

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Scarborough, Master in Equity

Case No. 2010-CP-10-5449
App. No. 2018-001888
Ct. App. Op. No. 5581 (Filed August 1, 2018)

RECEIVED

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S.C. SUPREME COURT

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

Petitioners,

v.

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

Respondents.

- BRIEF OF THE RESPONDENT

Derk Van Raalte and Brady Hair
2500 City Hall Lane
North Charleston, South Carolina 29406
(843) 572-8700. derk@bradyhair.com
Attorneys for Petitioners

Other Counsel of Record:
Robert Hood, Sr., James Hood,
Deborah Sheffield (of counsel)
172 Meeting St., Post Office Box 1508
Charleston, South Carolina 29402
Counsel for Respondents

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 - B. Paragraph 2 of the Deed Restrictions authorizes the Town's amendment of the zoning ordinance on trimming.
 - C. Paragraph 6 of the Deed Restrictions clearly authorized the Town's zoning ordinance amendment.
 - D. The Court of Appeals gave proper consideration to evidence of the deed grantor's interpretation.
2. The Court of Appeals correctly disposed of Petitioner's nuisance claims.
3. Petitioners' Other Listed Issues are Not Preserved
4. Even if Petitioner has identified some minor defect in reasoning, S.C.A.R. 220(c) supports affirmation of the decision based on the record below.
 - A. The Petitioners' claims are time barred.
 - B. Petitioners' proposed reading of the deed would constitute an impermissible impairment of legislative power.

STATEMENT OF THE CASE

The Town does not object to the *procedural history* set forth in Petitioner's Statement of the Case.

FACTS

This case revolves around Petitioners' desire to look across, and cut vegetation on, property they do not own. Sullivan's Island is a barrier island. Brief of Pet. p. 2. When house lots were initially sold decades ago the Town retained ownership of an additional, undeveloped parcel of land

lying between Petitioners' lots and the ocean (hereinafter "Accreted Land.") See Appendix for Certiorari Petition, p. 2. The Accreted Land can be seen in black on the graphic below.

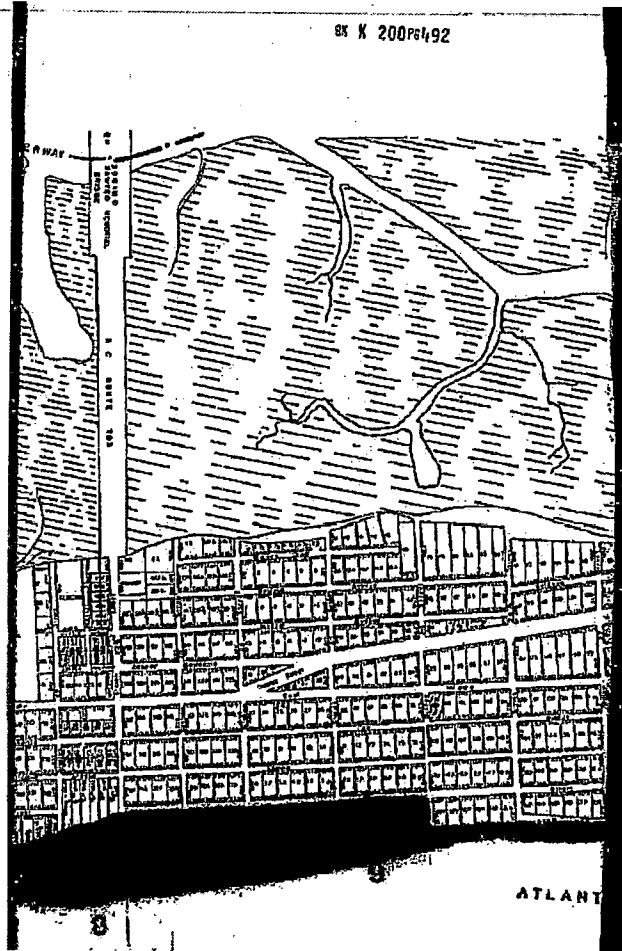


Diagram taken from ROA, p. 9.

The Town and Low Country Open Land Trust (hereinafter, the "LOLT") worked together in 1991 to protect the Accreted Land from development. Appendix, p. 2. They arranged a round-trip transaction in which the Town deeded the Accreted Land to the LOLT and the LOLT then sold the Accreted Land back to the Town with Deed Restrictions in place. See *Id.* The Deed Restrictions were intended to prevent development and preserve the Accreted Land largely in its natural state. See *Id.* The deed granted to the Town authority to govern vegetation trimming. Appendix, p. 3.

¹ Hereinafter, "Appendix."

In 1991, Petitioners lots were close to the beach and no significant trees existed on the Accreted Land. Appendix, p. 4 Today, decades later, natural shrubs and trees now exist in place of bare, hurricane ravaged sand. Appendix, p. 5. Similarly, sand build up has also made Petitioners' houses further away from the ocean, and thus different than 1991. See Petitioner's Brief, p. 5 (reporting nearly 20' a year accretion on the island.) Nature and time are unstoppable.

Consistent with the deed restriction rules, in 1995 and 2005 the Town passed zoning amendments that were more restrictive about what plants could be trimmed on town-owned land. Appendix, p. 4. In other words, these ordinances were more protective of the natural, undeveloped Accreted Land. With less trimming nature took its course. Some vegetation has reached a height where Petitioners' views across the Town-owned Accreted Land are no longer as good as they were just after Hurricane Hugo. See Appendix, p. 5. Of course, if the Petitioners' estimates of nearly 20' a year accretion are right, then over the almost thirty (30) years since the deed their views are not as good for another reason besides plants. Lots are now about 500' further away from the ocean!

Petitioners did not challenge either the 1995 or 2005 ordinance amendments within the sixty (60) day window specified by S.C. Code Ann. 6-29-760(D). Instead, Petitioners in 2010 sued the Town seeking to invalidate the 1995 and 2005 zoning ordinances, based on their alleged conflict with the deed restrictions. Ultimately the Town won Summary Judgment, leading to the Court of Appeals opinion below. Here, the Petitioners continue to argue that the Town's zoning ordinance amendments violate the Deed Restrictions. Consideration of these arguments requires identification of both the relevant Deed Restriction provisions and the relevant town ordinances.

Specific Deed Provisions

The Court of Appeals selection of relevant Deed Provisions cannot be improved upon and is relied upon here:

“Whereas the Lowcountry Open Land Trust (the "Grantor") is a nonprofit corporation whose purpose is to preserve and conserve natural areas; and

WHEREAS, the Grantor is the owner in fee simple of certain real property (hereinafter referred to as the "Property") which has aesthetic, scientific, educational, and ecological value in its present state as a natural area which has not been subject to development or exploitation, which property is described more on the attached Exhibit A;

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

WHEREAS, "natural, scientific, educational, aesthetic, scenic and recreational resource," as used herein shall, without limiting the generality of the terms, mean the condition of the Property at the time of this grant, evidenced by:

- A) The appropriate survey maps from the United States Geological survey, showing the property line and other contiguous or nearby protected areas;
- B) An aerial photograph of the Property at an appropriate scale taken as close as possible to the date hereof; and
- C) On-site photographs taken at appropriate locations on the property ”

Appendix, pp. 2-3

The Court of Appeals then noted that “[t]o further those purposes, the deed provided certain restrictions. Specifically,

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

Appendix, pp. 3-4

Specific Town Ordinance Changes

The Court of Appeals was similarly succinct in identifying the relevant history of Town ordinance changes, stating:

“When the deeds were executed in 1991, the Town had an ordinance, passed in 1981, restricting the use of the ocean adjacent property. The ordinance indicated

‘There shall be no construction of any type, no destruction of vegetation (except trimming, cutting and pruning of bushes and trees as provided in this section) and no man-made changes of topography in [the] area. The Town Council may establish a program pursuant to which citizens may apply to the Town for permission to prune, trim and cut bushes and trees in the . . . area as follows . . . (5) in those areas where the height of trees or bushes are deemed objectionable, the trees or bushes may be pruned to a height of no less than three (3) feet, provided that the cumulative effect of the trimming, cutting or pruning shall not be detrimental to the safety, welfare, and health of the people of the Town.’

§ 21-39A. In 1995, that ordinance was amended. The 1995 Ordinance was, in most material ways, identical to the 1981 Ordinance. However, the 1995 Ordinance noted, ‘vegetation may be trimmed and pruned so as to have a maximum height of no less than seven feet (7') above the ground.’ § 21-39.1G. Finally, the Town amended the ordinance again in 2005. The 2005 Ordinance indicated which plants could be trimmed and pruned and noted ‘[t]his vegetation may be trimmed and pruned so as to have a maximum height of no less than five (5) feet above the ground.’ § 21-71(C)(3).”

Appendix, p. 4

ARGUMENT

1. The Court of Appeals correctly interpreted the deed when ruling that the Town of Sullivan’s Island honored to all contractual obligations.

A. The Court of Appeals correctly determined the parties’ intent regarding preservation of the natural condition of the property.

The Petitioners sue to enforce a promise that never existed in the first place. Reading preamble language in isolation, the Petitioners argue that the deed restrictions require the Town to manage the Accreted Land as a virtual bonsai forest, where every grain of sand, blade of grass and tree leaf is perpetually maintained exactly as it existed on the 1991 deed date. See Pet Brief p. 12-

13 (“[T]he Petitioners maintain that the overriding intent of the Town and the Land Trust was to literally and figuratively take a snapshot in time and preserve the accreted land in the same condition as it existed in February 1991....”); Pet. Brief p. 8. (“Those photographs – which constitute a virtual snapshot in time – are expressly intended to set the standard for the Town’s obligations and the rights of the Plaintiffs....”)

The implications of this are startling. Petitioners position would mean that the Deed Restrictions promised them a never-changing Bonsai garden where a bush 3’ high in 1991 would remain 3’ high today, a 2” blade of grass in 1991 would remain 2” high today, and an un-vegetated patch of sand in 1991 would remain un-vegetated, more than 25 years later. Moreover, what of the accreting sand adding distance every day between the Petitioners’ homes and the ocean? Using the accretion rate Petitioners’ mention their houses are now almost 500’ further from the ocean than when all this started in 1991. Acres of new land exist now. Petitioners’ reading would obligate the Town to dredge. *After all, none of this accreted land (or the plants on it) is shown in the 1991 photos – it did not exist! It is simply not possible to match the 1991 photos up with the present.* And what of changes made over the years to the Accreted Land dunes and vegetation by Hurricane Fran, Hurricane Floyd, Hurricane Gaston and others? To match 1991 pictures those would have to be restored. If Petitioners are correct that the Deed and accompanying photographs were intended “to literally and figuratively take a snapshot in time” then the Town promised the impossible – to stop nature and Acts of God. The absurdity of this demonstrates the obvious: the Deed Restrictions did not, and were not intended to, promise what the Petitioners claim.

Even the Petitioners’ seemingly concede at various points that it isn’t really possible for anyone to meet the “snapshot” test their case relies upon. See Petitioner’s Brief p. 13 (“While freezing time and stopping all growth may not literally be possible and constant trimming might be arduous....”) and p. 6 (“preserve the accreted land in the same general condition as it existed in

February 1991....) (emphasis added.) This qualifier / concession language kills the Petitioners' logic. Once Petitioners admit that it may not "literally be possible" in 2019 to match the land to a 1991 photograph, Petitioners' strict test of looking for any deviation between 1991 and present-day photos cannot be the litmus test for deed adherence.

As it turns out, the deed language specifically recognized that changes to the Accreted Land's appearance could and would occur. In fact, the deed even recognized that one form of permissible change might come in the form of town ordinance amendments.

The Court of Appeals correctly determined that Petitioners' narrow focus on a few preamble words could not be the whole story, and instead looked at the overall scheme established by the Deed Restrictions. It noted that under Paragraph 2 of the Deed Restrictions, the Deed's Restrictions were "made subject to" the Town's "unrestricted authority to trim and control the growth of vegetation...." Appendix, p. 8. Further, the Court of Appeals recognized Paragraph 6 of deed expressly left the Town with the authority "to enact ordinances and regulations affecting the property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions." *Id.* Reading everything together, the Court of Appeals arrived at an accurate overview, observing that the Deed Restrictions were intended to "protect the Town's ocean adjacent property from development" rather than require the Town to maintain a never-changing bonsai exhibit. See Appendix, p. 2 and 8.

Even the Petitioners seem to recognize the uphill battle in challenging the Court of Appeals' common sense. They admit that "the concern in 1991 may have been for changes that would allow development, the new leadership [Council] has revised the trimming ordinance to create an overgrown maritime forest previously unknown on Sullivan's Island oceanfront." Brief of Petitioner p. 8. Both parts of this admission are profound. The first part recognizes the obvious (and confirms the Court of Appeals' opinion) that the underlying intent of the deed restrictions was

to prevent development of the accreted land. The second – that the maritime forest issue was “previously unknown” on the island – makes clear that addressing maritime forest growth could not have been the deed drafter’s intent. As Petitioners note, it was an unknown issue at the time.

The Town has faithfully honored the deed restrictions’ underlying intent. The Deed Restrictions were intended to keep the Accreted Land largely an undeveloped plant / wildlife habitat. Photos from 1991 show the land wild and undeveloped. ROA at pp. 121-27, 1029-35. (SAC Exh. 6E – K.) Photos submitted in 2010 show still show a wild and undeveloped state. ROA pp. 134-43, 1042-51 (SAC Exh 8A-J.) In fact, Petitioners’ complaint here is really that the Town has done *too good* of a job of limiting human intervention.

B. Paragraph 2 of the Deed Restrictions authorizes the Town’s amendment of the Zoning Ordinance on trimming.

The Town’s amendment of the trimming ordinance is specifically allowed by the Deed Restrictions. Paragraph 2 gives the Town the “unrestricted authority” over trimming vegetation. ROA p.97 (Para 2, Deed Restrictions.)² Despite this unambiguous language the Petitioners claim just the opposite - that there are restrictions because the Town has certain un-changeable duties. Petitioners “maintain that the Town is obligated under the terms of the Deed to cut ... all trees and shrubs on the accreted land...” to their 1991 state. Brief of Pet. p. 10. (emphasis added). Such an argument is completely at odds with the Deed’s use of the phrase “unrestricted authority.”³

² “Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given the unrestricted authority to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean and providing views of the ocean and beaches to its citizens.” ROA p. 97 (Deed Restrictions, Para. 2.)

³ Petitioners try to cast “unrestricted authority” in a negative and reckless light, describing the Town’s actions as motivated by a “we can do what we want to” attitude. Pet. Brief. p. 7.

It appears that Petitioners misreading of the Deed is based on confusing “unrestricted authority” with “duty.” There are several problems with Petitioners’ interpretation. *First*, the word “authority” is not an obligation, but rather a discretionary choice given to Council. Authority gives one the right to act, but also the right *not* to act. *Second*, the inclusion of the word “unrestricted” negates any argument that “authority” imposes a duty here. For if the “authority” was an “obligation” to keep the vegetation trimmed to a certain height then the power of Council to control vegetation by way of Paragraph 2 would be “restricted” since Council would not be able to choose any set of rules other than those rules in effect in 1991. Far from violating the Deed Restrictions, the Town was precisely following them as it adopted the trimming ordinance about which Petitioners complain.

As will be seen in the following section, the Town’s interpretation of its “unrestricted authority” to amend the trimming ordinance under Deed Paragraph 2 is also completely supported by Paragraph 6 of the Deed Restrictions.

C. Paragraph 6 of the Deed Restrictions clearly authorized the Town’s zoning ordinance amendment.

Petitioners’ argument to avoid Paragraph 2 – that the Town’s “unrestricted authority” is actually limited by a requirement that the Town can’t be more restrictive of trimming than it was in 1991 – is unraveled by Paragraph 6 of the Deed Restrictions. *Paragraph 6 expressly reserves for the Town the right to pass a “more restrictive” cutting ordinance.*⁴ That is exactly what the Town did

“Unrestricted authority” does mean that the Town can “do what it wants to” in the sense that the Town, not the Petitioner, is the one imbued with discretion by the Deed. That said, the Town’s compliance with the public legislative process of Title 6, Chapter 29, and respect for provisions such as Paragraph 6 of the Deed Restrictions certainly alleviates any danger of an unbounded, runaway train here.

⁴“During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of the law for any person to violate the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof. *The Town*

here and exactly why the Petitioner's don't like the challenged amendments.

The Petitioners' overarching complaint is that the Town allows them to trim less vegetation now than when the Deed Restrictions were imposed. In other words, Petitioners complain that the Town's current trimming rules are "more restrictive" and, as a result, impair their view of the ocean, allow for more bugs, etc.⁵ Paragraph 6 allows just this type of "more restrictive" ordinance to be enacted.

To avoid the obvious application of Paragraph 6 the Petitioners offer an Alice in Wonderland argument that a "more restrictive" trimming ordinances in our context must actually mean an ordinance that allows more lenient, lower cutting of vegetation.⁶ Brief of Petitioner p. 15. This appeal position is barred by their own prior admissions. Petitioners themselves revealed at deposition and elsewhere that they believe the challenged ordinances are "more restrictive" than the version they favor.⁷ The Court of Appeals correctly labeled the Petitioners' reading "illogical", particularly given that the Deed Restrictions were put in place by LOLT, an organization "whose purpose is to preserve land and conserve natural areas." Appendix p. 8.

The Petitioners try to prop up their claim that Paragraph 6 only allows for changes that

may enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions." Deed Restriction, Paragraph 6, ROA 99. (emphasis added.)

⁵ See ROA pp. 467-68. (Deposition of T. Albenesius p 17, lines 4 - 7; p 18, line 15 - p 22, line 22.) See also, See ROA pp. 589-90. (Deposition of N. Bluestein p. 70, line 8 - 25; p 72, line 24 - p 74, line 2.)

⁶ While certainly not conclusive, it is telling that the Deed Restriction Summary prepared by the Grantor describes the view being protected as the view from the beach looking inland, not from the houses toward the ocean. ROA at 81 (last paragraph). Given that it is the natural view from the beach inland being protected, it would certainly seem that a "more restrictive" cutting ordinance protecting the beachgoer's view would be an ordinance that promotes views of nature (more restricted trimming) rather than promoting naturalists views of Petitioner's houses (more trimming required).

⁷ See ROA pp. 467-68. (Deposition of T. Albenesius p 17, lines 4—7 ("Q: When you say it's [the current ordinance] not a good one, do you think that the Town needs a less restrictive cutting ordinance to better protect your view? A: Yes.")) See also, See ROA pp. 589-90 (Deposition of N. Bluestein p. 70, line 8 - 25; p 72, line 24 - p 74, line 2.) See also

would yield the same or lower heights of Accreted Land vegetation by arguing changes under Paragraph 6 are only allowable if consistent with all other parts of the Deed. In Petitioners' eyes this means that no change may be made under Paragraph 6 if it would allow taller vegetation than shown on the 1991 photographs mentioned in the Preamble. See generally Petitioner's Brief p. 15.

Petitioners' argument ignores a single, but critical word; "or." Paragraph 6 allows the Town to enact two types of regulations: (1) "more restrictive" ordinances; OR (2) ordinances that "are not inconsistent with these Restrictions." See Deed Restriction, Paragraph 6, ROA 99. Giving "or" its obvious meaning is easy. Under Paragraph 6 the Town may pass an ordinance that is NOT more restrictive, so long as it IS consistent with the overall Deed Restrictions scheme. That makes total sense and protects the Accreted Land more. Conversely, the Town may pass an ordinance that is NOT consistent with other restrictions, so long as it IS more restrictive (i.e. protective of the land being preserved.) Again, this protects the Accreted Land more. This latter aspect makes particular sense because every ordinance that is "more restrictive" than the rules originally set out in the Deed Restrictions will by nature be "inconsistent" with pre-existing rules. Without "or", further strengthening of protections could never occur. That is an absurd result.

There can be no real debate about the fact that the Town's 1995 and 2005 ordinances are "more restrictive" than the 1991 trimming ordinances in terms of Paragraph 6 of the Deed Restrictions. That ends the Petitioner's claims – the Deed Restrictions specifically allow the Town to put into place the challenged trimming rules.

D. The Court of Appeals gave proper consideration to evidence of the deed grantor's interpretation.⁸

The Court of Appeals not only used evidence of the deed grantor's intent properly, it did so in the manner Petitioners themselves suggest is appropriate. In addition to finding the deed language unambiguously favored the Town, the Court went on to note that the LOLT's executive director had provided an affidavit affirming that the LOLT had inspected the Town's stewardship of the property annually over the years and found no deed restriction violations. Appendix pp. 8-9.

According to Petitioners "[i]f the Land Trust annual reports might be some evidence of the Town's compliance, they do not automatically preclude the Petitioners from pursuing a breach of contract claim, and they cannot sustain the grant of summary judgment on interpretation of the deed." Pet. at p. 16. The problem for Petitioners is that the Court of Appeals made none of the mistakes Petitioners claim.

The Court of Appeals expressly noted that the "affidavit alone does not determine whether

⁸ Walking a tightrope, the Petitioners obligingly give lip service to the idea that contract interpretation is governed by the parties' intent, but at the same time offer that they (not the parties) know best what that intent was. See Pet. Brief, p. 12-13 ("[T]he Petitioners maintain that the overriding intent of the Town and the Land Trust was to literally and figuratively take a snapshot in time and preserve the land in the same condition as it existed in 1991....") Here and elsewhere they seek to magnify any role a third-party beneficiary might have. Ultimately, though, the Deed / contract has two parties – the Town ("grantee") and the Land Trust ("Grantor"), who are collectively referred to as "the parties". See ROA p. 96 (LOLT to Sullivan's Island Deed, page 1.) Paragraph 5 of the Deed Restrictions does give property owners and registered voters standing to seek enforcement of the Deed restrictions. ROA p. 98 (Deed Restrictions.) However, Paragraph 5 does not call such people "parties." ROA p. 98 (Deed Restrictions.) This makes sense. Standing allows residents to file an enforcement lawsuit, but having standing to sue is fundamentally different than being a "party" that negotiated a contract in terms of having knowledge of drafter's intent. A hypothetical illustrates the difference. Imagine Parent goes to Dealer and leases a Toyota expressly for the benefit of Daughter. If Dealer fails to deliver the Toyota the Daughter may have standing to sue to enforce the contract between Parent and Dealer. But it would be absurd to think that the Daughter could sue Dealer and Parent on a claim that the intent of the Toyota lease document was that she is entitled to drive a Lexus because her preference should prevail over that of the parties that negotiated the contract. That is exactly what the Petitioners try to do here.

the Town's actions comply with the deed's plain language." See Appendix p. 9. The affidavit is described as "additional evidence." See Id. In terms of its ultimate decision, the Court of Appeals made clear that it ruled for the Town "based upon the plain language of the deed in its entirety...." Id. Thus, the Court of Appeals used the affidavit exactly how Petitioner suggests, as "some evidence", but not conclusive, preclusive, or even essential evidence.

2. The Court of Appeals correctly disposed of Petitioner's nuisance claims.

The "nuisance" appeal, as framed by Petitioners, is dead in light of the Town's compliance with the Deed Restriction language. While traditional nuisance arguments are not resolved by contract interpretation, the Petitioners here present a unique nuisance issue. Based on Petitioners' framing, the Court of Appeals found that "Petitioners' arguments sound in contract, not in tort. Indeed, Petitioners acknowledged as much during oral argument." Appendix, pp. 9-10. (emphasis added.) Petitioners stay true to that approach on Certiorari, complaining that the Court of Appeals "overlooked and/or misapprehended the points stated above in regard to the Town's contractual obligations under the deed." Petitioners Brief p. 17 (emphasis added.)⁹ Thus, we are in the unusual circumstance where contractual/deed compliance, not traditional nuisance theory, becomes the test for Petitioners' claim. (Petitioners' brief does not even seem to argue that the Court of Appeals' chose the wrong nuisance rule or made factual mistakes.) As a result, the fact there was no breach of the Deed Restrictions by the Town means that the nuisance claim as framed by Petitioners is

⁹ Petitioners are emphatic that, even in the Nuisance section of the appeal, their problem is that the contract is being overlooked by the courts. See Pet. Brief at p. 17 ("The Court of Appeals ignored the Town's express intent to set a standard for maintaining the natural character of the Property as it existed in 1991, *and under the correct interpretation of the deed, these property owners are entitled to require* substantial, regular periodic trimming to the 1991 three-foot levels....") (emphasis added.)

resolved.

Perhaps Petitioners' do not try to offer a traditional nuisance argument because such an argument is legally barred. Petitioners' basic gist is that plant growth on the Accreted Land blocks their views and provides wildlife habitat. See ROA at p 73-74. (SAC para 116 – 118.) Obviously, the Town doesn't directly grow trees or reproduce mosquitos. These are acts of nature. The Complaint tries to tie this back to the Town by alleging that the problem has its roots in the Town enactment of the 1995 and 2005 ordinance amendments. See ROA at p. 58 (SAC at Para. 36.) At the end of the day, the Town's only "action" was the passage of the 1995 and 2005 zoning laws. That is an insurmountable problem here in terms of finding a Town nuisance because "[n]othing is a public nuisance which the law itself authorizes." Home Sales, Inc. v. City of North Myrtle Beach, 299 S.C. 70, 81, 382 S.E.2d 463, 469 (SC App. 1989); See also, Brading v. County of Georgetown, 327 S.C. 107, 115, 490 S.E.2d 4, 8 (SC 1997). A "lawful act" is simply not a wrongful act upon which nuisance may be predicated. Id. Here the Town's legislative passage of a law certainly is a "lawful act." The law itself is lawful. There is no actionable nuisance for which the Town can be responsible.

The other problem with the Nuisance claim is that the Plaintiffs fail to appreciate the distinction between "town action" and action by other forces. Both Home Sales and Brading recognized the fact that any nuisance which might subsequently develop after a lawful government act would be the result of acts other than the government. For instance, both cases dealt with road openings. The actual "government act" (opening of the road) was authorized by law and therefore could not be a "nuisance." The court recognized that a nuisance might later develop as a result of the Government act. People driving improperly on the road might one day constitute a nuisance. However, such improper driving would be by members of the public (the drivers), not the government and thus was not a "wrongful act" *by the government* to support a

nuisance suit against the government.

The logic of Home Sales and Brading fully disposes of any traditional nuisance theories which might have been asserted in this case. The 1995 and 2005 zoning ordinances were zoning laws passed by the Town. State law gives Towns the authority to enact zoning ordinances. See S.C. Code Ann. Title 6, Chpt 29. Thus, there was clearly nothing "wrongful" about Town council voting to pass the trimming ordinance. Council's passage of these laws was the only "act" that the Town took in this instance. That act cannot, as a matter of law, be a "nuisance." As discussed in Brading and Home Sales, it might be possible that negative effects (such as trees growing to obscure views) might later develop after the Town amended the ordinances in 1995 and 2005. Council did not plant trees, fertilize bushes, or import wildlife. Since the Town did not perform those acts of nature, those acts of nature cannot be a wrongful act *by the Town*. A nuisance action will not work under such circumstances.¹⁰

3. Petitioners' Other Listed Issues are Not Preserved

Petitioners, beginning on Page 17 of their Brief, devote several pages to issues not placed before the Supreme Court for consideration. Rule 242(d) requires that Petitions for Certiorari include a list of "Questions Presented for Review." In this case Petitioners listed two¹¹:

- (1) "Did the Court of Appeals err in affirming the Trial Court's grant of summary judgment ... on the Petitioner's breach of contract claims because the courts have misinterpreted the language of the 1991 Deed and ignored the express intention of the parties to preserve the conditions and character of the oceanfront area as it existed in February 1991" Pet. p. 1

¹⁰ Common examples confirm this. For instance, the State of South Carolina and United States protect wetlands and prohibit the filling or clearing of marshes and dunes. See, among others, S.C. Code Ann. 48-39-310 "Prohibition of destruction of any beach or dune vegetation seaward of setback line." Similarly, the federal and state government have regulations protecting the Francis Marion National Forest. Undoubtedly the protection of marshes and forests in this manner allows a habitat for rodents that at times venture onto the lots of abutting residential property owners (act of nature). Yet no one suggests that by passing a law South Carolina or the United States is guilty of a nuisance for protecting marshes or forests.

¹¹ For brevity the subparts are not reproduced here.

- (2) “Did the Court of Appeals err in affirming the Trial Court’s grant of summary judgment to the Respondent Town on the Petitioners’ nuisance claims because the Town’s violation of the Deed Restrictions through its new trimming policies have allowed overgrowth that ... poses dangers to the Plaintiffs....” Id.

As these are the only two listed Questions presented, they are the only issues on review. See S.C.A.R. 242(d). Moreover, the additional discussion Petitioners set forth starting on Page 17 were presented only in conclusory fashion to the Court of Appeals in the Petition for Rehearing and are only lightly sketched here. See Appendix pp. 17-18 (Petition for Rehearing.) Conclusory, short arguments may be deemed abandoned for purposes of appeal. See Glasscock, Inc. v. US Fidelity and Guaranty Co., 348 S.C. 76, 81 (SC App. 2002).

Should the Court wish to receive argument on any of these unpreserved issues the Respondent, given its respect for S.C.A.R. 242(d), respectfully requests an opportunity to brief the merits.

4. Even if Petitioner has identified some minor defect in reasoning, S.C.A.R. 220(c) supports affirmation of the decision based on the record below.

The Town respectfully asserts that SCAR 220(c), which permits affirmation of a decision below based on any ground which may exist in the record, justifies leaving intact the result reached by the Court of Appeals.

In particular, in addition to any other grounds, the Town believes the following dispose of the Petitioners’ claims.

A. The Petitioners claims are time barred.

Petitioners’ claims are untimely pursuant to S.C. Code 6-29-760(D). “Statutes of Limitations are not simply technicalities.” Stokes-Craven Holding Co. v. Robinson, 426 SC 517, 527, 787 SE2d 485, 490 (SC 2016). Challenges to the validity of zoning ordinances must be filed within sixty (60)

days.¹² There is no question that the Petitioners' lawsuit is about invalidating zoning ordinances. Petitioners' lead cause of action sought an order "invalidating all ordinances relating to the Accreted Land passed since February 12, 1991." ROA, p. 67, SAC, Para. 73. It is beyond dispute that the 1995 and 2005 trimming ordinances are "zoning ordinances" that appear as such in the Town's published zoning code.¹³ Finally, it is beyond dispute that the Petitioners waited more than sixty (60) days to file suit. In fact, the Petitioners missed the Statute of Limitations by at least five (5) years. The caption of this case bears a 2010 Common Pleas civil action number and the most recent ordinance being challenged is the "2005" ordinance.¹⁴

Petitioners can't avoid this result by arguing that their claims are labeled as something other than a challenge to the legitimacy of a zoning ordinance. The fundamental basis of every one of

¹² "No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made sixty days after the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission" SC. Code Ann. 6-29-760(D).

¹³ See [http://www.sullivanisland-sc.com/Files/Town%20Codes/Sec21%20Zoning%20AMENDED%20111715%20\(Conservation%20Easement%20Uses-Structures\).pdf](http://www.sullivanisland-sc.com/Files/Town%20Codes/Sec21%20Zoning%20AMENDED%20111715%20(Conservation%20Easement%20Uses-Structures).pdf) Challenged ordinances found beginning on Page 41 of the website text. Also, note that the topic of the ordinance, protecting ecologically sensitive areas, is specifically authorized by S.C. Code 6-29-710(A)

¹⁴ Petitioners cannot avoid this result by claiming a longer "sealed documents" statute of limitations under S.C. Code Ann. 15-3-520. Section 6-29-760(D) is a specific door closing statute. It is not unusual that such specific statutes may take priority over longer general statutes of limitations. See Quail Hill LLC v. County of Richland, 379 S.C. 314, 665 S.E.2d 194 (SC App. 2009); overruled in part on other grounds, 387 S.C. 223, 692 S.E.2d 499 (SC 2010)(Court applied the 60 day rule of S.C. Code 6-29-760(D) without even discussing fact that longer general statutes of limitations may have also existed in Title 15); See also S.C. Code 15-78-100(a) (setting 2 year statute of limitations under some circumstances for torts committed by the Government despite the fact that the general Title 15 tort statute of limitations is 3 years.) It is also common for specific, narrow statutes to take priority over more general statutes. See Rainey v. State, 307 S.C. 150, 414 S.E.2d 131, 132 (SC 1992)(noting "because there is a conflict between 44-53-375(B) and the general second offense statute, the later, more specific crack cocaine statute must prevail); Stone v. State, 313 S.C. 533, 443 S.E.2d 544 (SC 1994)(more recently enacted and specific statute prevails in event of conflict.) Here, not only does S.C. Code Ann 6-29-760(D) specifically address Petitioners' situation, it was also enacted in 1994, six years after S.C. Code 15-3-520, and therefore would take priority to the extent conflict exists. The heart of the Petitioners' claims are time barred.

Petitioners' causes of action is that they want the 1995 and 2005 Zoning Ordinances stricken. Paragraph 60 of the SAC alleges "[t]he Town Council does not have the power to enact ordinances in ways other than those allowed by the easements and restrictive covenants clearly stated in the contract and/or deed restrictions...." ROA at p. 64. This allegation is incorporated into every cause of action in the Complaint. See ROA pp. 65, 68-70, 72-73, 75-76, SAC para. 63, 76, 83, 88, 93, 108, 115, 123 and 127. In Paragraphs 80 and 82 the Petitioners seek an injunction against Council enforcing the zoning ordinance. See ROA p. 68, (SAC). And Paragraphs 84-87, while styled as Mandamus, clearly ask that the zoning ordinance be set aside. ROA. p. 69. The same may be said of the Nuisance allegation. ROA p. 74, SAC at Para. 122. The list goes on and on. While pled under differing names the various causes of action all, in one form or another, seek to invalidate the zoning ordinance.¹⁵ This is explicitly confirmed in the Prayer for Relief which asks in part "(c) That this Court invalidate the 1995 and 2005 Town Ordinances which limit what can be cut, trimmed or pruned, so as to put back into place the ordinance... as it was of February 12, 1991." ROA at p. 77 (SAC).

¹⁵ See also ROA, p. 854, (Plaintiffs' Memorandum of Law In Support of Their Motion for Reconsideration and Clarification, signed August 17, 2015 at p. 2) (noting "At the core of the Plaintiffs' claims is the Defendants' breach of contract and/or deed restrictions to which Plaintiffs are third party beneficiaries as a result of the Defendants failure to trim (or allow trimming of) the vegetation on the town-owned accreted lands.")

B. Petitioners' proposed reading of the Deed would constitute an impermissible impairment of legislative power.

The Petitioners' proposed reading of the Deed Restrictions would amount to an unlawful impairment of Town Council's legislative power. Petitioners' argument is predicated on a belief that the Deed Restrictions signed by the Town in 1991 legally deprived the Town of the power to enact certain zoning ordinances for a period of at least fifty (50) years. ROA 64, (SAC Para. 60) ("The Town Council does not have the power to enact ordinances in ways other than those allowed by the easements and restrictive covenants clearly stated in the contract and/or deed restrictions...."); See also ROA p 65-66 at para 66-67. South Carolina Law does not allow local legislatures to limit their powers in this fashion.

As a general rule, a contract is not binding if it purports to limit the exercise of a municipality's governmental power for a period longer than the remaining term of office of the councilmembers that voted for it. Piedmont Public Service District v. Cowart, 404 S.C. 434, 459 S.E.2d 876 (SC App. 1996). See also Cunningham v. Anderson County, 402 S.C. 434, 741 S.E.2d 545 (SC App. 2013), *aff'd in part, rev'd in part*, 414 S.C. 298, 778 S.E.2d 884 (SC 2015). In other words, the Council leaving office must pass on to the successor Council the full (unimpaired) government powers of the office and cannot, by contract, give away the powers that the successor Council should enjoy. See Id. at 880-82. See also Newman v. McCullough, 217 S.C. 17, 23-24, 46 S.E.2d 252, 255-56 (SC 1948).

The same logic applies here to thwart Petitioners' interpretation of the deed restrictions. The passage of a zoning ordinance is unquestionably a governmental power. See Title 6, Chapter 29, Article 5 of the South Carolina Code of Laws. If one accepted the Petitioners' claim that Deed Restrictions gave them a right bar amendment of the 1991 zoning ordinance, then the Deed

Restrictions would effectively have stripped fifty (50) years' worth of City Councilmen of a core governmental power.¹⁶

CONCLUSION

For the reasons stated, the Town of Sullivan's Island asks the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,



Derk Van Raalte
Derk Van Raalte
Brady Hair
2500 City Hall Lane
North Charleston, South Carolina 29406
(843) 572-8700 derk@bradyhair.com
Attorney for Respondent

Feb 23, 2019

¹⁶The Petitioners' theory also runs afoul of "delegation of powers" concerns. The Supreme Court has previously explained that a political subdivision may not "delegate away those powers and responsibilities which give life to it as a body politic. A municipal corporation ... created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise;" G. Curtis Martin Investment Trust v. Clay, 274 S.C. 608, 612, 266 S.E.2d 82, 85 (SC 1980); see also City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority, 325 S.C. 174, 181-182, 480 S.E.2d 728, 732 (SC 1997). This general logic has been specifically applied to prevent a municipal council from placing limits on its zoning authority. See generally, I'On LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (SC 2000). Thus, contrary to Plaintiffs' desires, the Deed Restrictions cannot be read as a "contract" allowing the LOLT, the Plaintiffs, or anyone else to limit or dictate the zoning rules which may be enacted regarding the Accreted Land.

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Scarborough, Master in Equity

Case No. 2010-CP-10-5449
App. No. 2018-001888
Ct. App. Op. No. 5581 (Filed August 1, 2018)

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

Petitioners,

v.

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

Respondents.

CERTIFICATE OF SERVICE

I certify that I have served the Appellants and the Hon. Daniel E. Shearouse by depositing a copy of the following documents:

Brief of the Respondent
Certificate of Service

In the care of the United States Postal Service, postage prepaid, addressed either directly or to their respective attorneys of record as follows:

Robert Hood, Sr.
James Hood
Deborah Sheffield, *Of Counsel*
172 Meeting Street
PO Box 1508
Charleston, SC 29402

(Copy)

Hon. Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

(Fifteen Copies)

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S.C. SUPREME COURT

Mar 5, 2019



Derk Van Raalte
J. Brady Hair
Law Offices of Brady Hair
2500 City Hall Lane
North Charleston, SC 29406
843-572-8700
derk@bradyhair.com

Counsel for the Respondents