The period for which an Instrument of Service is valid may be extended by mutual written consent of the Consultant and Client.

   Documents that may be relied upon by Client are limited to the printed copies (also known as hardcopies) that are signed or sealed by Consultant. Files in electronic media format of text, data, graphics or of other types that are furnished by Consultant to Client are only for the convenience of Consultant and Client. Any conclusion or information obtained or derived from such electronic files will be at the Client's or other user's sole risk. Data stored in electronic format can deteriorate or be modified inadvertently or otherwise. Consultant shall not be responsible to maintain documents stored in electronic media. When transferring documents in electronic media format, Consultant makes no representations as to long-term compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by Consultant.

   Consultant shall not be responsible for any alterations, modifications, or additions made in the electronic data by the Client or any reuse of the electronic data by the Client or any other party for this project or any other project without Consultant's written consent. Client shall indemnify, and hold Consultant harmless against any claims, damages or losses arising out the reuse of the electronic data without Consultant's consent or arising out of alterations, modifications, or additions to the electronic data made by anyone other than Consultant.

   Any Instruments of Service, including reports, generated as part of this Agreement are intended solely for use by Client and shall not be provided to any other person or entity without Consultant's written authorization. To the fullest extent permitted by law, Client shall indemnify and hold harmless Consultant from and against any action or claim brought by any person or entity claiming to rely on the information or opinions contained in the Instrument of Service without Consultant's written authorization.

8. **SAFETY:** Consultant will maintain a safety program for its employees. Consultant specifically disclaims any authority or responsibility for general job safety and for the safety of persons who are not employed by Consultant. Should Client, or third parties, be conducting activities on the Site, then each shall have responsibility for their own safety and compliance with applicable safety requirements.

   Field Personnel: The presence of Consultant's field personnel, either full-time or part-time, may be for the purpose of providing project administration, assessment, observation or field testing of specific aspects of the project as authorized by Client. Should Client retain the Services of a Contractor(s) for the project, Consultant is not responsible in any way whatsoever for the supervision or direction of the work of the Contractor(s), its' employees or agents. The presence of Consultant's field personnel for project administration, assessment, observation or testing shall not relieve the Contractor(s) of his responsibility for performing work in accordance with the project plans and specifications.

   If a Contractor (not a subcontractor of Consultant) is involved in the project, Client agrees, in accordance with generally accepted construction practices, that the Contractor will be solely responsible for working conditions on the jobsite, including safety of all persons and property during performance of the work, and compliance with OSHA regulations. These requirements will apply continuously and will not be limited to normal working hours. It is agreed that Consultant will not be responsible for job or jobsite safety on the project, other than for Consultant's employees and subcontractors, and that Consultant does not have the duty or right to stop the work of the Contractor.

9. **CONFIDENTIALITY**: Subject to any obligation Consultant may have under applicable law or regulation, Consultant will endeavor to release information relating to the Services only to its employees and subcontractors in the performance of the Services, to Client's authorized representative(s) and to persons designated by the authorized representative to receive such information.

10. **SAMPLES:** Unless otherwise requested, test specimens or samples will be disposed of immediately upon completion of tests and analysis. Upon written request, Consultant will retain samples for a mutually acceptable storage charge and period of time. In the event that samples contain or may contain hazardous materials, Consultant shall, after completion of testing and at Client's expense, return such samples to Client or make samples available for disposal by Client's agent. Client recognizes and agrees that Consultant is acting as a bailee and at no time assumes title to said samples.

11. **INVENTIONS:** Any and all inventions or discoveries relating to the Services, including improvements and modifications to existing products or processes made or conceived by Consultant or its employees during the term of this Agreement are and shall remain the sole and exclusive property of Consultant.

12. **REPRESENTATIONS OF CLIENT:** Client warrants and covenants that sufficient funds are available or will be available upon receipt of Consultant's invoice to make payment in full for the Services rendered by Consultant. Client warrants that all information provided to Consultant regarding the project and project location are complete and accurate to the best of Client's knowledge.

13. **CLIENT OBLIGATIONS:** Client agrees to furnish Consultant, its agents, employees, and subcontractors a right-of-entry and any authorizations needed for Consultant to enter onto the project site to perform the Services included in this Agreement. Consultant will take reasonable precautions to minimize damage to the Project Site from Consultant's activities and use of equipment. Client recognizes that the performance of the Services included in this Agreement may cause alteration or damage to the site. Client accepts the fact that this is inherent in the work and will not look to Consultant for reimbursement or hold Consultant liable or responsible for any such alteration or damage. Should Client not be owner of the property, then Client agrees to notify the owner of the aforementioned possibility of unavoidable alteration and damage and to indemnify, and hold harmless Consultant against any claims and claims related costs including attorney's fees by the owner or persons having possession of the site through the owner which are related to such alteration or damage.

14. **UTILITIES:** Client agrees to disclose the identity of all utilities serving the Project Site and the presence and accurate location of hidden or obscure man-made objects known to Client relative to field tests or boring locations. Client agrees to indemnify and hold harmless Consultant from all claims, suits, losses, personal injuries, death, and property liability including costs and attorney's fees resulting from damage or injury to utilities or subterranean structures (pipes, tanks, etc.) arising from the performance of Consultant's Services when the existence of such are not called to Consultant's attention or the location not correctly identified in information furnished Consultant.

15. **CERTIFICATIONS:** Client agrees not to require that Consultant execute any certification with regard to work performed, tested or observed under this Agreement unless : 1) Consultant believes that it has performed sufficient work to provide a sufficient basis to issue the certification; 2) Consultant believes that the work performed, tested or observed meets the criteria of the certification; and 3) Consultant has reviewed and approved in writing the exact form of such certification prior to execution of this Agreement. Any certification by Consultant is limited to an expression of professional opinion based upon the Services performed by the Consultant, and does not constitute a warranty or guarantee, either expressed or implied.

16. **FAILURE TO FOLLOW RECOMMENDATIONS:** The Client agrees that it would be unfair to hold the Consultant liable for problems that may occur if the Consultant's recommendations are not followed. Accordingly, the Client waives any claim against the Consultant, and agrees to indemnify, and hold harmless the Consultant from any claim or liability for injury or loss that results from failure to implement the Consultant's recommendations or from implementation of the Consultant's recommendations in a manner that is not in strict accordance with them.

17. **TERMINATION:**

For Convenience - Upon written notice, Client or Consultant may terminate the performance of any further Services included in this Agreement if the terminating party determines termination is in the terminating party's interest. Upon dispatch or receipt of the termination notice, Consultant shall stop work on all Services included in this Agreement and deliver any Instruments of Service complete at that time to Client and Client shall pay Consultant within 30 days for all Services performed up to the dispatch or receipt of the termination notice. Upon Termination for Convenience, Consultant and Client shall have no further rights or remedies other than those included in this paragraph.

For Cause –In the event of material breach of this Agreement, the party not breaching the Agreement may terminate it upon 10 days written notice delivered or mailed to the other party, which notice must identify the material breach. The Agreement may not be terminated for cause if the breaching party cures the breach within ten days of receipt of the written notice. Upon Termination for Cause, Consultant shall stop work on all Services included in this Agreement and deliver any instruments of service complete at that time to Client and Client shall pay Consultant within 30 days for all Services performed up to the termination. Upon Termination for Cause, Consultant and Client shall have no further rights or remedies other than those included in this paragraph.

18. **UNFORESEEN CONDITIONS OR OCCURRENCES:** If, during the performance of service hereunder, any unforeseen hazardous substance, material, element or constituent or other unforeseen conditions or occurrences are encountered which, in Consultant's judgment significantly affects or may affect the services, the risk involved in providing the Services , or the recommended scope of Services , Consultant will notify Client thereof. Subsequent to that notification, Consultant may: (a) If practicable, in Consultant's judgment and with approval of Client, complete the original scope of Services in accordance with the procedures originally intended in the Proposal; (b) Agree with Client to modify the scope of Services and the estimate of charges to include the previously unforeseen conditions or occurrences, such revision to be in writing and signed by the parties and incorporated herein; or (c) Terminate the Services effective on the date of notification pursuant to the terms of TERMINATION FOR CONVENIENCE. Client is responsible for reporting any releases of hazardous substances to appropriate government agencies as required by law. Client waives any claim against Consultant and will indemnify and hold Consultant harmless from any claim, injury or loss arising from the discovery of unforeseen hazardous substances.

19. **FORCE MAJEURE:** Neither party shall be deemed in default of this Agreement to the extent that any delay or failure in the performance of an obligation (other than the payment of money) results from any causes beyond its reasonable control and without its fault or negligence. For this purpose, such acts or events shall include, but are not limited to, storms, floods, unusually severe weather, epidemics, civil disturbances, war, riot, strikes, lockouts or other industrial disturbances, and inability within reasonable diligence to supply personnel, information or material to the project. In the event that such acts or events occur, it is agreed that both parties shall attempt to overcome all difficulties arising and to resume as soon as reasonably possible the normal pursuit and schedule of the Services covered by this Agreement. The time for performance shall be extended for a period equal to the delay.

20. **INSURANCE:** Consultant shall maintain at its own expense the following insurance subject to normal industry exclusions: (1) Worker's Compensation Insurance and Employer's Liability Insurance. (2) Commercial Automobile Liability Insurance with limits of $1,000,000.00. (3) Commercial General Liability Insurance with limits of $1,000,000.00. (4) Professional Liability Insurance. Certificates can be issued upon request identifying details and limits of coverage.

21. **INDEMNITY:** Client agrees to indemnify, and save harmless Consultant, its agents, employees, and subcontractors from and against any and all losses, liabilities, and costs and expenses of every kind (including cost of defense, investigation, settlement, and reasonable attorney's fees), which Consultant, its agents, employees, and subcontractors may incur, become responsible for, or pay out as a result of bodily injuries (including death) to any person, damage to any property, or both, to the extent caused by Client's negligence or willful misconduct.

    Subject to the Limitation of Liability in Article 5, Consultant agrees to indemnify, and save harmless Client from and against any and all losses, liabilities, and costs and expenses of every kind (including cost of defense, investigation, settlement, and reasonable attorney's fees) which Client may incur, become responsible for, or pay out as a result of bodily injuries (including death) to any person, damage to any property, or both, to the extent caused by Consultant's negligence or willful misconduct.

    Subject to the Limitation of Liability in Article 5, Client and Consultant shall, in the event of liability arising out of their joint negligence or willful misconduct indemnify, and save harmless each other in proportion to their relative degree of fault.

22. **DISPUTE RESOLUTION:** Consultant may in Consultant's sole discretion pursue collection of past due invoices by litigation in a court of competent jurisdiction. Other than Consultant's collection of past due invoices, in the event of a dispute between Consultant and Client with regard to any matter arising out of or related to this Agreement, the Parties will use their best efforts to resolve the dispute amicably within fifteen (15) calendar days. If the dispute cannot be settled amicably, the Parties agree that the dispute shall be subject to mediation in accordance with the mediation rules of the American Arbitration Association or similar Dispute Resolution organization. Mediation in good faith shall be a condition precedent to the institution of legal or equitable proceedings by either party. Once a party files a request for mediation with the other party and with the American Arbitration Association, or similar Dispute Resolution organization, the parties agree to commence such mediation within thirty (30) days of the filing of the request. The costs of such mediation shall be borne equally by both parties. If the dispute is not resolved after such mediation, then the dispute shall be resolved by litigation in a court of competent jurisdiction.

23. **CAPTIONS AND HEADINGS:** The captions and headings throughout this Agreement are for convenience and reference only, and the words contained therein shall in no way be held or deemed to define, limit, describe, modify, or add to the interpretation, construction, or meaning of any provision of or scope or intent of this Agreement.

24. **SEVERABILITY:** If any provision of this Agreement, or application thereof to any person or circumstance, shall to any extent be invalid, then such provision shall be modified if possible, to fulfill the intent of the parties as reflected in the original provision, the remainder of this Agreement, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and each provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

25. **ASSIGNMENT AND SUBCONTRACTS:** Neither party may assign this Agreement, in whole or in part, without the prior written consent of the other party, except for an assignment of proceeds for financing purposes. Consultant may subcontract for the Services of others without obtaining Client's consent if Consultant deems it necessary or desirable to have others perform Services.

26. **NO WAIVER:** No waiver by either party of any default by the other party in the performance of any provision of this Agreement shall operate as or be construed as a waiver of any future default, whether like or different in character.

27. **LAW TO APPLY:** The validity, interpretation, and performance of this Agreement shall be governed by and construed in accordance with the laws of the state in which the project is located.

CONSULTANT HEREBY ADVISES CLIENT THAT ITS PERFORMANCE OF THIS AGREEMENT IS EXPRESSLY CONDITIONED ON CLIENT'S ASSENT TO THE TERMS AND CONDITIONS DETAILED HEREIN.

ENTIRE AGREEMENT – This Agreement represents the entire understanding and agreement between the parties hereto relating to the Services and supersedes any and all prior negotiations, discussions, and Agreements, whether written or oral, between the parties regarding same.

TO THE EXTENT that any additional or different Provisions conflict with the Provisions of this Agreement, the Provisions of this Agreement shall govern. No amendment or modification to this Agreement or any waiver of any provisions hereof shall be effective unless in writing, signed by both parties.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representative.

CLIENT: Bethea Talbot & Company	**S&ME, Inc.**
BY: _____ (Signature)	**BY:** _____ (Signature)
_____ (Print Name / Title)	Thomas C. Still / Branch Manager (Print Name / Title)
DATE: _____	**DATE:** _____

PROPOSAL NUMBER : 1633-0443-05

Client's FAXED or DIGITAL signature to be treated as original signature.

Prebilling Analysis - Items through 10/7/2006

S&ME

S&ME, INC

Project :	163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT	**Bill Cycle :**	1 **Invoice Rpt :** INSMELSCVR
Inv Group :	** REGULAR TASKS	**Biller :**	100184 -- OATES JR., CHARLES C.
Client :	MB0265 SOUTHERN ASPHALT	**Bill Org:**	1634 -- ENVIRONMENTAL - MYRTLE BEACH
Rate Sched :	MB3 Myrtle Beach 3	**Bill Comp:**	00 -- S&ME, INC

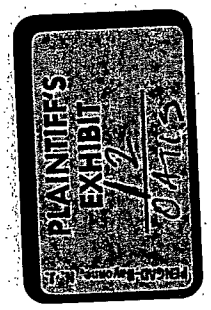
Total Project :163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT 0.00

	Available Billings			Effort On Hold			Effort Written Off		
	Hours	Labor	Expense	Hours	Labor	Expense	Hours	Labor	Expense
Current	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Previous	30.00	1,146.00	0.00				0.00	0.00	0.00
Total	30.00	1,146.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Billings			Bill Summary To Date					
Current	Previous	Total	Revenue	Billings	WIP	Collected	A/R	Budget
0.00	3,750.00	3,750.00	3,750.00	3,750.00	0.00	3,750.00	0.00	3,750.00

0711

COMPLETED



YAUHANNAH DEVELOPMENT LLC
P O BOX 1549 PH. 843-347-7283
CONWAY, SC 29528

1014
67-231/532
011726950401

DATE 9/27/06

PAY TO THE ORDER OF S & ME $ 3750.00

Three Thousand seven hundred fifty & 00/100's DOLLARS

Security Features Details on Back.

CNB The Conway National Bank
Conway, South Carolina 29526

FOR INV# 228580 - 1634 06 376

⑈001014⑈ ⑆053202318⑆011726950401⑈

STYLE XPP

0712

From: LaSasia Qualls
To: Oates, Charles
Date: 8/30/2006 8:26:47 AM
Subject: Jamie McClain

Hello Chuck,

I was wondering if you could please get an update on the possible pay status on the following accounts from Mr. McClain. I know that you left him a message last week, but I never heard back from you regarding payments on these accounts.

Thanks,
Sasia

1634-06-379: 280 Acre Highway 701 Tract - Invoice #228580 - Dtaed 6/27/2006 - $3,750.00
1634-06-567: 250 Acre Carolina Amphitheater - Invoice #233881 - Dated 7/26/2006 - $1,200.00
1634-06-491: Highway 501 Tract Phase i - Invoice #223429 - Dtaed 5/31/2006 - $1,500.00

All Invoices Total: **$6,450.00**

(This is not good for your Department)

Fax Transmittal

S&ME
ENGINEERING • TESTING
ENVIRONMENTAL SERVICES
www.smeinc.com

Date: August 1, 2006

To:	Jamie McClain	From:	Sasia Manigo-Qualls
Phone	843-347-7283	Phone:	843-347-7800
Fax:	843-347-9467	Fax:	843-347-7848
Re:	Past Due Invoice	Email:	Lqualls@smeinc.com
Status:	**Urgent**	Pages:	2 Including Cover

Comments: Thank you for your help in this matter. If you have any questions please feel free to call me at the phone number listed above. Also, if you would like someone will be available to pick up this check.



SASIA

0714

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INVOICE

S&ME

SOUTHERN ASPHALT
P.O. BOX 1549
CONWAY, SC 29528

Attention: MR. JAMIE MCLAIN

Invoice # :	228580
Invoice Date :	6/27/2006
Project :	163406376
Project Name :	280 ACRE HIGHWAY 701 SOUTH TRAC
Project Mgr :	OATES JR., CHARLES C.
Terms :	Due Upon Receipt
Client Code :	MB0265

FOR PROFESSIONAL SERVICES RENDERED
ENVIRONMENTAL SERVICES:
WETLAND DELINEATION
FROM 5/21/2006 THROUGH 6/17/2006

Amount Due This Invoice **$3,750.00**

0715

Remit to: S&ME, Inc.
PO Box 651399 Charlotte, NC 28265-1399 USA

1)
2)

Date/Time: Aug. 1. 2006 3:17PM

File No. Mode	Destination	Pg(s)	Result	Page Not Sent
2505 Memory TX	3479467	P. 2	OK	

Reason for error
E.1) Hang up or line fail
E.2) Busy
E.3) No answer
E.4) No facsimile connection

Fax Transmittal

S&ME
ENGINEERING • TESTING
ENVIRONMENTAL SERVICES
www.smeinc.com

Date:	August 1, 2006		
To:	Jamie McClain	From:	Sasia Manigo-Qualls
Phone	843-347-7283	Phone:	843-347-7800
Fax:	843-347-9467	Fax:	843-347-7848
Re:	Past Due Invoice	Email:	Lqualls@smeinc.com
Status:	**Urgent**	Pages:	2 Including Cover

Comments: Thank you for your help in this matter. If you have any questions please feel free to call me at the phone number listed above. Also, if you would like someone will be available to pick up this check.



SASIA

0716

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S&ME SPG-001
(Rev. 7/99)

Prebilling Analysis - Items through 7/15/2006

S&ME, INC

Project : 163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT
Inv Group : ** REGULAR TASKS
Client : MB0265 SOUTHERN ASPHALT
Rate Sched : MB3 Myrtle Beach 3

Bill Cycle : 1 **Invoice Rpt :** INSMELSCVR
Biller : 100184 -- OATES JR., CHARLES C.
Bill Org: 1634 -- ENVIRONMENTAL - MYRTLE BEACH
Bill Comp: 00 -- S&ME, INC

Total Project :163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT 0.00

	Available Billings			Effort On Hold			Effort Written Off		
	Hours	Labor	Expense	Hours	Labor	Expense	Hours	Labor	Expense
Current	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Previous	30.00	1,146.00	0.00				0.00	0.00	0.00
Total	30.00	1,146.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Billings			Bill Summary To Date					
Current	Previous	Total	Revenue	Billings	WIP	Collected	A/R	Budget
0.00	3,750.00	3,750.00	3,750.00	3,750.00	0.00	0.00	3,750.00	3,750.00

07127

NOT PAID

INVOICE

S&ME

SOUTHERN ASPHALT
P.O. BOX 1549
CONWAY, SC 29528

Attention: MR. JAMIE MCLAIN

Invoice # :	228580
Invoice Date :	6/27/2006
Project :	163406376
Project Name :	280 ACRE HIGHWAY 701 SOUTH TRAC
Project Mgr :	OATES JR., CHARLES C.
Terms :	Due Upon Receipt
Client Code :	MB0265

FOR PROFESSIONAL SERVICES RENDERED
ENVIRONMENTAL SERVICES:
WETLAND DELINEATION
FROM 5/21/2006 THROUGH 6/17/2006

Amount Due This Invoice **$3,750.00**

0718

Remit to: S&ME, Inc.
PO Box 651399 Charlotte, NC 28265-1399 USA
Federal ID# 56-0791580

ProdDB
INSMELSCVR - S&ME's Custom Lump Sum Amount Only Invoice

INVOICE

S&ME

SOUTHERN ASPHALT
P.O. BOX 1549
CONWAY, SC 29528

Attention: MR. JAMIE MCLAIN

Invoice # :	000
Invoice Date :	6/27/2006
Project :	163406376
Project Name :	280 ACRE HIGHWAY 701 SOUTH TRAC
Project Mgr :	OATES JR., CHARLES C.
Terms :	Due Upon Receipt
Client Code :	MB0265

FOR PROFESSIONAL SERVICES RENDERED
ENVIRONMENTAL SERVICES:
WETLAND DELINEATION
FROM 5/21/2006 THROUGH 6/17/2006

Amount Due This Invoice **$3,750.00**

0719

Remit to: S&ME, Inc.
PO Box 651399 Charlotte, NC 28265-1399 USA
Federal ID# 56-0791580

Inv. $3,750.00 100% complete

Prebilling Analysis - Items through 6/17/2006

S&ME, INC

Project : 163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT
Inv Group : ** REGULAR TASKS
Client : MB0265 SOUTHERN ASPHALT
Rate Sched : MB3 Myrtle Beach 3

Bill Cycle : 1 **Invoice Rpt :** INSMELSCVR
Biller : 100184 -- OATES JR., CHARLES C.
Bill Org: 1634 -- ENVIRONMENTAL - MYRTLE BEACH
Bill Comp: 00 -- S&ME, INC

Phase : ** -- GENERAL PHASE**

Rate Schedule Labor / Employee Name	OT Ind	EVC Code	Task	Org	Class	Activity	Transaction Date	Period End Date	Hours	Rate	Amount
PROJECT PROFESSIONAL - GRADE IV											
OATES JR., CHARLES C.		100184	****	1633	P4	****	1/12/2006	1/14/2006	2.00	75.00	150.00
		100184	****	1634	P4	****	2/28/2006	3/4/2006	4.00	75.00	300.00
									6.00		450.00
TECHNICIAN - GRADE II											
WOLLARD, CASEY R		100526	****	1634	T2	****	1/19/2006	1/21/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	1/20/2006	1/21/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	1/26/2006	1/28/2006	6.00	29.00	174.00
		100526	****	1634	T2	****	1/27/2006	1/28/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	2/7/2006	2/11/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	2/8/2006	2/11/2006	2.00	29.00	58.00
									24.00		696.00
								Total Rate Schedule Labor			***1,146.00***

Total Phase : ** -- GENERAL PHASE** **Labor :** 1,146.00
Expense : 0.00

Total Project :163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT 1,146.00

	Available Billings			Effort On Hold			Effort Written Off		
	Hours	Labor	Expense	Hours	Labor	Expense	Hours	Labor	Expense
Current	30.00	1,146.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Previous	0.00	0.00	0.00				0.00	0.00	0.00
Total	30.00	1,146.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Billings			Bill Summary To Date					
Current	Previous	Total	Revenue	Billings	WIP	Collected	A/R	Budget
1,146.00	0.00	1,146.00	2,501.25	0.00	2,501.25	0.00	0.00	3,750.00

HOLD

Prebilling Analysis - Items through 5/20/2006

S&ME, INC

Project : 163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT
Inv Group : ** REGULAR TASKS
Client : MB0265 SOUTHERN ASPHALT
Rate Sched : MB3 Myrtle Beach 3

Bill Cycle : 1 **Invoice Rpt :** INSMELSCVR
Biller : 100184 -- OATES JR., CHARLES C.
Bill Org: 1634 -- ENVIRONMENTAL - MYRTLE BEACH
Bill Comp: 00 -- S&ME, INC

Phase : ** -- GENERAL PHASE**

Rate Schedule Labor / Employee Name	OT Ind	EVC Code	Task	Org	Class	Activity	Transaction Date	Period End Date	Hours	Rate	Amount
PROJECT PROFESSIONAL - GRADE IV											
OATES JR., CHARLES C.		100184	****	1633	P4	****	1/12/2006	1/14/2006	2.00	75.00	150.00
		100184	****	1634	P4	****	2/28/2006	3/4/2006	4.00	75.00	300.00
									6.00		450.00
TECHNICIAN - GRADE II											
WOLLARD, CASEY R		100526	****	1634	T2	****	1/19/2006	1/21/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	1/20/2006	1/21/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	1/26/2006	1/28/2006	6.00	29.00	174.00
		100526	****	1634	T2	****	1/27/2006	1/28/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	2/7/2006	2/11/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	2/8/2006	2/11/2006	2.00	29.00	58.00
									24.00		696.00
								Total Rate Schedule Labor			***1,146.00***

T240

Total Phase : ** -- GENERAL PHASE** **Labor :** 1,146.00
Expense : 0.00

Total Project :163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT 1,146.00

	Available Billings			Effort On Hold			Effort Written Off		
	Hours	Labor	Expense	Hours	Labor	Expense	Hours	Labor	Expense
Current	30.00	1,146.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Previous	0.00	0.00	0.00				0.00	0.00	0.00
Total	30.00	1,146.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Billings			Bill Summary To Date					
Current	Previous	Total	Revenue	Billings	WIP	Collected	A/R	Budget
1,146.00	0.00	1,146.00	2,501.25	0.00	2,501.25	0.00	0.00	3,750.00

#8902

TOTAL HOLD
$2,500.00

#7627

Prebilling Analysis - Items through 4/22/2006

S&ME, INC

Project : 163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT
Inv Group : ** REGULAR TASKS
Client : MB0265 SOUTHERN ASPHALT
Rate Sched : MB3 Myrtle Beach 3

Bill Cycle : 1 **Invoice Rpt :** INSMELSCVR
Biller : 100184 -- OATES JR., CHARLES C.
Bill Org: 1634 -- ENVIRONMENTAL - MYRTLE BEACH
Bill Comp: 00 -- S&ME, INC

Phase : ** -- GENERAL PHASE**

Rate Schedule Labor / Employee Name	OT Ind	EVC Code	Task	Org	Class	Activity	Transaction Date	Period End Date	Hours	Rate	Amount
PROJECT PROFESSIONAL - GRADE IV											
OATES JR., CHARLES C.		100184	****	1633	P4	****	1/12/2006	1/14/2006	2.00	75.00	150.00
		100184	****	1634	P4	****	2/28/2006	3/4/2006	4.00	75.00	300.00
									6.00		450.00
TECHNICIAN - GRADE II											
WOLLARD, CASEY R		100526	****	1634	T2	****	1/19/2006	1/21/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	1/20/2006	1/21/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	1/26/2006	1/28/2006	6.00	29.00	174.00
		100526	****	1634	T2	****	1/27/2006	1/28/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	2/7/2006	2/11/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	2/8/2006	2/11/2006	2.00	29.00	58.00
									24.00		696.00
								Total Rate Schedule Labor			***1,146.00***

Total Phase : ** -- GENERAL PHASE** **Labor :** 1,146.00
Expense : 0.00

Total Project :163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT 1,146.00

	Available Billings			Effort On Hold			Effort Written Off		
	Hours	Labor	Expense	Hours	Labor	Expense	Hours	Labor	Expense
Current	30.00	1,146.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Previous	0.00	0.00	0.00				0.00	0.00	0.00
Total	30.00	1,146.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Billings			Bill Summary To Date					
Current	Previous	Total	Revenue	Billings	WIP	Collected	A/R	Budget
1,146.00	0.00	1,146.00	2,025.00	0.00	2,025.00	0.00	0.00	3,750.00

Prebilling Analysis - Items through 3/25/2006

#7259

S&ME, INC

Project : 163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT
Inv Group : ** REGULAR TASKS
Client : MB0265 SOUTHERN ASPHALT
Rate Sched : MB3 Myrtle Beach 3

Bill Cycle : 1 **Invoice Rpt :** INSMELSCVR
Biller : 100184 -- OATES JR., CHARLES C.
Bill Org: 1634 -- ENVIRONMENTAL - MYRTLE BEACH
Bill Comp: 00 -- S&ME, INC

Phase : ** -- GENERAL PHASE**

Rate Schedule Labor / Employee Name	OT Ind	EVC Code	Task	Org	Class	Activity	Transaction Date	Period End Date	Hours	Rate	Amount
PROJECT PROFESSIONAL - GRADE IV											
ATES JR., CHARLES C.		100184	****	1633	P4	****	1/12/2006	1/14/2006	2.00	75.00	150.00
		100184	****	1634	P4	****	2/28/2006	3/4/2006	4.00	75.00	300.00
									6.00		450.00
TECHNICIAN - GRADE II											
WOLLARD, CASEY R		100526	****	1634	T2	****	1/19/2006	1/21/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	1/20/2006	1/21/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	1/26/2006	1/28/2006	6.00	29.00	174.00
		100526	****	1634	T2	****	1/27/2006	1/28/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	2/7/2006	2/11/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	2/8/2006	2/11/2006	2.00	29.00	58.00
									24.00		696.00
								Total Rate Schedule Labor			***1,146.00***

0723

Total Phase : ** -- GENERAL PHASE** **Labor :** 1,146.00
Expense : 0.00

Total Project :163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT 1,146.00

	Available Billings			Effort On Hold			Effort Written Off		
	Hours	Labor	Expense	Hours	Labor	Expense	Hours	Labor	Expense
Current	30.00	1,146.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Previous	0.00	0.00	0.00				0.00	0.00	0.00
Total	30.00	1,146.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Billings			Bill Summary To Date					
Current	Previous	Total	Revenue	Billings	WIP	Collected	A/R	Budget
1,146.00	0.00	1,146.00	1,500.00	0.00	1,500.00	0.00	0.00	3,750.00

TOTAL HOLD $2,000.00

Prebilling Analysis - Items through 2/25/2006

S&ME, INC

Project : 163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT
Inv Group : ** REGULAR TASKS
Client : MB0265 SOUTHERN ASPHALT
Rate Sched : MB3 Myrtle Beach 3

Bill Cycle : 1 **Invoice Rpt :** INSMELSCVR
Biller : 100184 -- OATES JR., CHARLES C.
Bill Org: 1634 -- ENVIRONMENTAL - MYRTLE BEACH
Bill Comp: 00 -- S&ME, INC

Phase : ** -- GENERAL PHASE**

Rate Schedule Labor / Employee Name	OT Ind	EVC Code	Task	Org	Class	Activity	Transaction Date	Period End Date	Hours	Rate	Amount
PROJECT PROFESSIONAL - GRADE IV											
OATES JR., CHARLES C.		100184	****	1633	P4	****	1/12/2006	1/14/2006	2.00	75.00	150.00
TECHNICIAN - GRADE II											
WOLLARD, CASEY R		100526	****	1634	T2	****	1/19/2006	1/21/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	1/20/2006	1/21/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	1/26/2006	1/28/2006	6.00	29.00	174.00
		100526	****	1634	T2	****	1/27/2006	1/28/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	2/7/2006	2/11/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	2/8/2006	2/11/2006	2.00	29.00	58.00
									24.00		696.00
								Total Rate Schedule Labor			***846.00***

Total Phase : ** -- GENERAL PHASE** — **Labor :** 846.00 — **Expense :** 0.00

Total Project :163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT 846.00

	Available Billings			Effort On Hold			Effort Written Off		
	Hours	Labor	Expense	Hours	Labor	Expense	Hours	Labor	Expense
Current	26.00	846.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Previous	0.00	0.00	0.00				0.00	0.00	0.00
Total	26.00	846.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Billings			Bill Summary To Date					
Current	Previous	Total	Revenue	Billings	WIP	Collected	A/R	Budget
846.00	0.00	846.00	1,001.25	0.00	1,001.25	0.00	0.00	3,750.00

TOTAL HOLD
1,500.00

#5702

Prebilling Analysis - Items through 1/28/2006

#9257

S&ME, INC

Project : 163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT
Inv Group : ** REGULAR TASKS
Client : MB0265 SOUTHERN ASPHALT
Rate Sched : MB3 Myrtle Beach 3

Bill Cycle : 1 **Invoice Rpt :** INSMELSCVR
Biller : 100184 -- OATES JR., CHARLES C.
Bill Org: 1633 -- CONSTRUCTION SVCS. - MYRTLE BEACH
Bill Comp: 00 -- S&ME, INC

Phase : ** -- GENERAL PHASE**

Rate Schedule Labor / Employee Name	OT Ind	EVC Code	Task	Org	Class	Activity	Transaction Date	Period End Date	Hours	Rate	Amount
JECT PROFESSIONAL - GRADE IV											
OATES JR., CHARLES C.		100184	****	1633	P4	****	1/12/2006	1/14/2006	2.00	75.00	150.00
TECHNICIAN - GRADE II											
WOLLARD, CASEY R		100526	****	1634	T2	****	1/19/2006	1/21/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	1/20/2006	1/21/2006	4.00	29.00	116.00
		100526	****	1634	T2	****	1/26/2006	1/28/2006	6.00	29.00	174.00
		100526	****	1634	T2	****	1/27/2006	1/28/2006	4.00	29.00	116.00
									18.00		522.00
								Total Rate Schedule Labor			***672.00***

Total Phase : ** -- GENERAL PHASE** **Labor :** 672.00
Expense : 0.00

Total Project :163406376 - 280 ACRE HIGHWAY 701 SOUTH TRACT 672.00

	Available Billings			Effort On Hold			Effort Written Off		
	Hours	Labor	Expense	Hours	Labor	Expense	Hours	Labor	Expense
Current	20.00	672.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Previous	0.00	0.00	0.00				0.00	0.00	0.00
Total	20.00	672.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Billings			Bill Summary To Date					
Current	Previous	Total	Revenue	Billings	WIP	Collected	A/R	Budget
672.00	0.00	672.00	672.00	0.00	672.00	0.00	0.00	3,750.00

TOTAL HOLD
$1,000.00

S&ME, INC.

JOB SET-UP SHEET

Prepared By Charles Oates

Date Prepared 1/13/2006

GENERAL INFORMATION

PROJECT NUMBER **1634-06-376** PROJECT NAME 280 Acre Highway 701 South Tract

CLIENT TYPE CODE DEV WORK TYPE CODE 8 MARKET SEGMENT CODE OTH

SERVICE BUSINESS CODE 800 SERVICE LINE CODE 801

CLIENT # MB0265 CLIENT NAME Southern Asphalt

CLIENT ADDRESS P.O. Box 1549

CITY Conway STATE SC ZIP 29528

BILLING ADDRESS Same

CITY _____ STATE _____ ZIP _____

CONTACT NAME Mr. Jamie McLain PHONE NUMBER (843) 347-7283

PROPOSAL NO. 1633-0550-05 PROPOSAL DATE 21-Nov-05 FAX NUMBER (843) 347-9467

CLIENT AUTHORIZATION # _____ E-MAIL ADDRESS _____

CONTRACT, # AGREEMENTS, or OTHER _____ # MILES TO JOB SITE 20

PROJECT LOCATION: STATE SC COUNTY Horry CITY Conway

PROJECT OPEN DATE 1/13/2006 DATE TO COMPLETE 2/30/06

HOME DEPARTMENT # 1643 BRANCH MGR # / INITIALS 53090 TS

DEPARTMENT MGR # / INITIALS 100184 CO PROJ. MGR # / INITIALS 100184 CO

FEE INFORMATION

INVOICE MASK: ___ COST PLUS ___ UNIT RATES ___ COST PLUS W/ MAX. xx LUMP SUM
(check one)

ESTIMATED/MAXIMUM FEE $3,750.00 FRINGE LOADED? IF YES, No %

LABOR MULTIPLIER 1 LABOR FEE SCHEDULE: A B C D OTHER MB03

NON-LABOR FEE SCHEDULE: A B C D OTHER MB03

OVERTIME BILLABLE? No RETAINAGE APPLICABLE? No IF YES, _____ %

EXPENSE REIMBURSEMENT MULTIPLIERS

(cost plus 15% - 1.15)

SUB-CONTRACT COSTS AND DIRECT MATERIALS _____

TRAVEL EXPENSES _____ OTHER DIRECT COSTS _____

AUTHORIZED DEPARTMENTS/PROJECTED BILLINGS

DEPARTMENT (check all that apply)	LABOR	EXPENSES	DEPARTMENT (check all that apply)	LABOR	EXPENSES
___ 1 GEOTECH ENG	_____	$ _____	___ 7 METALS	$ _____	$ _____
___ 2 DRILLING	$ _____	$ _____	___ 8 RESIDUAL MGT	_____	$ _____
___ 3 CONSTR SVCS	_____	_____	___ 9 ROOFING	$ _____	$ _____
163 4 ENVIRONMENT	$3,750	_____	_____ OTHER*	_____	$ _____
___ 5 IH / ASBESTOS	$ _____	$ _____	_____ OTHER*	$ _____	$ _____
___ 6 LANDFILL	$ _____	$ _____	_____ OTHER*	$ _____	$ _____

* LIST INTER-OFFICE DEPARTMENT NUMBER

COMMENTS _____

JMC 1/13

November 21, 2005

Southern Asphalt
Post Office Box 1549
Conway, South Carolina 29528

Attention: Mr. Jamie McLain

Reference: **Proposal for Wetland Delineation**
280 Acre Highway 701 South Tract
Horry County, South Carolina
S&ME Proposal No. 1633-0550-05

Dear Mr. McLain:

S&ME, Inc. is pleased to submit this proposal for a wetland delineation related to the referenced project. This proposal outlines the description of the property, our proposed scope of services, as well as a schedule and fee for these services.

Background Information

Based on the information (aerial photograph with property boundaries depicted) you delivered to our office on November 21, 2005, we understand that the subject property is approximately 280 acres, and is located east of and adjacent to SC Highway 701 South in Horry County, South Carolina (see Figure 1).

Scope of Services

S&ME will conduct a wetland determination / delineation for the proposed project site. The purpose of the wetland determination / delineation is to identify the presence and location of jurisdictional and non-jurisdictional wetland areas within the boundaries of the proposed project

S&ME, Inc.
231 Labonte Street
Conway, South Carolina 29526

(843) 347-7800
(843) 347-7848 fax
www.smeinc.com

area. Jurisdictional wetlands are regulated by the U.S. Army Corps of Engineers (USACE). Our approach to performing the approximation includes:

1. Assess and document site conditions as to the presence and/or absence of wetland areas. Wetland areas will be determined utilizing the three parameter approach (hydric soils, hydrophytic vegetation and wetland hydrology), using the most current regional indicators of jurisdictional hydrology set forth in the 1987 United States Army Corps of Engineers (USACE) Wetland Delineation Manual.

2. Delineate wetland areas using pink flagging marked with "WETLAND BOUNDARY" in black.

3. Identify and map the approximate upland/wetland boundaries.

4. Identify and map areas that are considered to be waters of the United States (i.e. streams, creeks and jurisdictional ditches) under the jurisdiction of the USACE.

5. Provide map showing approximate location of wetland areas to surveyors.

6. Meet USACE agent on site to verify delineation.

7. Prepare and submit a wetland determination report of findings to the USACE Charleston District for approval.

Please note that the final wetland determination is contingent upon USACE approval. Clearing, site preparation or construction activities should not begin prior to the receipt of the USACE wetland certification letter.

Services outside of the scope of this proposal include:

- **Project boundary and wetland boundary surveying by R.L.S.**
- **Wetland permitting**
- **Mitigation design**
- **Threatened & endangered species surveys**

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Work Schedule

The estimated time frame for completion of the fieldwork and USACE submittal is two to three weeks. Due to scope and personnel outside of S&ME, the time frame associated with surveying and USACE approval can not be determined. However, the typical time frame for the USACE Certification is approximately four weeks after submittal of the Registered Land Surveyor's (RLS) wetland delineation and boundary plat.

Compensation for Services

S&ME, Inc. will provide the environmental services related to the determination / delineation of the wetland areas associated with the referenced project for the fixed fee price of **$3,750.00**. Our proposal cost includes all personnel time, travel, expenses and materials needed to complete the services outlined in the proposal and is based on our current knowledge of the site. We request payment be provided at the time of authorization if possible.

Proposal Acceptance

Agreement for Services, Form Number AS 041 is attached and is incorporated as a part of this proposal. Please indicate your acceptance of our proposal by signing the back of both copies of the form and returning one copy to our office.

If you elect to accept our proposal by issuing a purchase order, then please specifically reference this proposal number and date. Your purchase order will be an acceptance of our Agreement of Services and an authorization to proceed with the performance of our services. However, the terms and conditions included in any purchase order shall not apply, as our Agreement is for services which are not compatible with purchase order agreements.

Closure

S&ME appreciates this opportunity to provide this proposal for environmental services related to this project. If you have any questions or require additional information, please do not hesitate to contact us at (843) 347-7800 with any questions.

Sincerely,

S&ME, Inc.

Charles Oates
Natural Resources Project Manager

Thomas C. Still, P.E.
Branch Manager

Attachments: Agreement for Services Form AS-041

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S&ME

AGREEMENT FOR SERVICES

Form AS-041

Date: November 21, 2005	Job Number:
S&ME, Inc. (hereafter Consultant)	Client Name: Southern Asphalt (hereafter Client)
Address: 231 Labonte Street City: Conway State: South Carolina Zip: 29526	Address: Post Office Box 1549 City: Conway State: SC Zip: 29528
Telephone: (843) 347-7800 Fax: (843) 347-7848	Telephone: (843) 347-7283 Fax: (843) 347-9467

PROJECT

Project Name: 280 Acre Highway 701 South Property / Wetland Delineation

Project location: (Street Address) Highway 701 South

City: Conway State: SC Zip:

SERVICES TO BE RENDERED

Proposal Number: 1633-0550-05 dated: November 21, 2005 is incorporated into this Agreement For Services.
This Agreement For Services is incorporated into the above Proposal.

WITNESSETH: WHEREAS, Client desires to contract with Consultant to furnish Services to Client's project identified above.

WHEREAS, Consultant is engaged in the business of providing Services and related labor, materials, and equipment. (Herein individually and collectively referred to as Services.)

NOW, THEREFORE, in consideration of the Mutual Covenants and Promises included herein, Client and Consultant agree as follows:

1. **OFFER ACCEPTANCE:** Client hereby accepts Consultant's offer to provide Services as described in Consultant's proposal for Services referenced under "SERVICES TO BE RENDERED" and agrees that such Services and any additional Services authorized by Client shall be governed by this Agreement. **If Client requests Consultant to start performing Services prior to receipt of this Agreement, Client agrees that Consultant's beginning of performance is based on reliance that Client will accept and execute this Agreement for Services. If Client requests Consultant to start performing Services prior to the execution of this Agreement For Services by the Client, then such request is an acceptance of this Agreement for Services to the same extent as if Client had executed this Agreement.** Should Client choose to accept this Agreement for Services through the use of a Purchase Order, all preprinted terms and conditions on Client's purchase order are inapplicable to this Agreement as this Agreement is for Services that are not compatible with purchase order agreements. Unless this offer is previously accepted, it will be withdrawn automatically at 5:00 pm EST, ninety (90) days from the date of issue.

2. **CONTRACT DOCUMENTS:** "Contract Documents" shall mean this document as well as the proposal listed under "SERVICES TO BE RENDERED" each of which is incorporated into the other.

3. **PAYMENT:** Client will pay Consultant for Services and expenses in accordance with the Contract Documents. If prices for Services are not established under SERVICES TO BE RENDERED then the current fee schedule in effect for the location providing the Services shall be used as the amount to be paid by Client for Services provided. Consultant will submit progress invoices to Client monthly and a final invoice upon completion of its Services. Payment is due upon receipt of the invoice unless otherwise agreed to in writing prior to the submittal of the invoice. Invoices are past due 30 calendar days after the date of the invoice. Past due amounts are subject to a late payment fee of one and one-half percent per month (18 percent per annum) or the highest amount allowed by applicable law on the outstanding balance, whichever is less. Attorney's

fees and other costs incurred in collecting past due amounts shall be paid by Client. The Client's obligation to pay under this Agreement is in no way dependent upon the Client's ability to obtain financing, payment from third parties, approval of governmental or regulatory agencies, or upon the Client's successful completion of the Project

Consultant shall be paid in full for all Services rendered under this Agreement, including any additional Services authorized by Client in excess of those stated in this Agreement. However, if Client objects to all or any portion of any invoice, Client shall so notify Consultant in writing of the objection within fifteen (15) days from date of invoice, give reasons for the objection, and pay that portion of the invoice not subject to Client's objection. Client and Consultant will informally discuss Client's objections to the invoice and attempt to reach a resolution mutually acceptable to Client and Consultant. If Client or Consultant determine that an informal resolution is not possible then that party shall so state in writing to the other party and initiate a final resolution pursuant to the Dispute Resolution provisions of this Agreement for Services. If the Client does not object in writing to all or a portion of the invoice within fifteen (15) calendar days from date of invoice then the full amount of the invoice is due and payable and all objections are waived.

Without incurring any liability to the Client, Consultant may either suspend or terminate this Agreement if Client fails to pay any undisputed invoice amounts within 60 calendar days of the invoice date, or if Client states its intention not to pay forthcoming invoices. Such suspension or termination will not waive any other claim Consultant may have against Client. Following such suspension or termination, Consultant may resume work by mutual agreement with Client after payment by Client of all outstanding invoiced amounts and collection expenses. In case of such suspension or termination, Client waives all claims for damages or delay as a result of such suspension or termination.

Any invoices that are not paid within thirty (30) calendar days of Client's receipt of letter from Consultant demanding payment of the invoices or a collection action notification by an attorney or collection agency shall constitute a release of Consultant by Client from any and all claims whatsoever, including, but not limited to, tort or contractual claims which Client may have against Consultant for Services performed under said invoice(s).

4. **STANDARD OF CARE**: Consultant and its agents, employees and subcontractors shall endeavor to perform Services for Client using that degree of care and skill ordinarily exercised, under similar circumstances, by others ordinarily providing Services in the same or similar locality as the project at the time Services are provided. In the event any portion of the Services fails to substantially comply with this standard of care obligation and Consultant is promptly notified in writing prior to one year after completion of such portion of the Services, Consultant will re-perform such portion of the Services, or if re-performance is impractical, Consultant will refund the amount of compensation paid to Consultant for such portion of the Services. **THE REMEDIES SET FORTH HEREIN ARE EXCLUSIVE.** This **STANDARD OF CARE** is in lieu of all other warranties and standards of care. No other warranty or standard of care, expressed or implied, is made or intended by this Agreement, or by the proposal, by oral communications, or by any representations made regarding the Services included in this Agreement.

5. **LIMITATION OF LIABILITY: CONSULTANT AND CLIENT MUTUALLY AGREE THAT THE SERVICES PROVIDED PURSUANT TO THIS AGREEMENT INVOLVE RISKS OF LIABILITY WHICH CANNOT BE ADEQUATELY COMPENSATED FOR BY THE PAYMENTS CLIENT WILL MAKE UNDER THIS AGREEMENT. THEREFORE, THE TOTAL CUMULATIVE LIABILITY OF CONSULTANT, ITS AGENTS, EMPLOYEES, AND SUBCONTRACTORS WHETHER IN CONTRACT, TORT INCLUDING NEGLIGENCE (WHETHER SOLE OR CONCURRENT), PROFESSIONAL ERRORS OR OMISSIONS, BREACH OF WARRANTY (EXPRESS OR IMPLIED), NEGLIGENT MISREPRESENTATION, AND STRICT LIABILITY, OR OTHERWISE ARISING OUT OF, CONNECTED WITH, OR RESULTING FROM THE SERVICES PROVIDED PURSUANT TO THIS AGREEMENT SHALL NOT EXCEED THE TOTAL FEES PAID BY CLIENT OR FIFTY THOUSAND DOLLARS, WHICHEVER IS GREATER. CLIENT AGREES THAT PAYMENT OF THE LIMIT OF LIABILITY AMOUNT IS THE SOLE REMEDY TO THE EXCLUSION OF ALL OTHER REMEDIES AVAILABLE FOR THE TOTAL CUMULATIVE LIABILITY OF CONSULTANT, ITS AGENTS, EMPLOYEES, AND SUBCONTRACTORS ARISING OUT OF, CONNECTED WITH OR RESULTING FROM THE SERVICES PROVIDED PURSUANT TO THIS AGREEMENT. AT ADDITIONAL COST, CLIENT MAY OBTAIN A HIGHER LIMIT OF LIABILITY PRIOR TO COMMENCEMENT OF SERVICES. THE ADDITIONAL COST IS COMPENSATION TO CONSULTANT FOR INCREASING THE CONSULTANT'S LIMIT OF LIABILITY. THE ADDITIONAL COST IS NOT AN INSURANCE COST. THE HIGHER LIMIT OF LIABILITY APPLIES ONLY IF MUTUALLY AGREED TO IN WRITING BY CONSULTANT AND CLIENT AT THE TIME CLIENT ACCEPTS THIS AGREEMENT FOR SERVICES AND THE ADDITIONAL COST PAID WITHIN SEVEN DAYS OF THE DATE OF THE MUTUAL AGREEMENT TO INCREASE THE LIMIT OF LIABILITY. CLIENT MAY AT THE TIME OF EXECUTION OF THIS AGREEMENT ELECT TO INCREASE THE LIMIT OF LIABILITY AMOUNT TO FIVE HUNDRED THOUSAND DOLLARS UPON THE PAYMENT OF FIVE HUNDRED DOLLARS OR TO ONE MILLION DOLLARS UPON THE PAYMENT OF ONE THOUSAND DOLLARS IN ADDITIONAL COST AS CONSIDERATION FOR THE HIGHER LIMIT OF LIABILITY. CONSULTANT'S CONSIDERATION TO CLIENT FOR THIS LIMIT OF LIABILITY IS SPECIFICALLY REFLECTED IN CONSULTANT'S FEES FOR SERVICES UNDER THIS AGREEMENT AS SUCH FEES ARE LESS THAN CONSULTANT WOULD BE PAID FOR SERVICES UNDER THIS AGREEMENT WITHOUT A LIMITATION OF LIABILITY. CLIENT MUST ELECT THE HIGHER LIMIT OF LIABILITY BY CHECKING AND INITIALING BELOW:**
I HEREBY AGREE TO PAY ☐ $500.00 TO INCREASE THE LIMIT OF LIABILITY TO $ 500,000. _____ (INITIAL)
I HEREBY AGREE TO PAY ☐ $1000.00 TO INCREASE THE LIMIT OF LIABLITY TO $ 1,000,000 _____(INITIAL)
CLIENT IS CAUTIONED THAT THIS IS A LIMITED LIABILITY AGREEMENT LIMITING THE LIABILITY OF CONSULTANT; THEREFORE, CLIENT IS ADVISED TO CAREFULLY REVIEW CLIENT'S RISKS OF LIABILITY RELATED TO THIS CONTRACT AND ADDRESS SUCH RISKS THROUGH CLIENT'S INSURANCE OR OTHER MEANS.

6. **DISCLAIMER OF CONSEQUENTIAL DAMAGES:** In no event shall Consultant or Client be liable to the other for any special, indirect, incidental or consequential loss or damages, including, but not limited to, lost profits and loss of use arising from or related to Services provided by Consultant.

7. **REPORTS:** In connection with the performance of the Services, Consultant shall deliver to Client one or more reports or other written documents reflecting Services provided and the results of such Services. All reports and written documents delivered to Client are instruments reflecting the Services provided by Consultant pursuant to this Agreement and are made available for Client's use subject to the limitations of this Agreement. Instruments of Service provided by Consultant to Client pursuant to this Agreement are provided for the exclusive use of Client, and Client's agents and employees for the Project and are not to be used or relied upon by third parties or in connection with other projects. Subject to the authorized use of Client, and Client's agents, and employees, all Instruments of Service, other written documents, all original data gathered by Consultant and work papers produced by Consultant in the performance of or intrinsic to the Services included in the Services are, and shall remain, the sole and exclusive property of Consultant. Unless a shorter period is stated in the Instrument of Service, all Instruments of Service provided pursuant to this Agreement will be valid for a period of three years from the date of this Agreement after which the Instruments of Service are void and can no longer be used or relied upon by anyone for any purpose whatsoever. The period for which an Instrument of Service is valid may be extended by mutual written consent of the Consultant and Client.

Documents that may be relied upon by Client are limited to the printed copies (also known as hardcopies) that are signed or sealed by Consultant. Files in electronic media format of text, data, graphics or of other types that are furnished by Consultant to Client are only for the convenience of Consultant and Client. Any conclusion or information obtained or derived from such electronic files will be at the Client's or other user's sole risk. Data stored in electronic format can deteriorate or be modified inadvertently or otherwise. Consultant shall not be responsible to maintain documents stored in electronic media. When transferring documents in electronic media format, Consultant makes no representations as to long-term compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by Consultant.

Consultant shall not be responsible for any alterations, modifications, or additions made in the electronic data by the Client or any reuse of the electronic data by the Client or any other party for this project or any other project without Consultant's written consent. Client shall indemnify, and hold Consultant harmless against any claims, damages or losses arising out the reuse of the electronic data without Consultant's consent or arising out of alterations, modifications, or additions to the electronic data made by anyone other than Consultant.

Any Instruments of Service, including reports, generated as part of this Agreement are intended solely for use by Client and shall not be provided to any other person or entity without Consultant's written authorization. To the fullest extent permitted by law, Client shall indemnify and hold harmless Consultant from and against any action or claim brought by any person or entity claiming to rely on the information or opinions contained in the Instrument of Service without Consultant's written authorization.

8. **SAFETY:** Consultant will maintain a safety program for its employees. Consultant specifically disclaims any authority or responsibility for general job safety and for the safety of persons who are not employed by Consultant. Should Client, or third parties, be conducting activities on the Site, then each shall have responsibility for their own safety and compliance with applicable safety requirements.

Field Personnel: The presence of Consultant's field personnel, either full-time or part-time, may be for the purpose of providing project administration, assessment, observation or field testing of specific aspects of the project as authorized by Client. Should Client retain the Services of a Contractor(s) for the project, Consultant is not responsible in any way whatsoever for the supervision or direction of the work of the Contractor(s), its' employees or agents. The presence of Consultant's field personnel for project administration, assessment, observation or testing shall not relieve the Contractor(s) of his responsibility for performing work in accordance with the project plans and specifications.

If a Contractor (not a subcontractor of Consultant) is involved in the project, Client agrees, in accordance with generally accepted construction practices, that the Contractor will be solely responsible for working conditions on the jobsite, including safety of all persons and property during performance of the work, and compliance with OSHA regulations. These requirements will apply continuously and will not be limited to normal working hours. It is agreed that Consultant will not be responsible for job or jobsite safety on the project, other than for Consultant's employees and subcontractors, and that Consultant does not have the duty or right to stop the work of the Contractor.

9. **CONFIDENTIALITY:** Subject to any obligation Consultant may have under applicable law or regulation, Consultant will endeavor to release information relating to the Services only to its employees and subcontractors in the performance of the Services, to Client's authorized representative(s) and to persons designated by the authorized representative to receive such information.

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10. **SAMPLES**: Unless otherwise requested, test specimens or samples will be disposed of immediately upon completion of tests and analysis. Upon written request, Consultant will retain samples for a mutually acceptable storage charge and period of time. In the event that samples contain or may contain hazardous materials, Consultant shall, after completion of testing and at Client's expense, return such samples to Client or make samples available for disposal by Client's agent. Client recognizes and agrees that Consultant is acting as a bailee and at no time assumes title to said samples.

11. **INVENTIONS**: Any and all inventions or discoveries relating to the Services, including improvements and modifications to existing products or processes made or conceived by Consultant or its employees during the term of this Agreement are and shall remain the sole and exclusive property of Consultant.

12. **REPRESENTATIONS OF CLIENT**: Client warrants and covenants that sufficient funds are available or will be available upon receipt of Consultant's invoice to make payment in full for the Services rendered by Consultant. Client warrants that all information provided to Consultant regarding the project and project location are complete and accurate to the best of Client's knowledge.

13. **CLIENT OBLIGATIONS**: Client agrees to furnish Consultant, its agents, employees, and subcontractors a right-of-entry and any authorizations needed for Consultant to enter onto the project site to perform the Services included in this Agreement. Consultant will take reasonable precautions to minimize damage to the Project Site from Consultant's activities and use of equipment. Client recognizes that the performance of the Services included in this Agreement may cause alteration or damage to the site. Client accepts the fact that this is inherent in the work and will not look to Consultant for reimbursement or hold Consultant liable or responsible for any such alteration or damage. Should Client not be owner of the property, then Client agrees to notify the owner of the aforementioned possibility of unavoidable alteration and damage and to indemnify, and hold harmless Consultant against any claims and claims related costs including attorney's fees by the owner or persons having possession of the site through the owner which are related to such alteration or damage.

14. **UTILITIES:** Client agrees to disclose the identity of all utilities serving the Project Site and the presence and accurate location of hidden or obscure man-made objects known to Client relative to field tests or boring locations. Client agrees to indemnify and hold harmless Consultant from all claims, suits, losses, personal injuries, death, and property liability including costs and attorney's fees resulting from damage or injury to utilities or subterranean structures (pipes, tanks, etc.) arising from the performance of Consultant's Services when the existence of such are not called to Consultant's attention or the location not correctly identified in information furnished Consultant.

15. **CERTIFICATIONS**: Client agrees not to require that Consultant execute any certification with regard to work performed, tested or observed under this Agreement unless : 1) Consultant believes that it has performed sufficient work to provide a sufficient basis to issue the certification; 2) Consultant believes that the work performed, tested or observed meets the criteria of the certification; and 3) Consultant has reviewed and approved in writing the exact form of such certification prior to execution of this Agreement. Any certification by Consultant is limited to an expression of professional opinion based upon the Services performed by the Consultant, and does not constitute a warranty or guarantee, either expressed or implied.

16. **FAILURE TO FOLLOW RECOMMENDATIONS**: The Client agrees that it would be unfair to hold the Consultant liable for problems that may occur if the Consultant's recommendations are not followed. Accordingly, the Client waives any claim against the Consultant, and agrees to indemnify, and hold harmless the Consultant from any claim or liability for injury or loss that results from failure to implement the Consultant's recommendations or from implementation of the Consultant's recommendations in a manner that is not in strict accordance with them.

17. **TERMINATION**:

For Convenience - Upon written notice, Client or Consultant may terminate the performance of any further Services included in this Agreement if the terminating party determines termination is in the terminating party's interest. Upon dispatch or receipt of the termination notice, Consultant shall stop work on all Services included in this Agreement and deliver any Instruments of Service complete at that time to Client and Client shall pay Consultant within 30 days for all Services performed up to the dispatch or receipt of the termination notice. Upon Termination for Convenience, Consultant and Client shall have no further rights or remedies other than those included in this paragraph.

For Cause –In the event of material breach of this Agreement, the party not breaching the Agreement may terminate it upon 10 days written notice delivered or mailed to the other party, which notice must identify the material breach. The Agreement may not be terminated for cause if the breaching party cures the breach within ten days of receipt of the written notice. Upon Termination for Cause, Consultant shall stop work on all Services included in this Agreement and deliver any instruments of service complete at that time to Client and Client shall pay Consultant within 30 days for all Services performed up to the termination. Upon Termination for Cause, Consultant and Client shall have no further rights or remedies other than those included in this paragraph.

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18. **UNFORESEEN CONDITIONS OR OCCURRENCES:** If, during the performance of service hereunder, any unforeseen hazardous substance, material, element or constituent or other unforeseen conditions or occurrences are encountered which, in Consultant's judgment significantly affects or may affect the services, the risk involved in providing the Services, or the recommended scope of Services , Consultant will notify Client thereof. Subsequent to that notification, Consultant may: (a) If practicable, in Consultant's judgment and with approval of Client, complete the original scope of Services in accordance with the procedures originally intended in the Proposal; (b) Agree with Client to modify the scope of Services and the estimate of charges to include the previously unforeseen conditions or occurrences, such revision to be in writing and signed by the parties and incorporated herein; or (c) Terminate the Services effective on the date of notification pursuant to the terms of TERMINATION FOR CONVENIENCE. Client is responsible for reporting any releases of hazardous substances to appropriate government agencies as required by law. Client waives any claim against Consultant and will indemnify and hold Consultant harmless from any claim, injury or loss arising from the discovery of unforeseen hazardous substances.

19. **FORCE MAJEURE:** Neither party shall be deemed in default of this Agreement to the extent that any delay or failure in the performance of an obligation (other than the payment of money) results from any causes beyond its reasonable control and without its fault or negligence. For this purpose, such acts or events shall include, but are not limited to, storms, floods, unusually severe weather, epidemics, civil disturbances, war, riot, strikes, lockouts or other industrial disturbances, and inability within reasonable diligence to supply personnel, information or material to the project. In the event that such acts or events occur, it is agreed that both parties shall attempt to overcome all difficulties arising and to resume as soon as reasonably possible the normal pursuit and schedule of the Services covered by this Agreement. The time for performance shall be extended for a period equal to the delay.

20. **INSURANCE:** Consultant shall maintain at its own expense the following insurance subject to normal industry exclusions: (1) Worker's Compensation Insurance and Employer's Liability Insurance. (2) Commercial Automobile Liability Insurance with limits of $1,000,000.00. (3) Commercial General Liability Insurance with limits of $1,000,000.00. (4) Professional Liability Insurance. Certificates can be issued upon request identifying details and limits of coverage.

21. **INDEMNITY:** Client agrees to indemnify, and save harmless Consultant, its agents, employees, and subcontractors from and against any and all losses, liabilities, and costs and expenses of every kind (including cost of defense, investigation, settlement, and reasonable attorney's fees), which Consultant, its agents, employees, and subcontractors may incur, become responsible for, or pay out as a result of bodily injuries (including death) to any person, damage to any property, or both, to the extent caused by Client's negligence or willful misconduct.

    Subject to the Limitation of Liability in Article 5, Consultant agrees to indemnify, and save harmless Client from and against any and all losses, liabilities, and costs and expenses of every kind (including cost of defense, investigation, settlement, and reasonable attorney's fees) which Client may incur, become responsible for, or pay out as a result of bodily injuries (including death) to any person, damage to any property, or both, to the extent caused by Consultant's negligence or willful misconduct.

    Subject to the Limitation of Liability in Article 5, Client and Consultant shall, in the event of liability arising out of their joint negligence or willful misconduct indemnify, and save harmless each other in proportion to their relative degree of fault.

22. **DISPUTE RESOLUTION:** Consultant may in Consultant's sole discretion pursue collection of past due invoices by litigation in a court of competent jurisdiction. Other than Consultant's collection of past due invoices, in the event of a dispute between Consultant and Client with regard to any matter arising out of or related to this Agreement, the Parties will use their best efforts to resolve the dispute amicably within fifteen (15) calendar days. If the dispute cannot be settled amicably, the Parties agree that the dispute shall be subject to mediation in accordance with the mediation rules of the American Arbitration Association or similar Dispute Resolution organization. Mediation in good faith shall be a condition precedent to the institution of legal or equitable proceedings by either party. Once a party files a request for mediation with the other party and with the American Arbitration Association, or similar Dispute Resolution organization, the parties agree to commence such mediation within thirty (30) days of the filing of the request. The costs of such mediation shall be borne equally by both parties. If the dispute is not resolved after such mediation, then the dispute shall be resolved by litigation in a court of competent jurisdiction.

23. **CAPTIONS AND HEADINGS:** The captions and headings throughout this Agreement are for convenience and reference only, and the words contained therein shall in no way be held or deemed to define, limit, describe, modify, or add to the interpretation, construction, or meaning of any provision of or scope or intent of this Agreement.

24. **SEVERABILITY:** If any provision of this Agreement, or application thereof to any person or circumstance, shall to any extent be invalid, then such provision shall be modified if possible, to fulfill the intent of the parties as reflected in the original provision, the remainder of this Agreement, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and each provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

25. **ASSIGNMENT AND SUBCONTRACTS:** Neither party may assign this Agreement, in whole or in part, without the prior written consent of the other party, except for an assignment of proceeds for financing purposes. Consultant may subcontract for the Services of others without obtaining Client's consent if Consultant deems it necessary or desirable to have others perform Services.

26. **NO WAIVER**: No waiver by either party of any default by the other party in the performance of any provision of this Agreement shall operate as or be construed as a waiver of any future default, whether like or different in character.

27. **LAW TO APPLY**: The validity, interpretation, and performance of this Agreement shall be governed by and construed in accordance with the laws of the state in which the project is located.

CONSULTANT HEREBY ADVISES CLIENT THAT ITS PERFORMANCE OF THIS AGREEMENT IS EXPRESSLY CONDITIONED ON CLIENT'S ASSENT TO THE TERMS AND CONDITIONS DETAILED HEREIN.

ENTIRE AGREEMENT – This Agreement represents the entire understanding and agreement between the parties hereto relating to the Services and supersedes any and all prior negotiations, discussions, and Agreements, whether written or oral, between the parties regarding same.

TO THE EXTENT that any additional or different Provisions conflict with the Provisions of this Agreement, the Provisions of this Agreement shall govern. No amendment or modification to this Agreement or any waiver of any provisions hereof shall be effective unless in writing, signed by both parties.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representative.

CLIENT: Southern Asphalt	**S&ME, Inc.**
BY: _____ (Signature)	**BY:** _____ (Signature)
Jamie McLain (Print Name / Title)	Thomas C. Still / Branch Manager (Print Name / Title)
DATE: 1/5/06	**DATE:** 11/22/05

PROPOSAL NUMBER : 1633-0550-05

Client's FAXED or DIGITAL signature to be treated as original signature.

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S&ME

September 19, 2005

Bethea Talbot and Company
950 48th Avenue North
Myrtle Beach, South Carolina 29577

Attention: Mr. Mark Talbot

Reference: **Proposal for Wetland Delineation**
317 Acre Highway 701 South Tract
Horry County, South Carolina
S&ME Proposal No. 1633-0443-05

PENGAD 800-631-6989
EXHIBIT
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04/25

Dear Mr. Talbot:

S&ME, Inc. is pleased to submit this proposal for a wetland delineation related to the referenced project. This proposal outlines the description of the property, our proposed scope of services, as well as a schedule and fee for these services.

Background Information

Based on the information (Horry County Tax ID Number 169-00-03-027) you provided during our telephone conversation on September 19, 2005, we understand that the subject property is approximately 317 acres, and is located east of and adjacent to SC Highway 701 South in Horry County, South Carolina.

Scope of Services

000227

S&ME will conduct a wetland determination / delineation for the proposed project site. The purpose of the wetland determination / delineation is to identify the presence and location of jurisdictional and non-jurisdictional wetland areas within the boundaries of the proposed project

S&ME, Inc.
231 Labonte Street
Conway, South Carolina 29526

(843) 347-7800
(843) 347-7848 fax
www.smeinc.com

area. Jurisdictional wetlands are regulated by the U.S. Army Corps of Engineers (USACE). Our approach to performing the approximation includes:

1. Assess and document site conditions as to the presence and/or absence of wetland areas. Wetland areas will be determined utilizing the three parameter approach (hydric soils, hydrophytic vegetation and wetland hydrology), using the most current regional indicators of jurisdictional hydrology set forth in the 1987 United States Army Corps of Engineers (USACE) Wetland Delineation Manual.
2. Delineate wetland areas using pink flagging marked with "WETLAND BOUNDARY" in black.
3. Identify and map the approximate upland/wetland boundaries.
4. Identify and map areas that are considered to be waters of the United States (i.e. streams, creeks and jurisdictional ditches) under the jurisdiction of the USACE.
5. Provide map showing approximate location of wetland areas to surveyors.
6. Meet USACE agent on site to verify delineation.
7. Prepare and submit a wetland determination report of findings to the USACE Charleston District for approval.

Please note that the final wetland determination is contingent upon USACE approval. Clearing, site preparation or construction activities should not begin prior to the receipt of the USACE wetland certification letter.

Services outside of the scope of this proposal include:

- **Project boundary and wetland boundary surveying by R.L.S.**
- **Wetland permitting**
- **Mitigation design**
- **Threatened & endangered species surveys**

Work Schedule

The estimated time frame for completion of the fieldwork and USACE submittal is two to three weeks. Due to scope and personnel outside of S&ME, the time frame associated with surveying and USACE approval can not be determined. However, the typical time frame for the USACE Certification is approximately four weeks after submittal of the Registered Land Surveyor's (RLS) wetland delineation and boundary plat.

Compensation for Services

S&ME, Inc. will provide the environmental services related to the determination / delineation of the wetland areas associated with the referenced project for the fixed fee price of **$3,750.00**. Our proposal cost includes all personnel time, travel, expenses and materials needed to complete the services outlined in the proposal and is based on our current knowledge of the site.

Proposal Acceptance

Agreement for Services, Form Number AS 041 is attached and is incorporated as a part of this proposal. Please indicate your acceptance of our proposal by signing the back of both copies of the form and returning one copy to our office.

If you elect to accept our proposal by issuing a purchase order, then please specifically reference this proposal number and date. Your purchase order will be an acceptance of our Agreement of Services and an authorization to proceed with the performance of our services. However, the terms and conditions included in any purchase order shall not apply, as our Agreement is for services which are not compatible with purchase order agreements.

Closure

S&ME appreciates this opportunity to provide this proposal for environmental services related to this project. If you have any questions or require additional information, please do not hesitate to contact us at (843) 347-7800 with any questions.

Sincerely,

S&ME, Inc.

Charles Oates
Natural Resources Project Manager

Thomas C. Still, P.E.
Branch Manager

Attachments: Agreement for Services Form AS-041

0740

Instrument#: 2007000079087, DEED BK: 3249 PG: 2028 DOCTYPE: 001 06/01/2007 at 04:31:42 PM, 1 OF 4 COUNTY STAMPS: $1007.60 STATE STAMPS: $2381.60 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS
New 1690003117 split from 1690003027

ORIGINAL

RECORDING SPACE ABOVE:
Please Return To: Atty Richard N. Booth, 1905 N. Main St., Conway, SC 29526
RNB File No.: 07-06-20659

STATE OF SOUTH CAROLINA	)	
	)	***DEED***
COUNTY OF HORRY	)	

KNOW ALL MEN BY THESE PRESENTS, THAT IT, **BUCKSVILLE FARMS, INC.**, hereinafter called grantor(s), in consideration of the sum of **NINE HUNDRED FIFTEEN THOUSAND EIGHT HUNDRED FORTY AND NO/100 ($915,840.00) DOLLARS,** to the grantor(s) in hand paid at and before the sealing of these presents by the grantee(s) hereinafter named, the receipt of which is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the following named grantee(s), to wit:

DONALD D. GODWIN, LLC AND RANDY A. BEVERLY, LLC
P.O. Box 1549
Conway, SC 29528

SEE EXHIBIT 'A' ATTACHED FOR LEGAL DESCRIPTION

TOGETHER with all and singular, the rights, hereditaments and appurtenances to said premises belonging, or in anywise incident or appertaining; to have and to hold all and singular the premises before mentioned unto the grantee(s), and grantee's(s') heirs, successors and assigns forever.

AND the grantor(s) do(es) hereby bind the grantor(s) and the grantor's(s') heirs, successors, executors and administrators to warrant and forever defend all and singular the said premises unto the grantee(s) and the grantee's(s') heirs, successors and assigns against the grantor(s) and this

PLAINTIFF'S EXHIBIT 1 Sciaretta
PGI&D-Bayonne, N. J.

Instrument#: 2007000079087, DEED BK: 3249 PG: 2029 DOCTYPE: 001 06/01/2007 at 04:31:42 PM, 2 OF 4 COUNTY STAMPS: $1007.60 STATE STAMPS: $2381.60 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

grantor's(s') heirs, successors and against every person whomsoever lawfully claiming or to claim the same or any part thereof.

WITNESS the execution by grantor(s) this 1st day of June in the year of our Lord two thousand seven and in the two hundred and thirty first year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered
In the Presence of:

witness #1, sign here

Notary sign here

Bucksville Farms, Inc.

Benjamin J. Creel (L.S.)
BY: Benjamin J. Creel, President

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

ACKNOWLEDGEMENT

The foregoing instrument was acknowledged before me this 1st day of June, 2007 by Benjamin J. Creel, as President of Bucksville Farms, Inc., on behalf of the corporation.

Notary Public for South Carolina
My Commission Expires: 7/9/2008

Instrument#: 2007000079087, DEED BK: 3249 PG: 2030 DOCTYPE: 001 06/01/2007 at 04:31:42 PM, 3 OF 4 COUNTY STAMPS: $1007.60 STATE STAMPS: $2381.60 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF HORRY)

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. Property located at, 50.88 Acres, Bucks Township, Horry County, South Carolina, bearing Horry County Tax Map No. split from 169-00-03-027, was transferred by Bucksville Farms, Inc. to Donald D. Godwin, LLC and Randy A. Beverly, LLC, on June 1, 2007.

The transaction was (Check One)
__xx_____ an arm's length real property transaction and the sales price paid or to be paid in money or money's worth was $915,840.00.

_____ not an arm=s length real property transaction and the fair market value of the property is $_____.

The above transaction is exempt, or partially exempt, from the recording fee as set forth in S.C. Code Ann. Section 12-24-10 et. Seq. because the deed is (See Back of affidavit)

As required by Code Sections 12-24-70, I state that I am a responsible person who was connected with the transaction as _____SELLER_____.

I further understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Benjamin L Creel
SELLER

SWORN to before me this
1st day of June, 2007.
Gary R Todd
Notary Public for South Carolina
My Commission Expires: 7/9/2008

Instrument#: 2007000079087, DEED BK: 3249 PG: 2031 DOCTYPE: 001 06/01/2007 at 04:31:42 PM, 4 OF 4 COUNTY STAMPS: $1007.60 STATE STAMPS: $2381.60 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

EXHIBIT 'A'

ALL AND SINGULAR, all that certain piece, parcel or tract of land, together with any and all improvements situate thereon, situate, lying and being in **Bucks Township**, Horry County, South Carolina, **containing 50.88 Acres, more or less,** as shown on plat prepared by Carolina Land Surveyors, LLC for Donald D Godwin & Randy Beverly LLC, dated February 21, 2007, which plat is recorded in the office of the ROD for Horry County, in **Plat Book** 226 **at Page** 48, reference to which is craved as forming a part and parcel hereof.

This being a portion of the property conveyed to Bucksville Farms, by Deed recorded November 29, 1983, in the office of the ROD for Horry County, in Deed Book 835 at Page 826.

TMS# split from 169-00-03-027

Benjamin J Creel

Bucksville Farms, Inc.
BY: Benjamin J. Creel, President

CONTRACT OF PURCHASE

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

This **Agreement** made this 31st **day of May, 2007,** between **701 South, LLC, Purchaser**, and **Donald D. Godwin, LLC and Randy A. Beverly, LLC, Sellers.**

That for and in consideration of the sum of One and No/100 ($1.00) Dollar, the receipt and sufficiency of which is hereby acknowledged, the Purchaser and Sellers agree as follows, to wit:

1. Purchaser agrees to buy, and sellers agree to sell, those certain parcels of land **situate in Horry County, South Carolina:**

Tract No. 1: **51.08 acres, more or less,** as shown upon a survey prepared for Donald Godwin by Carolina Land Surveyors, LLC which survey is recorded in the Office of the ROD for Horry County in Plat Book 214 at Page 148, and being more specifically identified in that certain deed from Bucksville Farms, Inc. to Donald D. Godwin, LLC and randy A. Beverly, LLC as recorded in the Office of the ROD for Horry County in Deed Book 3110 at Page 656. (TMS No. 169 00 03 116).

Computation of Purchase Price = 51.08 acres less 1.08 acres in road less One (1) acre (possible wetlands). Wetlands were not delineated on boundary plat for the reason that the Sellers are in the process of eliminating them and if they are delineated on the plat the Sellers will be unable to remove them. If the Sellers are successful in the removal of the wetlands, then and in that event the Purchaser will owe the Sellers an additional $27,000.00 which sum shall be paid to Sellers within thirty (30) days written notice of the completion of the removal of the wetlands or in the event that the wetlands are determined and contain more than One (1) acre, then and in that event the Sellers will reimburse Purchaser for any amount over based on the uplands price.)

$28,000.00 x 49 acres (uplands) = $1,372,000.00 + $1,000.00 x 1 acre (possible wetlands) = $1,373,000.00.

Tract No. 2: **50.88 acres, more or less,** as shown upon a survey prepared for Donald D. Godwin and Randy Beverly LLC by Carolina Land Surveyors, LLC dated



February 21, 2007, reference to which is craved as forming a part and parcel hereof, and being a portion of TMS No. 169 00 03 027.

Computation of Purchase Price = 50.88 acres (uplands – no wetlands) x $29,000.00 = $1,475,520.00.

2. The property shall be conveyed subject to all covenants of record (provided they do not make the title unmarketable) and to all governmental statutes, ordinances, rules and regulations.

3. The purchase price is **Two Million Eight Hundred Forty Eight Thousand Five Hundred Twenty and No/100 ($2,848,520.00) Dollars** to be paid upon delivery of deed as hereinafter provided.

4. 2007 Taxes shall be adjusted as of the date of the delivery of the deed; the purchaser shall be responsible for the payment of any and all roll-back taxes, if applicable.

5. Seller agrees to convey by marketable (or insurable) title, satisfactory to Purchaser, and deliver a proper statutory warranty deed free of encumbrances except as herein stated, with all stamps affixed thereto. The deed shall be delivered at the office of Richard N. Booth, Attorney **on June 4th, 2007.**

6. No Real Estate Agents are involved in this transaction representing neither the purchaser nor the Sellers. The Purchaser is herewith notified that one of the Sellers is a licensed real estate agent.

7. Upon default by the Purchaser, the amount of earnest money deposit paid this date will be forfeited as liquidated damages. In event of forfeiture of earnest money deposit, the amount so forfeited will be paid to the Seller. Upon default by the Seller if

the Purchaser elects to rescind this agreement it shall be repaid all sums paid hereunder, and in addition, shall be reimbursed for its reasonable expenses of title examination.

8. This agreement constitutes the entire contract and can only be changed by written agreement between the parties.

9. The stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

WITNESS the parties by their hands and seals the day and year first above written.

WITNESS:

DONALD D. GODWIN, LLC

_____ (L.S.)
BY: DONALD D. GODWIN
As Its: SOLE MEMBER

RANDY A. BEVERLY, LLC

_____ (L.S.)
BY: RANDY A. BEVERLY
As Its: SOLE MEMBER

701 SOUTH, LLC

_____ (L.S.)
BY: DONALD D. GODWIN, LLC
As Its: MANAGING MEMBER

_____ (L.S.)
BY Byrum Land Development, LLC
As Member

_____ (L.S.)
Claremont SC Enterprises, LLC
By As Member

As to Byrum

0747

STATE OF SOUTH CAROLINA	)	
	)	**LAND OPTION**
COUNTY OF HORRY	)	

The agreement made this 31st day of May, 2007, between **Donald D. Godwin, LLC and Randy A. Beverly, LLC** hereinafter designated as the parties of the first part; and **701 South, LLC,** hereinafter designated as the party of the second part:

WITNESSETH: That in consideration of the sum of **One and No/100 ($1.00) Dollars,** paid by the party of the second part to the parties of the first part, (the receipt and sufficiency of which is hereby acknowledged) the said parties of the first part hereby grant, sell, and convey to the party of the second part an option to purchase the real property hereinafter described upon payment of the purchase price, to wit:

1. On June 4, 2008, a minimum of 50 upland acres, more or less, at an acreage price of Thirty Thousand and No/100 ($30,000.00) Dollars. Any wetlands purchased on June 4, 2008, shall be One Thousand and No/100 ($1,000.00) Dollars per acre. Said property is described in that

PLAINTIFF'S EXHIBIT 5

certain Agreement to Buy and Sell Real Estate in Multiple Closings dated October 2, 2005 between the parties of the first part and Bucksville Farms, Inc. (the "Underlying Agreement") attached hereto as Exhibit A, more specifically, the "Third Takedown Parcel" as described in the Underlying Agreement and, in particular, in paragraph 22(b) of said Agreement.

2. On June 4, 2009, the balance of the parcel containing One Hundred Twenty (120) acres, more or less, shall be purchased and the price per upland acre shall be Thirty-One thousand and No/100 ($31,000.00). All remaining wetlands purchased on June 4, 2009, shall be One Thousand and No/100 ($1,000.00) per acre. Said property is more particularly described as the "Fourth Takedown Parcel" as set forth in paragraph 22(c) of the Underlying Agreement.

3. The party of the second part shall notify the parties of the first part sixty (60) days prior to each closing date of its intention to exercise its option to purchase the subject property. Said written Notice of Intent to Purchase being

mailed to the parties of the first part at P. O. Box 1549, Conway, South Carolina 29528 or such other place or places that the parties of the first part may hereafter designate, by U. S. Mail, postage prepaid, return receipt requested. Failure of the second party to timely comply with the requirements hereof shall cause the within Land Option to terminate and be of no virtue, force, and effect. If the option granted herein is exercised as to one or both of the Takedown Parcels the party of the second part shall be entitled to the same rights that the party of the first part is entitled as Purchaser pursuant to the Underlying Agreement.

4. As hereinabove stated, the parties of the first part agree to sell to the party of the said second part at its option, the real estate hereinafter described, and to execute, deliver and confirm to the said party of the second part at its option, or to any other person, firm or corporation, their, his, its or her heirs, executors, admininstrators, successors, and assigns as may be directed by the said party of the second part; a deed in fee simple, therefor,

with general warranty, free from all equity of redemption, and encumbrances and defects of title whatsoever, to wit: See Exhibit "A" attached to the Underlying Agreement.

5. The parties understand and agree that the interest of the Parties of the first part in and to the property which is the subject hereof is derived from and subject to the Underlying Agreement.

6. During the period of this Option, the party of the first part shall not sell, convey, mortgage, or otherwise encumber the property herein described or part thereof, or enter into any lease or letting of the property, or any part thereof.

7. It is further understood and agreed, that in case the said party of the second part does not pay, or tender, or cause to be paid or to be tendered, to the party of the first part the purchase price aforesaid on or before first date above limited, then this agreement shall be void, and the amount this day paid shall be forfeited.

The within Option shall inure to the benefit of the parties hereto their heirs, successors and/or assigns.

IN WITNESS WHEREOF, said party of the first part has duly executed, signed sealed and delivered these presents on the day and year first hereinabove stated.

WITNESS:

DONALD D. GODWIN, LLC

(L.S.)
BY: DONALD D. GODWIN
As Its: SOLE MEMBER

RANDY A. BEVERLY, LLC

(L.S.)
BY: RANDY A. BEVERLY
As Its: SOLE MEMBER

701 SOUTH, LLC

(L.S.)
BY: DONALD D. GODWIN, LLC
As Its: MANAGING MEMBER

(L.S.)
BY Byram Land Development, LLC
As Member

(L.S.)
Claremont SC Enterprises, LLC
By As Member

0752

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

AGREEMENT TO BUY AND SELL REAL ESTATE IN MULTIPLE CLOSINGS

This Agreement to Buy and Sell Real Estate in Phases ("Agreement") is made this 2nd day of October, 2005 (the "Effective Date") by and between **BUCKSVILLE FARMS, INC.** (the Seller), and **RANDY A. BEVERLY, LLC** and **DONALD GODWIN, LLC** (the "Purchaser").

WITNESSETH:

WHEREAS, the Seller is an owner of that certain tract or parcel of land located in Horry County, South Carolina, containing approximately 317.5 acres, which is more particularly described on Exhibit A attached hereto and incorporated herein by reference (the "Land");

WHEREAS, Purchaser desires to purchase from Seller the Land and Seller desires to sell, transfer and convey the same to Purchaser in phases pursuant to the terms of this Agreement.

NOW, THEREFORE, in consideration of the promises and mutual covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Sale/Purchase. Seller agrees to sell in phases and Purchaser agrees to purchase in one or more takedowns the Land and all easements and other rights and interests appertaining to the Land, together with all improvements thereon and also together with all and singular the tenements and hereditaments, rights and appurtenances now or hereinafter belonging thereto (the "Property") less that certain 40 ± acres located on southern portion of the Property containing the pond and bordering Shelley Farm Road and Old Bucksville Highway to be more accurately identified on the Boundary Survey to be provided by Seller pursuant to Section 9 hereinbelow.

2. Purchase Price. The purchase price (the "Purchase Price") at each takedown of the Property shall be determined as follows:

a. [redacted] Dollars per upland acre of the Property purchased in the First Takedown Closing (as defined below) or before the first anniversary of the First Takedown Closing; plus

b. [redacted] Dollars per upland acre of the Property purchased between the first anniversary of the First Takedown Closing (as defined below) and the second anniversary of the First Takedown Closing ; plus

c. [redacted] per upland acre of the Property purchased between the second anniversary of the First Takedown Closing and the third anniversary of the First Takedown Closing; plus

d. [redacted] per upland acre of the Property purchased between the third anniversary of the First Takedown Closing and the fourth anniversary of the First Takedown Closing; plus

e. One Thousand and 00/100 ($1,000.00) Dollars per wetland acre of the Property, regardless of when purchased.

"EXHIBIT A"

ALL AND SINGULAR, all those certain parcels, or tracts of land, together with improvements thereon, situate, lying and being in **Bucks Township,** Horry County, South Carolina, in High School District No. 1, **containing in the aggregate 317.56 Acres, more or less, being** more particularly bounded now or formerly as follows:

North by lands of Buck, Sarvis, Joe McCray and Singleton, et al, East by Old Port Harrelson and Conway Road, lands of S. C. Morris, Joe McCray, and Singleton, et al; South by lands of S.C. Morris, Waccamaw River Swamp, Paul Hodges and Leila S. Hodges; West by Paul Hodges, Leila S. Hodges, Joe McCray and U.S. Highway 701 between Conway and Georgetown, South Carolina.

There is excepted from the above described tract of land that certain parcel of land containing 8.76 Acres conveyed by Canal Industries, Inc. to the South Carolina Public Service Authority by Deed dated August 31, 1972, which parcel of land is shown on the South Carolina Public Service Authority's Drawing No. D-2241, revised June 27, 1972; however, the grantor herein conveys unto the grantee those certain rights reserved in the aforesaid deed from Canal Industries, Inc., which rights were conveyed to the grantor herein under Deed from Canal Industries, Inc., recorded in Deed Book 476 at Page 463.

The land conveyed is shown on map of 543.85 Acres made for Canal Wood Corporation by S. D. Cox Surveyors, Inc. dated April 11, 1969, and recorded in the Clerk of Court's Office for Horry County in Plat Book 54 at Page 32, which land is all located on the eastern side of U.S. Highway 701 leading from Conway to Georgetown, South Carolina.

Less and excepting, however, that certain 40 acres, more or less, located on southern portion of the Property containing the pond and bordering Shelley Farm Road and Old Bucksville Highway to be more accurately identified on the Boundary Survey to be provided by Seller.

This being a portion of the identical property conveyed to Bucksville Farms, Inc. by Deed of G. J. Creel & Sons, Inc., recorded November 29, 1983, in the office of the ROD for Horry County, in Deed Book 835 at Page 826.

Instrument#: 2007000083760, DEED BK: 3252 PG: 93 DOCTYPE: 001 06/11/2007 at 12:12:15 PM, 1 OF 4 COUNTY STAMPS: $3133.90 STATE STAMPS: $7407.40 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

TMS Number correct
169000317&116

ORIGINAL

RECORDING SPACE ABOVE:
Please Return To: Atty Richard N. Booth, 1905 N. Main St., Conway, SC 29526
RNB File No.: 07-06- 20621

STATE OF SOUTH CAROLINA	)	
	)	***DEED***
COUNTY OF HORRY	)	

KNOW ALL MEN BY THESE PRESENTS, THAT WE, **DONALD D. GODWIN, LLC AND RANDY A. BEVERLY, LLC**, hereinafter called grantor(s), in consideration of the sum of **TWO MILLION EIGHT HUNDRED FORTY EIGHT THOUSAND FIVE HUNDRED TWENTY AND NO/100 ($2,848,520.00) DOLLARS,** to the grantor(s) in hand paid at and before the sealing of these presents by the grantee(s) hereinafter named, the receipt of which is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the following named grantee(s), to wit:

701 SOUTH, LLC
229 Yeager Avenue
Conway, SC 29526

SEE EXHIBIT 'A' ATTACHED FOR LEGAL DESCRIPTION

TOGETHER with all and singular, the rights, hereditaments and appurtenances to said premises belonging, or in anywise incident or appertaining; to have and to hold all and singular the premises before mentioned unto the grantee(s), and grantee's(s') heirs, successors and assigns forever.

PLAINTIFF'S EXHIBIT 6 Sciaretta

Instrument#: 2007000083760, DEED BK: 3252 PG: 94 DOCTYPE: 001 06/11/2007 at 12:12:15 PM, 2 OF 4 COUNTY STAMPS: $3133.90 STATE STAMPS: $7407.40 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

AND the grantor(s) do(es) hereby bind the grantor(s) and the grantor's(s') heirs, successors, executors and administrators to warrant and forever defend all and singular the said premises unto the grantee(s) and the grantee's(s') heirs, successors and assigns against the grantor(s) and this grantor's(s') heirs, successors and against every person whomsoever lawfully claiming or to claim the same or any part thereof.

WITNESS the execution by grantor(s) this 11th day of June in the year of our Lord two thousand seven and in the two hundred and thirty first year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered
In the Presence of:

Witness #1, sign here

Notary sign here

Donald D. Godwin, LLC

(L.S.)
BY: Donald D. Godwin, Member

Randy A. Beverly, LLC

(L.S.)
BY: Randy A. Beverly, Member

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

ACKNOWLEDGEMENT

The foregoing instrument was acknowledged before me this 11th day of June, 2007, by Donald D. Godwin, as Member of Donald D. Godwin, LLC and Randy A. Beverly, as Member of Randy A. Beverly, LLC.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 7/9/2008

Instrument#: 2007000083760, DEED BK: 3252 PG: 95 DOCTYPE: 001 06/11/2007 at 12:12:15 PM, 3 OF 4 COUNTY STAMPS: $3133.90 STATE STAMPS: $7407.40 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF HORRY)

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. Property located at, 50.88 and 51.08 Acres, Bucks Township, Horry County, South Carolina, bearing Horry County Tax Map No. 50.88: split from 169-00-03-027; and 51.08 Acres, 169-00-03-116, was transferred by Donald D. Godwin, LLC and Randy A. Beverly, LLC to 701 South, LLC, on June 11, 2007.

The transaction was (Check One)
__xx_____ an arm's length real property transaction and the sales price paid or to be paid in money or money's worth was $2,848,520.00.

_____ not an arm's length real property transaction and the fair market value of the property is $_____.

The above transaction is exempt, or partially exempt, from the recording fee as set forth in S.C. Code Ann. Section 12-24-10 et. Seq. because the deed is (See Back of affidavit)

As required by Code Sections 12-24-70, I state that I am a responsible person who was connected with the transaction as _____SELLER_____.

I further understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

SELLER

SWORN to before me this
11th day of June, 2007.

Notary Public for South Carolina
My Commission Expires: 7/9/2008

Instrument#: 2007000083760, DEED BK: 3252 PG: 96 DOCTYPE: 001 06/11/2007 at 12:12:15 PM, 4 OF 4 COUNTY STAMPS: $3133.90 STATE STAMPS: $7407.40 BALLERY V. SKIPPER, HORRY COUNTY, SC REGISTRAR OF DEEDS

EXHIBIT 'A'

PARCEL NO. 1: ALL AND SINGULAR, all that certain piece, parcel or tract of land, together with any and all improvements situate thereon, situate, lying and being in **Bucks Township,** Horry County, South Carolina, **containing 50.88 Acres, more or less,** as shown on plat prepared by Carolina Land Surveyors, LLC for Donald D Godwin & Randy Beverly LLC, dated February 21, 2007, which plat is recorded in the office of the ROD for Horry County, in **Plat Book 226 at Page 48,** reference to which is craved as forming a part and parcel hereof.

This being the identical property conveyed to Donald D. Godwin, LLC and Randy A. Beverly, LLC by Deed of Bucksville Farms, Inc., recorded June 1, 2007, in the office of the ROD for Horry County, in Deed Book 3249 at Page 2028.

TMS# split from 169-00-03-027

PARCEL NO. 2: ALL AND SINGULAR, all that certain piece, parcel or tract of land, together with any and all improvements situate thereon, situate, lying and being in **Bucks Township,** Horry County, South Carolina, **containing 51.08 Acres, more or less,** as shown on plat prepared by Carolina Land Surveyors, LLC for Donald Godwin, dated May 12, 2006, which plat is recorded in the office of the ROD for Horry County, in **Plat Book 214 at Page 148,** reference to which is craved as forming a part and parcel hereof.

This being the identical property conveyed to Donald D. Godwin, LLC and Randy A. Beverly, LLC by Deed of Bucksville Farms, Inc., recorded June 9, 2006, in the office of the ROD for Horry County, in Deed Book 3110 at Page 656.

TMS# 169-00-03-116

Donald D. Godwin, LLC
Donald D. Godwin, Member

Randy A. Beverly, LLC
Randy A. Beverly, Member

898613

ORIGINAL

HORRY COUNTY ASSESSOR
NEW PARCEL 169-00-03-116
SPLIT FROM 169-00-03-027
Map Blk Parcel
6-12-06 pa

FILED
HORRY COUNTY, S.C.
2006 JUN -9 PM 12:31
REGISTRAR OF DEEDS

RECORDING SPACE ABOVE:
Please Return To: Atty Richard N. Booth, 300 Beaty St., Conway, SC 29526
RNB File No.: 06-06-19836

STATE OF SOUTH CAROLINA)
) **DEED**
COUNTY OF HORRY)

KNOW ALL MEN BY THESE PRESENTS, THAT IT, **BUCKSVILLE FARMS, INC.,** hereinafter called grantor(s), in consideration of the sum of **EIGHT HUNDRED FIFTY THOUSAND AND NO/100 ($850,000.00) DOLLARS,** to the grantor(s) in hand paid at and before the sealing of these presents by the grantee(s) hereinafter named, the receipt of which is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the following named grantee(s), to wit:

DONALD D. GODWIN, LLC AND RANDY A. BEVERLY, LLC
P.O. Box 1549
Conway, SC 29528

SEE EXHIBIT 'A' ATTACHED FOR LEGAL DESCRIPTION

STATE 2,210.00 COUNTY 935.00
EXEMPT YES

TOGETHER with all and singular, the rights, hereditaments and appurtenances to said premises belonging, or in anywise incident or appertaining; to have and to hold all and singular the premises before mentioned unto the grantee(s), and grantee's(s') heirs, successors and assigns forever.

AND the grantor(s) do(es) hereby bind the grantor(s) and the grantor's(s') heirs, successors, executors and administrators to warrant and forever defend all and singular the said premises unto the grantee(s) and the grantee's(s') heirs, successors and assigns

PLAINTIFF'S EXHIBIT 7 Sciarretta
PREPARED-Seymour, N. J.

against the grantor(s) and this grantor's(s') heirs, successors and against every person whomsoever lawfully claiming or to claim the same or any part thereof.

WITNESS the execution by grantor(s) this 5th day of June in the year of our Lord two thousand six and in the two hundred and thirtieth year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered
In the Presence of:

witness #I, sign here

Notary sign here

Bucksville Farms, Inc.

Benjamin J. Creel (L.S.)
BY: Benjamin J. Creel, President

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

ACKNOWLEDGEMENT

The foregoing instrument was acknowledged before me this 5th day of June, 2006 by Benjamin J. Creel, as President of Bucksville Farms, Inc., on behalf of the corporation.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 7/9/2008

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF HORRY)

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. Property located at, 51.08 Acres, Bucks Township, Horry County, South Carolina, bearing Horry County Tax Map No. portion of 169-00-03-027, was transferred by Bucksville Farms, Inc. to Donald D. Godwin, LLC and Randy A. Beverly, LLC, on June 5, 2006.

The transaction was (Check One)

__xx_____ an arm's length real property transaction and the sales price paid or to be paid in money or money's worth was $850,000.00.

_____ not an arm's length real property transaction and the fair market value of the property is $_____.

The above transaction is exempt, or partially exempt, from the recording fee as set forth in S.C. Code Ann. Section 12-24-10 et. Seq. because the deed is (See Back of affidavit)

As required by Code Sections 12-24-70, I state that I am a responsible person who was connected with the transaction as _____SELLER_____.

I further understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Benjamin F. Essex
SELLER

SWORN to before me this
5 day of June, 2006.

Notary Public for South Carolina
My Commission Expires: 7/9/2008

EXHIBIT 'A'

ALL AND SINGULAR, all that certain piece, parcel or tract of land, together with any and all improvements situate thereon, situate, lying and being in **Bucks Township,** Horry County, South Carolina, **containing 51.08 Acres, more or less,** as shown on plat prepared by Carolina Land Surveyors, LLC for Donald Godwin, dated May 12, 2006, which plat is recorded in the office of the ROD for Horry County, in **Plat Book** 214 **at Page** 148, reference to which is craved as forming a part and parcel hereof.

This being a portion of the property conveyed to Bucksville Farms, by Deed recorded November 29, 1983, in the office of the ROD for Horry County, in Deed Book 835 at Page 826.

TMS# portion of 169-00-03-027

Benjamin J. Creel

Bucksville Farms, Inc.
BY: Benjamin J. Creel, President

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH TH
ORIGINAL ON FILE IN THIS OFFICE

APR 30 2010

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

ORIGINAL

STATE OF SOUTH CAROLINA
SECRETARY OF STATE
JIM MILES
ARTICLES OF ORGANIZATION
LIMITED LIABILITY COMPANY

The undersigned deliver the following Articles of Organization to form a South Carolina limited liability company pursuant to Section 33-44-202 and Section 33-44-203 of the 1976 South Carolina Code, as amended.

1. The name of the limited liability company which complies with Section 33-44-105 of the South Carolina Code of 1976, as amended, is **701 South, LLC**.

2. The address of the initial designated office of the Limited Liability Company in South Carolina is:

Street address: **229 Yeager Avenue**
City/Zip Code: **Conway, South Carolina 29526**

3. The initial agent for service of process of the Limited Liability Company is

Name: **Donald D. Godwin**

Signature

And the street address in South Carolina for this initial agent for service of process is

Street Address: **229 Yeager Avenue**
City & Zip: **Conway, South Carolina 29526**

4. The name and address of each organizer is:

(a) **Donald D. Godwin, LLC**
(a South Carolina Limited Liability Company)
P. O. Box 1549
Conway, South Carolina 29528

(b) **Randy A. Beverly, LLC**
(a South Carolina Limited Liability Company)
P. O. Box 512
Conway, South Carolina 29528

(c) **Claremont SC Enterprises, LLC**
(a New Jersey Limited Liability Company)
49 Route 202
Far Hills, New Jersey 07931

DEFENDANT'S EXHIBIT NO. 1 Sciarotta
PENGAD 800-631-6989

0763

070502-0082 FILED: 05/01/2007
701 SOUTH, LLC
Filing Fee: $110.00 ORIG
Mark Hammond South Carolina Secretary of State

(d) Byram Land Development, LLC
(a New Jersey Limited Liability Company)
P. O. Box 367
Millington, New Jersey 07946

5. ( )Check this box only if the company is to be term company. If so, provide the term specified: _____

_____

6. (x) Check this box only if management of the limited liability company is vested in a manager or managers. If this company is to be managed by managers, specify the name and address of each initial manager:

Donald D. Godwin, LLC
229 Yeager Avenue
Conway, South Carolina 29526

7. ( )Check this box only if one or more of the members of the company are to be liable for its debts and obligations under Section 33-44-303c. If one or more members are so liable, specify which members, and for which debts, obligations or liabilities such members are liable in their capacity as members. _____

_____

8. Unless a delayed effective date is specified, these Articles will be effective when endorsed for filing by the Secretary of State. Specify any delayed effective date and time: _____

9. Set forth any other provisions not inconsistent with law which the organizers determine to include, including any provisions that are required or are permitted to be set forth in the limited liability company operating agreement.

10. Signature of each organizer:

DATE: APRIL 24th, 2007

Donald D. Godwin, LLC
By _____
Donald D. Godwin, Member

Randy A. Beverly, LLC
By _____
Randy A. Beverly, Member

Claremont SC Enterprises, LLC
By _____
Stephen Sciaretta, Member

Byram Land Development, LLC
By _____
Gary Mahan, Member

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

Ralph P. Stroman, Special Referee

Case No. 2009-CP-26-1909

Randy A. Beverly, LLC, and Donald Godwin, LLC, ... Plaintiffs,

v.

Bucksville Farms, Inc., ... Defendant and Third-Party Plaintiff,

v.

Randy A. Beverly and Donald Godwin, ... Third-Party Defendants and Fourth-Party Plaintiffs,

v.

Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc., ... Fourth Party Defendant,

OF WHOM

Bucksville Farms, Inc., and Benjamin J. Creel, individually and as surviving Director of Bucksville Farms, Inc., are ..... Appellants,

and

Randy A. Beverly, LLC, Donald Godwin, LLC, Randy A. Beverly and Donald Godwin, are ..... Respondents.

Appellate Case No. 2012-212984

CERTIFICATE OF COUNSEL

The undersigned certifies that the foregoing Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

James B. Richardson, Jr.
1229 Lincoln Street
Columbia, South Carolina 29201
(803) 799-9412

Attorney for Appellants.

April 10, 2013.