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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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

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S.C. SUPREME COURT

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

Appellants,

v.

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

Respondents.

RECORD ON APPEAL
Volume III – pp. 884-1084

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

FOR THE NINTH JUDICIAL CIRCUIT

NATHAN BLUESTEIN, ET AL,

)

Plaintiff,

)

VS.

)

CLSE NO.:2010-CP-10-5449

)

TOWN OF SULLIVANS ISLAND, ET AL,

)

Defendants.

)



COPY

Hearing before the

Honorable Mikell R. Scarborough, reported by Bernadette A.

Cali, CSR and Notary Public, on November 25,

2013 at 100 Broad Street, Charleston, South Carolina.

A P P E A R A N C E S

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For the Defendant: J. Brady Hair, Esq.
Derk Van Raalte, Esq.

Bernadette Cali Leland, CSR
Notary Public

1 (Hearing commenced.)

2 THE COURT: Is it just the motion to amend
3 the Complaint?

4 MR. HOOD: And to educate the Judge on the merits
5 of the case

6 (Discussion off the record.)

7 MR. HOOD: Motion. We just want to add
8 four causes of action and after discovery we
9 think we should include -- they oppose that.
10 That's really all that's before you. However,
11 I do want you to understand, this is a totally
12 different case than you had in the
13 Bloom(phonetic) case. Because we've got a
14 contract that gives us a right to a view, when
15 we gave up our right to buy the land as it
16 developed. And that view, by two ordinances,
17 has been taken away by vegetation, and the
18 vegetation is supposed to be cut to three feet,
19 when we gave away our right to buy the accreted
20 land for \$800, which a lot of people in
21 Charleston were able to do on Sullivans Island.
22 And I think it's probably -- what we really
23 need to do is if the other side has got any
24 more discovery, maybe we've got another month
25 or two of discovery, then set this thing for

1 trial and there's some jury issues, some
2 non-jury issues, and let you try it and make a
3 ruling and move on to the next court. One of
4 the things I'm adding is breach of contract
5 under the United States Constitution and the
6 South Carolina Constitution. And if we keep
7 losing, or if we keep winning, I'm hoping the
8 U.S. Supreme Court will listen to us.
9 Eighty-one property owners have lost, that are
10 on the front beach -- I'm not sure actually how
11 many there are, but a lot of property owners
12 who have this tree problem have lost at least a
13 million dollars per lot in value according to
14 Tommy Hartnet. He said that three or four
15 years ago when this thing started. It's a lot
16 more than that now. And the comparable that
17 ends the issue -- and I am not saying a number
18 that's real or not, is the Barkley House,
19 Rufus' son sold their house for one number.
20 The Manigaults sold their house for another
21 number. The difference in the value of the
22 land, because the Manigaults house has trees
23 and the Barkley house didn't, is one million
24 dollars. And that's the current comparable.
25 The tax assessor's reducing everybody's -- got

1 the trees appraised values because of the
2 trees. We're not front beach any more. And
3 two clients both have a hard time seeing any
4 water out there. And you know, they bought a
5 beachfront property. They didn't want to be in
6 the woods.

7 THE COURT: Tell me about the contractual
8 basis. That's news to me.

9 MR. HOOD: Well, I've got with me, as
10 cocounsel, Mr. real-estate-law in South
11 Carolina as you see sitting here. And he will
12 educate you on this a lot better than I'll ever
13 be able to, but basically what happened in '91
14 is people in the town raised money to do
15 something good, to take the accreted land and
16 give it to the Nature Conservancy in
17 perpetuity. Sue (phonetic) Smith wrote the
18 deed. There is an email that we've gotten in
19 discovery where she says, we don't want to just
20 do an easement here, we need to make this thing
21 strong because one town council may want to do
22 one thing and another one may want to do
23 another. The Post and Courier asked the Mayor,
24 Andre' (phonetic), what do you think of this?
25 What about these front beach people, are they

1 going to get to still see the ocean? He said,
2 they bought on the front beach, they're paying
3 taxes on the front beach and they'll always be
4 able to see that ocean. But what happened is a
5 new government came in. They didn't think we
6 had a right of view across this land. It was
7 only a privilege. When I heard that at a
8 meeting I brought this suit the next week.
9 Because I think, growing up over there, and
10 you're very familiar with that island just like
11 I am, that if you live on the front beach,
12 whoever you are, you've got a right to see that
13 ocean. Not a privilege but a right. And your
14 parents -- like my house over there, I bought
15 it from the Krawcheck girls because Mr. Jack
16 Krawcheck bought the lot for \$300 as the land
17 accreted in front of him. Nicki Bluestein, our
18 client, did the same thing. Then when the land
19 accreted -- now there is enough land in front
20 of Nicki and me, we're next door neighbors,
21 that we could build two rows of houses. It's
22 pretty far to the ocean now. But because the
23 town passed two ordinances that limit what you
24 can cut and the height that you can cut and the
25 time of year you can cut, because they did

1 that, that view that we bought to enjoy, pay
2 taxes to enjoy, is gone. And we don't see the
3 beach anymore. We see trees. The trees are
4 willows and myrtles and junk trees that nobody
5 would intentionally plant in any yard. And so
6 it's different than Bloom. We're not saying
7 the law should be we have a right to a view.
8 We're saying the town knew and contracted when
9 the Open Land Trust -- to maintain
10 beautification, views and so forth. And it's
11 in the documents. It's in the contract between
12 the town and the Nature Conservancy, and it's
13 that contract that's been violated; it's terms
14 and conditions. Smith made sure that wasn't
15 just an easement; that it was a very strong
16 binding contract. And what it is, is people
17 that are not on the front beach, and they
18 resent the people that are on the front beach,
19 want to see trees growing out there, and they
20 don't want to see houses when they walk down
21 the beach, end of quotes, lady I deposed that
22 leads our opposition to this fight. To me
23 that's absurd. Sullivans Island is a family
24 beach. We don't want to be in a forest. If
25 they want to see a forest go to Capers. Go to

1 Bulls, Huntington Island. Sullivans Island is
2 a family beach where the kids can play on the
3 sand dunes and have a great time running and
4 doing things. Now we've got coyotes, snakes
5 and God knows what else in front of these
6 houses where there used to be wild flowers and
7 sea oats, because of this. We want to go back
8 to wild flowers and sea oats. We don't want to
9 bulldoze anything, just want to have natural
10 vegetation but not vegetation that blocks the
11 view. So that's where we're going.

12 But today all I want you to do, and I've
13 given you a proposed order, is let us amend the
14 Complaint, add four more causes of action, and
15 we've done most of the discovery we need to do.
16 There are a couple of people I would like to
17 depose just on this fraud issue. The town
18 hired -- just so you understand that issue --
19 some experts about accreted land and erosion.
20 And they came up with a question they had to
21 submit to the property owners. The first item
22 was ocean view. Someone took that out of the
23 form. The next item was property value. So
24 you, as a property owner, what's the most
25 important thing to you about the accreted land?

1 A view? Property value? Or these other
2 things? And they manipulated the form. If I
3 can ever prove who manipulated that form I'm
4 going to sue them. I think I know who did it
5 but haven't been able to prove it.

6 What they did was to try to take this town
7 council in the wrong direction that's away from
8 where the people want to be, which is I'm
9 paying taxes to look at the ocean, for God's
10 sake let me look at the ocean. And it's no
11 different than if you had a house in the
12 mountains and you had trees between you and the
13 valley. You're going to trim those trees up so
14 you can see the valley. It's why you're up in
15 the mountains, to have a pretty view. That's
16 why the taxes over there are so high for front
17 beach property, because they are supposed to be
18 front beach property. Tommy also said the next
19 row of houses, second row of houses, where I
20 think your ancestral family home is, is reduced
21 by 750,000; the third row by 500,000. So we're
22 not just talking about the rich people on front
23 beach, we're talking about everybody. Then
24 with this reduction in value of real estate
25 you've got a reduction in taxes, so everybody's

1 taxes are going to get increased. And at the
2 end of the day it's not right. They've done
3 nothing to study the economic impact on the
4 island of what they are doing here. They've
5 done nothing to determine what impact what
6 they've done has on the individual property
7 owners. In fact, they don't even care. When
8 asked, a town council member that's leading the
9 charge against this subject said it doesn't
10 matter, we don't care about that. So we're not
11 going to study the impact of a million dollar
12 loss to the property owner, that's their
13 problem, we're going to let these trees grow.
14 And that's not right. Otherwise, the people
15 that live on the front beach could be buying
16 those lots for \$800 and they would own them.
17 Then if they want trees, fine; if they don't
18 want trees, fine. By the way, there are some
19 people -- the Manigaults planted the trees in
20 front of their house, they sold the house now,
21 but since they planted them the island doesn't
22 want them touched; Long Leaf pines, things that
23 aren't indigenous to the island in today's
24 time. In any event, if you need some real
25 legal answers to anything today Steve is here

1 and eager to talk to you.

2 THE COURT: All right. I may get to him.
3 I'm assuming -- the four you wish to add, are
4 those the last four on the Second Amended
5 Complaint? Unfair Trade Practices, nuisance,
6 inverse condemnation --

7 MR. HOOD: No no.

8 THE COURT: Which ones?

9 MR. HOOD: Breach of contract, which is
10 what I've been talking about, the breach of
11 contract, accompanied by a fraudulent act which
12 is a fun cause of action, because if I can
13 prove who changed that form, I got it.

14 And the violation of UTPA. If I can prove
15 that one I get attorneys fees, which might be
16 interesting, because it's been a long pro bono
17 event. And violation of contract clauses of
18 the South Carolina and the United States
19 Constitution.

20 THE COURT: All right.

21 MR. HOOD: Thank you.

22 THE COURT: That's three of them. Is that
23 it?

24 MR. HOOD: That's four. Breach of
25 contract, breach of contract with fraud --

1 THE COURT: Got it. Okay. I'm with you.
2 Violation of contract, all right.

3 THE COURT: I'm Brady Hair. I represent
4 the Town of Sullivans Island along with my
5 partner, Derk Van Raalte. I want to talk about
6 a couple of things that Mr. Hood talked about
7 outside of the motion before the Court today.
8 Interestingly enough I don't disagree factually
9 with hardly anything Mr. Hood has said. What I
10 disagree with is his remedy. His remedy is a
11 political legislative remedy. Unfortunately,
12 he brought a lawsuit and has asked for a legal
13 remedy.

14 I believe the case is ready to try. The
15 reason it's here is that the case came up on
16 Judge Jefferson's docket ready to go to trial.
17 Mr. Hood called Derk and I and said, hey, the
18 case is up, what do you guys think about
19 transferring it to the Master in Equity and
20 have the case heard? We agreed. And we agreed
21 because in our opinion discovery was completed.
22 In our opinion I don't know that we have a
23 factual disagreement. We may. We can talk
24 about that. But I think this case sets itself
25 up perfectly for cross motions for summary

1 judgment and an argument before Your Honor,
2 because these are all legal questions. These
3 are interpretation type questions. Really no
4 factual dispute. At the end of the day this
5 case comes down to, did the town have the
6 authority through its zoning powers to regulate
7 their own property? And Mr. Hood's argument is
8 because of the restrictive covenants that were
9 put on the land that that took away the power
10 of the town. We think that's wrong. We think
11 it's clear that it's wrong. We also think that
12 he waited way too long to bring the lawsuit.
13 If he's going to challenge a zoning ordinance,
14 regardless of the reason, it has to be within
15 the statutory prescribed time. It is not.
16 Ain't even close. Mr. Van Raalte is going to
17 talk to you about why you shouldn't allow them
18 to add these four causes of action today and
19 the main reason is that, again, it's outside of
20 the statutory allotted period to bring the
21 causes in your court. So with that, maybe
22 after you hear the motion to amend we could
23 talk about a scheduling order, we can talk
24 about how the case shapes up and maybe Mr. Hood
25 and I can agree on what it is we've got left to

1 litigate and how we can do it.

2 THE COURT: Okay. Mr. Van Raalte.

3 MR. VAN RAALTE: Thank you, Your Honor.

4 I've got more of a technical argument with
5 respect to the -- if I can approach.

6 THE COURT: Sure.

7 MR. VAN RAALTE: Technical arguments
8 regarding the motion to amend. And first and
9 foremost I would say that the reason it
10 shouldn't be amended is, in every instance with
11 all four causes of action, they are untimely.
12 Amendments are liberally granted under Rule 15,
13 no question. But they are not allowed in every
14 case. Our courts have said, for instance in
15 Crocker versus State Highway Department, that
16 after the statute of limitations has run it
17 would be error to allow a complaint to be
18 amended in order to add a barred statute cause
19 of action. That's exactly what we have here.

20 With respect to the four causes of
21 action, three of them are contractually based.
22 We've got breach of contract, the breach of
23 contract by fraud, which also sounds in tort,
24 and then the impairment of contract. The
25 typical maximum statute of limitations is going

1 to be three years on that.

2 In this instance Mr. Hood alluded to
3 the 1991 deed. That's the contract that he would
4 allege. He also alluded to two zoning ordinances
5 that he feels like violated that. That was the
6 breach. Those are past in 1995, in 2005. Even
7 giving him the benefit of the doubt of the 2005
8 date, three years from that ran in 2008. This
9 lawsuit wasn't filed until 2010. We now stand in
10 2013 and it's simply too late to add those three
11 causes of action.

12 The same basic time analysis also
13 applies with Unfair Trade Practices. That's got a
14 three-year statute of limitations as well under
15 39-5-150. And, again, you've got the same basic
16 timeline. You've got the 1991 deed they allege is
17 the promise. You've got 1995, which was the first
18 ordinance change they would tell you is inconsistent
19 with that promise. They didn't sue then. Ten years
20 went by. There was a second ordinance they would
21 tell you is inconsistent with their version of the
22 promise. They still didn't sue. And the statute
23 ran in 2008 at the very latest. It's simply too
24 late. There are also a couple of other technical
25 reasons why these are barred.

1 With respect to the breach of
2 contract by fraudulent act, I would point out that
3 the South Carolina Tort Claims Act actually bars
4 claims against employees or governments based on
5 fraud. That would be 15-78-60, item, I believe, 17.
6 Employee conduct outside the scope of official
7 duties or which constitutes actual fraud, actual
8 malice, intent to harm or a crime of moral
9 terpitute. That would be an exemption right there.

10 Moreover, what we're really talking
11 about, as Mr. Hair alluded to a moment ago, is that
12 we've got legislative acts that the Plaintiff's
13 complain of. Under the Tort Claims Act, item one,
14 government entity not liable for a loss resulting
15 from legislative judicial or quasi judicial action.
16 Item two, not liable administrative action or
17 inaction; adoption in force, or compliance with any
18 law. These are the kinds of things that are barred,
19 and so we believe that for those kinds of reasons,
20 in addition to the time, it would also run into a
21 problem, it's simply not appropriate to add the
22 cause of action that's legally barred to begin with.

23 Similarly, with respect to Unfair
24 Trade Practices Act, there was actually a case that
25 came out earlier this year. I have a copy for

1 everyone; healthcare promotion specialist. If I
2 could approach, Your Honor, and provide you with a
3 copy?

4 THE COURT: Certainly.

5 (Hands up document.)

6 MR. VAN RAALTE: In that case it involved
7 the South Carolina Board of Dentistry and the
8 dispute was whether or not certain emergency
9 regulations constitute an Unfair Trade
10 Practices Act. But significant for today's
11 discussion is the idea that actions by the
12 governmental entity simply did not constitute
13 conduct of trade or commerce. So, again, we
14 just think that technically speaking what they
15 are seeking to add is a cause of action that
16 doesn't exist.

17 Brady also commented briefly on how we got
18 to this court. I think that touches on
19 prejudice and good faith, because this case was
20 ready for trial in February of 2012. It had
21 been filed in 2010, discovery had been ongoing
22 for an extended period of time. It was up on
23 the trial docket. And but for the
24 representations of the Plaintiffs that this
25 case could be resolved quickly before the

1 Master with basically legal issues being
2 determined, because the facts have been
3 established, we wouldn't be here today. This
4 case would have been tried in February of 2012
5 and we wouldn't be looking at an amendment. We
6 think it's appropriate to hold the Plaintiffs
7 to the position that they took in order to get
8 to this court in the first place and would
9 suggest that this matter be resolved by cross
10 motions for summary judgment.

11 THE COURT: All right. All right. Mr.
12 Spitz.

13 MR. SPITZ: Your Honor, may it please the
14 Court. My name is Steve Spitz and it truly is
15 a pleasure to be here today.

16 I think my first response is, we're mixing
17 some apples and oranges. For example, this
18 case that was just handed up to you is a motion
19 for summary judgment. The claims are already
20 in the case and the question before the Court
21 is should you or shouldn't you grant a judgment
22 against them?

23 This is a different question. The
24 question here first is, should we put four
25 claims in? And if it turns out that there is a

1 statute of limitations issue or if it turns out
2 that there is summary judgment, that's a really
3 different question.

4 I start with the Parker case, which is one
5 of the cases that we cited to you in our little
6 memorandum about adding claims.

7 Parker says, rules governing amendments of
8 pleadings are strongly favored. They really
9 are favored.

10 Now, there is only one reason to actually
11 not permit an amendment; not that it goes out
12 later on summary judgment, not that it goes out
13 on statute of limitations. You've got to get
14 it in before somebody can plead statute of
15 limitations. It's prejudice. And the question
16 of prejudice has been repeatedly discussed by
17 the South Carolina Supreme Court and Court of
18 Appeals. Prejudice means, a, you never had
19 notice of the claims. When you look at the
20 cases it's when the trial is over and someone
21 comes in under Rule 15 and says, oh, I want to
22 add estoppel, I didn't plead it, we didn't try
23 it, but I now would like to add estoppel.
24 Very, very, very, very late in the day. Then
25 you really do have a question of is there

1 notice?

2 This, we told them in January of this year
3 we would like to amend. They told us in
4 January of this year we oppose it, which of
5 course is their absolute right. I think a
6 great deal of the two lawyers on the other
7 side. I know how good they are. On the
8 record, all right? I really do. However, it's
9 already been since January and, you know, this
10 is the first time we're here to put him in the
11 case. And I can tell you right now if they
12 need additional time, if they want additional
13 time, if they want to depose somebody else,
14 they are going to have every -- if they want to
15 get rid of them fast then let's file a 12(b)(6)
16 and a statute of limitations and let's have a
17 separate hearing on that particular issue.
18 Mostly what Derk talked about was the merits of
19 the Unfair Trade Practices Act. I'm going to
20 cite a case to you, and it's not in our memo
21 because, in all candor, our memo deals with
22 just amending. Technically there is no
23 prejudice here because they don't have a
24 surprise. And, number two, they have every
25 opportunity in the world -- we can sit down and

1 have a scheduling order, they have every
2 opportunity to do whatever they want if they
3 are in. And I think we have a right to put
4 them in. Now I start with the Constitution.

5 And with all due respect, I think I have a
6 right to raise a constitutional claim in this
7 case that goes right to the heart of what this
8 particular town has done. We aren't just
9 unhappy. We are really -- this is not a
10 political case. We're appalled at actual
11 deception and impairment of contract. Judge, I
12 haven't had an impairment-of-contract case in
13 thirty years. I can't tell you how interesting
14 this particular claim is going to be. I hope
15 the Court will permit us, in its discretion,
16 to put it in so that you can hear some of the
17 facts that are real unusual about it, and then
18 down the line sort out whether or not you think
19 there is something of merit.

20 There was a case in the '90's where the
21 city of Columbia got together with someone, and
22 the allegations were they conspired together to
23 write some new zoning rules to actually exclude
24 somebody else who wanted to go into the
25 billboard business. That case went all the way

1 to the United States Supreme Court. And the
2 Court said, you know, you've got a problem
3 because it's an antitrust case and there is the
4 Nor Pennington (phonetic) immunity defense and
5 I don't think you can get around that. But
6 that was really on the merits. And it wasn't
7 that if some things were done totally
8 inappropriately in zoning that you didn't have
9 a chance to come into court and talk about it.
10 In short, Your Honor, let's leave the merits
11 out. Let's leave the arguments about summary
12 judgment out. Permit us to amend because there
13 really is no prejudice. Then promptly let's
14 have a scheduling order and come back and brief
15 some of the really interesting questions that
16 opposing counsel has raised.

17 MR. VAN RAALTE: Your Honor, I've got to
18 disagree with Mr. Spitz regarding the fact that
19 some of these issues aren't appropriate to take
20 up at the amendment stage. Crocker versus
21 State Highway Department, which I've got a
22 brief I'll hand up in a moment, 232
23 Southeastern 2cd, 340 notes that at issue is
24 whether Crocker complied with the section and
25 if not whether he could have amended his

1 complaint to comply. Turning through, the
2 court later notes after the statute has run the
3 complaint cannot be amended to state a cause of
4 action. Similarly, in Garner versus Houck,
5 which is 435 Southeastern 2cd, 847, they
6 affirmed the trial judge's ruling that
7 amendment was not appropriate.

8 If I could approach, I've got a brief that
9 cites both of these for your convenience.

10 THE COURT: Sure.

11 MR. SPITZ: Your Honor, this is the first
12 time we've seen this brief. This hasn't been
13 previously given to opposing counsel.

14 THE COURT: Me, too. All right.

15 MR. VAN RAALTE: Your Honor, what it
16 basically comes down to is it would be
17 prejudice to make the town discover and defend
18 against claims that don't exist, that are known
19 from the start to be non-existent under the law
20 and not cognizable. To the extent that that
21 can be is ascertained right now from the
22 argument before you with the dates cited by the
23 Plaintiff. We think it ought to be disposed of
24 for judicial efficiency at this point.
25 Certainly the idea of a scheduling order and

1 promptly moving to a disposition on the merits
2 is something that the town agrees with. No
3 question. But it ought to be on the original
4 complaint not a reshuffling of the deck.

5 THE COURT: Tell me what prejudice would
6 befall you if I allow the amendment.

7 MR. VAN RAALTE: I think it's basically a
8 loss of time and an expense. But I realize
9 those are not the issues that Rule 15 is most
10 concerned about, but Rule 15 does seem to draw
11 a line when it is statutorily barred. That's
12 where we think we are here. So to the extent
13 that we're talking about having to defend the
14 statutorily barred cause of action, we think
15 that crosses over the line and would constitute
16 prejudice.

17 THE COURT: As to the constitutional
18 allegation that would not be statutorily
19 barred; would it?

20 MR. VAN RAALTE: Actually, my research
21 indicates, Your Honor, that impairment of
22 contract falls under the same statute of
23 limitations as other contract based actions.
24 There has to be some statute of limitations.
25 Constitutional claims don't exist in

1 perpetuity. You can't go back to the 1850's
2 and today raise a claim complaining about it
3 for impairment of contract. There has got to
4 be closure.

5 MR. SPITZ: We only through discovery,
6 after starting this case, found out about the
7 wrongful manipulation of some things that the
8 town did. We only knew it by actually starting
9 to depose people and find out what they did.

10 MR. VAN RAALTE: If I can respond to that,
11 Your Honor? Legally the impairment happens at
12 the time of the breach. If the government
13 steps in and takes some legislative action that
14 devalues the contract it's been impaired. The
15 subjective intent or the sneakiness or whatever
16 it is that they claim to have discovered in
17 depositions or written discovery don't have any
18 bearing on the statute of limitations. If
19 there was impairment it was impaired. It
20 happened in either 1995 or 2005 under their
21 theory and the time has run.

22 THE COURT: All right.

23 (pause)

24 THE COURT: The standard to apply to an
25 amended pleading, motion to amend pleadings

1 under Rule 15, and Rule 15A amendments -- after
2 the pleadings have been joined, has to seek the
3 Court's permission to get the amendment and
4 leave shall be freely given when justice so
5 requires. It's not prejudice against another
6 party.

7 It is -- just, gentlemen, so you-all know,
8 it's this Court's practice to allow amendments
9 even up until the point of trial if they
10 conform the pleadings to the proof. So that's
11 just fairly standard in this court. So because
12 we're way ahead of that point in time I'm going
13 to find that under the circumstances we have
14 today that the amendment should be granted.

15 Now, that's not a ruling upon the merits
16 of the case one way whatsoever, as Professor
17 Spitz has pointed back to.

18 You've also got the issue of the relation
19 back under 15C, but what I hear you saying
20 Mr. Van Raalte, if it's too late today it was
21 too late then.

22 MR. VAN RAALTE: Yes.

23 THE COURT: So we'll cross that bridge at
24 another time. I'm going to allow the amendment
25 today to go forward. The pleadings can be

1 amended that add all four causes of action.
2 Then we'll have to come back at another time to
3 address the merits of those causes of action.
4 I understand what you're telling me.

5 Now, what can I do to help move this case
6 along?

7 MR. HOOD: First we're going to have a
8 motion for summary judgment. I'm sure they'll
9 have a motion for summary judgment. So we
10 needed some time to brief that and get those
11 issues in front of Your Honor. We're in the
12 month of November -- December, Christmas,
13 January, February. I heard you setting stuff
14 in February. I'm pretty booked in February.
15 March is open for me if we don't mess up St.
16 Patrick's Day completely. Other than that --
17 March is fine.

18 (Discussion off the record.)

19 MR. HAIR: One thing, if opposing counsel
20 doesn't mind and Court doesn't mind, if you can
21 make the effective date of the amendment to
22 start next Monday so -- I don't think you get
23 the seven days to answer.

24 MR. HOOD: I don't care how long you take.

25 MR. HAIR: We appreciate that.

1 THE COURT: I'll give you that time.

2 MR. HAIR: Other thing is, I guess what
3 we'll do is Mr. Hood and I and Spitz and Derk
4 will sit down and talk about whether or not we
5 really have a factual dispute, because I don't
6 know that we do. Now, there are some
7 allegations today about fraud and all that. We
8 dispute that. I've heard the allegation before
9 but I think even Mr. Hood said he hasn't been
10 able to prove it yet to put it together. If we
11 don't have factual disputes then I think it
12 would be appropriate to do cross motions for
13 summary judgment, have a motions hearing and
14 get this thing done. And March probably gives
15 us plenty of time. Does the Court's ruling,
16 does that mean that we can engage in discovery
17 further?

18 THE COURT: You can. I wasn't aware of it
19 being closed off.

20 MR. HOOD: It's not; take all the
21 depositions he wants.

22 MR. HAIR: We don't want to take any. We
23 thought when the case was transferred here our
24 agreement was everything had been done and
25 that's why we moved it here. Otherwise we

1 would not have agreed to it. As part of the
2 prejudice we pointed out earlier -- Court's
3 already ruled on that. So we thought the
4 discovery period was over. The town spent a
5 bunch of money defending this case and we don't
6 think they ought to spend a bunch of money and
7 we don't think they should have to spend a
8 bunch more money. We're opposed to more
9 discovery for whatever -- if you ruled you
10 ruled, but we feel like the case should have
11 been handled a long time ago. That's why we
12 moved it over here. We wouldn't have agreed
13 otherwise. So that's just sort of our position
14 on -- if March is the earliest we can do it,
15 we'll be ready in March.

16 THE COURT: Here's what I'll do. I'm
17 looking at that week of the 10th of March. I
18 can set you-all up with motions at that time.
19 If you-all think you can get to a stipulation
20 of facts and that would be sufficient for cross
21 motions for summary judgment, I'm happy to
22 entertain them. And I can block off -- that's
23 far enough out in time I can block that Monday
24 afternoon off. Monday March 10, and just give
25 you-all that time to come on at it. If we

1 don't get to that point then we'll still take
2 that time to entertain any motions that you've
3 got, dispositive motions or otherwise, and if
4 we're not looking at cross motions for summary
5 judgment, which is dispositive to the case,
6 then I would be looking to set the case for
7 trial at that time. I can either give it to
8 you then if you-all got an agreement as to the
9 facts and what the law should be relative to
10 each side, or if we're not fully disposed of
11 the case at that time set you up within the
12 next 30 to 60 days for a trial date at that
13 time. Okay? That should give you time to move
14 forward. That work?

15 MR. SPITZ: Absolutely, thank you.

16 MR. HAIR: If we're able to file motions
17 in advance it might dispose of some of these
18 causes of actions.

19 THE COURT: Absolutely. I can work you
20 in. Absolutely. Let me go ahead and give you
21 that time. I'll do a Form Order on the motion
22 to amend giving you -- you want 15 days, 30
23 days from next week? What's next -- what's
24 next week, the 2cd, or something, of December?

25 MR. VAN RAALTE: I never turn down longer

1 but I would anticipate I can get it done.

2 THE COURT: How about if you-all answer by
3 the end of 2013? How's that work?

4 MR. HOOD: Fine.

5 THE COURT: All right, gentlemen. Good to
6 see you. Sounds like a very interesting case
7 to me.

8 (Hearing concluded.)

9

10

11

12

13 STATE OF SOUTH CAROLINA)

14 C E R T I F I C A T E

15 COUNTY OF CHARLESTON)

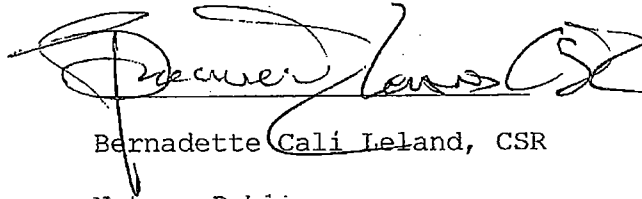
16

17 I, Bernadette Cali Leland, Notary Public, do
18 hereby certify that the within hearing was taken and
19 transcribed by me; and that the foregoing pages are
20 a true and accurate transcript of the within proceedings. I
21 further certify that the persons were present as stated.

22 I further certify that I am not of counsel or kin to
23 any of the parties to this action, nor am I interested in
24 the result of said action.

25 IN WITNESS WHEREOF, I have hereunto subscribed my name,

this April 12, 2016.

A handwritten signature in black ink, appearing to read "Bernadette Cali Leland" followed by a stylized flourish or initials.

Bernadette Cali Leland, CSR

Notary Public

My Commission Expires

April 5, 2020

STATE OF SOUTH CAROLINA)

: IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON) CASE NO. 2010-CP-10-5449

NATHAN BLUESTEIN,)

ETTALEAH BLUESTEIN,)

M.D., THEODORE)

ALBENESIUS, III, AND)

KAREN ALBENESIUS,)

)

Plaintiff(s),)

)

HEARING

-vs)

)

TOWN OF SULLIVAN'S)

ISLAND TOWN COUNCIL,)

)

Defendant(s),)

-----)

Given before The Honorable Judge Scarborough, in the
Charleston County Courthouse, 100 Broad Street, Suite 269,
Charleston, South Carolina on Monday, May the 19, 2014,
commencing at 9:30 o'clock a.m.

RAY SWARTZ & ASSOCIATES OF SOUTH CAROLINA

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N. Charleston, SC 29406

Also Present : Jerry Canehart

INDEX TO EXHIBITS

(None were marked.)

1 THE COURT: This case is captioned Bluestein
2 versus the Town of Sullivan's Island. I've got it scheduled
3 for summary judgment motions today. I know that there are
4 multiple memoranda, and reviewing those there's definitely
5 not an agreement as to what's what.
6 all right. For the plaintiffs I've got Mr. Spitz, Steve
7 Spitz.

8 MR. HOOD: Jamie Hood.

9 THE COURT: We've got Mr. Hood.

10 MR. BARNES: And Walker Barnes.

11 THE COURT: And Mr. Barnes. And for the
12 defendant, the town I got Mr. Hair.

13 MR. VAN RAALTE: Mr. Van Raalte.

14 THE COURT: Mr. Van Raalte.

15 MR. CANEHART: And Mayor Protem Jerry Canehart.

16 THE COURT: Very good. Who filed first, or who's
17 going to go first? Have y'all come to an agreement on that?
18 This is a cross motion for summary judgment. Usually I
19 would expect the defendants to go first. Mr. Van Raalte?

20 MR. VAN RAALTE: Thank you. Your Honor, the town
21 has filed a number of different motions for summary
22 judgment. And I think that it probably makes sense to start
23 with the timeliness of the statute of limitations type
24 issues first. If you get through that hurdle then there are
25 a number of more substantiative motions that the town would

1 like to have heard. And I know the plaintiffs have filed a
2 cross motion as well.

3 With the Court's permission what I'd like to do is
4 handle the timeliness motion myself, hand it over to
5 Mr. Hair to handle basically the argument about what the
6 promise is and whether there was a breach of that promise,
7 and then I may come back, if necessary and talk about some
8 of the other causes of action on some ancillary points.

9 THE COURT: All right, sir.

10 MR. VAN RAALTE: If I could approach, Your Honor.
11 I've got an exhibit or two I'd like to put on the board.

12 THE COURT: All right.

13 MR. VAN RAALTE: Thank you, Your Honor. I'd like
14 to talk about the timeliness of the plaintiff's filing in
15 this case. And I think it probably makes sense to do just a
16 brief thumbnail of what this case is about before we dig too
17 much into that. Sullivan's Island is, of course one of
18 South Carolina's barrier islands. And it's a little bit
19 unusual in the sense that while almost all others are
20 eroding constantly there are portions of the Town of
21 Sullivan's Island that have in recent decades been accreting
22 somewhat. And this case deals with the accreted land.

23 The plaintiffs in this case are house owners on this
24 front row of houses right there along the beach. But that's
25 not to say that they own the parcel of land closest to the

1 beach. That parcel of land, which we generally refer to, I
2 think on both sides as the accreted land, is right in here.
3 And that parcel is owned by the Town of Sullivan's Island.
4 And it's that parcel that this dispute revolves around.

5 THE COURT: Let me stop you right there. The
6 white line that's in there, that is not a road. What does
7 that represent?

8 MR. VAN RAALTE: No, sir. The white line on the
9 upward side of it is the OCRM setback line. And the
10 downside of it is, I guess actually the critical line, but
11 it was almost impossible to see from any distance. But in
12 any event it does a pretty good job of marking where that
13 parcel is dividing the properties, at least on the left-hand
14 side.

15 Years ago, shortly after Hurricane Hugo there was a
16 desire on the island to go ahead and preserve that land.
17 And at that time, obviously right after Hurricane Hugo the
18 land was pretty barren. And the plaintiffs that were on
19 that front row of houses had a fair view across that barren
20 land out towards the ocean. In the intervening decades, of
21 course sand has accreted. It's now further to the water
22 than it once was. And in intervening decades the plants
23 that are out there have grown up to a point where now in
24 2010 the plaintiffs filed a lawsuit essentially claiming
25 that the plants are growing too high and were blocking their

1 view. We believe that that's too late.

2 Back in 1991 shortly after Hurricane Hugo I had
3 mentioned a moment ago the desire to preserve that space.
4 And that led to a series of transactions between the town
5 and the Lowcountry Open Land Trust where the town deeded the
6 property over to the land trust and the land trust almost
7 immediately deeded it back. And the difference between
8 those deeds was that there were certain restrictions on
9 development and the use of that accreted land properly.

10 In 1995 the town amended the ordinance that governed
11 tree trimming out there on that property and raised the
12 height so it became more restricted. There was no lawsuit
13 or challenged filed by these plaintiffs. Ten years later in
14 2005 the town again amended it, and again there was no
15 lawsuit filed challenging it by these plaintiffs. It wasn't
16 until 2010 that there was ever a suit filed. And the town
17 believes that for a variety of reasons that 2010 filing is
18 simply years too late.

19 I'd like to start by taking a moment and just thinking
20 about the big picture implications of allowing this case to
21 go forward at this time. Allowing this case to proceed
22 years too late would do a couple of things. First, it would
23 undermine the public's ability to rely on published zoning,
24 which is critical. It would impair town council's ability
25 to legislate and use it's core authority. And it would

1 basically throw the ballot box of representational
2 government that's supposed to solve these kinds of disputes,
3 it would throw that out the window.

4 Towns are by statute charged with enacting zoning. And
5 there's a very specific very public process in Title Six,
6 Chapter 29 that governs how that's done. And that process
7 features public hearings ending in a vote, and significantly
8 after a town adopts an ordinance of zoning it sets forth in
9 629760D a 60 day window in which to file a challenge to the
10 validity of zoning. And that's because it's so important
11 that those rules be stable, and predictable, and reliable
12 for the general public.

13 Now even though the court challenge on the validity is
14 limited to 60 days there's still several windows available
15 to people who want to challenge and how the ordinance impacts
16 them. They can file for a variance. They can file for an
17 appeal with the Board of Zoning Appeals, or they can
18 reengage the representational process. They can go and
19 petition their legislator and have town council amend and
20 put a different rule in place if that's what a majority of
21 the island wants. Those are the remedies that are left to
22 you after 60 days. And in this case we're talking about
23 five years that have passed. The plaintiffs did not take
24 advantage of those opportunities to lawfully challenge it.
25 Now they're asking you to come forward and to place their

1 interest first rather than allowing that balancing to take
2 place.

3 Now, let me go back to Section 629760 and talk about
4 that in a bit more detail. As mentioned, that statute
5 states the challenges to the validity of a zoning ordinance
6 need to be brought within 60 days. There's no question that
7 this case involves the zoning ordinance of the town. The
8 plaintiffs have admitted that this was about the zoning
9 ordinance. There's no question that this case was more than
10 60 days after it's enactment. I mean, I think everybody
11 agrees we're talking about '95 and 2005 zoning ordinances.
12 And there's no dispute the case caption here is a 2010 case
13 caption. And there's no question that this lawsuit is a
14 challenge to the validity of the zoning ordinances.

15 If I could refer Your Honor to the actual complaint,
16 paragraph 73 they ask for an order quote, "invalidating all
17 ordinances relating to the accreted land passed since
18 February 12th, 1991." That's what, 14, 13 years ago, more
19 than that. Prayer for relief, asking for an order that this
20 Court invalidate the '95 and 2005 town ordinances. They
21 asked for an order enjoining the town from enforcing these
22 ordinances. This is all about a challenge to the validity
23 of these zoning ordinances. And it's brought years too
24 late.

25 This is not the first time Your Honor has actually

1 dealt with this statute and the 60 day rule and the accreted
2 land. I'd like to hand this case up to Your Honor. In 2005
3 Your Honor decided a case of Bloom versus Town of Sullivan's
4 Island. There, just as we have here, the dispute was from a
5 house owner who complaint that the bushes or trees were
6 blocking it's view.

7 In that case it started out as a variance request that
8 was denied, but it worked it's way up into the circuit court
9 system. And as it did so one of the arguments in circuit
10 court that the Blooms sought to make was that it was
11 invalid, the ordinance itself. Your Honor wrote at the
12 time, as to the Bloom's challenge to the constitutionality
13 of the ordinance this issue is not raised before the Board
14 of Zoning Appeals at the hearing or through any post hearing
15 motion. As such it is not preserved for appeal.

16 But then the crux of it is this, moreover the Blooms
17 failed to challenge the legality or constitutionality of the
18 ordinance within 60 days of it's adoption. As such any
19 challenge is barred by law, citing south Carolina Code
20 Section 629760. And we would contend that if a case filed
21 in 2005 missed the window to challenge the '05 ordinance
22 that a case filed in 2010 does as well.

23 Now, in response the plaintiffs have argued for a 20
24 year statute of limitations applicable to sealed documents.
25 Our position is that that quite simply is a red herring.

1 It's got no applicability here. What you have to remember
2 here is that in any situation you may have multiple hurdles
3 that you have to get over in order for a filing to be
4 appropriate. For instance, your normal statute of
5 limitations might be three years for negligence, but under
6 the tort claims act in a specific situation in suing a
7 government in some cases you may have to get two years. So
8 you've got to get under the shorter of those.

9 In this case we've got Section 760, which is more
10 specific. It's not a general contract claim. It's not a
11 general sealed document claim. It deals specifically with
12 challenge to the validity of the zoning ordinance. It's
13 also more recent, best I could determine 153530 was passed
14 in 1988. And the zoning provision I cite was passed some
15 six years later in 1994.

16 I'd also like to take a moment to talk about the
17 equitable arguments that the plaintiffs raise. They seem to
18 argue that equity should exempt their claims entirely from
19 the application of these time limits. And we don't think
20 that's the case, whether you talk about it in terms of
21 Section 760, a general statute of limitations, or equity.
22 First of all, equity follows the law. As our court of
23 appeals in 2011 mentioned in Regions Bank versus Winguard
24 Properties, quote, "The equitable powers must yield in the
25 face of an un-needlessly worded statute." It went on to say

1 that when providing an equitable remedy a court may not
2 ignore statutes, rules, or other precedents. We believe
3 that Section 760 is exactly that.

4 Additionally, equitable remedies are generally available
5 only when there's not a remedy in law. And the fact that
6 the statute of limitation may have run on your remedy of law
7 doesn't change that. It doesn't suddenly resurrect the
8 equitable claim. For that proposition I point the Court to
9 Nut Corporation versus Howell Road, another 2011 Court of
10 Appeals decision, where the Court noted quote, "The
11 possibility the statute of limitations may have potentially
12 barred the Nut Corporation from obtaining a legal remedy is
13 no ground in itself for allowing the Nut Corporation to seek
14 equitable relief." It went on to cite with approval other
15 cases for the propositions that no basis existed to exercise
16 the equitable power of the Court where the plaintiff failed
17 to exercise the statutory remedy within the time prescribed
18 in the statute of limitations. We think that's where we are
19 here.

20 Besides that, equity is simply not on the plaintiff's
21 side here. The plaintiffs argue that deed restrictions have
22 important policy considerations. And that may be, but
23 equally and more important is the policy consideration
24 behind giving the general public reliability and the ability
25 to predict zoning based on statutes that are years old.

1 Further, the legislature found it compelling enough to
2 put in specific 60 day rules. And we shouldn't be taking
3 that lightly and throwing it out the window. Here we've got
4 the plaintiff that slept for 15 years after the substantive
5 change first took place. And to come into court today
6 simply does not comport with equity. In fact, it sounds a
7 lot like latches would bar their claim. They're also
8 arguing in favor of deed restrictions, which I believe our
9 courts have generally said should be construed narrowly or
10 somewhat disfavorably.

11 In closing, Your Honor, the 60 day rule should apply.
12 We're at a point in this case where there are remedies for
13 the plaintiffs. That remedy is called the legislative
14 process. That remedy is the ballot box. If they want to
15 have the rule changed they need to go and petition their
16 city council and work through that process. Allow the
17 interest of the various people on the island to be balanced
18 rather than asking you to simply put their interest first.
19 Thank you.

20 THE COURT: Thank you, Mr. Van Raalte. Who wants
21 to respond to the timeliness questions. Mr. Spitz?

22 MR. SPITZ: I'd be happy to. May it please the
23 Court. My name is Steve Spitz, and with my co-counsel,
24 Jamie Hood and Walker Barnes, I represent the plaintiffs in
25 this case. If I can back up just a little bit and talk a

1 tiny bit about the circumstances and the setting of this
2 case that may assist the Court in some of the things that
3 are going to follow.

4 THE COURT: All right. Certainly.

5 MR. SPITZ: There was back in 1991 a very
6 deliberate process by the town and the town's mayor to enter
7 into long term restrictive covenants on the accreted land.
8 And it was documented and decided that the Lowcountry Land
9 Trust would take the town's land in one deed and convey it
10 right back for these long term restrictive covenants to take
11 effect that were to last a very long time. That was the
12 beginning of this situation.

13 When you look at that particular deed from the
14 Lowcountry Land Trust back to the town which the town
15 accepted you will notice on one page that there is three
16 different places on the final page where the document is
17 signed where it talks about signed, sealed, and delivered.
18 And in one part there's three places. There's a whereas
19 clause. Then there is in bold caps sign, sealed, and
20 delivered, two witnesses, and the Lowcountry Land Trust.
21 And then there's a final acknowledgement clause. And if you
22 look at that final page there can't be a doubt that the
23 intent of those parties was to create a long term document.

24 And if you look at South Carolina law if you really do
25 intend to create a document that is a sealed document take a

1 look at our brief. We cite the appropriate sections. That
2 runs for 20 years, not 60 days, Judge, not the shortest
3 little time period you ever heard. Twenty full years. And
4 this lawsuit was timely filed under the sealed document
5 rule. So number one, with all due respect to excellent
6 counsel on the other side I have a pretty darn strong
7 argument that it's a 20 year time period with a 20 year
8 window to bring about lawsuits that breech the covenants.
9 That's A. And Justice Kitridge wrote a case that talks
10 about that.

11 Number two, there are several reasons to deny summary
12 judgment. They come to you and claim 60 days and as a
13 matter of law we're entitled to summary judgment. Don't get
14 to the merits of this very troublesome case. My first
15 response is let's take a look and pull this up, 6-29-760.
16 Before you get to Part D why don't we look at Part A. They
17 use that statute over and over in their brief, but they
18 don't actually cite Part A, which is the precondition to get
19 to the 60 day rule.

20 Here is what A says as I read it, in cases involving
21 rezoning -- that's what this was -- conspicuous notice shall
22 be posted. And this is important, if you're going to use an
23 extraordinarily short period of time you have to give notice
24 to everybody close to personal. Conspicuous notice shall be
25 posted on or adjacent to the property effected.

1 One of the plaintiffs is right here in this courtroom.
2 Not only is there no evidence offered by his side that there
3 was a posting on his property or adjacent, he would take the
4 stand right now and under oath swear to you it never
5 happened. This 6-29-760, and it reads shall. It doesn't
6 say this is one way or discretionary way. 6-29-760 A says
7 you shall do this. I understand why. If you're going to
8 use the 60 day incredibly short period and slam the door
9 forever then you really ought to have close to personal
10 notice, we're rezoning your property. We're changing the
11 rules about your property.

12 It reads in fact, in cases involving rezoning
13 conspicuous notice shall be posted on or adjacent to the
14 property effected with at least one such notice being
15 visible from each public thoroughfare that abuts the
16 property. There's no evidence that happened in this summary
17 judgment setting. That's all we're here to talk about is
18 summary judgment. And there is a person right here who
19 would take the stand if you wanted him to and tell you it
20 didn't happen on his property. So I'm troubled at a very
21 basic level that the statute that they relied on is really
22 not applicable.

23 Now, I have a third concern. And in all candor it's
24 equally troublesome about 6-9-760. There are two novel
25 important significant constitutional questions raised in

1 this case. Not one, the due process issue, but two, the
2 actual impairment of obligation of contract right in our
3 state constitution and right in the federal constitution.
4 You've got to go back a ways to sort of thing through that
5 clause. And I'll talk about both of those maybe now, maybe
6 later as the Court is so inclined.

7 But there are two constitutional questions. Assume for
8 a moment that the 20 year statute doesn't work. I disagree,
9 but let's just for purposes of argument say throw out the
10 sealed document and the long term time period for long term
11 obligations. Throw out for the moment this argument about
12 conspicuous notice. I don't know how you can do either of
13 those, but let's just assume that you did. We still have
14 the question is it really appropriate to use a 60 day
15 statute to actually defeat two constitutional questions?
16 I've looked. I've looked, and looked, and looked, and
17 looked under South Carolina law. I can't find a case where
18 the Court has thrown out a constitutional question based on
19 60 days.

20 The issue in front of you in short is a novel one. And
21 one of the reasons to deny summary judgment, going way back
22 into our jurisprudence. One of the reasons to say wait,
23 let's hear more, let's have a trial. One of those reasons
24 is if there's a novel question. I don't know. Maybe I can
25 be enlightened. Maybe they know it, but I don't know the

1 South Carolina case that has thrown out two significant
2 important constitutional claims with that 60 day statute.
3 That also bothers me a whole lot.

4 And then last, there's four concerns here. Some of the
5 claims, all right, are renewable. That is they are like
6 nuisance. They come, and they go, and they come, and they
7 go, and they come, and they go. And if it's a permanent
8 nuisance -- that is all standard South Carolina law -- a
9 permanent nuisance, then the statute starts to run right
10 away for whatever time period, 20 years, or 60 days, or
11 whatever the time period is. But if it each year comes
12 back, if it's abatable -- that's the word in the brief.
13 That's the word in the supreme court. If it's abatable like
14 a nuisance, then you have a different rule.

15 So for all of those reasons, Your Honor, and because we
16 are in a very interesting setting of summary judgment I
17 respectfully ask you to deny the motion right now. Let's
18 set it for a trial. Let's put all of these claims together
19 and hear the full story. And don't throw out the
20 constitution. Thanks, Judge.

21 MR. VAN RAALTE: Your Honor, if I could respond.

22 THE COURT: Sure, absolutely. Mr. Van Raalte,
23 let me ask this question because it comes to mind right off
24 the bat. Clearly the statute came out of the 1994 planning
25 act?

1 MR. VAN RAALTE: Yes, sir.

2 THE COURT: When was that adopted by the town if
3 you know? Was it done in '94, or '95, or '96, or '97?

4 MR. VAN RAALTE: When was the comprehensive act
5 adopted?

6 THE COURT: Yes.

7 MR. VAN RAALTE: I have not kept up with the
8 procedural implications of it, but the state statute came in
9 clearly in 1994. And it's the state statutes that governs
10 and set it out for all the local governance in South
11 Carolina.

12 THE COURT: I understand that. I think in order
13 to have zoning you had to follow that planning act and
14 implement that. That's why I asked that question.

15 MR. VAN RAALTE: I don't think there's any
16 question that by 2005 it's certainly there, Your Honor.

17 THE COURT: I don't know whether it was there in
18 1995. I guess that's where I'm getting at.

19 MR. VAN RAALTE: I can get back to you on that.
20 There's several points I'd like to respond to, Your Honor.
21 Let me start with Professor Spitz's reading of 6-29-760 A
22 and his argument about conspicuous notice and postings on
23 properties and the like. If you read the sentence that he
24 refers to, In cases involving rezoning conspicuous notice
25 shall be posted. Rezoning certainly is one category of an

1 ordinance can be met where I'm going to take this parcel,
2 I'm going to change it's zoning from light industrial to
3 residential. That's not what this case involves. This case
4 is one where we're talking about an amendment to the text of
5 the zoning regulations as a whole. And that is not subject
6 in our opinion to the conspicuous notice requirement that he
7 talks about. It's got it's own notice requirements that
8 would apply to the amendments of the text or the rules, but
9 it's not a quote rezoning in that sense. And we still fall
10 clearly under subsection D. This is a challenge to the
11 validity of a regulation or amendment to it. And that's
12 just as plain as it can get on that.

13 Second of all, as far as posting the property, bear in
14 mind that this isn't the plaintiff's property that we're
15 talking about. The change in the cutting rules deals with
16 property. The town changing the cutting rules on town owned
17 property. So it's not their property that would be
18 involved.

19 As far as the inappropriateness of applying this
20 statute in the limitations period to constitutional
21 arguments, let me refer you again to Your Honor's own
22 opinion in Bloom versus Town of Sullivan's Island where it
23 dealt with the Bloom's challenge to the constitutionality of
24 the ordinance. And Your Honor went on to apply Section 760
25 as one of the grounds for barring it there. So clearly it

1 has been, is appropriate for use in these circumstances.

2 I'd also like to talk for a second about Professor
3 Spitz's discussion of the importance in the 20 year versus
4 the 60 days and the importance of these issues, you know. I
5 think that's interesting because it really gets to a
6 fundamental difference between the town's view of what's
7 going on here with a government process and the plaintiff's
8 view about what's happening in the view from their porch.
9 Because their interest is the litigant's interest. What the
10 town's interest is is having a stable reliable zoning code.
11 That's what the state legislature wants.

12 They thought it was not important just for a particular
13 property owner but for everybody who can look at that zoning
14 ordinance and made decisions about whether to buy a
15 property, sell a property, how do develop and use property.
16 Those kind of systemic governmental interests absolutely
17 justify a 60 day rule here and just say that the plaintiffs
18 cannot be allowed to sleep on their rights.

19 Further, remember that we're talking about applying 60
20 days to challenges that seek to invalidate the zoning rules,
21 which is the heart of what they're trying to do here, you
22 know. As far as nuisance maybe that goes forward. Maybe
23 it's abatable, maybe it's not. That'll be flushed out in a
24 separate motion. But as far as their desire to invalidate
25 the ordinance as a whole 60 days is the rule and 60 days is

1 passed by about four years and ten months.

2 MR. SPITZ: Judge, very briefly can I reply?

3 THE COURT: Go ahead.

4 MR. SPITZ: One final, I have the Bloom case in
5 front of me. And I'd like to specifically point to some
6 part of that. As to the Bloom's challenge to the
7 constitutionality of the ordinance -- that's your
8 paragraph -- this issue was not raised before or ruled on by
9 the BZA, Bureau of Zoning Appeals, at the hearing or through
10 any post hearing motion. Bloom was a truly different case.
11 The question in Bloom was should there be a variance or not.
12 That's not what's at stake here. This is a direct claim.
13 This is the first time we could raise the constitutional
14 issues. And I did not hear, as worthy as he is, any case
15 that he's sites from South Carolina that says you can throw
16 out the constitution in 60 days. It's a novel question.

17 As for the definition of rezoning, all I can tell you
18 is we're on summary judgment. The inferences, the evidence,
19 the interpretations, the ambiguities, all that's construed
20 in our favor when we -- I'm not asking that we prevail. I'm
21 just saying we need a trial to listen to some things about
22 rezoning and some other matters. There was no
23 constitutional claim in Bloom. It was never properly
24 raised. There are two here. And I spend a moment to talk
25 about both of them because they both are really pretty

1 extraordinary.

2 Most of the time due process really is a word that is
3 thrown around but not really seriously looked at in a lot of
4 cases. In this case go back to 1991. There was an actual
5 agreement between the town and all the town residents.

6 Standing was specifically given to the Lowcountry Land Trust
7 and to all the town residents to enforce that agreement. In
8 1995 they changed it enormously fundamentally. Instead of
9 having the right to leave the vegetation the way it was to
10 make sure it wasn't changed they wrote a brand new rule
11 which said eight months out of every year you're not allowed
12 to cut at all. You can't cut anything. When are those
13 eight months? The growing season, March, April, May, June,
14 July, August, September, October. When were you allowed to
15 cut? Talk about a change in an agreement. November,
16 December, January, and February, exactly the period when
17 things don't grow in South Carolina, the dormant season.

18 If you want to talk about changing a deal
19 unilaterally -- and by the way, the '91 agreement, look at
20 Exhibit One to the summary judgment. Take a close look.
21 It's got a series of things that are supposed to have been
22 done by the town if they want any change. If they want any
23 change they're supposed to look at alternatives. There's a
24 whole series of things. And just like there's no notice and
25 no conspicuous notice there is no evidence in this case they

1 did any of them. They just unilaterally took a deal they
2 didn't like and changed it fundamentally.

3 That raises very significant due process issues going
4 all the way back to Nactow (ph), the United States Supreme
5 Court case. Uclet (ph) says zoning is valid. One year
6 later Nactow came down and said but not for everything. You
7 don't have unlimited discretion to completely change the
8 rules. And that due process claim is here. I submit to you
9 it doesn't fall under the 60 days. And I submit to you that
10 calls out for a trial.

11 And then I only add this because this is even more
12 serious constitutional problem they have. If a state signs
13 it's own contract for a political subdivision and then
14 rewrites it fundamentally unilaterally to impair their own
15 prior obligations of contract, that's why the contract
16 clause was put into the constitution. And that's why it's
17 in the South Carolina Constitution. And there is an exhibit
18 in the record by Tommy Hartnet which says their change of
19 rules has impacted the two plaintiffs I represent at least
20 \$1 million. If you're on the front row and you no longer
21 have a view of the ocean, boy, that is a really expensive
22 real property change. That's \$2 million at stake here. And
23 I repeat again for all kinds of reasons, and he doesn't cite
24 a case about what is rezoning and what isn't, this issue
25 merits and all we want is a trial. Thanks, Judge.

1 THE COURT: All right. Let me do this, I'm going
2 to take that question under advisement. Let's go ahead and
3 get to the merits of the issues. I know that there are
4 multiple causes of action. I'll have some more questions
5 for Mr. Spitz about that as we go through. But Mr. Hair, if
6 you'd like to go ahead.

7 MR. HAIR: Thank you, Your Honor. May it please
8 the Court. I'm going to address the plaintiff's breach of
9 contract arguments. And as the Court has pointed out these
10 are the more substantiative arguments. And I think they're
11 going to cover many of our motions one way or another.

12 You know, Judge, breaching a contract is simply
13 breaking a promise. And so their argument is that the town
14 broke a promise to the front beach owners. However, it's a
15 promise that never existed and a right that they simply
16 don't have. Two front beach owners have brought a lawsuit
17 saying that the contract has been breached by the town. Of
18 course, as you've heard the contract consists of the
19 restrictive covenants that are in this deed from the
20 Lowcountry Open Land Trust in 1991. It's important to
21 notice that there are only two parties to this contract, the
22 Town of Sullivan's Island and the Lowcountry Open Land
23 Trust. The two plaintiffs say the town breached the
24 contract. Of course, the town says they didn't.

25 But I think what's really important here is the other

1 party to the contact, the Lowcountry Open Land Trust, the
2 group who made the contract with the town as Professor Spitz
3 says in a carefully negotiated setting they say the town has
4 not breeched the contact. The Lowcountry Open Land Trust
5 has dutifully inspected the accreted land for years and
6 years. And they say the town has acted in conformance with
7 the deed.

8 As recently as October, 2012 the Lowcountry Open Land
9 Trust filed their annual report. Now, their report is
10 attached as Exhibit D to one of our motions for opposition
11 to their motion for summary judgment. But for convenience
12 I'll give a copy of that attachment to the Court. And I
13 would ask the Court to look at Item Two on page one. List
14 acts or uses prohibited by the terms of the deed restriction
15 that have taken place since the last monitoring visit.
16 Answer; none observed.

17 Look at page two. Paragraph five that begins based on
18 the terms, I've highlighted. Based on the terms of the deed
19 restriction the Town of Sullivan's Island and it's elected
20 town council have the right to issue permits for vegetation
21 management and the right to enforce the rules, regulations,
22 or guidelines as they deem appropriate. As they deem
23 appropriate, not as the plaintiff's deem appropriate. The
24 town council has the authority to enforce the town's
25 vegetation, tree, and beach ordinances. That's what the

1 town has done by adopting these zoning ordinances. And the
2 plaintiffs simply don't like it, but that doesn't mean that
3 the town has breeched the contract. Even though the
4 plaintiffs may have standing to sue in the document in this
5 case they have no right to sue because there is no breech.

6 The Court should also look very carefully at the two
7 plaintiff's motivation asking the Court to substitute their
8 interpretation of a contract between two other parties of
9 which they are only third party beneficiaries. But this
10 Court can grant summary judgment for the town without even
11 looking at this deed. And here's why, of course it's
12 clearly established law that the plaintiffs have no
13 statutory or common law right to a view. Even Professor
14 Spitz wouldn't argue that here today. That's been decided.
15 No one can argue that they have a statutory or common law
16 right to look over somebody else's property. And it's
17 clearly the town's property. The town owns it.

18 As detailed in our briefs there is a parcel that is
19 owned by the town between the plaintiffs and the accreted
20 land called Bayonne Avenue. And it runs right along here,
21 Judge. It's inside of the critical line. You see it sort
22 of blank area here. There are no restrictions on that
23 property, none. The town owns it. And the town could build
24 a 50 foot wall there if they wanted or a hundred foot
25 vegetative buffer, and these folks would have absolutely no

1 argument. In order to get to the accreted land issue they
2 got to get across Bayonne Avenue and they can't. And this
3 Court could grant us summary judgment based on that, because
4 we believe Bayonne preempts their other arguments about the
5 deed.

6 However, even if the Court wants to look at the deed,
7 and we're certainly going to do that right now, it's clear
8 that there's no relief for the plaintiffs. Let's look at
9 the deed. This is the front page, Your Honor, of the deed
10 with the restrictions that we're going to be talking about.
11 And so what we need to do in order to see if the town has
12 breeched this promise is we need to find a promise that they
13 say the town has breeched.

14 Now, the promise they want us to find in this deed goes
15 something like this; the purpose of this deed is to protect
16 the view of the ocean from the front beach owners house to
17 the ocean. They want the restriction to say that the Town
18 of Sullivan's Island will take all steps necessary so that I
19 can look across someone else's land from my back porch and
20 have an unobstructed view. That's what they want it to say,
21 but it's not there. It's not in the restrictions. There's
22 nothing even close to that in this deed.

23 Now, Professor Spitz cites an Abbot case. Abbot was a
24 case decided down based on developer's restrictive covenants
25 at Hilton Head. And we agreed with the decision in Abbot.

1 The decision in Abbot makes perfect sense because a
2 developer bought a bunch of lots that had a view of the
3 ocean. And guess what he did, he put restrictive covenants
4 on the adjacent property that he owned there so that the
5 folks that he wanted to sell the lots to would have a view
6 of the ocean. That makes sense. He makes money that way.
7 We got no problem with that.

8 But that promise is not in this deed. And the reason
9 is the Lowcountry Open Land Trust and the Town of Sullivan's
10 Island were not interested in selling lots or preserving the
11 view from the plaintiff's porch. What is in the deed is the
12 true purpose. We believe the deed language is clear. And
13 it makes sense.

14 You know, we actually agree with the plaintiffs on
15 perhaps the most important interpretation in the whole case.
16 And they cited with approval, Exhibit Four of their
17 complaint -- their complaint -- and it's cited with approval
18 in their motions. It says this, conservation values
19 associated with protected property, scenic views and open
20 space values very significant. The scenic value of this
21 property is due to it's visibility from the Atlantic Ocean
22 and the public beach -- from the Atlantic Ocean and the
23 public beach, not from the porch to the beach. That's very
24 clear. They site that. They site that out of the summary
25 of the law, and we agree that's what they meant.

1 Those are the drafters of the deed, the same drafters
2 that say that Sullivan's Island has faithfully followed the
3 deed restrictions. Clearly the purpose, Your Honor, was to
4 prevent development and to protect the view from the beach
5 toward the accreted land. And guess what, that makes sense.
6 They didn't want walkers on the beach, the residents of
7 Sullivan's Island, and the visitors like you and I would do,
8 to walk along that beach and see hotels, restaurants, bars,
9 or these folks' houses. It's not Myrtle Beach. They didn't
10 want it to become Myrtle Beach. The drafters were concerned
11 about keeping the property undeveloped and beautiful for
12 generations of citizens to stroll along the ocean shore and
13 look at what mother nature has intended, not the houses on
14 the front row. That makes sense.

15 Now, the plaintiffs try to use a tortured reading of
16 the deed to create a promise that we've already seen that
17 isn't there. They argue that the accreted land must stay in
18 it's natural state specifically and precisely the way it was
19 in 1991. Well, quite frankly, Your Honor, we just think
20 that's ridiculous, but this is their complaint. This is
21 what the relief they ask for. In this case if the Court
22 will review the undisputed and uncontested documents it is
23 clear that the predominant plan and use of the property was
24 to preserve this land precisely the way it physically looked
25 in 1991 for the benefit of the entire township. Of course,

1 that's impossible. And it's ridiculous on it's face. They
2 actually attached pictures from October of 1989, and 1990,
3 and 1991, and argue that that's the natural state that it
4 must be kept precisely that way, the natural state.

5 Well Your Honor, those of us from the lowcountry
6 certainly know that nothing looked anything close in October
7 of 1989 as it did on September 21st, 1989. Hurricane Hugo
8 changed the face of Sullivan's Island, our other beaches,
9 and the entire lowcountry in a manner that hopefully we will
10 never see again. Hugo was a stark reminder that man cannot
11 control mother nature. It is quite simply impossible. The
12 Lowcountry Open Land Trust is in the business of preserving
13 land. They're in the business of doing these deeds and
14 restrictions. They would not have intended an
15 impossibility. They are in the business of preserving
16 nature for all citizens, not the view of front beach owners.
17 And they go out every year and inspect this protected land.
18 They say the town conforms.

19 Take a look at Elizabeth Haygood's affidavit that's
20 attached to our motions. And again, for the Court's
21 convenience I'll just hand you up a copy of what's attached
22 to our motion. Now, Elizabeth Haygood is the Executive
23 Director of the Lowcountry Open Land Trust. And she was
24 also there in 1991 when the deeds were transferred back and
25 forth. Look at what she says in Paragraph 15 of her

1 affidavit. The attached monitory reports show that the
2 Lowcountry Open Land Trust periodic and regularly visited
3 the accreted land each year since 2001, reviewed the
4 existing field conditions, compared the field conditions to
5 the deed restrictions, and found nothing that violated the
6 deed restrictions. So --

7 THE COURT: That's 2001 to 2012?

8 MR. HAIR: Yes, sir. So as a little summary here
9 before I go on, what we established is the plaintiffs have
10 number one, no common law right to a view; number two, no
11 statutory right to a view; number three, absolutely no right
12 to a view over Bayonne Avenue; and number four, no right in
13 the deed to a view.

14 So what authority does the deed give to the town, and
15 has the Town of Sullivan's Island somehow breeched that
16 authority? The deed is clear. Paragraph two gives the town
17 unrestricted authority to manage the vegetation.

18 Judge, this is an excerpt of paragraph two of that
19 front page of the deed that I just put up. And it says, not
20 withstanding the provisions of paragraphs one and three and
21 subject to the limitations of paragraph four, the town
22 council is given the unrestricted authority to trim and
23 control the growth of vegetation for the purposes of
24 mosquito control, scenic enhancement, public and emergency
25 access to the Atlantic Ocean, and providing views of the

1 ocean and beaches to it's citizens.

2 Now, interestingly the only place in the entire deed
3 covenant that suggests that providing views of the ocean and
4 beaches to it's citizens can be considered at all even a
5 consideration is here in paragraph two. That's where it is.
6 And Your Honor, paragraph two, it's the town's position that
7 it's the only paragraph really that matters in the whole
8 deed. The deed makes it clear that with regard to trimming
9 and controlling the growth of vegetation -- that's what's at
10 issue here -- just the trimming and controlling of the
11 vegetation for purpose of providing views, and you don't
12 read any other part of the document.

13 Again, it starts with not withstanding. The Court
14 knows what not withstanding means. It means despite
15 everything else. It means you don't have to go anywhere
16 else. You can't go anywhere else. Not with standing
17 paragraphs one and three. So don't read paragraphs one and
18 three because they're irrelevant, but subject to paragraph
19 four which only deals with building structures on the AL,
20 which is not a subject of this litigation. Not withstanding
21 anything else this is what matters when it comes to trimming
22 and controlling vegetation.

23 So how is the town supposed to exercise this
24 unrestricted authority? Well, that's in the deed too.
25 Paragraph six tells you how they do it. During the term of

1 these restrictions the town shall cause to remain in effect
2 an ordinance of the town making it a violation of law for
3 any person to violate the provisions of these restrictions.
4 The deed told them to adopt an ordinance.

5 As such restrictions may be modified pursuant to
6 paragraph eight hereunder, the town may enact ordinances and
7 regulations affecting the property which are more
8 restrictive than these restrictions. Right there in the
9 deed it says that the town can exercise it's unrestricted
10 authority to make more restrictive ordinances than existed
11 when this document was passed. What could be more clear?
12 It is definitely more restrictive. I don't think anybody
13 will argue with that. That's why they sued. They don't
14 like the law. The plaintiffs want to cut more vegetation
15 than the zoning ordinance allows. The zoning ordinance allows
16 less cutting than they want. It's more restrictive. That's
17 why we're here. But the deed is clear. And the law is
18 clear. The town may enact ordinances which are more
19 restrictive.

20 Our supreme court, Your Honor, has consistently held
21 that when zoning ordinances and restrictive covenants are in
22 conflict with each other the more restrictive prevails. The
23 often cited case of Bird versus the City of North Augusta
24 201 Southeast Second 744 stands for that proposition and has
25 never been overturned.

1 Now, Spitz and Dirk have talked a little bit about the
2 ordinances that have been passed since the passage of
3 restrictions, so I just want to go over them real quickly.
4 In 1991 when the deed restrictions were put in place the
5 town's ordinance allowed the zoning administrator in his best
6 judgment to allow trimming into AL of down to three feet,
7 but he didn't have to do that. It was based on the terms
8 and conditions of things he could look at. But he could
9 give them a permit to cut to three feet. And it also could
10 give them a permit to cut everything to three feet with no
11 difference between what type of vegetation.

12 In 1995 the town decided that as the accreted land
13 changed with the hand of mother nature the ordinance
14 regarding trimming needed to be changed as well. They
15 recognized the value of certain species of trees that had
16 begun to grow up. Remember, '89 it's wiped out. But now
17 we've got Oak trees, Palmetto trees, Cedars, trees of value
18 growing in the accreted land. And so they put a limit on
19 the type of vegetation that you could cut. And you could no
20 longer cut Oaks, and Pines, and Cedars, and these other type
21 valuable trees that they determined. But you could cut Wax
22 Myrtles, and Popcorn trees, and other invasive species.

23 The other thing that they do, which was clearly more
24 restrictive is before they had allowed three feet, right?
25 This ordinance allowed seven feet. So it was clearly more

1 restrictive of what you could cut, not only by species but
2 by height. You no longer can cut three foot flat top. Now
3 you can go seven feet on invasive trees, but you can't mess
4 with the others. So it's clearly more restrictive. And
5 nobody challenged that ordinance. That was a zoning
6 ordinance. It's in effect for ten years without a
7 challenge. As a matter of fact, one of the plaintiffs,
8 Mr. Bluestein, applied for permits under that ordinance and
9 cut during that time, followed the law.

10 2005 the town changed the ordinance again. This time
11 not so significantly. They still left the species
12 limitations in effect, but they gave the residents the right
13 to cut down to five feet. So really they gave them more
14 authority. This ordinance was less restrictive than '95 but
15 more restrictive than what had been in effect in '91.
16 Again, nobody sued on that until 2010.

17 Your Honor, in summary the plaintiffs are here because
18 they don't like the laws that the town has passed. But just
19 because you don't like the law doesn't mean you have an
20 action. Their remedy is at the ballot box, not here. The
21 plaintiffs lose their case based on the plain language of
22 the deed and well settled South Carolina law. There is no
23 promise for the front beach owners to have a view of the
24 beach. If there is no promise there can be no breach. The
25 Court should grant the town's motion for summary judgment

1 and allow the political legislative process to work.

2 THE COURT: Thank you, Mr. Hair. Mr. Spitz?

3 MR. SPITZ: May it please the Court. I'd like to
4 go right back to the deed. And I believe you have to read
5 the document as a whole. I think you have to read all the
6 paragraphs and take a look at what drafters of this deed
7 were trying to do. And I would start with paragraph one of
8 the deed, because I find a promise right in paragraph one
9 that's very significant except as otherwise provided or
10 permitted in paragraphs two or three.

11 So there's an exception. There's always exceptions.
12 And that's to include a variety of actions that the town may
13 well need to take for drainage, or mosquito control, or
14 public safety, and public health, and all the rest of it.
15 But here's the first promise in the document. Here is
16 paragraph one. Take a look. It literally is the words of
17 the document. The property shall remain in it's natural
18 state. Okay. That's significant. No change shall be made
19 to the topography or vegetation.

20 The reason there are photographs so many places along
21 the way, the reason that this deed was written is that at
22 the time in 1991 when these restrictive covenants were put
23 in place their vegetation at that time was three feet. As
24 clear as can be it says don't mess with the three feet of
25 vegetation. Don't let it grow up to seven unless you can

1 justify it under something that's coming. But it starts
2 with, in my view very clear promise, don't change what's
3 there. The whole reason to write the restrictive covenants
4 was to preserve what was there for a long, long period of
5 time. And there were ways to make changes. The document
6 talks about those.

7 One thing that the other side has not discussed is what
8 we call Exhibit One to our summary judgment. And it was
9 drafted at exactly the same time as these documents were
10 drafted. And it's the summary of the deed restrictions.
11 And it was recorded right along with the deed. What does
12 this mean? And if you read the summary of the restrictions
13 signed February 12th, 1991, recorded February 14th, 1991,
14 and you look at the top of page three Wildlife Habitation
15 Value -- and this is very significant.

16 What's the purpose of this? The property consists of
17 vegetated dunes, wetlands, white sand beaches which provide
18 nesting for a variety of birds and animals, and so on, and
19 so on. These conservation values will be protected by
20 limitation on subdivision building commercial use as well as
21 limited ability to alter the vegetation. The reason all the
22 photographs are attached to the summary judgment, the reason
23 they were all taken is to demonstrate that of course it's
24 not exactly. We never said ever it's exactly the way 1991.
25 You're not supposed to fundamentally change the character of

1 the land. You're not supposed to turn it from a place where
2 you can view the ocean and have scenic enhancement into
3 something where you can't see the ocean. What kind of
4 island on the front row where you can't see the ocean?
5 That's the most un-natural reading. And that's directly
6 contrary to the summary of the deed.

7 Not only that, take a look at Exhibit Three to our
8 summary judgment. There is a newspaper story when a cutting
9 took place. And when is the Mayor -- this is really
10 interesting. What does the Mayor of this town say about
11 this in it's final paragraph? And this is in our brief.
12 And the newspaper story says -- Exhibit Three to plaintiff's
13 summary judgment motion reads, The Mayor scenic
14 enhancement -- that's one of the important things in the
15 deed -- scenic view enhancement means -- I'm not going to
16 quote -- a better view of the ocean. People owning front
17 beach property pay a high price for property and should be
18 allowed to cut back growth. The whole purpose, first
19 cutting back in '91, the whole purpose of having front beach
20 property is to have a view of the ocean. They didn't just
21 modify it. They didn't just change it a little. They
22 actually changed everything. The fundamental nature of what
23 the front row has in front of them has been totally changed.

24 By the way, there's some affidavit on summary judgment.
25 Take a look at the affidavit that was actually filed in our

1 memorandum in opposition. And this was Exhibit A on
2 Paragraph Seven where one of the front owned people, Tom
3 McCutchin, who lives there on the front row says in
4 paragraph seven of his affidavit under oath the very
5 character and nature of the accreted land has been
6 dramatically changed. Not just changed, not just materially
7 changed. This is somebody who uses words carefully.
8 Dramatically changed.

9 Now, on summary judgment when you've got one side
10 saying one thing and the other side with affidavits, with
11 contemporary newspaper accounts, with a summary that was
12 reported with the deed, we really don't read the exception
13 to engulf the entire rule. That's not what you do. You
14 don't read one section of a document. You read all the
15 sections. I got a rule. Leave it pretty much the same.
16 Keep it in character. And the exceptions get totally --
17 this is upside down. This is inside out.

18 This is actually destroying one of the most important
19 property rights that a front own person -- and by the way,
20 Hartnet's opinion is that it goes much further than the
21 front row. It goes back to the second row. It goes back to
22 the third row. There's less loss of value, but take a close
23 look at what Tommy Hartnet says. And that's here as part of
24 the summary judgment motion. And if you read this the way
25 we read it, and there's obviously -- and I have the greatest

1 of respect -- by the way, for the record we knew all about
2 the Bloom case.

3 Nonetheless, the other side was extraordinarily
4 professional and sent us little tiny one paragraph letter
5 saying, Spitz, I just wanted you to know we're going to use
6 the Bloom case. That was really appropriate. That was
7 proper. I commend them. And I really, really appreciate we
8 knew about it. But nonetheless, it was exactly the right
9 thing to hope South Carolina lawyers do.

10 So here's where we are on Exhibit One. We read the
11 document real differently. Now, maybe a trial judge where
12 you ultimately are going to have to decide this, maybe
13 you'll read it one way. Maybe you'll read it another. On
14 summary judgment, where all the inferences -- we all agree
15 that it exists. And I'm saying, read the rule before you
16 read the exception. They're saying, read the exception and
17 ignore the rule. I think this was broken. Not only do I
18 think it's broken, I've got affidavits from a bunch of
19 people on the front row who say it was broken. That's
20 enough. We don't have to go further.

21 I'm going to get to the Lowcountry Land Trust in a
22 moment. That's enough to absolutely say, come on, let's
23 have a trial. There's obviously differences of opinion
24 about this document. Let's go do some more -- especially
25 when there are contemporary accounts.

1 It's interesting, and I'm a fan of Elizabeth Haygood.
2 I know all about her affidavit. I'm going to talk a little
3 bit about that in a moment. She's also in the newspaper.
4 She's the paragraph above the Mayor. She says, you know --
5 I'll read it. And I don't have the paragraph, but I'll read
6 it. Elizabeth Haygood, Executive Director of the land trust
7 said she wasn't sure that the cutting complied with the
8 spirit of the deed restrictions, but that issue raises a big
9 question. She didn't have an opinion back then one way or
10 the other. It was a big question, the question in front of
11 you right now -- talk about words to come back -- about the
12 scenic enhancement term. So her view back then was, I don't
13 know. Gee, there's some arguments in play. To me that's
14 the definition of a trial and the opposite of summary
15 judgment.

16 Now, let's talk about the Lowcountry Land Trust for
17 just a single moment because --

18 THE COURT: Who was the Mayor you quoted?

19 MR. SPITZ: Bear with this Yankee accent and my
20 inability to read the right words. It's Melvin Andre. And
21 I apologize to the Court.

22 All right. Here's the deed restriction monitoring
23 report of 2012 which was discussed in Brady's excellent
24 argument. And Brady said, come on, read 2012 monitoring
25 report; that settles it all. Well, Tom McCutchin's

1 affidavit is directly contrary. And there are a couple
2 other affidavits right in the record that are distinctly
3 contrary.

4 Moreover, I think I know why she came with this
5 particular opinion. Barbara Holmes, who is in fact the
6 general counsel for the open country land trust. And if you
7 read on the second page of the document they have a
8 fascinating paragraph. Based on the terms of the deed
9 restriction, this is what their general counsel said, the
10 Town of Sullivan's Island and it's elected town council have
11 right to issue permits for vegetation management -- couldn't
12 agree more so far -- and the right to enforce the rules,
13 regulations, and guidelines as they deem appropriate. The
14 town council has the authority to enforce the town's
15 vegetation, tree, and beach ordinances.

16 I disagree that they have carte blanche authority as they
17 deem appropriate. I think this restrictive covenant with
18 all the photographs was put on because of paragraph one.
19 Leave it the way it is at three feet. Enhance the scenic
20 enhancement. Keep cutting so that people get to see the
21 beach. And while they can do lots of things here I don't
22 doubt for a second they have some authority, I don't think
23 they have the authority to completely totally rewrite the
24 contract so no cutting ever in the months where it grows and
25 you get to do very limited cutting in the months which are

1 dormant.

2 And by the way, let's make it a crime if you violate
3 which -- what was a significant property right worth a
4 million bucks is now a crime if you violate this particular
5 ordinance. If you read this I think they were monitoring for
6 the wrong thing, because they themselves say the town can do
7 anything they want. That's not a restrictive covenant. Why
8 enter into it? Why read -- read the summary of the deed.
9 Read the exhibit of the newspaper story. Read the
10 affidavits that say it's fundamentally changed.

11 That's the real question here. Does the town have the
12 unlimited authority to do anything it wants? If that's true
13 that's one thing. If you think all these legal documents
14 were put together and all this was done so to give the town
15 total unlimited unfeathered agreement to do anything it
16 wants any time it wants then that's very different than the
17 way we read this particular document, Judge. This is just
18 one more reason why this case calls out for a trial and not
19 summary judgment.

20 THE COURT: Mr. Spitz, do you take any issue with
21 the items, the list of items in paragraph three that's
22 listed under public policy?

23 MR. SPITZ: I have no problem, but read on. Here,
24 the deed is actually real very specific. Prior to taking
25 any action effecting the property to further or effect a

1 public policy -- all these are public policies.

2 THE COURT: Right.

3 MR. SPITZ: Obviously we're not going to give the
4 town a straight jacket where they can't do anything, because
5 this is supposed to be a long term thing. Read on. There's
6 a whole set of rules, suggested requirements. Take a look
7 at Exhibit One. They haven't copied them all. Take a look
8 at Exhibit One. Of all the things the town was supposed to
9 do before they adopted anything even remotely as radical as
10 what they did in '95 they didn't follow any of them.

11 Let's have a trial to discuss not just the highlight
12 two and the highlight three. You bet I take issue with
13 this. Let's read on. Read the rest of paragraph three.
14 There's some on the next page. You add it all together, of
15 course, Town, you have discretion. Of course, Town, you
16 have some power. Of course, we're not contracting away the
17 police power. Of course, this is going to be long term
18 things are going to come up. But you did promise to
19 leave -- and it's supposed to be very significant that the
20 vegetation sides won't be altered so that people have a
21 view.

22 By the way, there's one more thing that I respectfully
23 request and I hope the Court will consider. After you've
24 heard all these arguments there is two cases in our
25 memorandum that talk about your inherent authority to walk

1 the property yourself with council and walk and see how it
2 compares with the photos from 1991 and with your law clerks
3 and see. It will only take 30 or 45 minutes. And if you
4 want walk into somebody's house and take a look at what view
5 they actually have. That's the Turner versus Carry case.
6 It's a footnote right in our super long 59 page -- I
7 apologize for the length of the document.

8 And I point out one more case that I think is relevant.
9 The United States Supreme Court in the Nactow case actually
10 said, you know, the Master in Massachusetts examined the
11 property. The Master exactly looked and when the United
12 States Supreme Court was considering what they should do
13 with the troublesome due process issue they went right back
14 and said, take a look. The Master actually walked out and
15 saw the property. The Turner case was a defective house.
16 And the judge walked out with consent of counsel and took a
17 look at it. He overturned a jury verdict because he found
18 they couldn't have gotten to the opinion they reached. It's
19 really an interesting South Carolina Supreme Court case from
20 '53.

21 I would urge you to exercise your inherent equitable
22 powers and walk some of this property. Come to Station 25.
23 Come right to where the plaintiff is. Take a look at what's
24 there. Go to Tom McCutchin's house and take a look at what
25 happened. Compare the photos. We've got the photos from

1 '91 for a reason. Judge, this is trial not summary
2 judgment. Thank you, Your Honor.

3 MR. HAIR: Your Honor, this won't take but a
4 minute.

5 THE COURT: Okay.

6 MR. HAIR: And first of all, we have no objection
7 to you and your law clerks going to visit, but we do want to
8 go in both the plaintiff's houses. I think that's the
9 relevant question is what they see from the beach.

10 You know, the reason Professor Spitz wants you to read
11 all this other stuff that doesn't apply is because he
12 doesn't like what it says. More importantly he doesn't like
13 what it doesn't say. If the drafters wanted to protect the
14 view from the porch they could have written it in. Don't
15 miss this, Judge. This is the only paragraph that matters.
16 He doesn't want you to read the clear language of the deed.
17 A difference of opinion does not create a issue of fact on
18 summary judgment. When a contract is clear on it's face it
19 is a question for the judge to determine. And this one
20 couldn't be clearer. You don't read number one. You don't
21 read number three. When it comes to the trimming and
22 controlling the growth of vegetation to provide views of the
23 ocean. Judge, if you're going to do some other things then
24 you have to follow these rules. If you're going to alter
25 the provisions, if you're going to alter the land, then

1 yeah. You got to jump through these hoops, because they
2 didn't want you to do that willy nilly.

3 But Professor Spitz is way off base when he says that
4 the town can do anything they want. That's not true.
5 That's not what this says. What this says is with regard to
6 this purpose, what we're here for, trimming the vegetation
7 for the purpose of providing the views -- this is the only
8 thing that matters because it says not withstanding the
9 provisions of paragraph one. That means you don't read
10 it -- or paragraph three, that means you don't read it. How
11 do you accomplish this? I showed you paragraph six, through
12 the adoption of a town ordinance.

13 Now, that doesn't mean they get to do anything they
14 want. You know how to pass an ordinance. Your Honor has
15 seen this many times. It goes advertised to the public, to
16 the planning commission. It's talked about at the planning
17 commission. They have public hearings at the planning
18 commission. Then it goes to City Council for them to
19 advertise and for the public to come in and give comments
20 about what they're doing. And then it goes to a second
21 reading. And so this is not some do it in the back room, do
22 whatever they want thing. It's a organized process,
23 legislated process that is specifically called for in this
24 document.

25 And Professor Spitz says they changed everything in

1 1995 and they made it illegal. Well, that's not true. It
2 was illegal in 1981. You can look at that ordinance. It's
3 the same basic ordinance with different provisions in it.
4 It's always been a crime as is the violation of all zoning
5 ordinances.

6 Now, Professor Spitz wants to quote Melvin Andre, who
7 is a deceased Mayor in a newspaper article. Now, just so
8 the Court knows, we don't object to that kind of evidence as
9 parole evidence. That in no way that's coming in in a
10 trial. They can't object to our good evidence from the
11 Lowcountry Open Land Trust because they plead it, and that's
12 why we're using it.

13 This document that Professor Spitz says says all these
14 things about protecting the view from the porch, here is
15 Exhibit Four. And I'm going to give you my copy. And I'm
16 going to ask you and your law clerks to read that thing
17 later and see if there's anything at all in that document
18 that even suggests that the Lowcountry Open Land Trust cared
19 to preserve the view from the porch forever and ever for
20 these plaintiffs. They quote that document with authority
21 and approval. And this is the quote that's in there. This
22 is what talks about what's important at the time of the
23 drafting. This is the interpretation. The scenic value of
24 this property is due to it's visibility from the Atlantic
25 Ocean and the public beach.

1 THE COURT: That board there is taken directly
2 from the summary; is that correct?

3 MR. HAIR: Yes, sir.

4 THE COURT: So clearly y'all got a difference of
5 opinion as to what --

6 MR. HAIR: And their complaint.

7 THE COURT: Yeah. Providing views of the ocean
8 and beaches to it's citizens is clear language of the
9 article paragraph two in the deed restrictions, correct?
10 What we looked at just a moment ago? There's a question
11 from whose perspective?

12 MR. SPITZ: Exactly. Precisely.

13 THE COURT: Y'all disagree with that? Y'all say
14 it's clear from here?

15 MR. VAN RAALTE: We disagree slightly. There are
16 two separate terms in there. One is scenic value. And they
17 argue in their original complaint and a number of things
18 that scenic value is this view to the beach. And they go on
19 to a variety of paragraphs in the deed.

20 THE COURT: Right.

21 MR. VAN RAALTE: Scenic value does not mean what
22 they say it means. Scenic value means it's the visibility
23 of the land from the ocean.

24 THE COURT: From the beach.

25 MR. VAN RAALTE: From the beach looking inland.

1 THE COURT: All right.

2 MR. VAN RAALTE: The only place it mentions a view
3 of the ocean looking seaward is this paragraph two. And
4 paragraph two was controlling here.

5 THE COURT: Okay. I'm with you. And that's where
6 you acknowledge that that's the only source of their genesis
7 of their complaint; is that right?

8 MR. VAN RAALTE: Right.

9 MR. HAIR: That's what gives the town the
10 authority to do what they wanted to do. They just don't
11 like the way the town authorized it -- executed the
12 authority.

13 THE COURT: All right. I'm clear on that I think.
14 And that question then arises whether it's ambiguous or not
15 ambiguous. If it's ambiguous it's a question of fact. If
16 it's not it's a question for the Court. I get that. Is
17 that what y'all have been trying to teach me today?

18 MR. SPITZ: Well, Judge, there is a nuisance claim
19 as well. And if I could approach the stand very briefly,
20 Your Honor. We consider what they've done to be a nuisance.
21 The reason we consider that is found in the affidavits where
22 there is a long list of things that really are fundamentally
23 different and inappropriate on this area.

24 Their response, if you read their brief their response
25 is they cite two cases from South Carolina. First, this is

1 interesting, Judge. They're both full trials. They're not
2 summary judgment. And second, they use the sentence, a
3 single sentence, if the legislature passed it it can't be a
4 nuisance. They pull one single sentence out of the Home
5 Sale case and say as matter of law it can't be a nuisance.
6 If you read Home Sale carefully you'll notice they were
7 referring to a public nuisance. This is, our claims are in
8 fact private nuisance and public. And the town can be
9 involved in both, not one or the other.

10 And much more importantly the Court goes onto say -- if
11 it was one sentence they wouldn't write the second half of
12 the opinion. They go onto say in that case, you know,
13 nuisance is a question of fact. There is no clear
14 definition of what a nuisance is. And it really is a case
15 by case question. I think if you read the affidavits as far
16 as I'm concerned this obviously has to be a draw.

17 MR. VAN RAALTE: Your Honor, if I may respond.

18 THE COURT: Sure.

19 MR. VAN RAALTE: The town filed a motion for
20 summary judgment regarding the nuisance claim as well, and
21 I'd like to address that and respond to Professor Spitz.

22 THE COURT: All right. Thank you.

23 MR. VAN RAALTE: The plaintiff's basic claim is
24 that the town's own accreted land is a nuisance because it's
25 overgrown and a home to wildlife and interviews with their

1 ocean view. It's basically that it's in it's natural
2 forested state.

3 There's no way that that plaintiff theory can be
4 correct from a common sense perspective, because if it were
5 the United States Government and the State of South Carolina
6 would both be liable for nuisances for hundreds of thousands
7 of acres. Think about the Francis Marion National Forest.
8 It's an overgrown woodland. It's got mosquitos, and snakes,
9 and animals, and tall trees, and all those things that the
10 plaintiffs would tell you are bad about the accreted land.
11 And yet there are property owners that live all around the
12 national forest. Not every one of them has got a nuisance
13 claim against the United States Government.

14 What about the creeks and marshes of this state? Those
15 creeks and marshes and areas are home to snakes, and rats,
16 and mosquitos, and all sorts of bad things that the
17 plaintiffs would tell you are in the accreted land. And yet
18 the state OCRM rules generally protect those areas from
19 being disturbed or cut down. You don't see the state liable
20 for a nuisance on the fact that there are marshes in this
21 state. Those common easy examples demonstrate just how
22 wrong they are when it comes to the nuisance.

23 Now, one answer for that is the Tort Claims Act, which
24 tells you that at least as far as damages claims go the
25 government entity is not liable for a loss resulting from a

1 nuisance. That's at 1578 Section 60 Subsection 7.

2 Now, the plaintiffs can't really get around that by
3 saying that they're after abatement only and it's not dollar
4 damages, because again, when you drive up Highway 17 you
5 still see the Francis Marion National Forest sitting there.
6 When you drive along the coast you still see marshes with
7 the same rodents, and snakes, and mosquitos, and all that
8 stuff. It hasn't been abated.

9 When it comes to those situations what you have is a
10 legislature, United States Government, State of South
11 Carolina, some legislature has passed a law that is
12 protected or put regulations on those areas. For instance,
13 protecting the marshes, that legislative act just like the
14 town's zoning ordinance protecting trees here, cannot be a
15 nuisance by itself. What the plaintiffs are upset about, if
16 anything are acts of nature. There's no allegation that the
17 town is out there planting snakes and mosquitos in there,
18 that they're pouring fertilizer on the trees each spring.
19 What you have are acts of nature, and those are not
20 nuisances attributable to the town.

21 I also want to take a moment to sort of highlight the
22 general motivations in this case, because in some of the
23 briefs there were suggestions that -- I think I remember the
24 phrases like the plaintiffs are concerned about the safety
25 of their own grandchildren and children out there with the

1 birds and the snakes and the like. We talked to them about
2 that in deposition.

3 Let me read to you what Ms. Albenesius, one of the
4 plaintiffs had to say. I asked her a series of questions
5 about whether she would favor improving the view even it
6 meant the situation getting worse with the nuisance. I
7 asked her, Say you had to make a decision between one state
8 of the world or another state of the world, which would you
9 choose, more snakes or more view? Answer, I'd choose more
10 view. Same question with mosquitos, I want you to assume
11 that. Just assume for the purposes of the question that
12 fewer mosquitos would live in a grown up forest than would
13 live if it were trimmed every year to three feet. So you've
14 got to choose between a better view and more mosquitos or no
15 view -- or less view and a better mosquito situation. Which
16 would you choose? Well -- answer, well, again, I'd say I
17 don't believe in the assumption, but I would agree to trim
18 for more views. I asked her the same thing about storm
19 risk. If I told you that having these trees out there
20 holding the sand in place meant the dunes were more stable
21 in a storm would you want more views. She wanted more
22 views.

23 Deposed Mr. Albenesius, asked him about that, got the
24 same basic answers. But he was even more succinct about it.
25 I walked him through some legislative fact findings about

1 holding the dunes in place and asked him, if you learned
2 that cutting down to three feet would decrease the
3 protection that that was giving you -- the trees -- would
4 you still want to reduce the cutting height so that you had
5 a better view? Answer, no, cut it to three. Okay. So even
6 if cutting down to three feet, changing the rule from five
7 feet down to three feet increased the number of rodents that
8 were out there would you still want to move it down to three
9 feet for a better view? Answer, yes. I paid for a view.
10 And I paid millions of dollars to have a view. And I don't
11 have one now. Question, okay. So it's all about the view?
12 Yes. Natural or unnatural, you want your view? Correct.
13 Okay.

14 That's the way it was in '81. I asked him more
15 rodents, less rodents. You want your view? I want the
16 view. That's what this case is about. They're talking to
17 you about the natural character of the property and
18 preserving exactly three feet. This isn't about the deed.
19 It's not about safety. It's about the fact that they want a
20 view that they are not promised under the common law South
21 Carolina and they are not promised in the deed in this case.
22 For that reason we believe that the nuisance claim simply
23 cannot go forward. It's out of step with what we see in our
24 own common experience. It relates to a legislative act, and
25 it simply can't be a nuisance. And the actions that they

1 really complain of are acts of nature which are not
2 actionable against the town. Thank you.

3 THE COURT: Thank you, Mr. Van Raalte. Mr. Spitz,
4 help me out with something. I got a question for you. My
5 recollection of the law is there's two kinds of nuisances,
6 nuisance per se and a nuisance per accident; is that
7 correct?

8 MR. SPITZ: Yes.

9 THE COURT: Tell me what the difference is.

10 MR. SPITZ: Well, nuisance per se is it is a
11 nuisance at all places at all times for all circumstances.
12 And accident is, you know, it could be the right thing at
13 the wrong place. Judge Southerland said it best. A pig in
14 the powder is not the same as a pig in the barnyard. So the
15 analogy to the natural forest doesn't really work. I would
16 tell you, Your Honor, that I have something labeled Exhibit
17 Number 12. And it is to the memorandum in opposition to our
18 second amended complaint.

19 And this is what actually this case is about, with all
20 due respect to Derk. The Bluesteins in 2010 said let us cut
21 some. We really have a problem. Let us cut some, just like
22 the 1991 covenants say you have the right not to have the
23 vegetation overrun. And here is the town's response.
24 Nothing about acts of God, nothing about national forest.
25 You may have cited an older version of the zoning ordinance

1 when requesting permission to trim and prune on town
2 property. Under the current ordinance, because they changed
3 all the rules, they changed the contract -- Section 21-7
4 will define the area where cutting is allowed. That doesn't
5 exist before. Specify the cutting season, only when things
6 aren't growing. And list the trees and shrubs that may be
7 trimmed and pruned and explain the terms under which cutting
8 may occur.

9 I go back to the constitution. There's a problem when
10 the state, which enters into a contract unilaterally
11 modifies it for their benefit and to harm a whole bunch of
12 people who've been relying on it. This goes right to the
13 case that's actually -- and there's a page from a Horne
14 book, which is in the memorandum talking about, you know,
15 when the state itself decides to modify it's own prior
16 contracts we have to take a second look. We have to be more
17 cautious.

18 States aren't allowed on their own to just sign it and
19 change it. That's particularly true with long term bonds.
20 That's particularly true with some other kinds of things
21 where people really rely for long periods of time. I really
22 do think when you go back and take a look at this stuff I
23 suspect you're going to conclude there's too many questions
24 on the nuisance as well. And this case merits a trial.
25 Thanks, Judge.

1 THE COURT: Have y'all explored any mediation in
2 this case? I know I read about it in the prior order, the
3 Bloom case. I know it's typically required on appeal. Has
4 that been tried or --

5 MR. HAIR: We have talked numerous times. And
6 we've attempted it. And the lines of communication remain
7 open. So the answer is yes, we have tried. And the line of
8 communication is still open.

9 THE COURT: Formal mediation, informal mediation,
10 what? Just communicating?

11 MR. HAIR: Informal.

12 THE COURT: It might not be a bad idea to pursue
13 that.

14 MR. SPITZ: We're eager to find a middle ground if
15 it's possible.

16 THE COURT: All right. And I understand I've got
17 a decision to make. We have more issues?

18 MR. BARNES: We do. And Derk's going to clean
19 those up, Judge. There are some causes of action that we
20 think that have to be addressed here. And then I'd like to
21 just say two more words.

22 THE COURT: All right.

23 MR. VAN RAALTE: There is a claim for mandamus in
24 the plaintiff's complaint. And we believe that summary
25 judgment is appropriate there, because mandamus may not be

1 used to undue a legislative act. And mandamus may not be
2 used to order a public official to order the law.

3 What the plaintiff's claim for mandamus does is
4 basically turn the idea of separation of powers and judicial
5 review on it's head. What's supposed to happen is a
6 legislature passes a law. A challenge is brought that asks
7 Your Honor to look at it and rule up or down. And then the
8 legislature goes back and decides what to do with Your
9 Honor's ruling.

10 THE COURT: That's not the way I read it. You
11 just had a mandamus kind of judge. But go ahead and tell me
12 why I can't do it.

13 MR. VAN RAALTE: Your Honor, what the plaintiffs
14 are basically asking for here, Your Honor, is an
15 order either directing the town to vote differently and
16 enact a different ordinance or to order town officials to
17 grant a cutting permit that is in violation with the law
18 that is on the books. And mandamus is simply not the
19 vehicle with which to do that.

20 The South Carolina Supreme Court back in the '50s in a
21 case called Dunbar versus City of Spartanburg confronted
22 similar situation. There the city had declined to rezone a
23 parcel and a group of citizens presented a petition wanting
24 to go get around, and eventually sought a court order
25 compelling the city to rezone the property.

1 What's interesting what our supreme court wrote.

2 Quote, It's conceivable that the legislature might pass an
3 act meeting with the disapproval of a vast majority of the
4 people of the state. Those disapproving could all sign a
5 petition to the legislature requesting an amendment thereto.
6 And upon it's refusal to pass such an amendment the Court
7 would be powerless, either by mandamus, or citraturia, or
8 any other judicial process to compel a favorable action by
9 that body.

10 And so to the extent that what they're looking for is a
11 mandamus changing the rules for cutting out there the
12 council enacted law, that is not appropriate through a
13 mandamus. That may be something that can be hashed out
14 through declaratory judgment or these other type of claims,
15 but mandamus is not the way that gets settled.

16 THE COURT: The Court can't mandate a legislative
17 body to violate the law, but they can certainly mandate them
18 to follow the law, correct?

19 MR. VAN RAALTE: They could, but the law that is
20 on the books, Your Honor, is a 2005 cutting ordinance that
21 we are absolutely following. And so what I'm saying is that
22 mandamus would not allow the Court to order the town to pass
23 a different law. And it wouldn't allow the town to order an
24 official to violate the law that's on the books.

25 THE COURT: I agree with that.

1 MR. VAN RAALTE: Further, the law is clear that
2 mandamus is not a remedy that's available when there are
3 other remedies that exist for the plaintiff. And here what
4 we've got is, I think the plaintiffs have filed eight, nine
5 causes of action. And so clearly they've got other remedies
6 at law, other remedies they say in equity. And so mandamus
7 would be a last resort. And they can't demonstrate there's
8 no other option then consequently mandamus would not be
9 appropriate.

10 MR. SPITZ: Judge, we plead so many causes of
11 action because we wanted to be cautious. I know you
12 understand that. When it comes to the constitution we raise
13 a whole new set of issues in this case. Unlike the Bloom
14 case you really do have a question in front of you. Did the
15 town under it's police powers go way beyond what it should
16 have done, gone way beyond what the exceptions to paragraph
17 three including the ones beyond the list of what they were
18 supposed to do?

19 And then here is the case from South Carolina that kind
20 of puts some of this in perspective, the Harleyville Mutual
21 Insurance Company versus the State. The citation is 736
22 Southeastern Second 651, a divided South Carolina Supreme
23 Court said, wait a second. We're in real trouble when you
24 enter into a formal agreement that's supposed to last a real
25 long time and four years later you change it unilaterally

1 always in your favor and don't tell anybody about it. And
2 the United States Supreme Court and the South Carolina
3 Supreme Court have both said slow down. Was there an
4 emergency to justify changing all these rules? Was the law
5 enacted to protect the basic societal interest rather than a
6 favored group? Is there really something so awful about
7 trimming some stuff on nearby land to not be a nuisance that
8 actually you could ignore your own private contracts? This
9 is what bothers us. There was an agreement. And it has
10 been changed all out of proportion. Was the law narrowly
11 tailored?

12 He hasn't talked about the constitution once. I
13 haven't heard them argue about the constitution at all. We
14 think there are two constitutional issues in this case. And
15 is this limited in some way? Do they really have the right
16 to do anything they want, or do the restrictive covenants
17 read as a whole and read the way they were written limit
18 them in some significant way? I think we should go back,
19 take a long look at the covenants, frankly.

20 And they are excellent lawyers. We read the document
21 fundamentally different. I think one trial can sort through
22 all these things, all these claims that he wants to talk
23 about now. Let's have a trial. Let's get to the real
24 merits, and then when there is in fact appropriate motions
25 at the end of the trial then let's clean up some stuff. I

1 have no trouble with that at all. I am bothered by
2 prematurely throwing out claims that may or may not turn
3 out.

4 And there's some stuff we haven't talked about yet. We
5 know that someone on this council, we don't know who -- we
6 don't know who. No one will admit to it. They hired a
7 consultant to give them guidance about what to do on the
8 beach on the accreted land. And the consultant's report
9 said do a survey of the town. And by the way, here's our
10 recommendation about what the matrix is for the survey. And
11 in the matrix was property rights. Somebody, we don't know
12 who -- we have one deposition left to do in June.

13 So far no one has admitted this ever happened --
14 although it never happened somebody changed it. The
15 consultants, their own consultant's survey matrix report
16 dropped property rights. The number one thing that we think
17 is important, the number one thing that we think this
18 document was partially generated for, and we find it very
19 troublesome that they had unilateral -- the only way we
20 found out about it was in discovery. It was hidden.

21 It's still not admitted by anybody. Somebody took
22 their own consultant's report which said ask the town
23 residents what they think about the property values, and
24 somehow by some means that disappeared completely as a
25 question.

1 We're bothered by the process they use. We're bothered
2 by what they did. We know they have lots of rights. We
3 don't think they're unlimited. That also merits a trial,
4 Judge.

5 MR. VAN RAALTE: Your Honor, I'd like to shift
6 gears for a moment and talk about another one of the town's
7 motions. Then I'm going to come back and address Professor
8 Spitz's discussion, questionnaires, and the like.

9 I'd like to talk to the Court about the town's motion
10 to strike damages claims based on rightness and the OCRM
11 critical line. The critical line in this case is not just
12 the elephant in the room. It's a crushing elephant sitting
13 on the plaintiff's lap. The plaintiff's fundamental damages
14 theory goes something like this, that they have houses that
15 are close to the water. They can look across the accreted
16 land. And that but for the town ordinance keeping them from
17 cutting down to three feet they could go tomorrow and
18 restore that view. It's the town that's stopping them from
19 being able to do that.

20 The lynch pin in their damage claim against the town is
21 that assumption that if you invalidated this zoning
22 ordinance that tomorrow they'd be free to cut. That's
23 simply not the case. They're just wrong. State DHEC's OCRM
24 has well established coastal protection systems in place.
25 Generally speaking those rules draw a critical line and a

1 setback line. And landowners may not disturb the area that
2 is seaward of that line absent OCRM permission.

3 In this case a setback line would be along the top edge
4 of the critical line along the bottom edge. And this is one
5 of the plaintiff's houses right here. And what you see is
6 that the line swallows everything that they want to cut.
7 Now, it's not just the town that has this viewing. OCRM
8 evidently does as well, because OCRM, their chief council,
9 Brad Cheval -- if I can approach, Your Honor -- sent a
10 letter to plaintiff's counsel after reading a newspaper
11 article about this case back in January and informed
12 plaintiff's counsel that they would need to secure these
13 permits and go through this process. Informed them, they
14 wanted to make sure that they didn't pursue this and then
15 start cutting without going through OCRM, which I think
16 demonstrates that they don't have permission in hand, that
17 even if the town repealed this ordinance tomorrow they would
18 not be free to cut.

19 And if they're not free to cut tomorrow the town has
20 not delayed them in this instance. For that reason damages
21 simply can't be right that are not appropriate to consider
22 at this juncture. Until they've got an OCRM permit in hand
23 they're not being delayed by the town.

24 MR. HOOD: Before we even get to damages, Judge,
25 the issue that Derk just mentioned has to do with ripeness.

1 And so I want to talk about that for a minute. I think the
2 Town of Sullivan's Island would benefit from heading the
3 advise that Albert Einstein gave us, which was we can't
4 solve our problems with the same thinking we used to create
5 them. And this lawsuit the town has created it's own
6 problems by implementing ordinance and violations of it's
7 contractual obligations. And it's discovery's already
8 proven the manner in which the town has promulgated,
9 implemented, and enforced ordnances related to the accreted
10 land has been willful, deliberate, and some instances
11 potentially fraudulent. Now by asserting this defense of
12 ripeness at this point two hours into the hearing I think
13 gives us an indication about the relative merit of that, but
14 because it's raised I do want to bring it up.

15 In this instance the town has asserted that this OCRM
16 line somehow eliminates any claim that these property owners
17 have. The problem with that is that's not a ripeness
18 argument. Ripeness is defined as justiciable cause. And
19 justiciable cause includes ripeness. And there are two
20 different analyses that the Court looks at. You can look at
21 ripeness in terms of the federal constitutional ripeness, or
22 you can look at it in terms of from the state perspective.

23 But either way you get to the same issue, which is do
24 you have a substantial controversy between parties with
25 adverse legal interest sufficient immediacy in realty to

1 warrant adjudification. If we don't have that I don't know
2 what we've been talking about for two hours. We clearly
3 have two different parties that have two different
4 interpretations of the same deed restrictions.

5 And we have, we're looking at these deed restrictions
6 here on this board that have been referred to as paragraph
7 two. We take exception to their interpretation. There is
8 nothing that you do to trim and control growth that enhances
9 mosquito control by letting the trees get bigger, nothing
10 you can do by trimming and controlling growth that somehow
11 by letting the trees get bigger. If trim and control
12 would've meant that they would allow for increased access
13 for emergencies for the public or provide increased views to
14 the ocean and it's beaches. That is a tortured
15 interpretation. They disagree with mine, but I look at
16 that -- and maybe a fresh set of eyes from the three of you
17 would look at this in a different perspective when you
18 haven't been so emersed in the details.

19 My point being that we have identified a real
20 controversy between these parties. And the damages that are
21 alleged don't come from a progressive type of injury. The
22 damages, Your Honor, is probably best analogized as follows:
23 If I own a piece of coastal property that's adjacent to the
24 water I may not have a dock on it, but I can certainly apply
25 to DHEC for a dock permit. Now, an appraiser would look at

1 that parcel and -- you're familiar with appraisals, so I'm
2 not going to belabor that process, but he would look at the
3 potential for access to building a dock as an enhancement
4 for that value.

5 Now, if that same municipality where my property was
6 passed an ordinance that says we're no longer going to have
7 docks, there's now a prohibition against it. They're
8 suggesting that we create some type of bureaucratic vortex
9 where we're sent to DHEC who tells us well, we can't give
10 you the permit. You have to go to town. The town says, you
11 need something here. So we run around doing what they want
12 us to do. They being the town. And never get any traction.

13 At the end of the day they do acknowledge that there is
14 some tree, some infrastructure, some aspects within the
15 property that's beyond the critical line but it's just not
16 as much as they want. That's a damage issue. That's
17 something that you determine at trial. That's something
18 that's based on the competing testimony of the witnesses,
19 and experts, and appraisers, and things of that nature.

20 But what we've come to is the Town of Sullivan's Island
21 has created a prohibition. We no longer have the right to
22 get the view if you want it because the way they're managing
23 the accreted land in violation of these contracts. DHEC on
24 the other hand has a permitting process, and if obligated to
25 pursue that process a homeowner can or can't, but he has

1 that separate thing. And that is a permitting process as
2 opposed to a prohibition. And that's a very real
3 distinction that would be a distinction from a property
4 value and an appraiser's perspective that cuts straight to
5 the heart of the issue.

6 So when we look at the ripeness issue we see all the
7 elements met. And then we look at the damages and what they
8 want to try to recast this case into is something that we
9 are very resistant to. And they have repeatedly tried to
10 describe our motivation, our causes of action, everything
11 about this lawsuit in the terms that they want to. It's
12 like political spin, but this is not a political issue.
13 This is simply a legal issue. And when it comes to dollar
14 figures and damages they can have an appraiser who can come
15 in. And they can put a value on seeing that property with
16 or without views. And we can do the same thing.

17 Judge, you can listen to all of it, none of it, do
18 whatever you want. But that is a discreet aspect of a trial
19 that only gets flushed out with all of the evidence. And so
20 to raise ripeness now in some, you know, final opportunity
21 to eliminate any damage claim because there's no OCRM or
22 DHEC permit I think is disingenuous. And the reason I think
23 it's disingenuous is the town hasn't cited a single instance
24 where any permit to cut trees on Sullivan's Island has been
25 refused for want of a DHEC permit. There is no condition

1 precedent on the application to submit to the Town of
2 Sullivan's Island to cut your vegetation in accordance with
3 this ordinances that requires you to demonstrate that. They
4 haven't presented that as evidence in the case. And if it's
5 not evidence in the case and the town hasn't established it
6 as a condition precedent how can we as litigants be
7 forbidden from pursuing damages for something the town
8 hasn't required?

9 So for all those reasons, Your Honor, we take a strong
10 exception to the way that they interpret the ripeness claim.
11 We take exception to the way that it's argued and the way it
12 applies here. We obviously have a vast disagreement over
13 legal interpretation, probably a vast disagreement about
14 damages. But those disagreements in this instance don't
15 arise to the issue of ripeness that would justify tossing a
16 case out.

17 And I don't think from a legality standpoint that
18 you're able to use ripeness in a way to partially throw out
19 a portion of the case. Either you're ripe or you're not
20 ripe. And you may be entitled to nominal damage. You may
21 be entitled to pecuniary damages. You may be entitled to
22 something, but if you're entitled to something you're ripe.

23 And if there's one tree on one property and you can't
24 cut it, and it's having some impact, that makes it ripe. It
25 may not make it valuable, but it makes it ripe. And so we

1 can't let the dollar figure distinction at this point make
2 the determinations. Either you got it or you don't. And by
3 acknowledging that there's some property that is without,
4 that is outside of the critical line, outside of the
5 critical line within the accreted land, I think that we
6 establish that immediately. I don't think it warrants any
7 further discussion. So with that I will sit back down.

8 THE COURT: Does your clients' property run to the
9 critical line?

10 MR. HOOD: It does not. There is -- well, these
11 are gross pictures, obviously not in significant detail.
12 And there's no property line in reference to that pit but --

13 THE COURT: That was Bayonne Road, wasn't it?

14 MR. HOOD: You do have Bayonne Road here. And
15 that would be the Bayonne Extension that he was referring to
16 there. Here is one of the flagged properties. So here, the
17 property line ends about there, and then you have this. So
18 you have the vegetation land-ward of the setback line. Does
19 that make sense?

20 THE COURT: And roughly what station are we in
21 here?

22 MR. HOOD: This is 25 and a half.

23 MR. VAN RAALTE: The critical line is not
24 necessarily co-extensive with the property lines, maybe one
25 side or the other.

1 THE COURT: Okay. What've you got, Mr. Van
2 Raalte?

3 MR. VAN RAALTE: Next cause of action, Your Honor,
4 is a motion for summary judgment on the claim for breach of
5 contract by fraudulent act. The town moves for summary
6 judgment on this claim based on two distinct theories. The
7 first Mr. Hair already has argued, and I'm not going to
8 re-hash that. And that's the idea that you can't have
9 breach of contract by fraud or anything else if there was no
10 breach to begin with. We simply don't believe that
11 happened.

12 But what I'd like to talk about is even if there were a
13 breach, Your Honor, just assuming that hypothetical, the
14 additional fraud allegation necessary for breach of contract
15 by fraudulent act is not viable in this case because it's
16 barred by the law. It's not allowed. You can't get that
17 inference from the fact. Breach of contract and breach of
18 contract by fraudulent act differ with fraud. That's the
19 difference between the cause of action.

20 But 15-78-60 Subsection 17 tells us that government
21 entities -- that's the Tort Claims Act -- are not liable for
22 quote, loss resulting from employee conduct outside the
23 scope of it's official duties or which constitute actual
24 fraud, actual malice, intent to harm, those type of things.
25 And that's what the plaintiffs allege here.

1 Turn to their second amended complaint where they
2 allege starting at paragraph 103. The above described acts
3 represent fraudulent intent specifically relating to the
4 breaching of the contract. 104, they have information and
5 belief, made false representations as to the circumstances
6 relating to the breach of the contract. 105, they talk
7 about fraudulent acts described were made based on
8 defendants' dishonesty in fact, unfair dealing, unlawful
9 appropriation. These are all in the heartland of what the
10 Tort Claims Act says are out of bounds for a claim against a
11 government entity.

12 In any event, I think it's important to recognize that
13 these allegations of fraud, while offered to be shocking
14 they don't have anything to do with any ordinances being
15 challenged in this case. What the plaintiffs have sued to
16 invalidate is a 1995 ordinance and a 2005 ordinance by the
17 town. The questionnaire, the fact finding, those type of
18 things that Professor Spitz alluded to, I don't think
19 there's any dispute that those took place in 2009 with
20 respect to a draft ordinance that was under consider and
21 discussion and was never adopted. And so no matter what
22 might have happened with respect to the 2009 process it
23 doesn't have any bearing on any ordinance that's being
24 challenged in this case.

25 I think it's also important to understand that none of

1 what they've alleged as fraud can be fraud to begin with. I
2 mean, first of all, governments act by taking a vote in this
3 case. They pass an ordinance. That's not what happened
4 here. There's no requirement the government engage a
5 consultant at all. There's no requirement that they send
6 out a questionnaire. If they decide to send out a
7 questionnaire there's no requirement that they use the same
8 phrasing that consultant suggested. They're, the
9 legislature is free to send out whatever questionnaire they
10 want. And when the information comes back, legally they're
11 free to heed the information, discard the information, use
12 it however they see fit. Since there's no requirement the
13 council do it at all it certainly can't constitute fraud.
14 They can't have done it wrong in this case.

15 I think it's also important to think about the Sections
16 1, 2, and 4 of the Tort Claims Act which tell us that --
17 legislative action and inaction, administrative action or
18 inaction of a legislative nature. An adoption, enforcement,
19 or compliance with any law or the failure to adopt or
20 enforce any law, whether it's valid or invalid, the town is
21 immune to those type of things.

22 And what I hear them trying to allege is that the way
23 that the town went about the legislative process was flawed,
24 that the way that the town went about the administrative
25 activity behind the scenes of the fact finding, of the

1 drafting, and this type of thing, that that's what the cause
2 of action would flow from. And we're immune when it comes
3 down to that under the Tort Claims Act.

4 Now, it's not a defense to the town's motion to say
5 well, there's a breach. There's a separate breach of
6 contract cause of action here. We don't think it's viable,
7 because it doesn't make sense on the deed. But if that's
8 what they want to have adjudicated there's a separate cause
9 of action. What differentiates this cause of action is
10 fraud. And the fraud is barred by the Tort Claims Act.

11 Thank you.

12 MR. SPITZ: I'll try to be brief. The breach of
13 contract first, the Tort Claims Act has two exceptions as I
14 understand it. Gross negligence takes it outside the
15 statute. And equity is outside the statute. From the
16 beginning the town has talked about consultants, used
17 consultants, justified a lot of it's decisions by
18 consultants, has a requirement that the consultants get
19 involved in almost every decision. It's pretty shocking to
20 suddenly discover -- and we only did this because of
21 discovery and bringing the lawsuit. This is within the last
22 three years. We don't know how many other times.

23 We don't have all the information that calls for the
24 trial, but I know this. Somebody -- they used consultants.
25 I know they never told anybody, you know. And the one

1 reason we know it's wrong is no one will admit to it.
2 They've all been asked did you change the consultant's form;
3 no. Did you change the consultant's form; no. Did anybody
4 change the -- no. But it was sent out to the whole town,
5 and it is changed from their own consultants. They spent a
6 hundred thousand dollars or what's the actual figure?

7 MR. HOOD: 150.

8 MR. SPITZ: \$150,000 to ignore their own
9 consultant. They didn't have to use it, but it's in the
10 law. And that's probably enough from our perspective given
11 that we're in summary judgment, given that the facts are
12 hidden, given that they never told anyone, given that
13 everybody in the town thought this was the consultant's
14 survey when it wasn't, that's enough smoke, Judge, to
15 certainly create some inferences that the town would much
16 prefer not to have service. We're troubled by it. And if
17 you are I suggest we have a trial. I'm a broken CD on this.
18 Have a trial to actually -- before we toss it let's try it.
19 Thanks, Your Honor.

20 THE COURT: Thank you.

21 MR. VAN RAALTE: Your Honor, I'd like to next take
22 up the town's very brief motion for summary judgment on the
23 unfair trade practices claim. The plaintiff's lawsuit
24 claims that the town passed 1995 and 2005 zoning ordinances
25 that violated deed restrictions and in doing so that

1 manipulated the real estate market and constituted an unfair
2 trade practice act. That's it in a nutshell.

3 The first problem with that is that the South Carolina
4 Supreme Court has already ruled that the passage of
5 regulations by a governmental entity cannot be an unfair
6 trade practice violation, because it doesn't constitute
7 trade or commerce for the Unfair Trade Practices Act.

8 I'd like to hand up to Your Honor the case of Health
9 Promotion Specialists versus the South Carolina Court of
10 Dentistry, which is a 2013 case from the Supreme Court of
11 South Carolina. In Health Promotion Specialists basically
12 the board issued regulations that meant that dental
13 hygienists were not going to be able to continue working in
14 a certain fashion in schools. And the hygienists sued
15 claiming that this was among other things an unfair trade
16 practice because the regulation impacted their ability to
17 market for this service. And the supreme court noted that
18 it was simply not trader commerce.

19 And that's exactly what we have here. We have the town
20 council, which is even more of a core legislative body than
21 a board of dentistry, passing a law. And that's not trader
22 commerce. It's called legislative activity. It's what
23 governments do.

24 Further, if Your Honor were to entertain that this
25 zoning ordinance enactment would constitute an unfair trade

1 practice act think about the implications. Every zoning
2 ordinance in one sense or another probably impacts property
3 values somewhere and probably impacts the real estate market
4 in some fashion. If the plaintiffs knew the unfair trade
5 practice act prevailed then basically every zoning ordinance
6 becomes a violation or a potential claim.

7 Finally, again, I'm going to turn, Your Honor, to
8 15-78-60 Sections 1, 2, and 4 which state that the passage
9 of a law cannot be the basis for a liability. Thank you.

10 THE COURT: Mr. Spitz?

11 MR. SPITZ: Very briefly, Judge. We have briefed
12 this pages 46 through 52 or 53 in that very long memorandum.
13 If what they did was lawful that would be one argument. If
14 what they did was unconstitutional that's a different
15 argument. Our claim is that this town has -- we may be
16 wrong, but then again maybe we aren't wrong. Our claim is
17 that this town has violated due process of law, actually
18 changed and manipulated it's own prior contract, and done it
19 in a way to truly effect the real estate market on the
20 island. And Tommy Hartnet says that's a million dollars for
21 each property. That's \$2 million. That does effect trade
22 and commerce at this stage. And I've said this half a dozen
23 times this afternoon, at this stage and looking at the
24 inferences, and giving us the benefit of the doubt, and
25 unless you're prepared right now to rule that everything

1 they did was constitutional -- and I really think that's a
2 question you ought to take a close look at -- I think it
3 survives summary judgment.

4 THE COURT: Go ahead, Mr. Van Raalte.

5 MR. VAN RAALTE: Last one, Your Honor. The town
6 requests summary judgment on the claim from the plaintiffs
7 requesting an injunction against the town expecting taxes
8 based on so called beachfront and ocean view location. We
9 believe that that is an unlawful request.

10 As a general matter injunctions against tax collection
11 are improper. It's not something the Court is going to get
12 involved in. South Carolina Code Section 12-60-80 A is
13 pretty clear. It tells us that except as provided in this
14 section there is no remedy other than those provided in this
15 chapter in any case involving the illegal or wrongful
16 collection of taxes or attempt to collect taxes.

17 And I take Your Honor to the one location of Riverwood
18 and Brackenbrook here which dealt with tax cap and tax
19 action related to that. And basically what the supreme
20 court determined was that there was an administrative
21 procedure under this 12-60-80 in this Tax Procedures Act.
22 That was the way if you dislike their taxes, you think
23 they're calculated improperly, that's the way that you
24 challenge it. You don't come into court, go to the circuit
25 court, and ask for an injunction against the assessor, or

1 the city, or anybody else.

2 The plaintiffs essentially in their brief in attempting
3 to distinguish themselves admit exactly what we're talking
4 about. They claim that Brackenbrook and Riverwoods are
5 somehow different because they stand for the propositions
6 that the plaintiffs had an adequate remedy of law or they
7 fail to exhaust their administrative remedies. They go on
8 to say the plaintiffs have timely paid all their property
9 taxes.

10 And at least one of the plaintiffs has even contested
11 their taxes with various Charleston County officials. Well,
12 that's our point entirely. There is, when you get your
13 assessment if you think that it says ocean view, and you
14 don't think you have an ocean view there's a process. They
15 need to follow that administrative process and refute and
16 appeal that up through the Revenue Procedures Act. It's not
17 something to be handled with an injunction in the circuit
18 Court.

19 MR. BARNES: I'll be real quick. First off, as I
20 read the town's argument there basically is a problem with
21 one paragraph within our complaint. If you look at our
22 second amended complaint they have a problem with Paragraph
23 81. But the problem is is that a part of our cause of
24 action for injunctive relief is more than just asking for
25 the town to refund a tax refund. The two cases they cite

1 are tax refund appeals. That's not this case. For the past
2 three hours we've explained what this case is about. It's
3 not just a tax refund case.

4 And if you look at the ordinance that Derk just cited to
5 12-60-80 he referred you to Paragraph A, but if you look at
6 Paragraph B it says, notwithstanding Subsection A an action
7 for declaratory judgment where the sole issue is whether a
8 statute is constitutional may be brought in circuit court.
9 For the reason Mr. Spitz has cited about the constitutional
10 issues this ordinance allows us to be in circuit court for
11 this reason. So we still have a right.

12 Our second mended complaint is for -- we have a cause
13 of action for injunctive relief. And we're basically
14 saying -- we're asking you to enjoin the town from failing
15 to live up to it's 1991 deed. That's how we are allowing
16 injunctive relief.

17 THE COURT: I understand that's the genesis of it.
18 But what you're asking for here is what, that they not
19 collect taxes?

20 MR. BARNES: No, Your Honor. Well, we would need
21 a trial to assess the full damages in terms of taxation. Of
22 course they can collect taxes, but there's been deposition
23 testimony in this case that the town gets over 50 percent of
24 it's revenue from property taxes. And it would not be the
25 amount, a certain amount of property value has been harmed

1 by their actions. And we would argue that they would not be
2 able to collect based upon the illegal conduct. We would
3 have to prove it at the trial.

4 THE COURT: Isn't there a remedy available there?
5 Isn't that exactly what Mr. Van Raalte was saying? Isn't
6 that an assessment issue?

7 MR. BARNES: Yes. And Mr. Bluestein's actually
8 challenged, gone through that process. And he has, as I
9 understand it been -- there has been classification changes
10 for, I know Mr. Bluestein's property. I'm not sure about
11 the Albenesius', but they have sought administrative
12 remedies, and to fully assess injunctive relief we would
13 need a trial to develop our whole damages theories is the
14 argument.

15 THE COURT: Mr. Hair?

16 MR. HAIR: Very briefly. I'm going to borrow one
17 of my good friend, Steve Spitz's favorite phrases. I'm
18 troubled by something. I'm troubled that we're here today
19 and they are screaming we need a trial. We need a trial.
20 We need a trial. And I wish Bobby was here. But I said
21 this to the Court with Bobby here last time. The way this
22 court got to Your Honor was it was getting ready to be tried
23 by Judge Jefferson. Bobby called me and Derk on the phone.
24 And none of these guys were involved. And said hey, let's
25 refer this case to Judge Scarborough for cross motions for

1 summary judgment and resolve the case. And we said that
2 makes sense. And so when they filed their second amended
3 complaint after the case got here we objected to it. And we
4 had a hearing before you. And you granted them the right to
5 change it.

6 And so I ain't hear to cry about that, but I don't
7 think we need a trial. I think these issues are very clear
8 and very simple. And again, my friend, Professor Spitz,
9 when he's got his back up against a wall on the clear
10 language of a deed he goes to the constitution. And that's
11 what we all try to do, but if the Court doesn't grant the
12 town's motions for summary judgment I want to make it clear
13 that if we have a trial that it's a jury trial as we've
14 requested in our answer to their complaint. We have an
15 absolute right to it I believe. And I think under the
16 Court's rules, the master, they have to consent to you for
17 you to have a jury trial.

18 And we would ask them right now if you don't grant the
19 motion for summary judgment to consent to that so that we
20 don't have to be punted back to the circuit court and get in
21 line for another couple of years. The town, the plaintiffs,
22 everybody deserves a decision. Whether it's going to be
23 your decision or whether it's going to be a jury's decision,
24 please let's let it end here.

25 THE COURT: Y'all want to talk about that some

1 more as to how it proceeds? Y'all seek a jury trial. I
2 hadn't gone back and looked at the way the records were.

3 MR. HAIR: Absolutely. And we believe on all
4 these damages claims we're clearly entitled to a jury trial.

5 MR. SPITZ: Judge, Brady's right. I'm not a party
6 to some of the prior stuff. I haven't talked to the
7 clients, and so I have to actually sit down and chat with
8 the clients in this case. So I can't, you know, give you a
9 positive yes or no right here as we're talking about it. I
10 don't doubt Mr. Hair because I respect a great deal almost
11 everything, not everything, but almost everything he says.

12 THE COURT: All right. Here's what I'm ready to
13 do today, and this is going to have some impact. I think
14 I'm pretty clear on this one. I did read y'all's memoranda
15 coming in. And I did have some specific questions. And as
16 to the motions for summary judgment I'm going to grant
17 defendant's motions as to the injunction for taxes, do that
18 now. I'm going to do that now, injection for taxes, the
19 unfair trade practices claim, and I'm going to go ahead and
20 grant the summary judgment on the question of breach of
21 contract. It is this Court's opinion that those last two
22 unfair trade practices and breach of contract by fraudulent
23 act are protected by statute, Tort Claims Act. And as to
24 the injunction I think that's also statutory. So I'm going
25 to grant those.

1 What I'm going to ask that you do on the rest of the
2 matters, and you can get me an order to that effect if you
3 like, Mr. Hair and Mr. Van Raalte. And certainly run that
4 by the plaintiffs' counsel. I generally give 30 days or so
5 to get proposed orders in here. If I'm going to deny
6 summary judgment I don't even need that. But what I'd like
7 to get from you is a proposed order somewhere in the next 30
8 to 45 days. There's a lot to digest here.

9 But I'm just going to think out loud here. As I sit
10 here and I look at paragraph two up there I can see how
11 there seems to be a question as to what providing views of
12 the ocean and beaches to it's citizens means. And that
13 seems to be where this case is going. So that's going to be
14 what I'm going to be wrestling with largely. And it comes
15 couched in a constitutional claim, so that's going to be the
16 other factor that I've got to really take a look at here.
17 And it's the issue of one, due process but certainly
18 impairment of contract. So I'll be looking further into the
19 deed restrictions and then the actions taken since 1991, in
20 particular the '95 and '05.

21 With that I do think that it could benefit your clients
22 to go to mediation. And I'm inclined to order that y'all do
23 that. What I'm going to ask that y'all do is take the next
24 couple of weeks on or before the 1st of June. Y'all let me
25 see if y'all can't come to some agreement to who you think

1 would be a proper mediator. And if y'all can't come up with
2 one then I'm happy to do that, make that decision for you.

3 I do appreciate the memoranda that y'all have provided
4 me. It certainly gives me a lot to see into. That's my
5 ruling as we get out of here today. And the other matters
6 I'll take under advisement and give y'all an answer. My
7 practice generally to get orders within 30 days and give you
8 a ruling in 30 days, but I can tell you the way things have
9 been going it's probably going to be like 45 days or 60 days
10 that way it's going. I'm going to give y'all some time if
11 y'all can get to mediation and try and talk about it.

12 (Hearing concluded at 1:30 o'clock p.m.)
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1 STATE OF SOUTH CAROLINA)

2 : C-E-R-T-I-F-I-C-A-T-E

3 COUNTY OF DORCHESTER)

4 I, Stacey L. Scoggan, Court Reporter and Notary Public,
5 certify that I did have The Honorable Judge Scarborough to
6 appear before me at 9:30 o'clock a.m. on Monday, May 19,
7 2014, at the Charleston County Courthouse, 100 Broad Street,
8 Charleston, South Carolina; that the witness was sworn and
9 cautioned to tell the truth, the pages constitute a true and
10 accurate transcript of the testimony given at that time and
11 place.

12 I further certify that I am not of counsel or kin to
13 any of the parties to this cause of action, nor am I
14 interested in any manner in its outcome.

15 IN WITNESS WHEREOF, I have hereunto set my hand and
16 seal this the 4th day of February, 2016.

17
18
19
20 _____
Stacey L. Scoggan

21 Notary Public for South Carolina

22 My Commission Expires: February 23, 2021
23
24
25

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF CHARLESTON
4 Nathan Bluestein, Ettaleah Bluestein, M.D.,
5 Theodore Albenesius, III, and Karen Albenesius,
6 Plaintiffs,
7 vs. CASE NO. 2010-CP-10-5449
8 Town of Sullivan's Island and Sullivan's
9 Island Town Council,
10 Defendants.

11
12 Hearing before the Honorable Mikell R.
13 Scarborough, reported by Christine A. Smith, Court
14 Reporter and Notary Public, at 10:45 a.m. on
15 February 25, 2015 at 100 Broad Street, Charleston,
16 South Carolina.

17
18
19
20
21 Christine A. Smith, Court Reporter
22 Master-in-Equity
23 P.O. Box 30296
24 Charleston, South Carolina, 29417
25 (843) 958-5071
casmsmith@charlestoncounty.org

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1 PROCEEDINGS

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3 THE COURT: Mr. Hood? Mr. Hair?
4 Mr. Van Raalte? Mr. Barnes? Who's the Plaintiffs?

5 MR. HAIR: I know it's unusual for Mr. Hood to
6 be a Plaintiff. In this case he is.

7 THE COURT: I think he likes being a
8 Plaintiff.

9 MR. HOOD: You're right.

10 THE COURT: Mr. Barnes?

11 MR. BARNES: Yes, sir. Good morning.

12 THE COURT: I got your memos yesterday. I
13 appreciate that.

14 (Off-the-record conference.)

15 THE COURT: I did grant Summary Judgment on
16 some of the Plaintiff's claims. Let's just verify
17 that. The Breach of Contract Accompanied by a
18 Fraudulent Act, Unfair Trade Practices, and the
19 Motion for Injunctive Relief, I think, is what I
20 granted Summary Judgment on. This is a Motion to
21 Reconsider Those Rulings?

22 MR. BARNES: Yes, Your Honor. I'll start
23 wherever you want. I figured I would start with the
24 injunctive relief first if that's okay?

25 THE COURT: Okay.

2
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15 (INDEX AT REAR OF TRANSCRIPT)
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4
1 MR. BARNES: Your Honor, the Plaintiffs would
2 respectfully request you reconsider that Summary
3 Judgment on Injunctive Relief primarily because I
4 think we might have gotten confused at the last
5 hearing. We kept on talking about taxation and
6 taxes. We're not asking you to throw that out, but
7 even if you threw out taxation we still are entitled
8 to injunctive relief based upon the contract at issue
9 in this case which specifically provides that any
10 registered voter within the Town is afforded an
11 appropriate remedy including but not limited to
12 injunctive relief of the contract, Exhibit 4 of our
13 complaint. Nobody disputes that that's what it says.

14 We're not suggesting that we're going to try
15 to interfere with the taxes of the Town. We're
16 actually saying we'd like to give more money to the
17 Town, but they're affecting our property values. If
18 the property values go up in the Town would get more
19 taxes. So we're not saying we're going to meddle
20 with the taxation on the Town of Sullivan's Island.

21 We are suggesting that we're entitled to
22 injunctive relief. So there is one paragraph,
23 Paragraph 82 of the Second Amended Complaint that
24 refers to taxation. If Your Honor wanted to strike
25 that you could, but we would still be entitled to

5 1 injunctive relief based upon the contractual rights 2 we have. So that's basically the primary argument 3 we're asking for. 4 The Town has cited an Horry Telephone 5 Cooperative case. It's interpreting the South 6 Carolina Competitive Cable Services Act. It has 7 nothing to do with this case. It doesn't even have 8 anything to do with contract rights. It's really a 9 tort case. 10 Again, our argument primarily throughout this 11 whole case is it's a breach of contract, and 12 therefore the contract gives us an injunctive relief, 13 and therefore we should be afforded that remedy. 14 Nowhere in our Complaint do we allege that the 15 Town must enact a new ordinance. That's another 16 argument that the Town is making. We're not 17 suggesting that the Town cannot enact ordinances. 18 What we are suggesting is that they can't violate the 19 1991 deed and contract. So because of that we're 20 entitled to the injunctive relief afforded in that 21 contract. 22 THE COURT: All right. 23 MR. BARNES: Do you want me to do all three of 24 them at once? 25 THE COURT: Yes. Let's go ahead and do all	7 1 delegated it to the current mayor, Mr. O'Neil, in 2 2010. It was his responsibility. Under oath 3 Mr. O'Neil says he doesn't remember what he did, but 4 it's a question of fact, and at this juncture -- the 5 way that the order reads it really seems to suggest 6 that we argued a fraud claim. We didn't. We don't 7 have to prove fraud, elements of fraud. All we have 8 to do is prove breach of contract and some 9 accompanying fraud. So that's why we would request 10 that that not be thrown out of this juncture. 11 It's really a question of fact. Were you the 12 fact finder? You or the jury -- at the last hearing 13 the Town's attorneys told us that they wanted a jury 14 trial. It would be inappropriate to throw that out 15 right now. 16 THE COURT: All right. 17 MR. BARNES: Your Honor, as a part of that 18 argument the Town submitted a memorandum two days ago 19 suggesting for the first time that in and of itself 20 you can't get punitive damages against a 21 municipality. For the most part that seems to be 22 true, but there are exceptions, and I have a case in 23 which punitive damages were found against accounting 24 based upon the conduct of its police officers. 25 So it's not -- there's no per se rule that I'm
6 1 three of them. I'm with you on that one. 2 MR. BARNES: Okay. 3 THE COURT: I'm sure you didn't waive the 4 other ones, but they seem to sound like a tort, but 5 go ahead. 6 MR. BARNES: Breach of Contract Accompanied by 7 a Fraudulent Act, Your Honor, respectfully I think 8 that the order that was signed inappropriately 9 confuses Breach of Contract with -- Breach of 10 Contract Accompanied by a Fraudulent Act with a fraud 11 claim. It's very clear that under South Carolina law 12 you don't have to prove nine elements of fraud in a 13 breach of contract. It's a contract cause of action. 14 It's not a tort cause of action, and therefore -- the 15 question is, what do you have to prove under breach 16 of contract? 17 You have to prove breach of contract, you have 18 to prove fraudulent intent relating to the breach, 19 and you have to prove fraudulent act accompanying the 20 breach. We can do that. At this stage of summary 21 judgment, giving us the benefit of the doubt, there 22 is evidence that we put forward that the Town's 23 employees have fraudulently monkeyed with a form that 24 was submitted to all of the Town residents. The 25 former mayor has given testimony under oath that he	8 1 aware of that punitive damages cannot be found 2 against a municipality. So it's really important for 3 us to have punitive damages on the table and if you 4 throw this claim out we wouldn't have an argument to 5 be made on punitive damages. Again, we think that's 6 best left in the hands of the fact finder and deny 7 the Summary Judgment. 8 Finally, Your Honor, on this argument, the 9 Town repeatedly tries to confuse what they say is -- 10 we're just trying to meddle with legislative conduct 11 inappropriately. We don't have a right to talk about 12 legislative conduct. I agree with him. We're not 13 saying that legislative conduct -- that we have a 14 right to tell them what they can and can't do with 15 regard to passing ordinances. 16 What they can't do is again be violative of a 17 contract that they entered into, that they signed, 18 relating to this piece of property, the accreted 19 land. That's all I have to say about Breach of 20 Contract Accompanied by a Fraudulent Act. 21 The final Motion to Reconsider is the Unfair 22 Trade Practices Act. Your Honor, the order again on 23 the Unfair Trade Practices Act, I think 24 inappropriately frames our argument in this case. 25 Again, they're saying that we have a right to a view.

9 1 We spent hours and hours and hours trying to 2 craft our complaint specifically with the knowledge 3 that there is no right to a view under South Carolina 4 law. We recognize that. There is no right to a 5 view. 6 That does not mean that the Town cannot live 7 up to its obligations on their contract. The 8 argument is -- again, if you read the South Carolina 9 Unfair Trade Practices Act, it's very liberal. It's 10 very broad. It says, Any unfair or deceptive act or 11 practices in the conduct or any trade or commerce are 12 hereby declared unlawful. 13 We would argue that by engaging in the very 14 transaction that they did with regard to their 15 accreted land in 1991 whereby they sold it to the Low 16 Country Open Land Trust on the very same day, they 17 deeded it back to themselves. That is engaging in 18 real estate, the commerce of real estate, and also 19 not only that act in and of itself, but the way the 20 Town is managing that land of theirs affects the real 21 estate on the whole island. 22 So they have done sufficient acts that would 23 constitute trade or commerce and therefore we're 24 entitled to our Unfair Trade Practices Act cause of 25 action. So the Town cites to the Health Promotions	11 1 by this document that it wasn't going to be an 2 easement. It was going to be a contract. 3 People that live on the front beach 4 contributed money to pay her a fee to do that 5 document, so the whole point of why we're here today 6 is we're not dealing with a Town passing an ordinance 7 and the Town's right to govern the people who live 8 there. We're dealing with a contract that was entered 9 into in '91 that everybody on that island relied upon 10 to maintain what was there and how it appeared at 11 that time. That's all we're after. 12 What happened after that '91 date is two 13 ordinances were passed systematically on purpose to 14 allow certain vegetation to grow so that the ocean 15 view disappeared so that my next door neighbor, 16 Tom McCutcheon, says he may as well be in Columbia in 17 his backyard. I think he's on front beach. People 18 who have been to his house have seen the enormous 19 trees in front of his house. 20 Dr. John Arthur Siedman's (phonetic) daughter 21 lives on the other end of the island. She has trees 22 two feet from her front porch that are like this 23 (indicating). She doesn't know the ocean's out 24 there. Her name is Forte. 25 We brought this case for two individuals
10 1 Specialist case versus the South Carolina Board of 2 Dentistry. 3 For the facts in this case, they're dealing 4 with hygienists that want to perform certain 5 procedures while they're in hygiene school. I don't 6 see how that's relevant to the facts in this case. 7 In the hygiene case there's no contract involved. 8 It's really just a negligence tort cause of action. 9 We're talking about a contract here. 10 Finally, Your Honor -- I couldn't find any 11 case directly on point, but we made this argument 12 from the start that it's not just the Town's action 13 related to the accreted land. It's also their 14 inaction. It seems to be a novel issue as to whether 15 inaction can constitute a breach -- an Unfair Trade 16 Practices cause of action. So to the extent that 17 that hasn't been ruled upon we would argue that it's 18 inappropriate to throw that cause of action out right 19 now. 20 THE COURT: Thank you, Mr. Barnes. 21 MR. HOOD: I just have a couple of points. 22 When the accreted land issue came up the Town hired 23 Susan Smythe to draft a document to accomplish the 24 goal. The residents, including myself, thought it 25 was a great idea because we were going to be assured	12 1 because they met the criteria we needed to bring a 2 lawsuit. With these claims the Town has a motivation 3 to settle with us. Without these claims we're going 4 to be fighting this thing until Jean Toal writes an 5 order and we have a final decision. We're ready to 6 do that for however long it takes also. 7 If this Town Council understands that they 8 could get treble damages, we could collect attorney's 9 fees which are enormous for them and for us. Of 10 course, ours is pro bono unless a jury gave them to 11 us. Under the UTPA they could and then Your Honor 12 could treble. 13 So we're talking about this tremendous amount 14 of pressure on a Town Council to do what's right. 15 Just last week I learned that our damage claim for 16 front beach property on this -- I'm not sure how many 17 are involved -- one number someone gave me was 81. 18 The tax assessor assessed front beach property at 19 \$3 million just for a lot across the front of that 20 island. 21 A lot sold recently for 1.2 million, so our 22 damages that Tommy Hartnett gave us when this 23 litigation started of 1 million per lot has now gone 24 to \$1,800,000 per lot. We've lost value because of 25 this stupid fight.

13 1 No one wants to hurt the ecology. My God, 2 I've got a place in the country where I've planted 3 tens of thousands of trees. I think 80,000 trees. 4 We do want to have what we want on Sullivan's Island. 5 We grew up having it. That is a view of the ocean, 6 to smell the ocean, to see the ocean, to see the 7 ships come in and out. We don't have that anymore. 8 As a result the Town's tax base is going to 9 get dropped significantly once everybody figures this 10 out and starts appealing -- we're talking about a 11 tremendous amount of lost tax revenue. 12 So anyway, at the end of the day we've got a 13 contract that says we can get an injunction. We've 14 got a contract that's been breached, and I love 15 Breach of Contract Accompanied by a Fraudulent Act. 16 I've had tremendous recoveries on those -- that one 17 claim because it's so easy to prove. Of the nine 18 elements -- just one thing and we've got it. We got 19 a form that was changed. If we can ever put our 20 finger on who changed that form or who directed it be 21 changed, we've got a great lawsuit against that 22 person. 23 At the end of the day we want to do what's 24 right. We had a mediation with Tom Wills. We split 25 the cost of it. We still haven't gotten anywhere. I	15 1 What he's asking the Court to do is leave in 2 these causes of action that you've already thrown out 3 so that he can have a stick over the Town of 4 Sullivan's Island, an improper stick, to threaten 5 them into resolving the matter. You were right the 6 first time on all three of these. They have said 7 nothing today to change it. 8 Mr. Van Raalte is going to address the legal 9 issues on those three, but please, you've got to 10 disregard what Mr. Hood said with all due respect. 11 He's my friend, and I appreciate where he's coming 12 from, but it's got nothing to do with the decision in 13 front of you today. 14 THE COURT: All right. Thank you, Mr. Hair. 15 Mr. Van Raalte? 16 MR. Van RAALTE: Thank you, Your Honor. To 17 reiterate, we believe that Your Honor ruled correctly 18 on each of the three motions before you when they 19 came up the first time. 20 Let me start by responding to the comments 21 about the Motion for Injunctive Relief. What it 22 really comes down to is separation of powers, and 23 while they try to downplay it our own Supreme Court 24 recently in 2014 said the following in the Horry 25 Telephone case. There they were arguing about
14 1 thought the thing was going to be resolved. The Town 2 was going to have committees, come up with ideas, we 3 would present them to our clients, and we would move 4 on in life, but that hasn't happened. So I'm ready 5 for a jury trial. I'm ready to go for treble damages 6 and attorney fees, and I'm ready to have this whole 7 thing brought to a head so we can take it to the next 8 level. 9 I would like Your Honor to be the trial judge 10 so we don't waste time getting in the Circuit Court 11 system, waiting for a judge a year from now or two 12 years from now to have time to hear us. I'm 13 available when it suits you. 14 THE COURT: All right, sir. Very good. 15 MR. HAIR: Judge, may it please the Court? 16 I'm going to respond to Mr. Hood, and Mr. Van Raalte 17 is going to do what we're here to do today, which is 18 argue the law and Motions for Reconsideration. 19 I ask the Court to disregard everything that 20 Mr. Hood just said. It's got nothing to do with why 21 we're here today. I patiently sat here and listened 22 to him. He's very eloquent about his belief and 23 passion about his case and what they want, and I 24 clearly understand that. We've always understood 25 that.	16 1 getting a consent and an issuance for a franchise. 2 Finally, HTC argues these improper bases rendering 3 the City's denial of consent unreasonable and request 4 that the Court vacate the City's denial and issue an 5 injunction requiring the City to grant an HTC 6 franchise. This requested relief is fundamentally 7 improper as it would require this Court to compel the 8 City Council to enact an ordinance which would 9 consist of a violation of the separation of powers. 10 That's what we're talking about here. What 11 they're asking for in Items A and C of their 12 injunctive relief is essentially for you to issue an 13 injunction requiring the Town to perform certain 14 cutting. The problem is there is a law on the books 15 that says that that cutting can't occur. 16 The only way that gets reconciled is 17 effectively that Your Honor forces a legislative body 18 to take action, to pass -- to vote on a new law. 19 That's a separation of powers issue that can't be 20 remedied by this lawsuit. 21 They talk about their contract rights 22 repeatedly and I want to come back to that, but 23 specifically here -- I guess I can imagine the 24 contract, the deed if you will, talking about 25 injunctive relief. Maybe it would be appropriate in

1 some circumstances. If there wasn't a law on the
2 books forbidding the cutting then a violation could
3 perhaps be remedied by Your Honor giving the Town a
4 directive that its staff needed to cut or to do
5 whatever.

6 In this case what you have is an ordinance, a
7 duly passed law that says, Don't do this. What the
8 Plaintiffs are asking for is Your Honor to force the
9 Town to do something, and the only way that can
10 happen lawfully is for the legislative body, Town
11 Council, to change the law. That's where you get
12 into a separation of powers issue.

13 If anything, on the Motion for Injunctive
14 Relief, we say that Your Honor's order should go
15 further than it did the first time. That's a far cry
16 from reversing itself.

17 Let me change now for a moment to Breach of
18 Contract by a Fraudulent Act. You know, I guess
19 theoretically there might be a world where it's
20 possible to plead that as a strict contract, and now
21 I've run into the immunities that we talked about.
22 That's not the way that the Plaintiffs pled it here.
23 They specifically pled -- talking about their
24 independent and tortious wrong. That's what they
25 wanted -- to punish him. They already have a breach

1 of contract claim. They've already asked for those
2 damages, so what they set forth in their own
3 complaint, their own memos in this cause of action,
4 is that they want to be compensated for an
5 independent and tortious wrong. We think that that
6 is clearly barred by the Tort Claims Act. It should
7 be.

8 Additionally, we point out the punitive
9 damages, and we do, as Mr. Barnes mentioned, believe
10 that punitive damages are inappropriate against the
11 government. We believe that the law is pretty clear
12 on that.

13 I point Your Honor to the McMurphy and
14 Brinkley cases, both of which are cited in my brief.
15 Basically they go through a reasoning that it is
16 improper to punish the public. In order to make a
17 point the government is going to be expected to do
18 the right thing and to honor the contracts. If
19 there's a breach the breach should be compensated.
20 There's not supposed to be this extra quantum of
21 punishment for a tort or a contract or for anything
22 else we'd say.

23 We also really want to touch on the remoteness
24 of the alleged fraud and the fact that it is out
25 there to say the least. If there was a change to the

1 cutting rule it took place -- it got raised in 1995.
2 This questionnaire that the Plaintiffs have talked
3 about being changed happened in 2009. It was part of
4 the legislative inquiry gathering information to
5 consider and contemplate an ordinance change that
6 never took place.

7 Be that as it may, you're talking about 14 or
8 15 years of temporal separation and that's simply too
9 long. I want to turn to a case that Mr. Barnes, I
10 think, cited in the brief that he sent to Your Honor
11 where he quoted, and we've got no quarrel with this.
12 It's the Floyd versus Country Squire Mobile Homes.
13 He quotes the following -- the first half of the
14 sentence.

15 "The fraudulent act may be prior to,
16 contemporaneous with, or subsequent to the Breach of
17 Contract." That's true. It could be subsequent.
18 The Court goes on to say, "But it must be connected
19 with the breach itself, and cannot be too remote
20 either in time or character."

21 As far as remoteness they got both problems
22 here. Fourteen years is too long. A questionnaire
23 relating to an ordinance that wasn't the one that
24 changed the cutting rule -- there was an ordinance
25 that wasn't even passed. It's too remote in

1 character, so for that reason we also feel that Your
2 Honor should uphold this prior determination on that.

3 Finally, let me turn briefly to the Unfair
4 Trade Practices claim. The basic problem that they
5 run into here is the same with the health promotion
6 specialist. It's that there was a legislative act.
7 That's what they complained about. They called it a
8 breach, but whatever change happened with the cutting
9 rules it was done by Town Council passing an
10 ordinance, and that's exactly what is forbidden here,
11 so Your Honor was exactly right the first time
12 around.

13 You hit the nail squarely on the head that
14 this simply isn't an unfair trade practice. It's not
15 trade or commerce. It's legislative activity.
16 Again, they've talk about contract, contract,
17 contract. Well, they got a Breach of Contract Claim.
18 That's not South Carolina Unfair Trade Practices. If
19 they want to talk about that claim there's a
20 different vessel that they can make those arguments
21 in, but unfair trade practices is not appropriate.
22 Neither is Breach of Contract by a Fraudulent Act,
23 and frankly injunctive relief is not appropriate
24 either.

25 THE COURT: Mr. Barnes?

21 1 MR. BARNES: Your Honor, again, it's a 2 question of fact. They're misinterpreting this 3 legislative conduct. We're not talking about the '95 4 ordinance passage. We're not talking about the 2005 5 ordinance. We're talking about breaching the 1991 6 contract. That's why the temporal problem -- there 7 is no temporal problem because the contract is being 8 breached today. The contract is being breached in 9 2009 or 2010 whenever the questionnaire was monkeyed 10 with. 11 With regard to the injunctive relief, Derk 12 says that we're specifically saying that Your Honor 13 has to tell the Town, perform this cutting, perform 14 that cutting. We're not asking that. We're saying 15 they just have to abide by the 1991 deed. We're not 16 asking you to get into what trees should be cut and 17 what should not be cut as part of this lawsuit. I 18 think that's all I have to say. 19 THE COURT: Okay. Thank you. On the issue of 20 the injunction, Mr. Van Raalte, let me ask you about 21 that one. If the contract calls for injunctive 22 relief, then how -- what equitable remedy would be 23 applicable? 24 MR. Van RAALTE: Your Honor, I guess what I 25 say is two-fold. First off, I can imagine scenarios	23 1 of powers. 2 THE COURT: I understand that. You-all are 3 relying on the argument of the breach of contract, 4 the 1991 contract. That's where the Plaintiffs rest 5 their case. I'm with you. Okay? 6 Let's talk about -- I'm not going to rule 7 today. Is there anything else you-all want me to 8 read other than what you-all submitted in the briefs? 9 Cases? Anything else? I'm going to take it under 10 advisement, but I'll consider it and go from there. 11 Where do we stand as far as moving forward? 12 Whose motion is to be -- the case is in front of me 13 today. I'm typically a non-jury judge. I keep 14 hearing, We want a jury. Tell me where we stand on 15 that one. 16 MR. HAIR: Judge, I would be happy to tell 17 you. Of course you heard the arguments, our Motions 18 for Summary Judgment, their Motions for Summary 19 Judgment, Partial Summary Judgment on different 20 causes of action. You ruled on the three that we had 21 a rehearing on today. I assume you have the rest of 22 them under advisement. 23 You directed us to engage in mediation which 24 we did, and unfortunately the case did not get 25 settled through the mediation process, so where we
22 1 even under this deed where injunctive relief might be 2 something that Your Honor could order. The breach 3 that somebody complains about and brings into Court 4 might be one that is not directly linked to 5 legislative action, so you don't run into a 6 separation of powers argument. That's not this case. 7 In this case what you've got is them complaining 8 about a change in their cutting height and their 9 cutting height is set by an ordinance. 10 So effectively what you've got is squarely in 11 opposition, and what I say is, when you have a remedy 12 mentioned -- there are a variety of remedies that one 13 can get for a contract or a deal or whatever and 14 where one of them runs into a separation of powers 15 problem. 16 That remedy may go out the window. The other 17 remedies may remain if it's established that there 18 are damages or breach or whatever, but that one 19 remedy -- any instances where it is violated with 20 separation of powers, it's gone. That's what we say 21 here. So injunctive relief in the deed -- it may 22 have application, but it's not appropriate on this 23 case. 24 THE COURT: All right. 25 MR. HOOD: We're not dealing with separation	24 1 are is, you've got these other motions under 2 consideration. You've got the Motions for 3 Reconsideration under consideration, and we are ready 4 as the Town, to move forward with trying the case. 5 Now, these three motions that you reconsidered 6 today are important because if you were to reverse 7 yourself on any of those, and we certainly don't 8 think you should, then we believe that the Town is 9 entitled to a jury trial because there would be 10 questions of fact presented with regard to the Breach 11 of Contract with Fraudulent Intent and the others. 12 However, with these out of the case the 13 remaining causes of action are clearly matters of 14 law. I don't believe we have any factual 15 disagreement on any of the causes of action that 16 survive as of today that you have under consideration 17 notwithstanding these three. If they can point out 18 something that we may disagree with factually we will 19 need to try to come to an agreement or I'll tell them 20 that we disagree, but I don't think we do. 21 So in other words, I believe notwithstanding 22 these three motions the case is ready for you to 23 decide. The case is a matter of law. You have to 24 determine what those words mean, and I don't think 25 there's any testimony that would be admissible that

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1 would help the Court in that endeavor.

2 So where I believe we are is you have to

3 decide whether or not you're going to reverse

4 yourself on these three Motions for Reconsideration.

5 If you do then we're ready for a jury trial. That's

6 what we believe that we need, and we are happy for

7 you to do it. If you affirm yourself on these three,

8 which we believe you should, then we believe the case

9 is ready to decide on the briefs, and we would then

10 submit proposed orders outlining our position before

11 the Court. You asked us last time to hold off on

12 that until after we went through the mediation

13 process. I believe that's where we are.

14 THE COURT: All right. Very good. Any

15 difference on that?

16 MR. HOOD: Did I miss something in mediation,

17 that we don't have any kind of agreement?

18 MR. HAIR: What kind of agreement?

19 MR. HOOD: We don't have a resolution of this

20 case by mediation?

21 MR. HAIR: Not that we're aware of.

22 MR. HOOD: We're ready for trial anytime you

23 want to try the case.

24 THE COURT: All right. Very good.

25 MR. HOOD: I think you're going to need a jury

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1 because I'm going to ask for a lot of money.

2 THE COURT: I'm with you.

3 MR. HAIR: There are no causes of action,

4 other than these three, that give them monetary

5 relief.

6 THE COURT: The injunctive relief doesn't

7 typically provide monetary relief, does it?

8 Certainly the other two would.

9 MR. HAIR: But it's not a jury issue.

10 THE COURT: I'm with you. So I'm going to

11 take it under advisement. My goal is to give you-all

12 an answer within two weeks, certainly within a month.

13 Okay? We'll see if we can't go from there. Thank

14 you, gentlemen.

15 (The proceedings were concluded at 11:15 a.m.)

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1 State of South Carolina)

2 County of Charleston) CERTIFICATE

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4 I, Christine A. Smith, Court Reporter and

5 Notary Public for the State of South Carolina at

6 Large, do hereby certify that the foregoing

7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to

9 nor counsel for any party to the cause pending or

10 interested in the events thereof.

11 Witness my hand, I have hereunto affixed my

12 official seal this 22nd day of December, 2015 at

13 Charleston, Charleston County, South Carolina.

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18 Christine A. Smith

19 Notary Public

20 My Commission Expires

21 May 12, 2021

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1 STATE OF SOUTH CAROLINA 2 COUNTY OF CHARLESTON COURT OF COMMON PLEAS 3 Nathan Bluestein, Ettaleah Bluestein, M.D., 4 Theodore Albenesius, III, and Karen Albenesius, 5 Plaintiffs, 6 vs. CASE NO. 2010-CP-10-5449 7 Town of Sullivan's Island and Sullivan's 8 Island Town Council, 9 Defendants. 10 11 12 Hearing before the Honorable Mikell R. 13 Scarborough, reported by Christine A. Smith, Court 14 Reporter and Notary Public, at 3:15 p.m. on 15 July 20, 2015 at 100 Broad Street, Charleston, 16 South Carolina. 17 18 19 20 21 22 Christine A. Smith, Court Reporter 23 Master-in-Equity 24 P.O. Box 30276 25 Charleston, South Carolina, 29417 (843) 958-5071 casmith@charlestoncounty.org	3 1 <u>PROCEEDINGS</u> 2 3 THE COURT: Mr. Hood? I asked Mr. Hair if he 4 told you to come at 3:30. I had you scheduled at 5 3:00. 6 MR. HOOD: I thought it was 3:30. My office 7 said it was 3:00. It's my fault. 8 THE COURT: I've been known to get here late 9 as well. 10 MR. HOOD: This is a scheduling conference. 11 Do you want us to stand, or are we seated all right? 12 THE COURT: You are fine. What I needed to 13 verify with you-all was sort of the status of where 14 we are, and I did get a package of materials from 15 Mr. Hair before I went on vacation last week, so I 16 had a chance to read most of that while I was gone. 17 He reminded me that I have not yet ruled on a 18 number of his Motions for Summary Judgment. The one 19 I had ruled on was subject to a Motion to Reconsider 20 which I have not yet ruled upon. Then there was some 21 discussion about outstanding or ongoing discovery and 22 then whether or not it would go to trial and if so in 23 what fashion. As Plaintiffs' counsel why don't you 24 fill me in, Mr. Hood. 25 MR. HOOD: We have a problem with the month of
2 1 APPEARANCES OF COUNSEL: 2 ATTORNEYS FOR THE PLAINTIFF: 3 A. Walker Barnes, Esq. 4 Robert H. Hood, Sr., Esq. 5 Hood Law Firm, LLC 6 172 Meeting Street 7 Charleston, SC 29401 8 (843) 577-1227 9 Walker.barnes@hoodlaw.com 10 11 ATTORNEYS FOR THE DEFENDANT: 12 J. Brady Hair, Esq. 13 Derk B.K. Van Raalte, IV, Esq. 14 J. Brady Hair Law Offices 15 2500 City Hall Lane 16 North Charleston, SC 29406 17 (843) 572-8700 18 Derk@bradyhair.com 19 20 21 22 23 24 25 (INDEX AT REAR OF TRANSCRIPT)	4 1 October. My son, Jamey, and I have some trials. One 2 is in Florida and is supposed to take two weeks. It 3 will probably take a week, and then he has another 4 one as soon as he gets back here. 5 November is wide open. I was just asking 6 Brady if November is good for him. I would like to 7 get a trial date and get it on your calendar. I 8 think they've waived their right to a jury trial, and 9 we want to try all the issues that are before the 10 Court before Your Honor. 11 I was rushing. I had a little sticker on my 12 desk with two weeks in November that were great. I 13 can't remember which two. 14 THE COURT: I bet you it's not going to be the 15 week of Thanksgiving, though. 16 MR. HOOD: No. It's definitely not that week. 17 THE COURT: Other than that that gets us into 18 the first week of December. There are only three 19 weeks in November. November 2, 9, and 16 are those 20 weeks. 21 MR. HOOD: Right. I think the 16th was one of 22 them, which gives me a break from another trial, I 23 think, if that suits the Defendants. 24 THE COURT: Okay. 25 MR. HOOD: There's a couple of discovery

5 1 things that -- they don't like the fact that I've 2 added a few witnesses, but we don't have a scheduling 3 order. They are just fact witnesses. They've got a 4 survey that I'm anxious to see, a tree survey. I 5 don't see where a survey is critical. It's just the 6 fact that there is a tree here or not a tree there. 7 That's about -- well, let's see. That's about it 8 really. 9 THE COURT: All right. 10 MR. HOOD: We want to take two depositions. 11 They're not in favor of that. 12 THE COURT: Who do you seek to depose? 13 MR. HOOD: A guy named Randy Robinson, a Town 14 employee, I would think would be available anytime. 15 There is a person named Jeff Jackson, who recently 16 built something in the accreted land. 17 THE COURT: Okay. And then you're asking -- I 18 saw a reference to the tree survey. 19 MR. HOOD: I would like to see it just to see 20 what it is, to see whether or not this sheds any 21 light. We tried to go back to mediation and they 22 conditioned it on dismissing the case with prejudice 23 if we worked out or didn't work out something about a 24 transition zone. That doesn't resolve the case. 25 THE COURT: Okay.	7 1 Depending on how you rule on several of those motions 2 really changes both Mr. Hood's presentation and my 3 defense and our presentation. So we really need the 4 Court to rule on those if the Court's inclined to do 5 so. 6 As you know, from hearing from us before, the 7 way we got to your Court is we were up for trial in 8 front of Judge Jefferson. Mr. Hood said, Hey, let's 9 refer this thing to the Master in Equity. We'll have 10 Cross Motions for Summary Judgment and we can be 11 done. So we agreed to do that. 12 That did not involve us affirmatively waiving 13 anything. We thought we could come here and you 14 could rule on the Motions for Summary Judgment and 15 either we would win or we would lose, and in any 16 instance we would be going to Columbia. We still 17 believe that. 18 When Mr. Hood -- we got here and he made a 19 motion to the Court to allow him to amend his 20 complaint. The Court granted that. We opposed that 21 as you will recall, and you granted his right to 22 amend the Complaint. He added causes of action. We 23 answered the Amended Complaint and demanded a jury 24 trial. 25 So even if by some stretch we waived coming
6 1 MR. HOOD: So we would -- we are eager to try 2 to mediate this case and settle it, but not on the 3 terms they dictated. It would just be a routine 4 mediation like we had before. I thought we reached a 5 settlement on a transition zone. The Town's done 6 nothing to go forward with that. Then I got 7 interested in going on in getting the legal issues 8 and the factual issues tried. 9 THE COURT: All right. Very good. 10 MR. HOOD: I think that's where we are. 11 THE COURT: Thank you. Mr. Hair? 12 MR. HAIR: Yes, Your Honor. May it please the 13 Court? We'll sort of take things one at a time. If 14 we're going to have a trial in your Court, November 15 is okay with us. 16 If the Court rules on our pending Motions for 17 Summary Judgment we can avoid having a trial all 18 together and the Supremes can decide whether or not 19 they missed the Statute of Limitations. We would 20 urge the Court to carefully consider the Motions for 21 Summary Judgment and our proposed orders. 22 Along those lines, Judge, as you're looking at 23 those orders and the motions, note, we really need 24 some guidance from the Court on what it is we're 25 going to try if we're going to have a trial.	8 1 here, which we don't believe we did, certainly after 2 he amended the Complaint we haven't waived anything, 3 and we've maintained that there were several causes 4 of action in the Complaint that allow us to have a 5 jury trial and we want that. 6 THE COURT: Those causes of action which would 7 lead to damages, correct? Monetary damages? 8 MR. HAIR: That's correct. Under the breach 9 of contract, breach of contract with fraudulent 10 intent, these are very classic jury issues. There 11 are a couple, I think, that are probably equitable 12 issues like the mandamus and injunctions and those 13 kinds of things. There's clearly four or five of 14 them that would require a jury. I told you last time 15 I was here that I'm fine with you having a jury 16 trial. 17 Unfortunately, we looked at the law, and I'm 18 not sure jurisdictionally if you can do the jury 19 trial. I just don't know. 20 THE COURT: Unfortunately, I think I can, but 21 I haven't had to do that yet. I do have some lawyers 22 asking me to do one, believe it or not. 23 MR. HAIR: Well, again, we don't want to go 24 somewhere else and all that, but I don't want to 25 create an appealable jurisdictional issue that messes

9 1 us up, so with all due respect, if we're going to 2 have a jury trial then we really, both sides, need to 3 look at it hard in the Court to make sure we're not 4 creating an appellate issue. 5 So that's on the scheduling and what the trial 6 looks like, and of course once we know what the trial 7 looks like we'll know better about how long it will 8 take. 9 With regard, Judge, to the discovery we're 10 adamantly opposed to more discovery. We thought we 11 were coming here over two years ago with discovery 12 completed, Cross Motions for Summary Judgment, and 13 out of here. You amended the Complaint and you gave 14 him more time to do discovery. We did that. 15 Contrary to what Mr. Hood says, there is a 16 scheduling order in effect in this case and it is 17 filed with the Court. Discovery ended, according to 18 that scheduling order, in February of 2014. 19 Now, during February and March of 2014 Walker 20 Barnes, Mr. Hood's associate, communicated with us 21 and said, Hey, we want to amend the scheduling order 22 to take another deposition or something and would 23 you-all agree to it? We said, Sure. Then he sent me 24 a proposed scheduling order and sent me an e-mail and 25 said, Hey, Brady, do you mind if I sign your name? I	11 1 clear. When it's our work product they've got to 2 show a substantial need and a substantial harm. 3 There can't be any harm because we're not going to 4 use it. It's my work product, and it's none of their 5 business what I got it done for. 6 So I think that's our position on everything. 7 We want to move the case along. I think if Your 8 Honor is of the mind to grant somebody's Motion for 9 Summary Judgment we can avoid a big old fight in 10 November. If we need to have a big old fight we just 11 need to decide where it's going to be. 12 THE COURT: Let me ask you, in particular, 13 about the tree survey and the ordinance itself. The 14 ordinance provides for the cutting of specific types 15 of vegetation, does it not? 16 MR. HAIR: Yes, sir. 17 THE COURT: And if it's not -- I'm trying to 18 recollect. It's got to be included in that list of 19 vegetation to be cut. If it's excluded it's not 20 included in what can be done; is that right? 21 MR. HAIR: That's correct. There are three 22 species that may be cut: Wax myrtles, popcorn trees, 23 and bacillus (phonetic) -- whatever that is. Nothing 24 else can be cut under the ordinance. You're correct. 25 THE COURT: So if there's a pine tree out
10 1 said, No, sign my name. He signed my name, and he 2 sent it to the Court. 3 I don't know whether it was ever signed or 4 not, but it doesn't really matter because what was in 5 there we already did. So now they're coming back and 6 they want more. You know, Judge, our position all 7 along has been, there really aren't any factual 8 issues here. This is a case that is based upon the 9 interpretation of the contract, interpretation of the 10 statute and the statute of limitations. So yes, 11 we're opposed to discovery. We're ready to get this 12 thing done one way or the other. It's time to move 13 it on. 14 With regard to the tree survey, as Mr. Hood 15 describes it, we commissioned, the lawyers, an expert 16 to go out and survey those trees and give us the 17 information along with us working with them. It's my 18 work product, and he's not entitled to it. It was 19 acquired based on our ideas about what to do with it 20 or not to do with it. We don't plan to introduce it 21 at whatever trial we have. It's ours. It cost a lot 22 of money. 23 We gave them the authority just recently to go 24 out and have a survey done themselves. They can 25 create this very same thing, and the law is pretty	12 1 there it's going to grow; is that right? 2 MR. HAIR: Right. Pine trees, cedars, 3 palmettos, oaks, yes, they can grow under that 4 ordinance. 5 THE COURT: Under that ordinance only those 6 three, and that change came in the 2005 or the '95 7 ordinance? When was that? 8 MR. HAIR: Yes. Before 1995 you could cut 9 everything to three feet. In 1995 they changed it 10 such that you could cut those three species to seven 11 feet, and then they changed it in 2005 so that you 12 could cut those three species to five feet. Of 13 course our argument is that they're challenging that 14 2005 ordinance, and they challenged it in 2010, and 15 it's just too late. 16 THE COURT: Okay. Mr. Hood, anything further? 17 MR. HOOD: Not really. We're ready to get 18 this thing done. 19 THE COURT: Okay. 20 MR. HOOD: We don't think we need a jury. We 21 think you can decide the issues. We do want to take 22 at least a couple of depositions and we've added some 23 additional fact witnesses. 24 THE COURT: On the discovery aspect of it his 25 argument is that it's work product and he doesn't

13 1 plan on using it? 2 MR. HOOD: Well, that's fascinating. I'm 3 supposed to go mediate and settle a case based on 4 something that is his work product and is top secret? 5 I guess we won't ever discuss settlement again. 6 THE COURT: And then tell me about these 7 other -- what is Mr. Robinson's position with the 8 Town? Does he have anything to do with it? 9 MR. HOOD: He is an employee of the Town. I'm 10 not sure what his title is, but he issues permits and 11 different kinds of things. 12 THE COURT: He's a zoning administrator or 13 something? 14 MR. HOOD: They would know. One of the 15 witnesses we requested is over there doing the 16 talking now. His name is O'Neil. He's the current 17 mayor. When all of this was going on he was on Town 18 Council and was very much involved. 19 MR. HAIR: It's my understanding, Your Honor, 20 that Mr. Robinson was in zoning and now he's in 21 building, but he's a current employee of the Town. 22 THE COURT: And then Mr. Jackson was a new 23 owner of property out there? 24 MR. Van RAALT: Mr. Jackson is a naturalist 25 and an arborist who we have been consulting with for	15 1 MR. HOOD: I think it will be at the most two 2 days. It could be three. I told Jack Simons that 3 one time and it took three weeks. He never let me 4 forget it. 5 THE COURT: Okay. On the -- I have your 6 motions before me. I've been reading your orders. I 7 have your Motion to Reconsider before me on the ones 8 I heard. I just recall the day we were in here my 9 head was spinning. You-all had me working hard that 10 day. I'm not inclined to change my ruling for what 11 I've already done. I'm looking hard into how I'm 12 going to rule on the Motions for Summary Judgment. 13 The timing issue has given me some concern. 14 I've gone back and reread -- I know, Mr. Hood, 15 you've said it's not that kind of case. It 16 essentially is not. I've gone back and reread my 17 Bloom versus Sullivan's Island case, which of course 18 is a Board of Zoning Appeals case. This is not a 19 Board of Zoning Appeals. It was actually appellate 20 body merits. It's a totally different standard. 21 I'll keep that in mind as well. Okay? 22 If you-all could do those depositions in short 23 order? 24 MR. HAIR: Judge, one more thing. On the 25 right to a jury trial, do you want us to file a
14 1 a number of years in our management of the accreted 2 land. He's the one who found the various contractors 3 who were hired to cut. 4 THE COURT: Okay. Are those the only two 5 depositions you're seeking at this point in time? 6 MR. HOOD: Yes, sir, that's it. 7 THE COURT: You've done whatever discovery you 8 want done? You don't want to give up the tree 9 survey? 10 MR. HAIR: We've been done, and no, sir. 11 THE COURT: I'm going to allow him to go 12 forward with those two depositions. I'm going to 13 allow him to do that. I'm going to open it up for 14 that purpose. I'm not going to require that you-all 15 provide the tree survey if what you're telling me is 16 it's work product. I don't think there's any need to 17 do that if it's not going to come into evidence. 18 Okay? 19 It is what it is. I'm sure you-all are going 20 to have some photographs for me to look at when the 21 time comes. I'm going to set you-all up for trial 22 the week of November 16th is what I'm going to set it 23 up for. I have essentially that week available. I 24 don't know why it would take longer than that. If we 25 need to get a jury involved we will.	16 1 formal motion with you? If that issue is immediately 2 appealable, and it's my understanding if we don't 3 appeal it immediately we lose it. So we need to know 4 whether you can do that or not. 5 THE COURT: Go ahead. What I can get you is a 6 copy of the administrative order that the Chief 7 Justice sends me every year. I have the authority to 8 do it. We'll have to work with the clerk to get that 9 done. 10 MR. HAIR: That would be great. 11 THE COURT: We'll have to go to a different 12 courtroom, number one, because I don't have a jury 13 room here. If you'll go ahead and send your motion 14 in detailing what causes of action you're contending 15 you're entitled to a jury trial on, and I'll take 16 that under consideration. 17 MR. HAIR: That would be great. I just want 18 the Court to know I'm happy to try it with you with a 19 Jury, but I sure don't want to create any more 20 appellate issues than we already have. 21 THE COURT: I'm with you. Mr. Hair, thank you 22 very much. Mr. Hood, good to see you, sir. Thank 23 you very, much. 24 (The proceedings were concluded at 3:29 p.m.) 25

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON COURT OF COMMON PLEAS Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius, Plaintiffs, vs. CASE NO. 2010-CP-10-5449 Town of Sullivan's Island and Sullivan's Island Town Council, Defendants. Hearing before the Honorable Mikell R. Scarborough, reported by Christine A. Smith, Court Reporter and Notary Public, at 3:00 p.m. on October 1, 2015 at 100 Broad Street, Charleston, South Carolina. Christine A. Smith, Court Reporter Master-in-Equity P.O. Box 52276 Charleston, South Carolina, 29417 (843) 528-3071 csmith@charlottesvillecounty.org	3 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 <u>PROCEEDINGS</u> MR. Van RAALTE: Your Honor, just to clarify, I think we have three motions today. THE COURT: That sounds right. MR. Van RAALTE: It would be my suggestion that maybe we take the Summary Judgment Motion first on the grounds that it's fairly short, and if it's resolved in the Town's favor then it obviates the need to take up the other two at all. MR. HOOD: I don't agree with that at all. I have a Motion to Reconsider first. THE COURT: Let's do the Motion to Reconsider, and then we'll get into that. Okay? MR. HOOD: Your Honor, it's totally confusing to me what I'm going to be trying when we try this case. It's not clear in your orders what you've left standing and what you've struck. Whatever you've struck we would like to have a determination based on true facts, not the believed facts by the Town's lawyers. For example, you made a decision based on the OCRM line. No one knows where the line is except OCRM. It's never been enforced. The Town's building inspector clear cuts his mother's property at Station
2 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 APPEARANCES OF COUNSEL: ATTORNEYS FOR THE PLAINTIFF: A. Walker Barnes, Esq. Robert H. Hood, Sr., Esq. Hood Law Firm, LLC 172 Meeting Street Charleston, SC 29401 (843) 577-1227 Walker.barnes@hoodlaw.com ATTORNEYS FOR THE DEFENDANT: J. Brady Hair, Esq. Derk B.K. Van Raalte, IV, Esq. J. Brady Hair Law Offices 2500 City Hall Lane North Charleston, SC 29406 (843) 572-8700 Derk@bradyhair.com (INDEX AT REAR OF TRANSCRIPT)	4 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 16 every year so she can see the ships. They've never prosecuted her. The OCRM has never been enforced on Sullivan's Island by DHEC to my knowledge. The line has not been redrawn in almost 30 years. It's about 300 or 400 yards off of where the statute says it should be. It will get redrawn, if I'm still alive, and put where it belongs at the primary sand dune. So number one, deciding anything based on OCRM is just not fair to these people. You understand this case involves some 80-some property owners, two of whom are suing. A million bucks plus per property is at risk here by this conduct. It's a significant -- huge significant problem to people who have put a lot of time and money into owning a house on Sullivan's Island. The other thing that's not right about this, Your Honor, is they talk about and what they wrote for you, that they are on extension. The prior mayor wrote a letter -- the Town wrote a letter to the property owners one block of Bayonne, which is Station 25, saying we're not going to ever use it. Enjoy it. Some of the people have planted. Nothing permanent is supposed to be there but use it and enjoy it. So what we're doing is people who live there are cutting the grass,

5 1 planting vegetation. 2 It will never be a street. The Town made that 3 determination. There's no reason to put a street 4 there to block -- a street in front of the houses 5 that are looking towards the beachfront houses. So 6 that affects one of the Plaintiffs, Mr. Bluestein. 7 Mr. Albenesius's house is down two blocks. It 8 doesn't affect his house at all. So to make a 9 decision based on that platted street is ridiculous. 10 It has nothing to do with why we're here. 11 We're here because of a contract that says 12 it's going to always look like it does now. They 13 passed an ordinance that doesn't allow that. It 14 allows things to grow so you can't cut them and you 15 can't see. So what was there in '91 is gone. We now 16 have a forest. 17 To the extent that my next door neighbor, 18 Tom McCutcheon appeals his assessment -- he's told by 19 the Chairman of the Appellate Committee that here's 20 the assessment, the highest and best use of his house 21 is to tear it down. It's a one-story house. He'll 22 never see the ocean. He used to. 23 So at the end of the day we need to try this 24 case on all the issues. This Town needs to be at 25 risk to money being lost. If they were this case	7 1 that I know of. 2 THE COURT: Okay. 3 MR. HOOD: Anyhow, the problem needs to be 4 decided one way or the other. Whichever side you 5 decide with the other side is going to appeal. Let's 6 get on to where we're finally going to get a decision 7 from the Supremes and get it resolved one way or the 8 other. If they're not going to settle then let's get 9 the legal issues resolved. I would like to be able 10 to present to you damages. 11 Tommy Hartnett is going to say four years ago 12 it was a million dollars to each of these two 13 people's properties. Now it's a lot more than that. 14 He's got comparables. The real estate appraisers 15 appraise front beach lots based on -- you're a 16 front-beach lot, \$3 million. Then they added the 17 value of the house. That's what they told us years 18 ago. They can't do that now. 19 So everything is going to have to get 20 reassessed and reduced in value to be fair to the 21 property owners. 22 THE COURT: Do any of these houses of the 23 Plaintiffs do they have ocean views at all? Are they 24 obstructed? Are they non-existent? What's the 25 status today? Mr. McCutcheon's single-story house
6 1 would settle. We were willing to settle and have 2 zones of vegetation, and we thought it was settled. 3 That didn't happen apparently. I don't know where 4 that is with the current Town Council and their 5 lawyers, but it's irrelevant, I guess, for today. 6 We would like to have all of our causes of 7 action decided by you after you hear the testimony 8 and the true facts of this case and not off on 9 some -- you can't do this because OCRM's going to 10 ultimately make the decision. They've never done 11 that before. I'm not worried about them because 12 ultimately they can put the line where it's supposed 13 to be and we're not interested in touching anything 14 near the primary sand dune. 15 All we want to do is have sea oats and wild 16 flowers back instead of poison ivy, all the junk that 17 lives out there now. I just killed four rats in my 18 attic the day before yesterday. I live next to 19 Mr. Bluestein. They've come because of this dadgum 20 forest. I've never had them before. They were big 21 old boys. I almost took a gun up to the attic. They 22 were unbelievable. 23 THE COURT: Big old rats in the attic? 24 MR. HOOD: Huge. They're wharf rats is what 25 they are. We've never had them on the island before	8 1 doesn't have any kind of view I wouldn't think. 2 MR. HOOD: He has none. There might be a 3 little crack of a view between two big cedar trees 4 for one or two houses. I don't think Nicky Bluestein 5 has any view. I don't think Mr. Albenesius has any 6 view. The trees are blocking the whole view. I know 7 that there's not a legal right to a view, but there's 8 a contract in the law in South Carolina under the 9 Constitution, both State and Federal, that contracts 10 can't be dealt with like they dealt with this 11 contract. 12 Susan Smythe wrote it. She didn't want to do 13 an easement. There's an e-mail that says that. She 14 want a contract so future town councils can't change 15 things. It's binding what was done in '91. Leave it 16 like it is. Everybody is in favor of it and relies 17 on it because we think it's going to be beautiful. 18 We're going to have this natural area, and it's going 19 to stay like it is now. We've got pictures we'll 20 show you when we try the case, like it was then, with 21 zero trees. None. 22 Now, because of what can be cut and what can't 23 be cut, you've got awful growth going on that blocks 24 everything. The breezes, the ship channel view, and 25 their response is, when we walk down the beach we

9 1 don't want to see houses. Well, this is Sullivan's 2 Island. It's a family beach. We've been walking 3 down and seeing houses our whole life. For that to 4 be the winning event here is not right to a lot of 5 families. It's totally wrong. 6 I want you to hear the whole case and decide 7 it. Whatever you do we're happy with. Let us have 8 all of these causes of action. Let us go through the 9 whole thing. Let us explain to you some of the 10 things they've done. They're unbelievable. The lack 11 of concern about property values, the lack of concern 12 about impact of the tax base on the island -- we're 13 talking millions and millions of dollars here. It 14 just needs to be done fairly. It hasn't been done 15 fairly. 16 THE COURT: Thank you, sir. 17 MR. HAIR: I just have a brief response, 18 Your Honor. We've been here before you now for over 19 two and a half years. You've heard all of this 20 before. There's nothing different. What Mr. Hood 21 says is not facts. It's not evidence. I don't know 22 about these builders and all that. What he says 23 about the OCRM line is just wrong. It is where it 24 is. We visited with OCRM on more than one occasion. 25 We talked to them about when does it get reevaluated.	11 1 develop what they believe that it needs. Derk is 2 going to talk about that. 3 It's important for you to keep that in your 4 mind. He doesn't like the fact that Bayonne Avenue 5 is a separate parcel that is platted, that is owned 6 by the Town. The reason he doesn't like that is 7 because the current zoning ordinance that they're 8 challenging says that in order to have any right to 9 cut at all you have to be an adjacent landowner. 10 Now, the Town has allowed them to cut over 11 these years through a validly passed zoning 12 ordinance. One other thing I would like for you to 13 think about, Judge, and I know you've ruled on the 14 Statute of Limitations but you ruled in a form 15 fashion. This case is going to Columbia. I would 16 ask you to consider and reconsider that ruling and 17 consider writing your reasons for denying that, and 18 keep this in mind -- and Derk's going to talk about 19 this today. 20 They state in their pleadings that the reason 21 they couldn't take the deed to DHEC, to OCRM to get a 22 permit to cut. They say that. It's ridiculous. We 23 can't take it because they won't accept it. 24 The reason is because they've admitted that 25 nowhere in here does it give them the right to cut or
10 1 It doesn't just change because Mr. Hood wants 2 it to change. Your orders are perfectly correct. 3 You were careful in considering them, you based them 4 on the law, and you made good decisions. Nothing's 5 changed. Nothing's changed before today for you to 6 reconsider and change your opinions. They're not 7 confusing. They're not misunderstood or not 8 understandable. He just doesn't like your rules. I 9 get that. 10 He doesn't like what's happening with the 11 management of the vegetation on the beach. I get 12 that. Bobby and I have talked about it at length. 13 He's unhappy, but just because he's unhappy and other 14 folks are unhappy doesn't mean their rights have been 15 violated, and we've been through this over and over. 16 He said an interesting thing and Derk is going 17 to talk about this more on the Motion for Summary 18 Judgment, but Mr. Hood stood right here today and 19 said, This is about a contract that states that the 20 land is to remain exactly as it was when the contract 21 was entered. That's what he said, but his pleadings 22 say otherwise, and Derk is going to point it out. 23 Their latest pleadings say, Nowhere in the contract 24 does it state that it will remain as it is, that they 25 must get the attention of the parties in order to	12 1 do anything. The only right they have is the right 2 that was granted to them by the Town through the 3 zoning ordinance. 4 The zoning ordinance is what they're 5 challenging. The zoning ordinance is what this case 6 is about, and they missed the Statute of Limitations 7 by five years. What they want to do is convince Your 8 Honor to ignore that it's a zoning ordinance despite 9 their challenge to it. It's the only thing that 10 gives them a right to cut so they want to say, Oh, 11 it's a contract. It's a contract. It's a contract. 12 It's a contract. They admit the contract doesn't 13 give them what they want. 14 So I would ask, as you're reconsidering these 15 things, to reconsider looking at that Statute of 16 Limitations argument in the light that I just 17 presented. I'll let Derk address the other issues. 18 THE COURT: Mr. Van Raalte? 19 MR. Van RAALTE: Yes, sir. I would like to 20 talk about a couple of things and respond to their 21 specific arguments that they put forth in the written 22 pleadings. Regarding the OCRM -- I think Brady makes 23 a good point. They might not like where the line is, 24 but the line is where it is. This is the same 25 exhibit we had at the prior hearing. They talk

13

1 about --

2 THE COURT: We're talking about the OCRM

3 critical line?

4 MR. Van RAALTE: Yes, sir.

5 THE COURT: That supposedly moves every

6 five years. I don't know how often they go out

7 there, but they go out there, right?

8 MR. Van RAALTE: They do periodically, and one

9 of the Plaintiffs is here, and the other one is just

10 down a little bit (indicating), but in any event what

11 Your Honor ruled initially was that -- I can put it

12 on there if that would be easier.

13 As far as the dollar damages go because they

14 had not gotten with OCRM about anything down here

15 that the Rule from the Town really didn't matter as

16 far as dollar damages because they didn't have the

17 right from OCRM to go cut even if you ruled on the

18 Town ordinance tomorrow. So any damages to date

19 wouldn't be right. We think that you're absolutely

20 correct when it came to that, and you should stand by

21 that order.

22 The other thing that Brady touched on is this

23 idea about whether they should have applied, and they

24 cited a regulation along the way that said that they

25 had to present written documentation to OCRM in order

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1 to apply, so they can't do it without us. That's our

2 point exactly. They don't have that written

3 documentation.

4 I wrote back to Your Honor and said, Well, if

5 the deed is as strong as they say it is, why don't

6 they just hand up the deed if it gives them a clear

7 right. They write back, and in their most recent

8 pleading they admit, literally the deed does not

9 explicitly state that the vegetation must be cut and

10 maintained at the heights of 1991. That's exactly

11 our point. That's the whole crux of it, that they

12 don't have a common law or statutory right, and

13 frankly they don't have the deed right either.

14 I would also like to talk about some of the

15 other things that they admit here. This actually

16 sort of walks right into the Summary Judgment Motion.

17 They admit, Your Honor, in their pleadings that

18 basically the deed says what it says. They admit

19 that Paragraph 6 says that the Town may enact

20 ordinances and regulations that are more restrictive

21 than these regulations.

22 As I'll take up in a moment in the Summary

23 Judgment Motion, their own clients have admitted that

24 the reason they're challenging the ordinance here is

25 that it's more restrictive. That's what they don't

15

1 like about it. So it's far from reconsidering and

2 backpedaling as Mr. Hood has asked Your Honor to do.

3 We think that you should stand firm. Damages aren't

4 appropriate in this case, and you should stand on

5 your prior order and decline to reconsider. I'm

6 happy at your leisure to take up the Summary Judgment

7 Motion as well.

8 THE COURT: Let's go ahead and go into that

9 then.

10 MR. Van RAALTE: Thank you, Your Honor. I'm

11 going to have your entire courtroom littered with

12 slides here.

13 THE COURT: I know you-all are getting ready.

14 MR. Van RAALTE: Your Honor, again, we would

15 ask you to grant summary judgment to the Town based

16 upon not just the deed in the language and some of

17 the admissions in the pleadings, but also based upon

18 what the Plaintiffs themselves have told you. We

19 know Mr. Hood even today told Your Honor that there's

20 no statutory common law right to a view, and that

21 that's not it.

22 Anything that they claim they have comes from

23 the deed. Well, we see from their own pleadings that

24 they just filed that they admit the deed does not

25 explicitly state that the vegetation must be cut and

16

1 maintained. They say it's some nebulous intention of

2 the parties, a purpose that you should go deep to try

3 to find.

4 You don't have to go into that because you can

5 just read what the deed says. I mean, Mr. Hood keeps

6 talking about what Susan Smythe would say. Well, she

7 wrote it. What she wrote was, "The Town may enact

8 ordinances and regulations affecting the property

9 which are more restrictive than these restrictions or

10 which are not consistent with these restrictions."

11 So I ask, and Brady and I both asked in

12 depositions -- we asked Mr. Bluestein, What is it

13 that you don't like about the current -- why are you

14 suing over the current rules? We talk about how it

15 was three feet and then went to seven feet. Is that

16 something you like or you don't like? He says, No, I

17 don't like that. Seven feet is too high he tells us.

18 Would you agree with me that with regard to

19 the cutting rules, the 1995 ordinance that makes you

20 cut to seven feet is more restrictive than the 1981

21 ordinance that you allowed you to cut at three feet?

22 Answer, Yes, definitely.

23 It takes you right here to Paragraph 6. It

24 wasn't a mistake that I asked him that question. He

25 has just admitted that what he doesn't like is the

17

1 very thing that the Town has expressly allowed.
 2 We went to Mr. Albenesius and we asked him a
 3 very similar set of questions. You would agree with
 4 me that the 1981 zoning ordinance dealt with the
 5 three-foot height rule, right? Right. And that's
 6 the one that you favor? Correct. And the reason
 7 that you like the 1981 three-foot rule better than
 8 the current one is that it lets you cut more,
 9 correct? He says, Correct. Because it's less
 10 restrictive, and we put something in under
 11 Paragraph 6 that says more restrictive.
 12 As we flow through we ask him, in that sense
 13 the '95 version is more restrictive than the '81
 14 version, right? Answer, yes again and again and
 15 again when we go through this.
 16 Now, in their response they come up with this
 17 theory that it's not an option to be restrictive.
 18 It's restrictive and not inconsistent with these
 19 restrictions. Again, the problem is, that's not what
 20 the deed says. The deed says or. So you can pass
 21 the one or you can pass the other. If you get
 22 through the inner hoop you've complied with
 23 Paragraph 6, and the Town is clearly within its
 24 rights.
 25 We would say, that's exactly what's happened

18

1 here. What you have is a zoning ordinance today that
 2 is, everybody agrees, more restrictive than the one
 3 that was in place at the time of the deed. The
 4 entire dispute is about the fact that it's more
 5 restrictive. It allows them to cut less. It's more
 6 protective of the environment. We think that this
 7 case should be resolved based upon these admissions,
 8 the testimony of the Plaintiffs, and the deed that
 9 they say is the origin of their rise.
 10 MR. BARNES: Your Honor, may I respond?
 11 THE COURT: All right.
 12 MR BARNES: What are we here for today? We're
 13 here for -- we've presented a scintilla of evidence
 14 and the Town has given you deposition snippets of
 15 Mr. Albenesius and Mr. Bluestein. They're giving you
 16 the restriction summary. We're talking about
 17 extrinsic evidence. We've put forth a scintilla of
 18 evidence by the mayor of the Town at the time of the
 19 deed creation.
 20 Mayor Anderegg in a 1991 Post and Courier
 21 article says, To Mayor Anderegg, however, scenic
 22 enhancement means getting a better view of the ocean.
 23 He said, People watching from beach property pay a
 24 high price for property and should be allowed to cut
 25 back growth. The whole purpose of having front beach

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1 property is having a view of the ocean. We've put
 2 forth a scintilla of evidence to go to trial to
 3 present the entire thing and not just snippets of
 4 deposition testimony so we can put it all in context.
 5 We would just ask Your Honor that we would have that
 6 opportunity.
 7 The literal language of the deed --
 8 Mr. Van Raalte is trying to argue it all today.
 9 Well, we'd like to put forth not just the deed but
 10 would like to put forward the entire document and
 11 have witnesses who are involved in that process. I
 12 think we can put forward a scintilla of evidence. We
 13 would ask that you would reconsider the cause of
 14 action be thrown out and clarify for us today what we
 15 can and can't do.
 16 As Mr. Hood said, the main issue we have on
 17 damages is it seems to be that your orders are
 18 stating that there's no right to a view damages.
 19 Now, one, we would ask you to reconsider that, but it
 20 seems also implicit in your orders that we are
 21 entitled to damages as far as nuisance, but we're
 22 really not clear as to what damages remain from the
 23 orders that you've given so far.
 24 THE COURT: Mr. Barnes, I'm assuming the
 25 damages you claim are damages in diminution of value.

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1 That's where a large amount of your damages are
 2 coming from, right?
 3 MR. BARNES: Yes.
 4 THE COURT: You would also argue, I'm sure,
 5 that you've got damages out of the nuisance. You've
 6 got rats in the attic. You've got coyotes roaming
 7 around the island.
 8 MR. BARNES: Increased fire hazard, yes.
 9 THE COURT: You've got other issues as well.
 10 How do you equate those to monetary damages, those
 11 nuisance damages. How do you equate those?
 12 MR. BARNES: Well, we'll have to present
 13 evidence as to why -- how increased varmint
 14 population, increased fire hazard, increased
 15 nuisance, how that has affected the Plaintiffs and
 16 we'll do so.
 17 THE COURT: Okay. Mr. Van Raalte?
 18 MR. Van RAALTE: Your Honor, with respect to
 19 the scintilla of evidence that the Plaintiffs hang
 20 their hat on, I don't think the trial is going to get
 21 the testimony that they want if they're looking for
 22 Mr. Anderegg. Sadly, he's deceased.
 23 Further, even if he hadn't the South Carolina
 24 Supreme Court -- this is going back to 1942 -- It is
 25 a set principal in the interpretation of statutes

21 1 that even where there is some ambiguity or 2 uncertainty in the language used resort cannot be 3 added to the opinions of legislators where others 4 concerned in the enactment of the law for the purpose 5 of ascertaining the intent of the legislature. 6 These transactions were authorized by the 7 ordinance. The Town went through all this stuff. I 8 think the takeaway is that you're not able to take 9 any one council member, any one member of the voting 10 body, and put that up to say what it meant. 11 Otherwise, think about Congress where you've 12 got 400-plus people -- Democrats, Republicans, you'd 13 never get a consensus. That's not competent 14 testimony, so that's the scintilla. 15 THE COURT: That's a good or a bad preference. 16 I understand. 17 MR. Van RAALTE: They don't have evidence. 18 When you're ready I'm also ready to talk a little bit 19 further about the Motion to Exclude. 20 MR. HOOD: He was -- 21 THE COURT: He was the mayor at the time, was 22 he not? 23 MR. HOOD: Yes, sir. He said, if you're going 24 to pay to be on the front beach, enjoy it. This Town 25 is not going to stop it. Unfortunately, there's a	23 1 right? 2 MR. HOOD: Yes. It's a huge swamp and a mess 3 out there. So let us have our trial. Let us have as 4 many causes of action as we have. Let's get the 5 whole thing flushed out and you decide it and we'll 6 be happy. 7 THE COURT: All right, MR. Hood. 8 MR. HOOD: Thank you for listening to me. 9 THE COURT: Certainly. Mr. Van Raalte, your 10 last one? 11 MR. Van RAALTE: Thank you, Your Honor. Let 12 me also talk briefly about the Motion to Exclude the 13 article and testimony of Mayor Anderegg. We touched 14 on that just a second ago. For the record I was 15 quoting a moment ago from Greenville Baseball versus 16 Bearden. That's 200 S.C. 363. 17 We would rely on that same case line as the 18 basis for this Motion to Exclude his Testimony or 19 Articles Related to his Testimony, et cetera. 20 Similarly, Kennedy versus the South Carolina 21 Retirement System, which is 2001, I think tells us 22 that this is still a live and viable case line. On 23 top of that idea, which says that the folks that 24 voted for politicians are not competent to talk about 25 what their intent was -- I would also point out that
22 1 handful of people that want to stop it, that don't 2 want to see anything except trees. That's not 3 Sullivan's Island, and that's not right. We're not 4 in a game preserve, for Lord's sakes. We're on a 5 beach. 6 Judge, the idea of a Summary Judgment on this 7 case -- I try to get Summary Judgment all the time. 8 State Courts' Judges -- I was in Miami arguing for 9 Summary Judgment yesterday. The State Court Judge 10 says, No one gives Summary Judgment. What are you 11 doing here, lawyer? I said, Well, I was hoping, and 12 that's what they're doing. This case has got issues, 13 genuine issues of fact. It needs to be decided by 14 you, but you need to hear all the facts. 15 Don't run on this stupid line here in this 16 picture. It doesn't even show one of the Plaintiffs' 17 house. His house is way on down the beach. I don't 18 know where the line is in front of his house. The 19 line in this picture is not where the -- the water is 20 not where the water is now. This is Nicky's house 21 here. The water is out here now in front of Nicky's 22 house. 23 THE COURT: That's all filled -- 24 MR. HOOD: All that's filled in. 25 THE COURT: That whole gully is filled in now,	24 1 when you got a deceased mayor in a newspaper article 2 that you're dealing with hearsay within hearsay and 3 it would not be admissible for that reason either. 4 So for both of those grounds we would ask that 5 it be excluded. Further, the ability to cross 6 examine them, now that he's deceased obviously, is 7 gone. That's not furthering the goal of finding 8 truth in justice we think to allow folks to go back 9 20 years and plus isolated statements. 10 THE COURT: The statement was made in the 11 press in 1991; is that what it was? 12 MR. Van RAALTE: It was. That was one 13 opinion, certainly in 1991, and there were, of 14 course, folks on the other side, I'm sure, that had 15 different opinions. We think that what you should be 16 doing -- excuse me, Mr. Hood, if I could have just a 17 second -- what Your Honor should be focused on, given 18 the Plaintiffs' contention that it's the deed. It's 19 the deed. It's not common law. It's the deed. 20 Well, we ought to start with the deed. We 21 ought to look at the four corners of the deed. We 22 ought to read the deed, and only if you get beyond 23 that might other things come into play, but where the 24 deed tells you clearly what the answer is, all the 25 rest of it doesn't come into play.

25 1 MR. HOOD: I thought you might want to see 2 this article. It's well-written by the Post and 3 Courier for a change. Judge, this is a little 4 premature. This is a Court of Equity, thank 5 goodness. 6 THE COURT: It gets my attention right off the 7 bat because the indicted judge wants a salary. 8 MR. HOOD: There you go. There is a little 9 teeny corner down there on that page, but it picks up 10 for two more pages. 11 THE COURT: I remember those days, too. 12 MR. HOOD: The Judge is not you. 13 THE COURT: Tree work, I've got it. Tree Work 14 by David Quick. Okay. He's still around? 15 MR. HOOD: Yes. 16 THE COURT: All right. There you go. 17 MR. HOOD: That was the start of the jungle 18 that's growing out there. I mean, it's a jungle. 19 THE COURT: Well, let me just tell you what 20 I've thought about this case. I'm just going to be 21 frank with you-all. It's one of the things that I've 22 wrestled with in this matter. What concerns me -- I 23 understand the Plaintiffs want to be able to 24 establish damages and that those damages could be 25 substantial if it impacts the value of the property.	27 1 contract is something separate from an easement 2 although an easement ultimately is a contract. What 3 do we have here? So that has been in the back of my 4 mind, sort of what's driving this train from the 5 Plaintiffs' perspective. How are they impacted as 6 citizens of the community who live right around that 7 accreted land and what's going on with that land? 8 How has it impacted their lives on a day-to-day 9 basis? 10 MR. HOOD: I can bring in 100 people to tell 11 you, which start with me. My golden retriever was 12 killed by an Eastern Diamondback rattler in my front 13 yard because of this accreted land. I caught the 14 snake two weeks later and killed it. A lot of people 15 have seen a lot of poisonous snakes on the island 16 because they have a habitat for them now. They're 17 under their houses where their children and 18 grandchildren are playing. It's a huge problem. 19 Mosquitos have never been worse on Sullivan's 20 Island in my lifetime, and I grew up going there in 21 the summer as you know. The rats? We've never had 22 rats. These are not little mice. I'm talking about 23 something with a big old long tail, and a big old 24 ugly looking thing. 25 THE COURT: A wharf rat.
26 1 What's giving me concern has more to do with 2 the police power of the island and what they're doing 3 to protect and make sure that the residents of the 4 island are safe and that they're not being inundated 5 with -- I think I was looking at some of the language 6 yesterday -- mosquitos. 7 The idea was it was going to be protected so 8 they were going to keep the mosquito abatement down 9 and varmints down and those types of things. That's 10 one of the things that's sort of been in the back of 11 my mind as to whether or not the unbridled growth of 12 accreted land and its impact and how it impacted the 13 residents of the island. 14 That's been my issue because that's when you 15 do get into the purpose behind the police power, 16 behind the zoning ordinances and those types of 17 things. That's sort of how -- I've been trying to 18 gauge this place. That's when I granted summary 19 judgment on some of those issues. That was really 20 what I was looking at there. 21 I don't think anybody in this room says 22 there's a right to a view, a legal right to a view 23 under our laws. Now, whether or not there's a right 24 under this contract -- I understand that's what your 25 argument is. There's a contract right here, and the	28 1 MR. HOOD: If they bite a child we've got a 2 problem. The child is going to have to have rabies 3 shots. We have the damn coyotes. I mean it's 4 unbelievable that we would have coyotes. You hear 5 them at night. You can sit on your porch and hear 6 them. They're out there in big packs. 7 Once they run out of something to kill and eat 8 they're going to start biting on whatever they can 9 find. Then it's going to be a real problem. When we 10 have them in the country we shoot them. That's what 11 ought to be done at the beach, but they're not 12 shooting them. 13 The other things we've got going out there is 14 poison ivy. When you're walking to the beach if you 15 brush into some of this junk your child gets poison 16 ivy. If they're allergic to it you've got a real 17 problem. All of a sudden you've got to get an 18 EpiPen. 19 The kind of vegetation that is growing has no 20 value to any wildlife. One of our witnesses is a 21 two-star general, Nat Robb, who you probably know. 22 Nat grew up coming to Charleston and he ended up 23 marrying Lucy Roper (phonetic) and moving here. He 24 was in charge of eight hurricanes in North Carolina 25 as the National Guard chief. He will tell testify

1 that trees are the worst thing you can have in a
2 hurricane.

3 The storm we have offshore right now, if it
4 came in those trees would get uprooted and be flying
5 through the air into everyone's houses like missiles.
6 If we had wild flowers and sea oats out there, which
7 we used to have, nothing would happen. The sand
8 would be moved around and leveled and the water would
9 recede and everything would be fine.

10 We saw that in Hugo, the damages that Nicky
11 had at his house were from flying debris. That's
12 another nuisance kind of problem. I could go on and
13 on and on. I get calls, letters, and e-mails from
14 all these people that live on the island who are
15 putting up with this and wondering, Why is this
16 allowed in a civilized normal society? Why do we
17 even have to fight about it?

18 I mean, we're paying -- based on a \$3 million
19 lot, to smell and see and feel the ocean, and you
20 don't even know it's out there. It's not right. As
21 Anderegg says, It's not right. You're going to make
22 people pay those kinds of taxes and claim they have
23 that kind of value, don't tell them to tear the house
24 down like they did with Mr. McCutcheon. Let them
25 have what they had in '91 and enjoy it.

1 That's all we're asking. So when you look at
2 this contract and you think about the Constitution
3 and its application to contracts it says, Views. It
4 says, Reasons. It says the things we're claiming.
5 So let us develop that in front of you. You think
6 through it, rule however you're going to rule. One
7 of us is going to be unhappy and we'll move on.
8 Let's get all the issues in front of you.

9 MR. HAIR: Judge, let me address what Mr. Hood
10 said. What Mr. Hood is asking you to do is ignore
11 the law, ignore the law totally, ignore the contract,
12 ignore the zoning ordinance, ignore the police
13 powers, ignore the way we run local government, and
14 help him because he doesn't like what's out in front
15 of his house on somebody else's property.

16 It's all about the view. Their claim is it's
17 all about the view. It's all about the view to
18 Mr. Hood and the front beach owners. He would have
19 you believe that there are hundreds and hundreds of
20 people on the island that share this view. That's
21 not right.

22 They just had an election, and this was a hot
23 issue in the election as you might suspect, and the
24 people voted, and the people didn't vote folks in
25 that want to go cut down all that vegetation, so

1 there's differences of opinion as the Court knows.
2 This idea of a nuisance, no. One man's nuisance is
3 another man's playground.

4 There are plenty of scientific reasons about
5 how you let nature take its course. It's the
6 survival of the fittest, and I don't know why the
7 coyotes don't eat Mr. Hood's rats because that's what
8 they eat, but what they propose is this idea of a
9 three-foot flat top. We can bring in all the
10 scientists that will say, that's the worst thing you
11 can possibly do. That's not the natural state.
12 That's an artificially manmade state that creates
13 this area underneath for other critters and varmints
14 to live.

15 Now, the Town is charged with the
16 responsibility of managing that property, and they do
17 that through their zoning ordinances. There's ways
18 to challenge that. They missed that. I want to end
19 this today because I want you to think about
20 something. It's all in their pleadings, this one
21 foam board.

22 They acknowledge that the deed does not
23 explicitly state that the vegetation must be cut and
24 maintained to the heights of 1991. They admit that.
25 Okay? So if they admit that, that it's not in the

1 deed, then where is it? Where is it?

2 Here's what they said. It's encompassed in
3 the intention of the contracting parties by virtue of
4 the stated purpose of the deed, the intention of the
5 contracting parties. Guess what the Plaintiffs are
6 not? They are not contracting parties. There are
7 two contracting parties: The Town of Sullivan's
8 Island and the Low Country Open Land Trust.

9 We have provided numerous documents through
10 our pleadings that the Low Country Open Land Trust,
11 Elizabeth Hagood's affidavit says the Town is doing
12 exactly what the deed says for them to do. We have
13 submitted to the Court at lease 15 annual inspections
14 by the Low Country Open Land Trust that say the Town
15 is doing exactly what the deed says.

16 The rights that the Plaintiffs have are
17 third-party beneficiaries to enforce it. That's not
18 what they're saying here. They say it is the
19 intention of the contracting parties to know what the
20 Town's intention is, and we know what the Low's
21 intention is. They are the only two contracting
22 parties. So you can grant Summary Judgment based on
23 their own pleadings. I would ask you to do that.

24 THE COURT: Okay.

25 MR. BARNES: Your Honor, we're talking about

33 1 one snippet of a pleading. I'm not even sure which 2 one it is. We've submitted 70 pages, 100 pages of 3 memorandum. We've put a scintilla of evidence in 4 front of you as to our theory in this case. We think 5 we are entitled to a trial before you. 6 One other thing I forgot to mention earlier, 7 today for the first time there's been nothing in 8 writing from the Town about the Statute of 9 Limitations issue. 10 I would say it's an improper time to argue. 11 If they wanted a Motion to Reconsider on the Statute 12 of Limitations they should have filed one. We put 13 forward plenty of arguments that this is a sealed 14 document. 15 That's why we have a 20-year Statute of 16 Limitations. That's why filing the lawsuit in 2010, 17 19 years after the 1991 deed was timely filed, and 18 Your Honor has already ruled that the case not get 19 thrown out on the Statute of Limitations. I just 20 wanted to add that. 21 MR. HOOD: You've made that the law of this 22 case. 23 THE COURT: I think I ruled on that question. 24 So here's what I want to do. I have 25 Plaintiff's Motion to Reconsider. I have Defendants'	35 1 MR. HOOD: We don't need to call the mayor as 2 our first witness. 3 MR. HAIR: One thing that I agree with 4 Mr. Hood on, and I don't agree with you on very much, 5 but I agree with you that we really do probably need 6 to come back as soon as we can and get an idea of 7 what is left and what you're going to allow and what 8 you're not going to allow. 9 I think you would agree with me that depending 10 on what causes of action are left and what kind of 11 evidence you're going to be willing to hear, this 12 thing could last a day or it could last a week. 13 We've bantered back and forth about different 14 witnesses and different testimony. It really could 15 change dramatically. It could be a very, very long 16 trial or it could be a very, very short trial 17 depending. 18 THE COURT: Then why don't you-all submit to 19 me -- as it stands today why don't you-all submit to 20 me pretrial briefs as to what it is or on what issues 21 you've got. If you're not clear on something -- I 22 understand what you're telling me. As I indicated 23 today I thought I was relatively clear on the damages 24 question. That isn't what you want to hear, but it's 25 kind of where I'm thinking.
34 1 renewed Motion for Summary Judgment, and then I've 2 got the issue about the Motion to Exclude the 3 Testimony. Those are the three issues that came 4 before the Court today. 5 I'm going to review this material, and I'll 6 get back with you-all. My plan is to get back with 7 you-all by the end of this month. I know we're 8 getting ready for trial. We have a trial date. I've 9 got an entire week set aside as I recollect. 10 MR. Van RAALTE: November 16th. 11 THE COURT: Right. 12 MR. HOOD: Does that still suit you? 13 THE COURT: That works for me. Does that work 14 for you-all? 15 MR. HAIR: It sort of does. The mayor -- 16 Mayor O'Neil might have a conflict on the 16th. Met 17 me check. 18 MR. Van RAALTE: Not the entire term but for 19 some limited part. 20 THE COURT: For one day or something? I may 21 have some conflict come up that week. The public 22 hearings for the Judges are the 16th and the 30th. 23 One of those days I'm going to have to go up to 24 Columbia. One of those days of those weeks I'm going 25 to have to go to Columbia.	36 1 Who are your witnesses? How many are you 2 going to need? Let's get some idea as to how long it 3 will take. I think that's important for us all to 4 do. I'm going to tell you, I've already set a week 5 aside. I did that based on the indications I've 6 gotten previously. So unilaterally grant your 7 Summary Judgment Motion today and dispense with the 8 whole thing, I'm expecting us to be heading towards 9 trial come the week of November 16th. Okay? 10 MR. HOOD: Good. 11 MR. HAIR: Obviously, if you grant our Motion 12 for Summary Judgment today then that resolves it. 13 That's it, right? Bobby's Motions to Reconsider are 14 critical because the aspect of damages turns it into 15 a whole different game. 16 THE COURT: I agree. I agree. 17 MR. HAIR: So if everything stays as it is 18 today it's not that long. So if the Court could help 19 us out by just ruling one way or the other we could 20 figure out the rest. 21 THE COURT: All right. You all do that. I'm 22 going to be out the last two weeks of October, so 23 what I will try to do is get you-all a response 24 before I go. 25 MR. HOOD: Once we have that we can do the

1 pretrial.

2 THE COURT: That will be the great. So that
3 will be the 16th. That's two weeks.

4 MR. HAIR: And we're happy to sit down with
5 the Plaintiffs and talk about it. We'll sit down and
6 say, Here's our witnesses, and here's what it will
7 take and all that.

8 The COURT: That will be fine. And then if
9 you-all will get me pretrial briefs somewhere around
10 that first week in November we'll take a look at
11 that. Okay? If we need to get together again we'll
12 find time to do that. Okay?

13 MR. HOOD: Thank you.

14 MR. HAIR: Thank you, Judge.

15 THE COURT: Very good. Thank you-all.

16 MR. HOOD: I appreciate your time.

17 THE COURT: Yes, sir.

18 (The proceedings were concluded at 3:45 p.m.)
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25

1 State of South Carolina)

2 County of Charleston) C E R T I F I C A T E

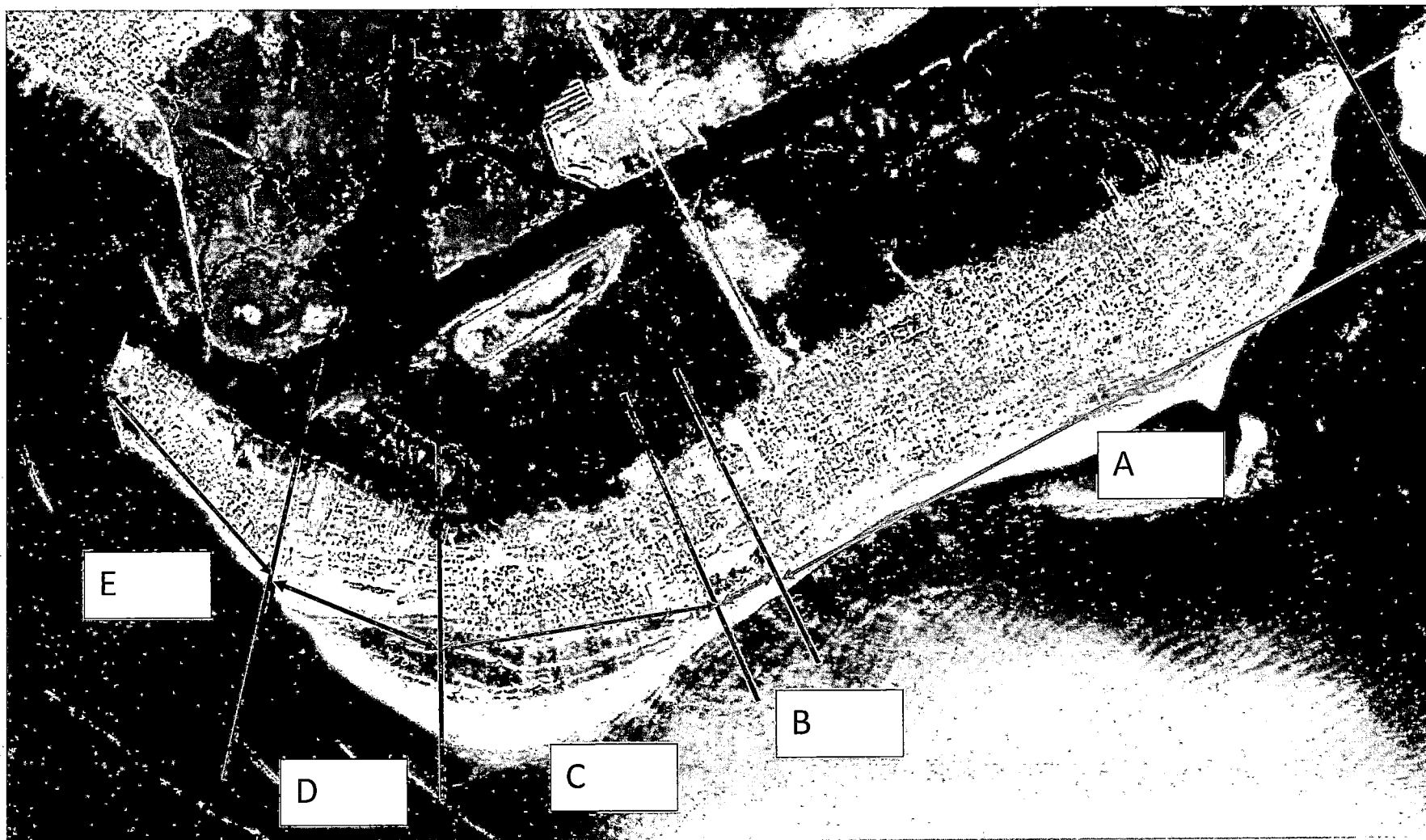
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4 I, Christine A. Smith, Court Reporter and
5 Notary Public for the State of South Carolina at
6 Large, do hereby certify that the foregoing
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to
9 nor counsel for any party to the cause pending or
10 interested in the events thereof.

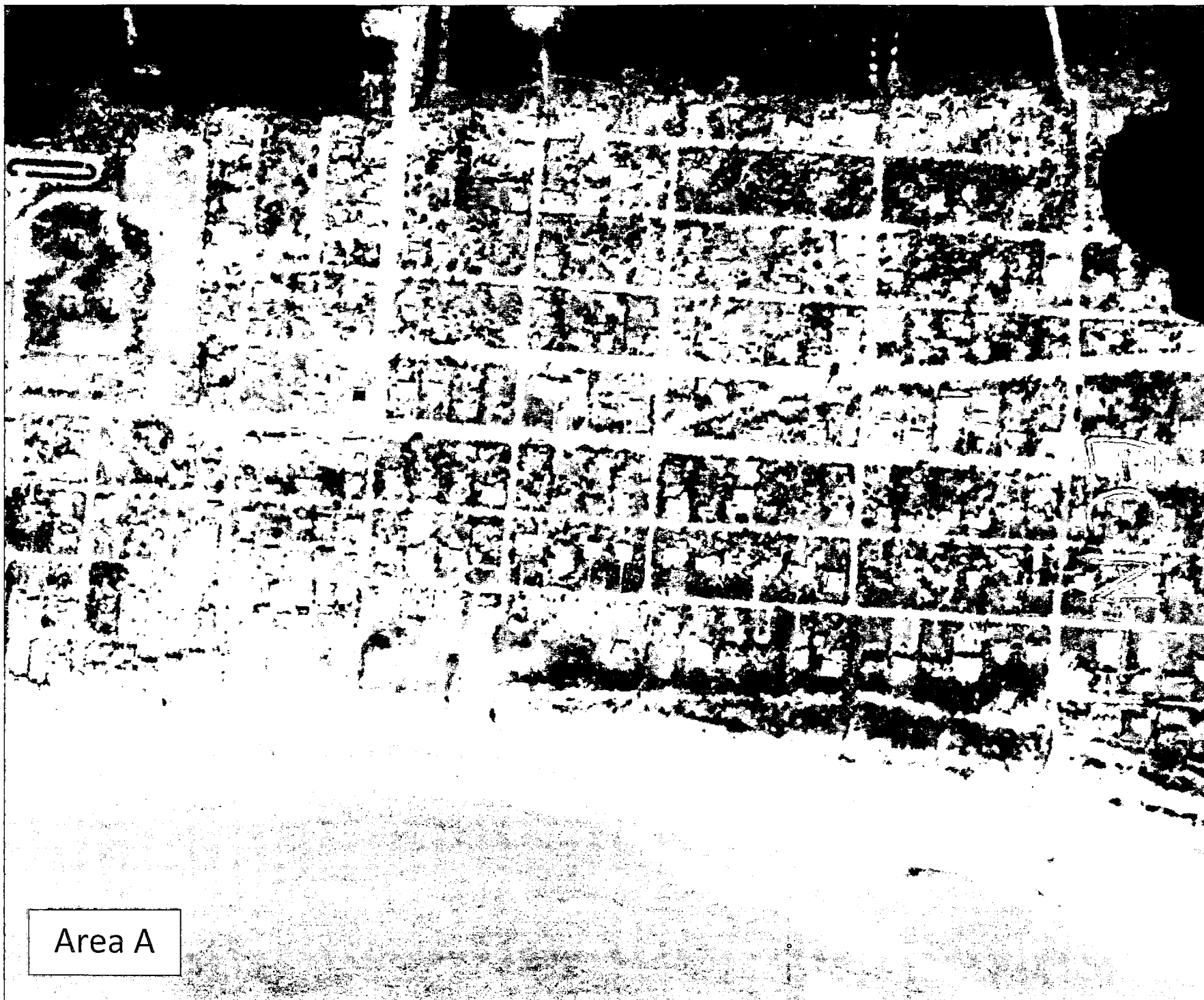
11 Witness my hand, I have hereunto affixed my
12 official seal this 22nd day of December, 2015 at
13 Charleston, Charleston County, South Carolina.
14
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16
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Christine A. Smith
Notary Public
My Commission Expires
May 12, 2021
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Aerial Map of Sullivan's Island - October 1989



ROA 1024



Area A

ROA 1026



Area A



ROA 1027



ROA 1028

Area A



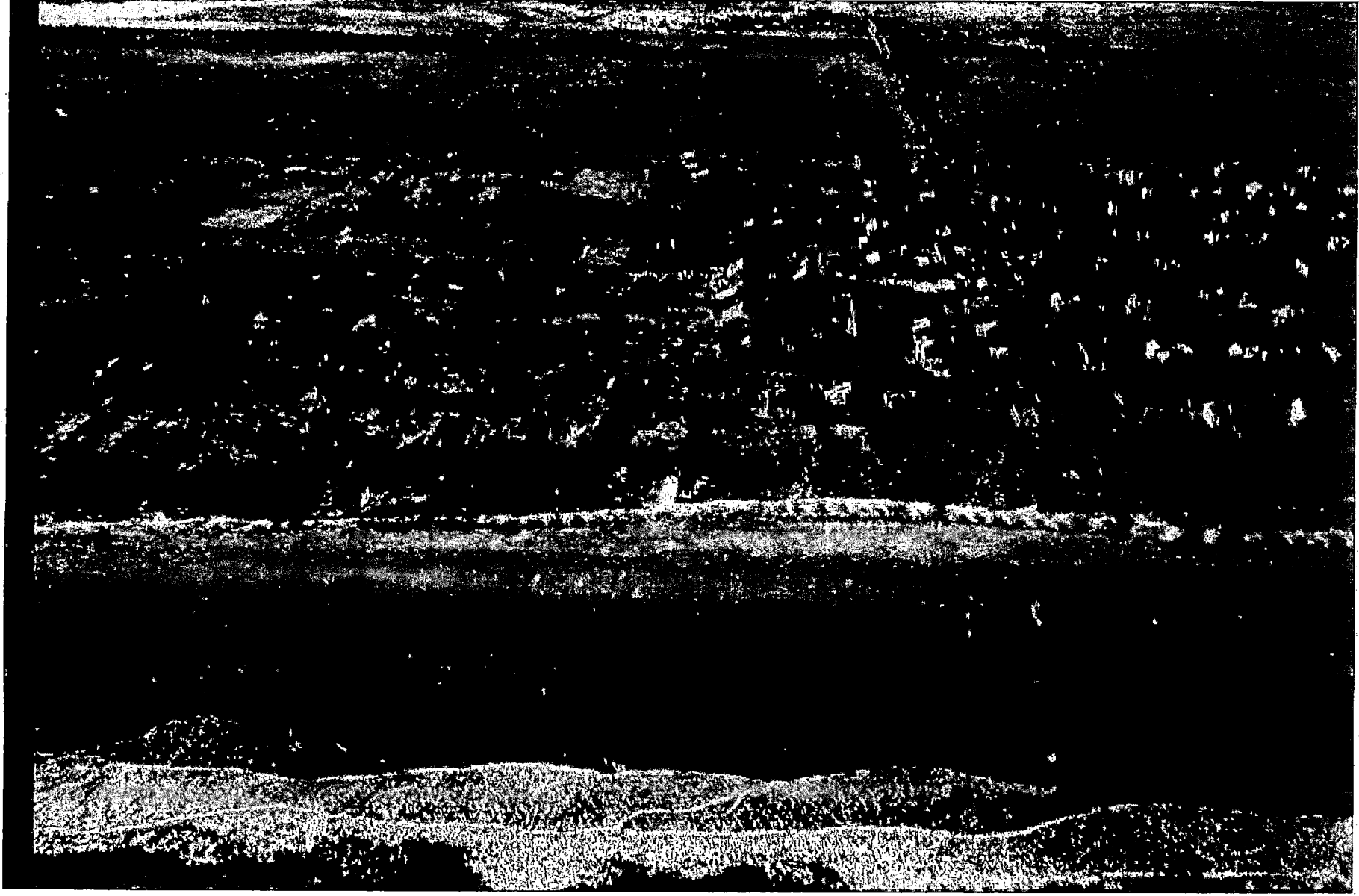
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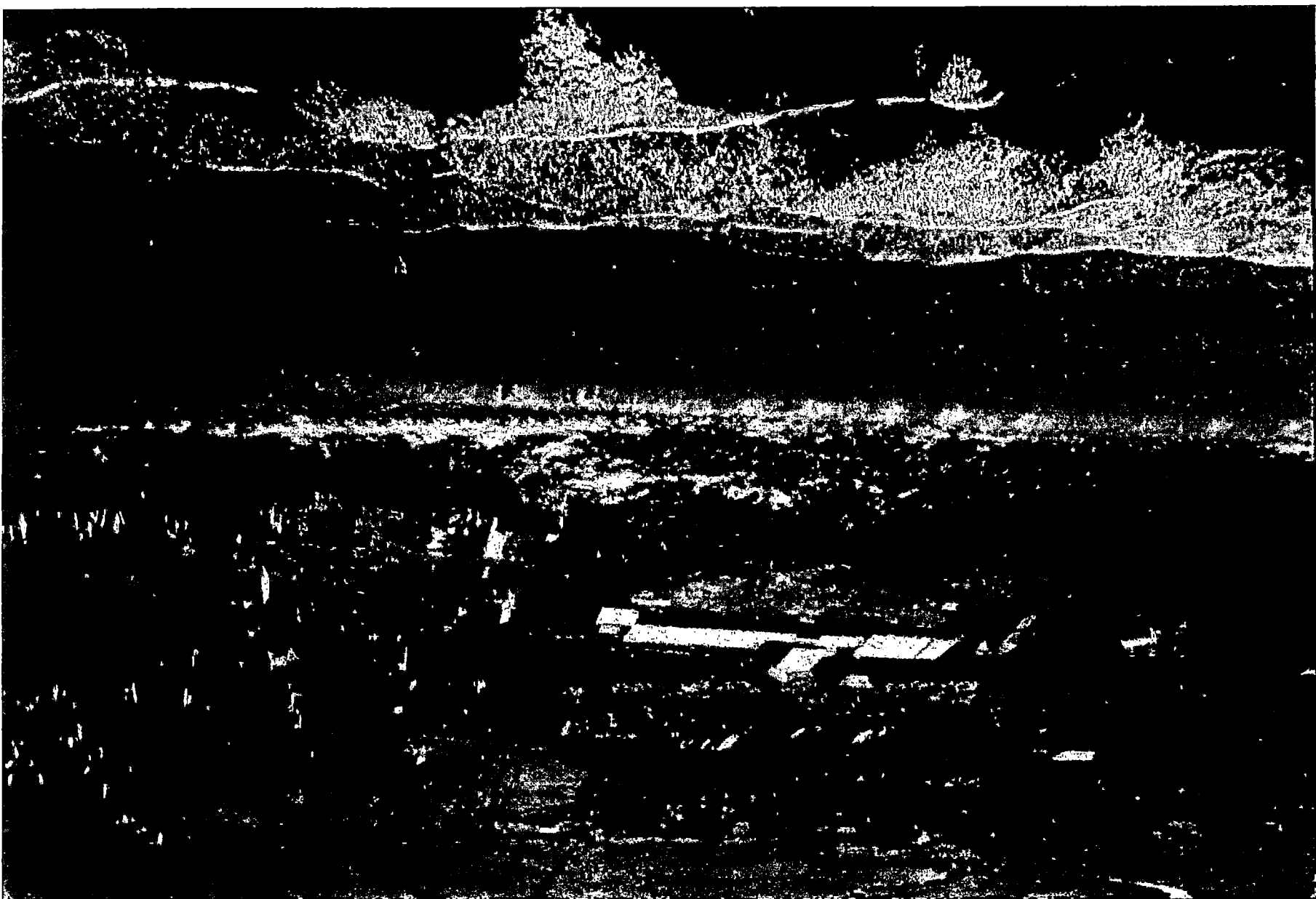
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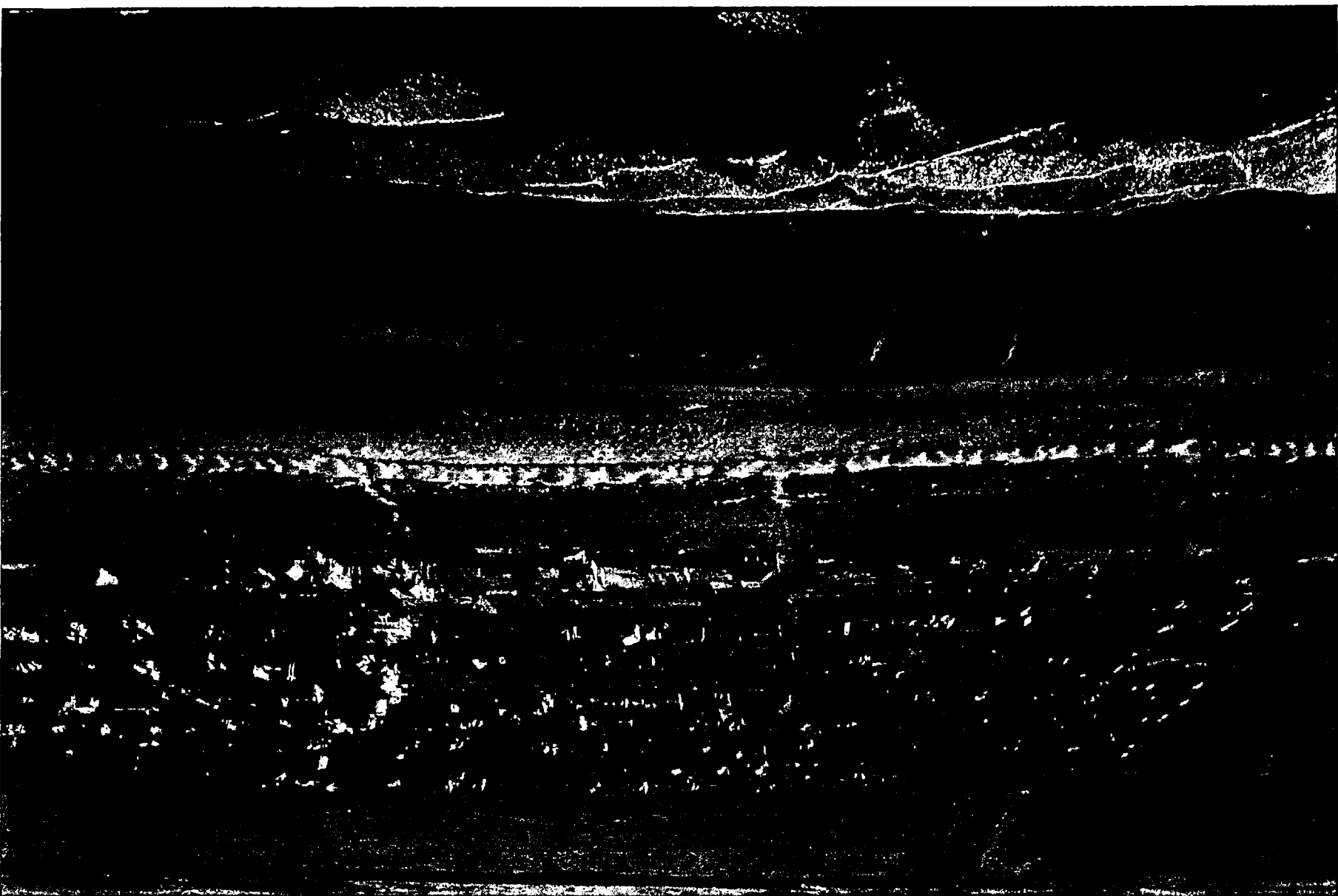


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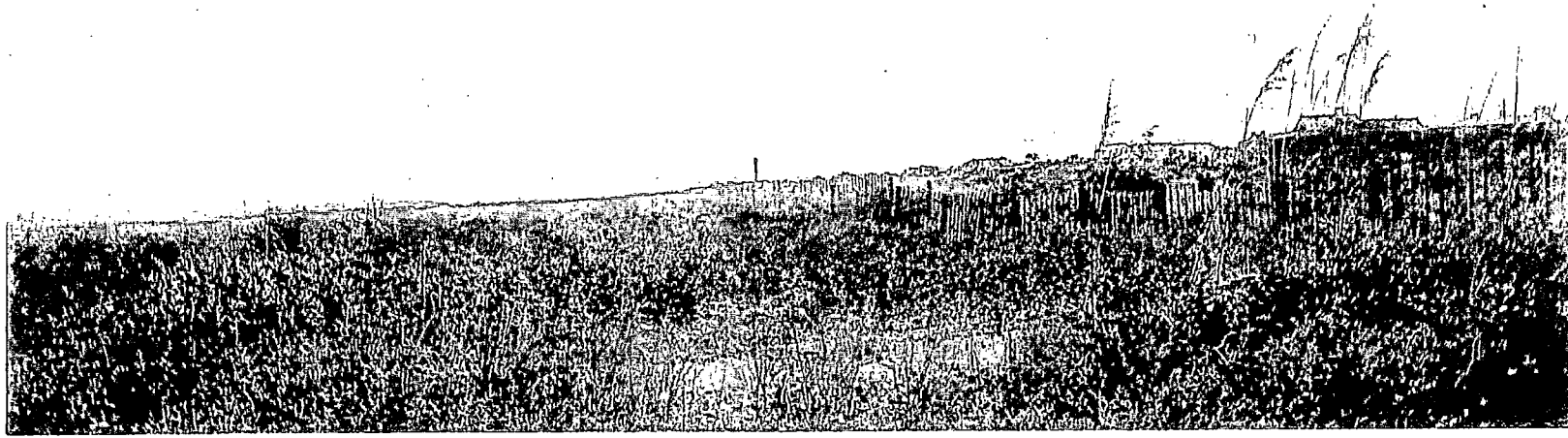
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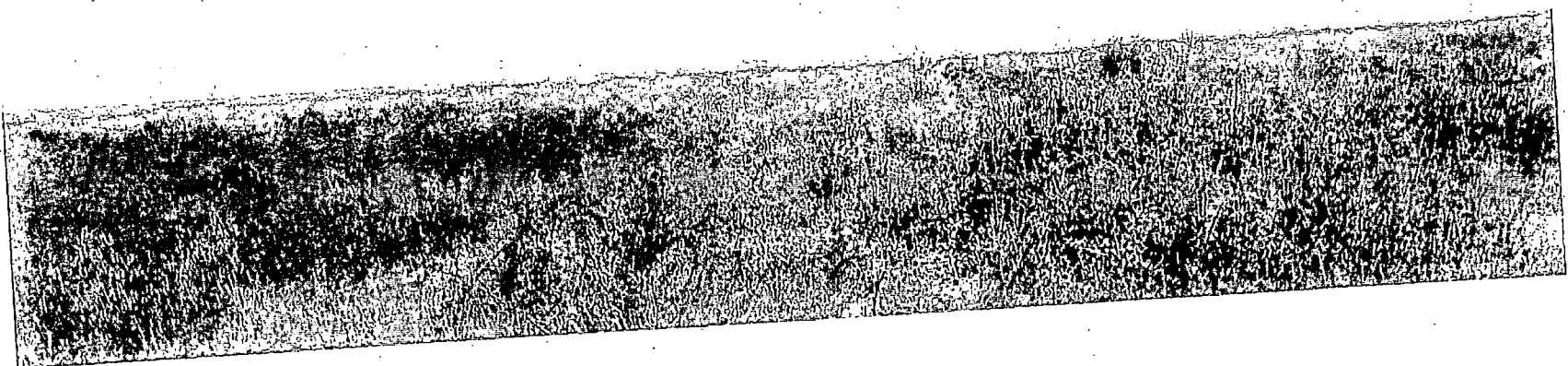


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ROA 1037



ROA 1038

ROA 1039

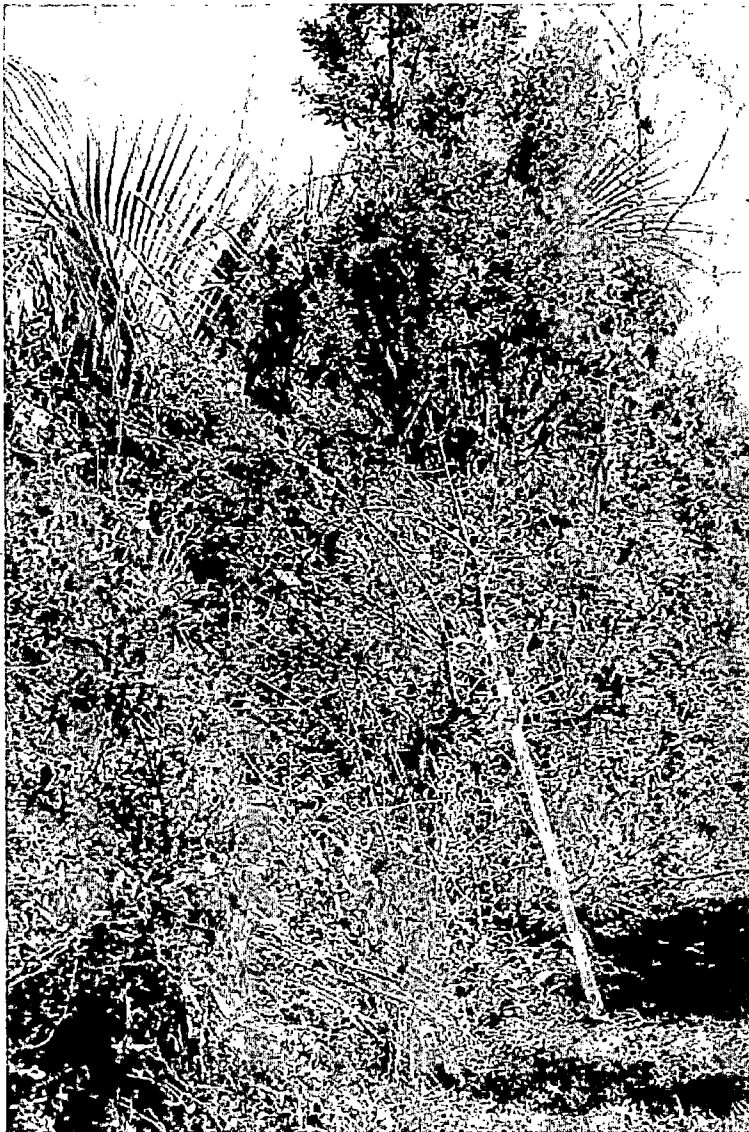




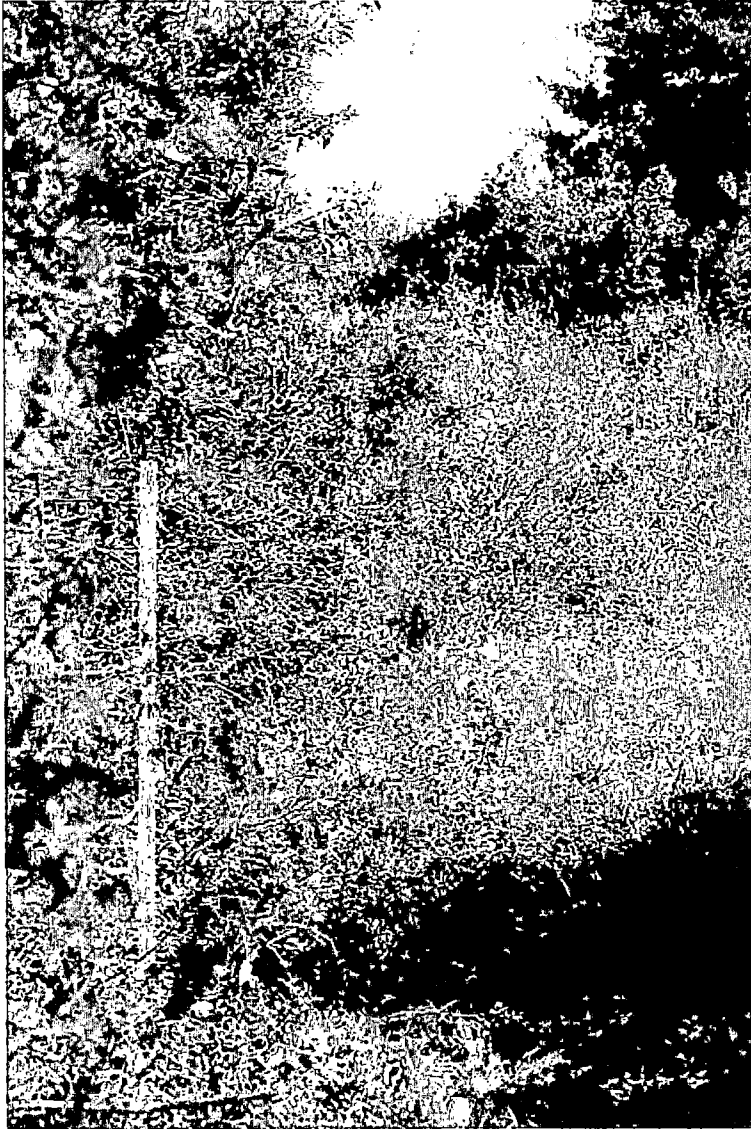
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ROA 1041



ROA 1042



ROA 1043

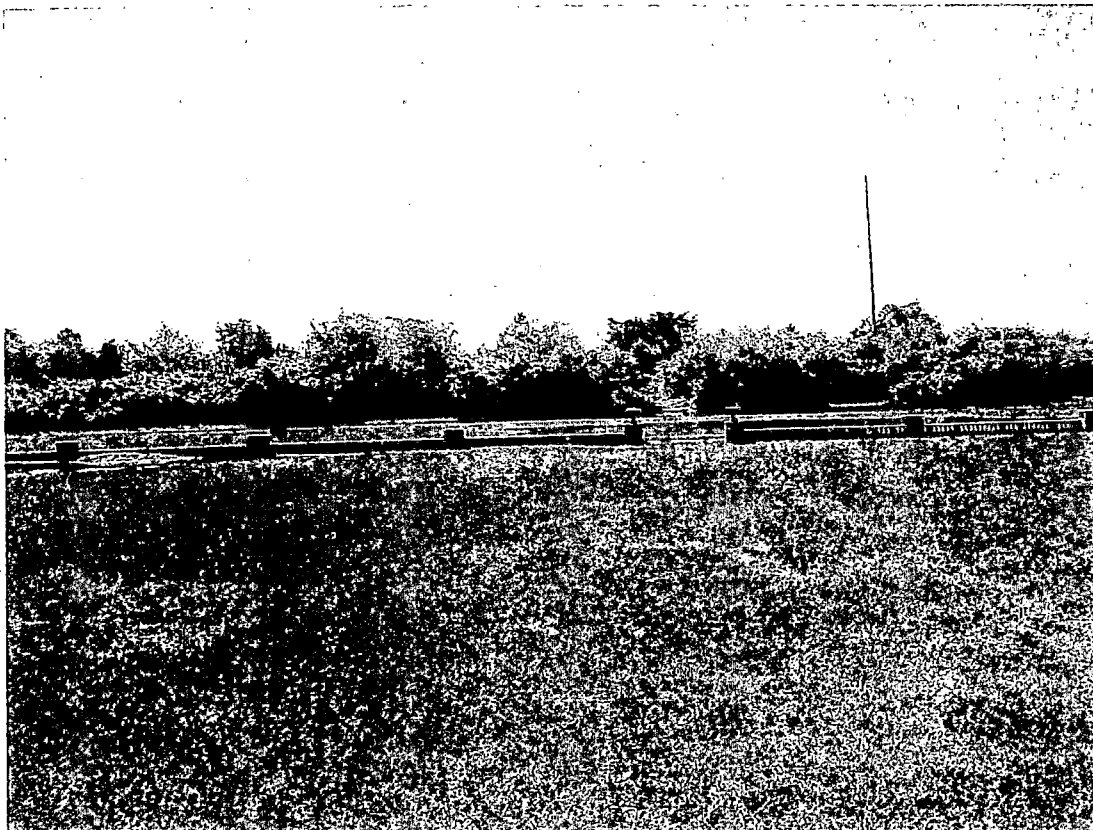


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ROA 1045

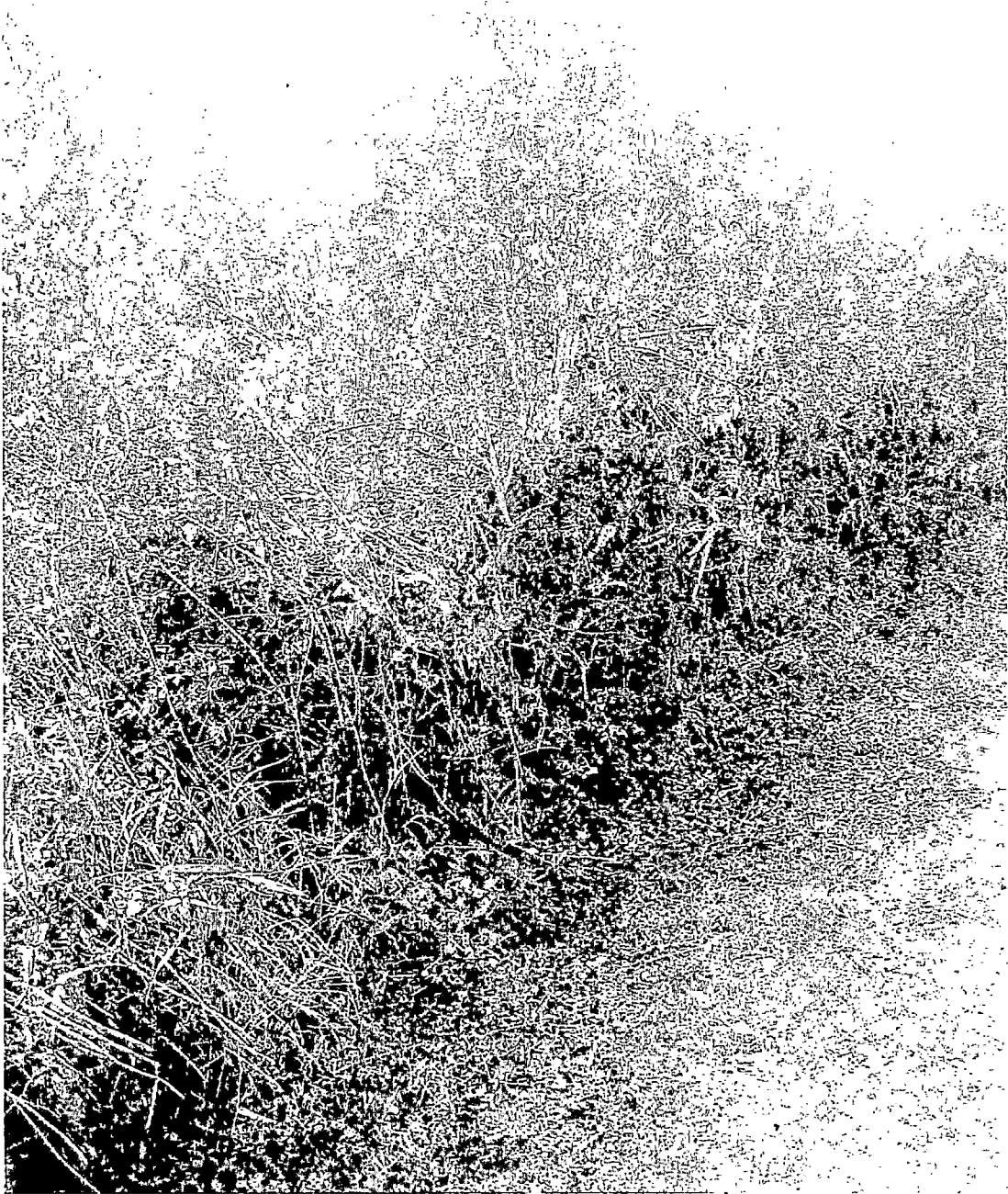




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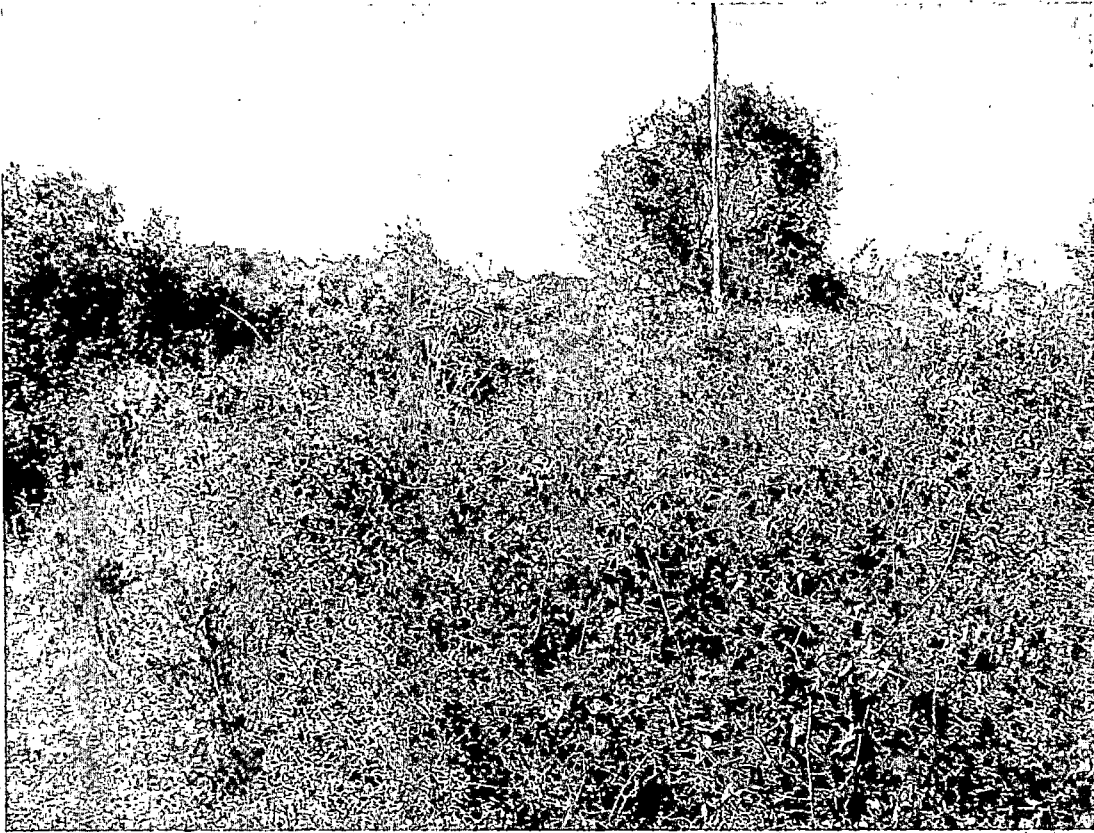
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ROA 1049



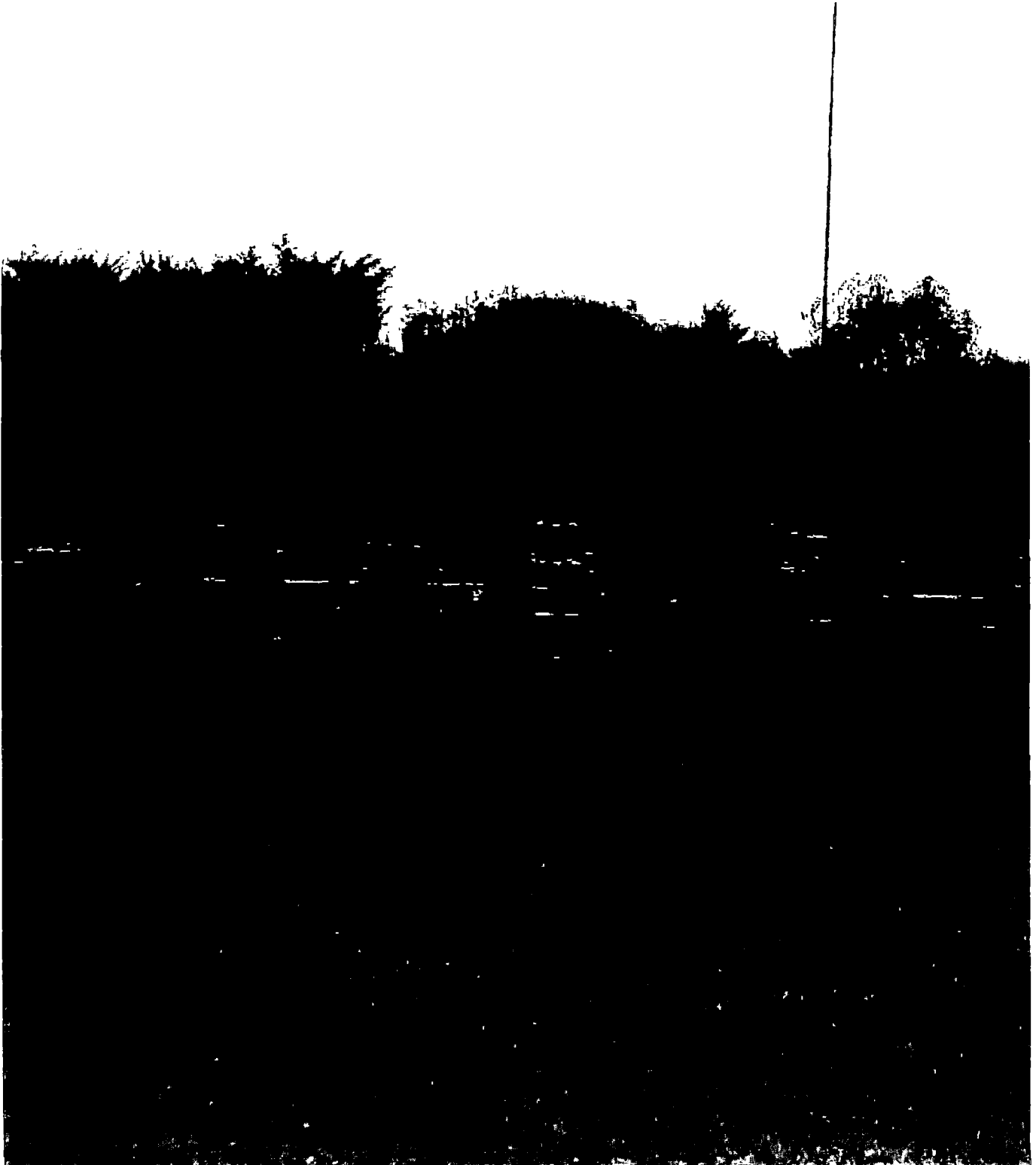
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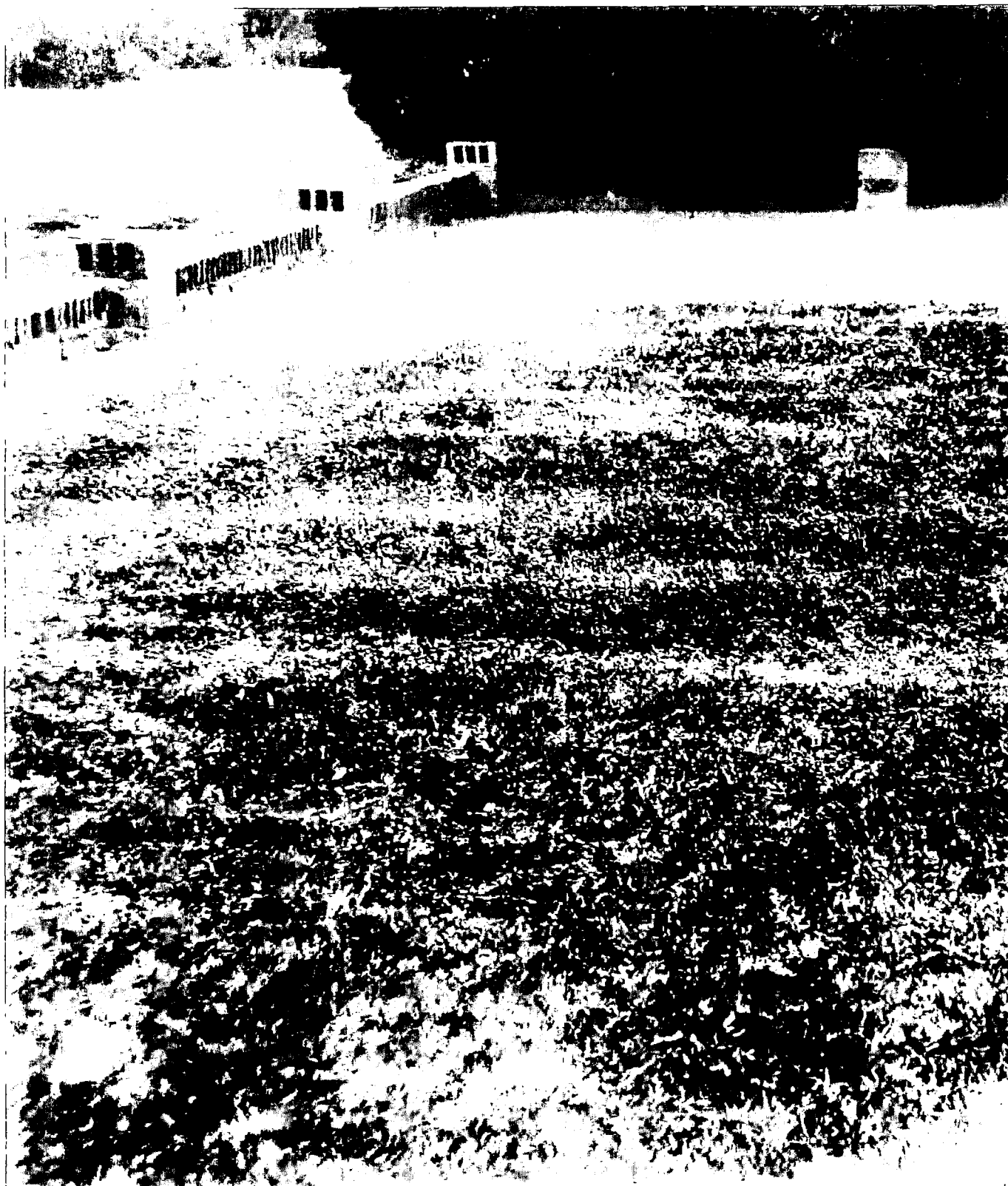
ROA 1051

Joanna Cleary

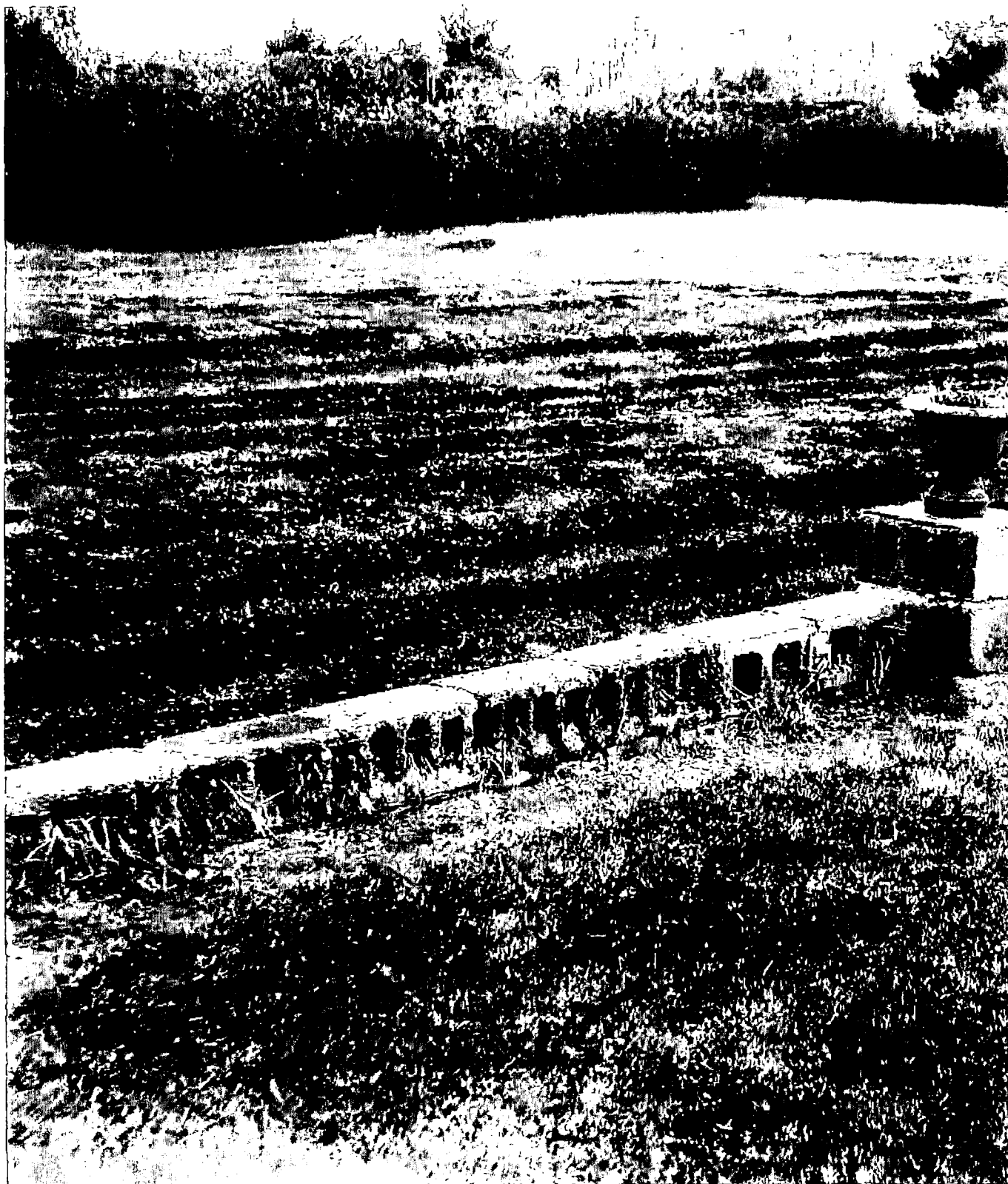
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Sent: Sunday, March 20, 2011 8:23 PM
To: Joanna Cleary
Subject: fire at Sullivan's



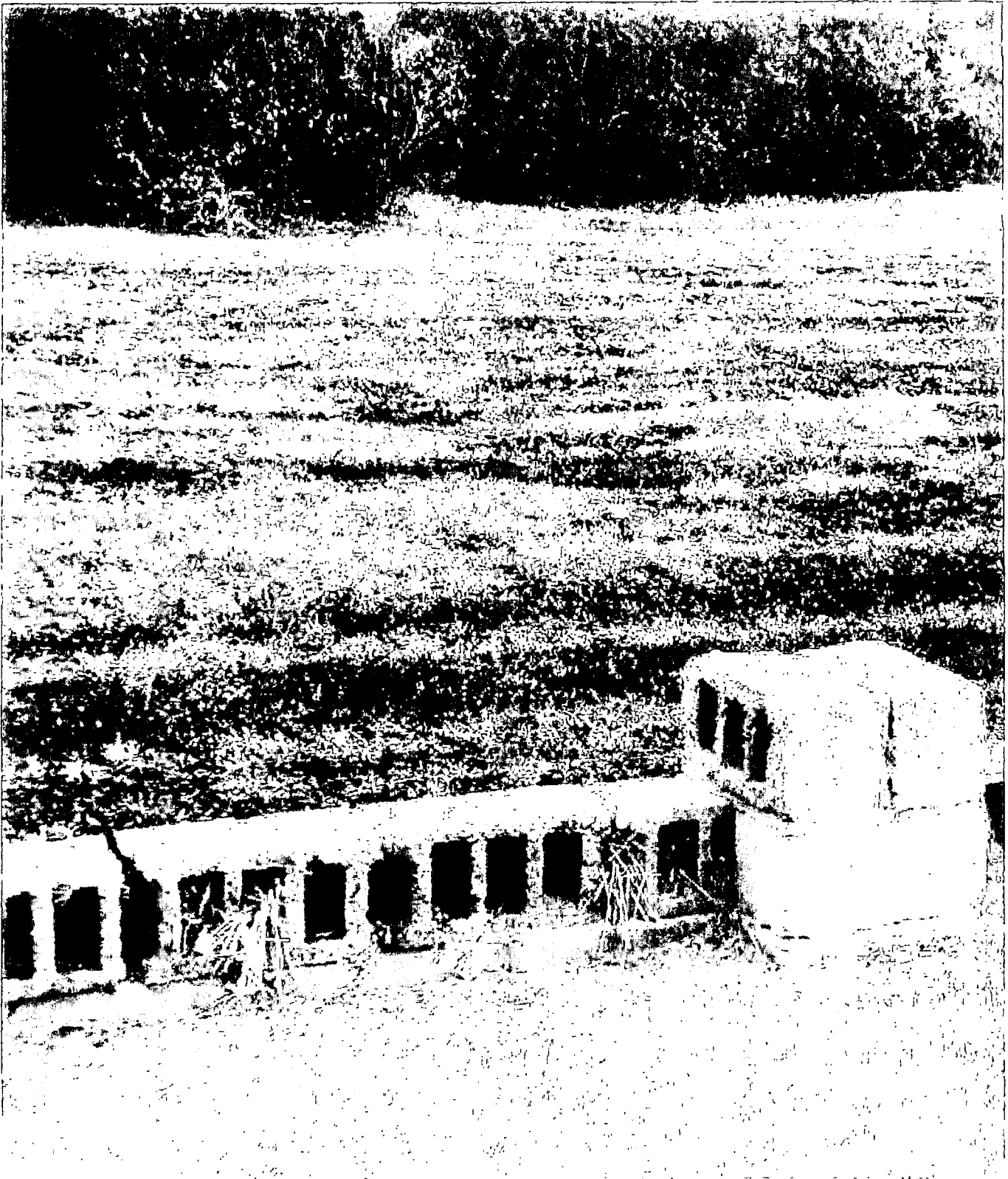
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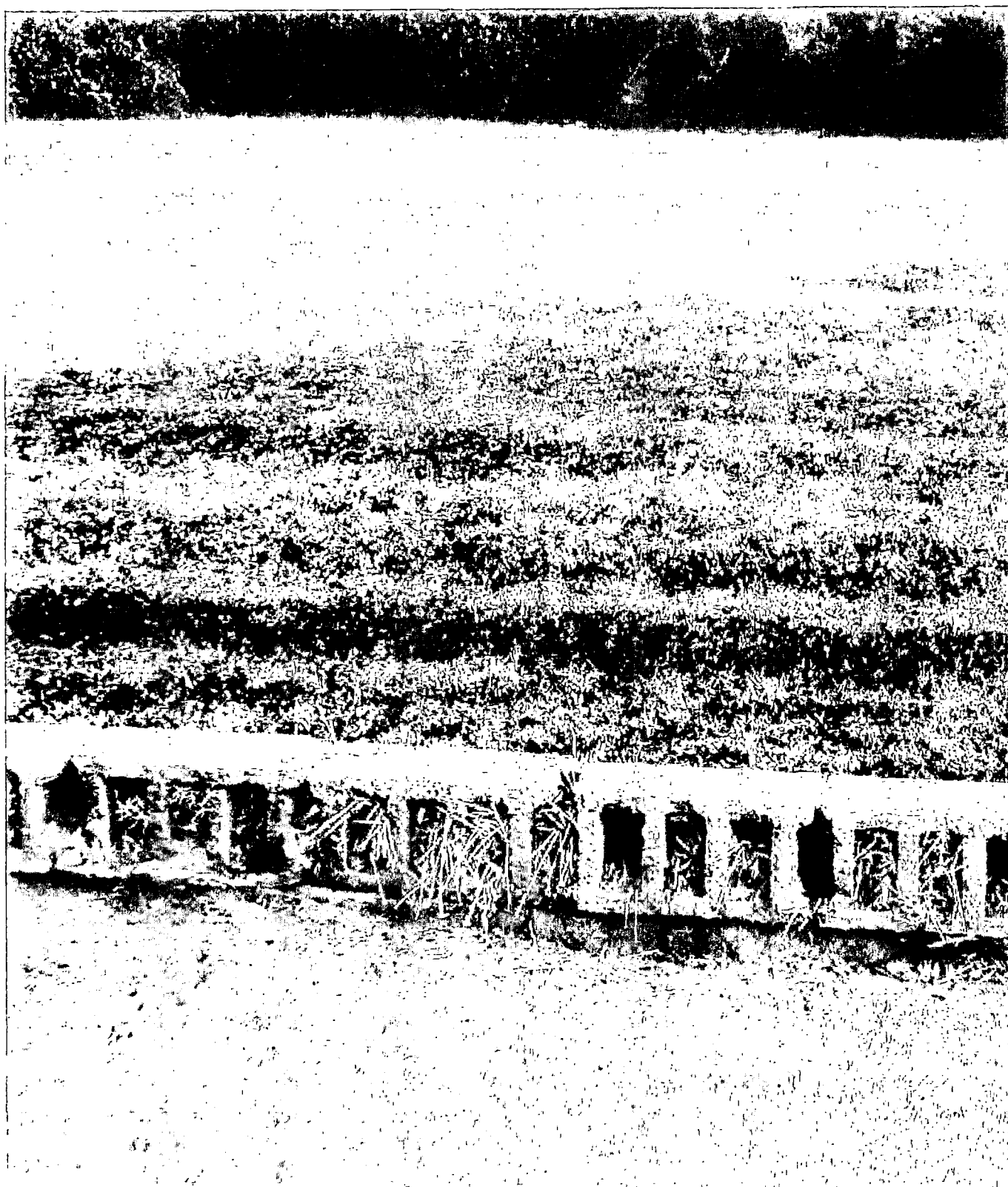
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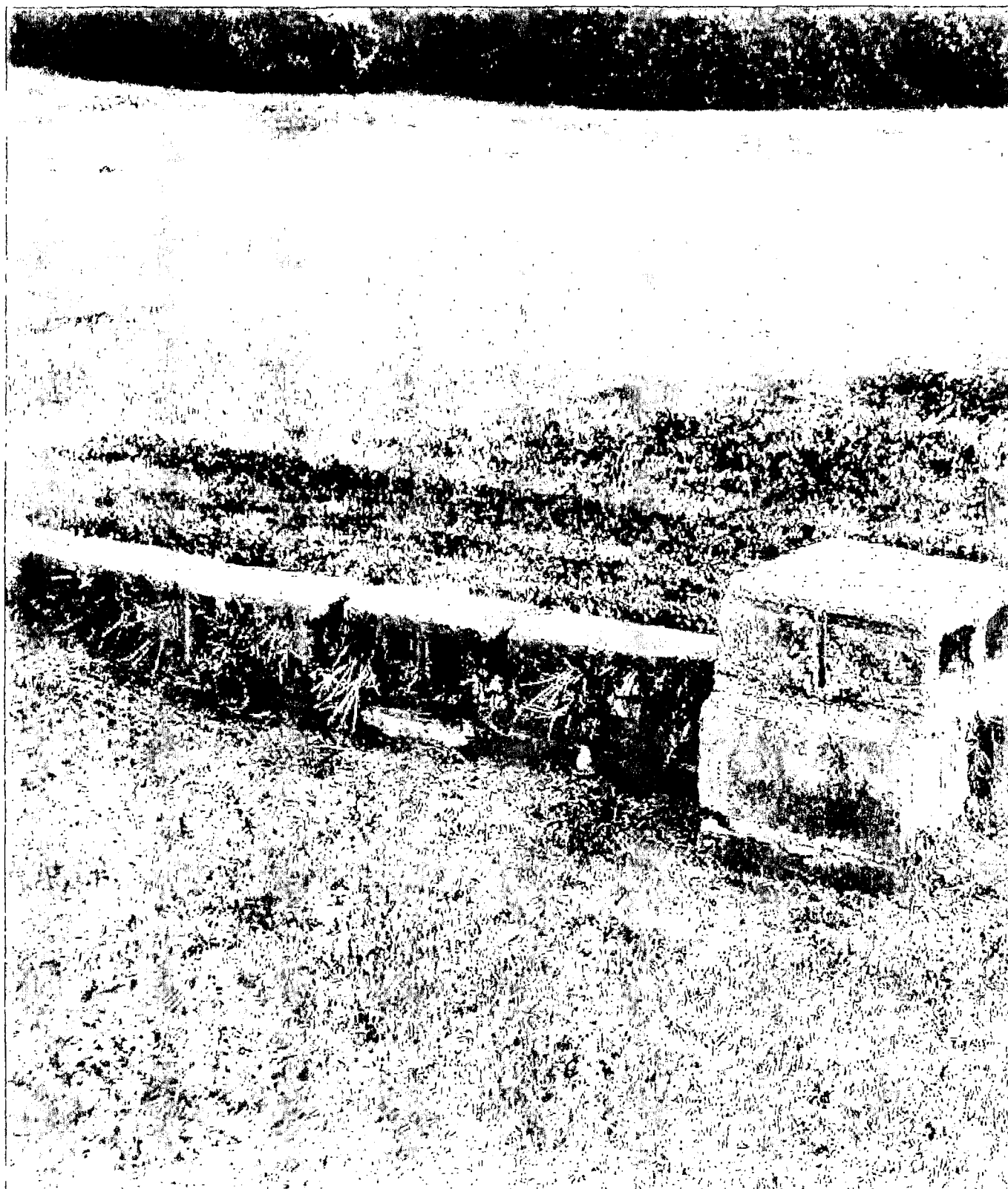
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DSC05221



DSC05222



DSC05223

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Nathan Bluestein, Ettaleah Bluestein,	)	C/A No. 10-CP-10-5449
M.D., Theodore Albenesius, III, and	)	
Karen Albenesius,	)	
	)	
Plaintiffs,	)	
	)	PLAINTIFFS' MEMORANDUM OF
Versus	)	LAW AND EQUITY IN OPPOSITION
	)	TO DEFENDANTS' MOTION FOR
Town of Sullivan's Island and Sullivan's	)	SUMMARY JUDGMENT
Island Town Council,	)	
	)	
Defendants.	)	

In Opposition to the Defendants' Motion for Summary Judgment and Memorandum in Support of same to be filed by the Defendants in the above-referenced matter on February 28, 2014, the Plaintiffs – Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius (collectively "Plaintiffs") – file the following Memorandum. In further support of this Memorandum, Plaintiffs attach notarized affidavits submitted by:

- (a) Thomas E. McCutchen (**Exhibit A**);
- (b) Warren Tawes (**Exhibit B**);
- (c) Nathan Bluestein (**Exhibit C**);

FILED
 2014 FEB 28 PM 2:38
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY 

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I. ORIGIN AND BACKGROUND OF THE LEGAL AND
EQUITABLE ISSUES PRESENTLY BEFORE THE COURT.

At the November 25, 2013 hearing conducted by Judge Scarborough in the above-referenced matter, where the Court permitted the Plaintiffs to amend their First Amended Complaint to add four new causes of action, most of the discussion by the Defendants concerned the Statute of Limitations. After the hearing, the Defendants were professionally kind enough to alert Plaintiffs that the Defendants intended to argue and rely upon the 2005 Bloom v. Town of Sullivan's Island Board of Zoning Appeals decision of this Court. Accordingly, this memorandum addresses those two specific defenses. Defendants may well intend to raise additional defenses, and Plaintiffs reserve the right to respond to those defenses in a subsequent brief, prior to argument of all of these issues in front of this Court.

In anticipation of Defendants' anticipated Statute of Limitations affirmative defense theory, Plaintiffs have drafted this Memorandum of Law and Equity so that the Court will fully understand Plaintiffs' legal and equitable positions concerning this particular affirmative defense raised by the Defendants at the last hearing.

First, and of central importance, the deed and/or contract (Exhibit D) executed on February 12, 1991 by the Lowcountry Open Land Trust ("LOLT") conveying the Accreted Land¹ to the Town of Sullivan's Island ("Town"), is a sealed document. Because Exhibit D is a valid sealed document between LOLT (Grantor) and the Town (Grantee), as a matter of law, the twenty (20) year statute of limitations for sealed documents is applicable. Accordingly, this lawsuit was timely filed in July of 2010.

¹ As defined in the Second Amended Complaint.

Exhibit D was a part of an integral plan, wherein LOLT deeded back to the Town, in a sealed document, the same eleven (11) separate tracts of land, with a series of promises and restrictions, that the Defendants had previously deeded (on the same day, February 12, 1991) to LOLT. The Town, as Grantee of this deed, fully accepted and agreed to in that document an express term granting the Plaintiffs standing,² as intended and named third-party beneficiaries, to enforce the agreements and restrictions that run with the land found in that Document.

Exhibit D (hereinafter "Sealed Deed") contains critically significant restrictions, promises and affirmative obligations on the part of the Town. The Town's clear, unequivocal written intent is that the Accreted Land's condition "at the time of this grant" was to remain in the same condition for a period of fifty years, subject to various exceptions that the Plaintiffs firmly believe are irrelevant to this current suit.

Simply put, Plaintiffs submit as part of their claims in this lawsuit that the Town has purposefully, knowingly and deliberately violated the restrictions and promises made in the 1991 Sealed Deed, and has enacted zoning laws, purposefully and deliberately, expressly designed to deliberately thwart these restrictions and promises, all in direct violation of the plain and clear terms of the Sealed Deed, and also in violation of the Constitution of the United States of America and the Constitution of the State of South Carolina, as well as in violation of the Unfair Trade Practices Act of South Carolina.

² See Paragraph 5 of Exhibit D (BK K 200 Pg. 498) which expressly reads, in part: "These Restrictions may be enforced by the Town, any property owner within the Town, or by any voter registered within the Town. Such persons may seek any appropriate remedy for any violation, including, but not limited to, injunctive relief to force a termination of the violation or to permit restoration of the area damaged by a prohibited activity. . . ." Exhibit D. (emphasis added)

The Defendants appear to argue that, even if this is all true, the statute of limitations period of time to complain and sue about these violations has long since passed. Respectfully, the Plaintiffs disagree.

II. THE ALLEGED STATUTE OF LIMITATIONS

A. Assuming for Argument's Sake³ that a Legal Statute of Limitations Should Even Be Applied to Plaintiffs' Claims that Fifty-Years of Covenants Have Been Deliberately Breached and Broken, the Only Applicable Legal Statute of Limitations Is the Twenty-Year Statute for a Sealed Document, and Thus this Lawsuit Was Timely Filed.

Although South Carolina has yet to recognize a general property rule that permits a party to complain, as a part of property law, about another person obstructing his view, this rule has significant exceptions, particularly when there was a deliberate recorded promise and restriction that the current 1991 view would remain "open" (the very word used in the Sealed Deed) "in the same condition as it existed in 1991" for 50 years. Exhibit D.

That a cause of action exists when restrictive covenants are involved, as contrasted to a general property rule, was squarely settled in Sea Pines Plantation v. Wells, 363 S.E.2d 891 (S.C. 1987), where the South Carolina Supreme Court, without hesitation, upheld the right of a homeowner in that Plantation **on the second row** to validly complain that their view had been obscured and obstructed by trees and shrubbery that had grown up over the years in violation of the restrictive covenants and affirmative obligations found in the Sea Pines covenants.

³ Some of Plaintiffs' claims are legal in nature and some are equitable in nature. For example, fraud is a legal claim whereas breach of a restrictive covenant are equitable claims. With regard to all the legal claims, Plaintiffs argue that the twenty-year statute of limitations for a sealed document is the only applicable statute of limitations. With regard to the equitable claims, Plaintiffs assert that no statute of limitations applies and that the doctrine of laches, equitable tolling and unclean hands are all relevant (as discussed later in this brief).

Thus, at this stage of the proceedings, the question is merely whether Plaintiffs are time-barred to even raise this equitable argument. Even at first blush, and merely using common sense, it would be very odd that an affirmative obligation to keep the property in the same condition as it existed in 1991, and which obligation was intended to run for fifty years (and thereafter to be renewed) was subject to mere contract rules concerning statutes of limitation. This is especially true in a sealed document. S.C. Code Section 15-3-520 reads as follows:

Within Twenty Years states:

- (b) an action upon a sealed instrument, other than a sealed note and personal bond for the payment of money only whereon the period of limitation is the same as prescribed in Section 15-3-520, except that a sealed contract for sale or an offer to buy or sell good whereon the period of limitation is the same as prescribed in Section 36-2-725. S.C. Code Ann. § 15-3-520 (emphasis added).

The Plaintiffs' legal position is that Exhibit D falls squarely within S.C. Code Section 15-3-520. In Exhibit D (and the Court should contrast the words found in that Exhibit with Exhibit E, the transfer of the Accreted Land from the Town to LOLT) the plain, clear language of Exhibit D demonstrates beyond argument that the parties' intentions were to create a Sealed Document. In fact, on the key page of the Deed where the signatures are found, the word "sealed" is found three different times.

- 1) The very final Clause, in the body of the document itself, and significantly on the same exact page as the parties signature line (prior to the exhibits) expressly references "Witness its hand and seal" This alone, Plaintiffs submit, makes this a sealed document. However, if there were any possible doubt, the Court should also consider the second time the word "Sealed" is found on this page and this time it is expressed in all caps.
- 2) Just above the witnesses and side by side with the Grantor's own Signature, in all caps, SIGNED, SEALED, AND DELIVERED IN THE PRESENCE OF It is impossible to ignore these words.

- 3) Finally, in the first part of the Attestation Clause, one finds the statement (made under oath, by the way) that the Witness actually "saw the [Grantor] by its authorized officers sign, seal, and witness and by its act and deed . . ." Exhibit D (emphasis added).

In short, on the most critical document page, where parties have to sign, the deliberate use of the word "seal" is found on three different occasions. Under S.C. Code Ann. Section 19-1-160 (1976) the General Assembly has made it extremely clear:

Whenever it shall appear from the **attestation clause** or from any other part of any instrument in writing that it was the **intention of the party or parties thereto that such instrument should be a sealed instrument** then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto. S.C. Code Ann. § 19-1-160. (emphasis added)

To be sure, there is at least some case law in South Carolina where the casual use of the single word "seals" might not unequivocally indicate that a sealed document is intended. However, where the parties to the deed, on three separate occasions, use the word "seal" and, in particular, proclaimed "signed, sealed, and delivered" in all caps right above the signatures, it turns the intentions of the parties upside down and inside out to even suggest that this was not intended to be a "sealed" document. Why else would the language appear in all caps, appear in the body of the document itself and finally appear in the attestation clause of the Deed itself? This document was drafted by LOLT and formally accepted by the Town.

Justice Kittredge confronted a deed somewhat similar (but actually not as strong) as Exhibit D in Treadaway v. Smith, 325 S.C. 367, 479 S.E.2d 849 (S.C. App. 1996) overruled on other grounds. In Treadaway, Justice Kittredge squarely held that the use of all caps in that deed (in identical language as found in Exhibit D "SIGNED, SEALED, AND DELIVERED IN THE PRESENCE OF... [signature of

parties and witnesses]" manifested the parties intent to create a sealed instrument. Id., 325 S.C. at 378.

Similarly, in an action in which the attestation clauses stated that "the parties hereto have set their hands and seals" and the notation "L.S." followed the signatures of the agents for both Plaintiff and the Defendant, the South Carolina Court of Appeals ruled that the two contracts at issue in the case were sealed instruments. S. Carolina Dep't of Soc. Servs. v. Winyah Nursing Homes, Inc., 282 S.C. 556, 561, 320 S.E.2d 464, 467 (Ct. App. 1984) (citing S.C. Code Ann. Section 19-1-160; Wallingford v. Western Union Telegraph Co., 60 S.C. 201, 38 S.E. 443 (1901); Cook v. Cooper, 59 S.C. 560, 38 S.E. 218 (1901).

Based directly upon the Treadaway and Winyah cases, if a legal statute is applicable at all, it is the twenty-year statute of S.C. Code Ann. § 19-1-160. Reaching this conclusion not only conforms to the document to the actual intentions found in the Deed itself, it follows the general law of many other states. In C.J.S. Limitations on Actions, Section 102, the general property rule is squarely noted that:

"A covenant in a deed imposing an obligation on the grantee accepting such deed is based on a specialty and governed by the statute applicable to sealed instruments. The statute of limitations governing instruments under seal applies to such a covenant in a deed even where the grantee does not sign the deed." C.J.S. Section 102.

In short, both under the general rule of property law, and under the specific property statutes of South Carolina law, the long term promise that so many homeowners have relied upon, and had a right to rely upon, that the Town would keep its word, and its formal legal obligations in a sealed document, calls out for the use of the twenty year statute of limitations. Because Exhibit D is dated, February 19, 1991, and this case was filed on July 7, 2010, this lawsuit was timely filed as a

matter of law⁴, even assuming one uses the earliest possible date of 1991.⁵

B. Because Plaintiffs' Nuisance Claim Starts Anew Each Year, the Defendants' Actions and Inaction are Abatable Nuisance, and the Statute of Limitations Starts Over Periodically.

Although Plaintiffs believes that the Sealed Deed ends the argument as to Defendants' statute of limitations theory, merely as a precaution, Plaintiffs also submit the following additional backup arguments. It has long been the settled law in this State that nuisances, for purposes of statute of limitations, can conveniently be divided into periodic reoccurring nuisances and permanent nuisances that never change over time. For example, in the recent case of In Re Estate of Ann Burns Livingston v. Livingston, 744 S.E.2d 203 (Ct. App. 2013), our Court of Appeals accurately summarized existing South Carolina law as follows:

The Supreme Court [referring to the S.C. Supreme Court] has held that when a nuisance is continuing and the injury is abatable, the statute of limitations does not run merely from the time of original intrusion on the property and cannot be a complete bar. Silvester v. Spring Valley Country Club, 344 S.C. 280, 543 S.E.2d 563, 567 (Ct. App. 2001). Rather a new statute of limitations begins to run after each separate invasion of the property. Id. See Cutuchin v. S.C. Dep't of Highways & Pub. Transp. 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990) (stating if the injury is permanent, the plaintiff has a single cause of action that cannot be split, however if the cause of injury is abatable, each injury gives rise to a new cause of action. (citing Webb v. Greenwood Cnty., 229 S.C. 267, 277, 92 S.E.2d 688, 692 (1956)).

⁴ It goes without saying that if a statute's language is plain, unambiguous and conveys a clear meaning, the rules of statutory interpretation are unnecessary and the court has neither right nor reason to impose another meaning. A&I, Inc., v. Gore, 621 S.E.2d 383 (S.C. App. 2005). (See Headnotes 3 & 4)

⁵ Plaintiffs have a number of additional arguments that the statute of limitations should not be construed to run in 1991 discussed below.

Applying this test to the facts of this case, it is clear that a new limitations time period runs, or might run, each and every year Plaintiffs are not permitted to abate the growth of vegetation and thus this is a periodic nuisance⁶ which would have to be abated from time to time.

C. Plaintiffs' Fraud Claim Was Only Discovered After this Lawsuit Was Actually Filed and Clearly Is Timely as a Matter of Law Under Section 15-3-530.

Plaintiffs assert that only after they actually filed this lawsuit in 2010, and had engaged in depositions and asked for production of documents did they uncover the highly unusual fact that while the Town specifically hired a team of expert consultants⁷ to draft an opinion matrix or survey to submit to Town residents for their consideration with regard to the Town's management of the Accreted Land did the Plaintiffs learn that the Town secretly changed the actual survey that the hired consultants recommended, and sent out an altered survey, ignoring their own

⁶ Although this is not the place to argue this case on the merits, it is very clear that the nuisance claim is quite real and is so substantially interconnected with contested and disputed facts that there is no place at all for summary judgment. A private nuisance exists where the defendant's conduct on his own land results in "an unreasonable interference with the Plaintiffs' use and enjoyment of land, which interference is continuous or at least potentially recurring." Hubbard and Felix, South Carolina Law of Torts, at Pg. 211 (2d Ed. 1997). Specifically, these two Professors note that under South Carolina law, any or all of the following factors are relevant to the determination as to whether or not an "unreasonable interference":

- (1) An interference is "substantial"
- (2) Whether an "ordinary" person would be upset by the interference
- (3) The nature and social value of the activity
- (4) The manner of conducting the activity
- (5) The appropriateness of the activity to the location involved
- (6) The "intent" of the defendant

Id. at Pg. 213.

As the filed affidavits attest (Exhibits A, B and C), almost all of these activities are potentially at issue in this case. It is claimed in these affidavits that the interference is very much substantial and that conduct of the Defendants has not been truly responsive to this legitimate concern. Plaintiffs submit that these affidavits taken together raise factual issues of nuisance that is not barred by any statute of limitations and which certainly cannot be decided as a matter of summary judgment.

⁷ At a cost of \$100,000-150,000 to the taxpayers according to recent testimony given by the Town's Administrator Andrew Benke.

consultants, but at the very same time suggesting to the Town's citizens that they were merely following his program and suggestions.

They did this without telling anyone.

They did this without revealing the altered survey.

They did this deliberately in secret and contrary to their own consultant's recommendation.

This actual (or perhaps constructive or equitable fraud) was unknown and would have forever stayed unknown without the filing of this lawsuit.

It has been the rule in South Carolina for several centuries that the "statute of limitations begins to run [only] against a fraud from the time it is discovered. See Parham v. McCravy, 6 Rich. Eq. 140 (1853). See also Burgess v. American Cancer Society: "In South Carolina, the statute of limitations for causes of action for fraud is governed by the 'discovery rule,' and does not begin to run until discovery of the fraud itself or of 'such facts as would have led to the knowledge thereof, if pursued with reasonable diligence.' " Burgess v. Am. Cancer Soc., S. Carolina Div., Inc., 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct. App. 1989) (internal citations omitted).

Whatever else the Court decides, Plaintiffs very respectfully request that this particular claim calls out for a fair and full trial on the merits and full public airing of exactly what the Town did and who undertook this action. It is not subject to any applicable statute of limitations as it was only found in discovery itself after 2010, and just as clearly, it is not the basis of a summary judgment at all as it is full of disputed, contested, secret acts, that no one within the Town government⁸ claims to have even done!

⁸ Despite eight depositions of current and former Town officials, at which this issue was thoroughly discussed and addressed. Without exception, all eight Town officials denied knowing about this issue or taking part in the intentional conduct of removing "property values" for the consideration of Town residents despite the recommendation for inclusion of the same by the experts hired by the Town.

D. The Applicable Statute of Limitations for Plaintiffs' Unfair Trade Practices Act Claim Is Similar to Plaintiffs' Fraud Claim – Upon Discovery of Defendants' Deceptive Trade Practices.

Most of the time, a Town or City would never even be considered as a potential defendant in an unfair trade practices claim. For example, in Calcaterra v. City of Columbia, 315 S.C. 196, 432 S.E.2d 498 (S.C. App. 1993) (no violation of the UTPA for a city to charge higher water rates to non-residents than to residents). However, that assumes that the Town is playing “fairly” and is doing what is actually authorized by proper rules, customs and law.

It is an altogether different story when a Town deliberately sets out to hide what it is doing from the public, and secretly changes its consultant's report, when, without this lawsuit and its related discovery process, no one would ever know about the Town's unauthorized, inappropriate conduct, and when confronted with the truth – no one on Town Council will admit to anything about what happened. That is a different scenario. Unauthorized conduct falls into a special category. See Dema v. Tenet Physician Services, 383 S.C. 115, 678 S.E.2d 430 (2009)⁹

The Plaintiffs claim that the Town engaged in deceptive conduct that was unauthorized. It is not proper for any public entity to mislead the public, to claim its experts suggested one thing but actually suggested something else. To affect commerce (and the economic value of real properties on Sullivan's Island) not by any authorized zoning law or proper use of the Town's powers, but to secretly change its

⁹ “We hold that the trial court erred in ruling it did not have subject matter jurisdiction over this case. Appellants did not file suit seeking a determination from the trial court that HHRMC was acting in violation of the CON Act. Rather, Appellants' suit involved civil claims arising out HHRMC's violations of the CON Act, which DHEC had already determined HHRMC had committed. While DHEC has exclusive subject matter jurisdiction to determine whether a violation has occurred, it does not have subject matter jurisdiction to hear civil claims for damages resulting from those violations. Therefore, we hold that the trial court's ruling was erroneous.” Dema v. Tenet Physician Servs.-Hilton Head, Inc., 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009)

consultant's own expert report, involves trade and detrimentally affects Plaintiffs' economic endeavors.

Admittedly, this may be a novel claim (on that ground alone, summary judgment is almost certainly inadvisable as there is clear case law that novel claims should not be decided on summary judgment grounds). Furthermore, merely because a claim is novel hardly bars its consideration. Long ago, it was wisely stated by a common law court in Keeble v. Hickeringill, 103 Eng. Rep. 1127 [report date 1809] 11 East 574 (Queen's Bench 1707) "every man that hath a property may employ it for his pleasure and profit and when a violent or malicious act is done to a man's occupation, profession, or way of making a living, [or property] then an action lies in all cases." Id. The Plaintiffs' property has unlawfully been tampered with and illegally harmed. That was enough for a trial in 1707 and, Plaintiffs submit, in 2014.

III. WITH REGARD TO PLAINTIFFS' EQUITABLE CLAIMS PREMISED UPON VIOLATION OF RESTRICTIVE COVENANTS, NO LEGAL STATUTE OF LIMITATIONS APPLIES AT ALL.

All of the proceeding arguments are premised on Defendants' argument at the November 25, 2013 hearing that the statute of limitations has run on all of the Plaintiffs' claims. However, it is far from clear that *any* statute of limitations is even implicated on many of the claims pled by the Plaintiffs¹⁰. Justice Toal noted in Buffington v. T.O.E. Enterprises, 680 S.E.2d 289 (S.C. 2009) that an action to enforce restrictive covenants by injunction is an action in equity. If this is so, as it certainly appears from the central holding in Buffington, then the equitable claim of

¹⁰ The Plaintiffs have pled: (1) Declaratory Relief; (2) Temporary & Permanent Injunctive Relief; (3) Writ of Mandamus; (4) Breach of Contract; (5) Breach of Contract with Fraudulent Act; (6) Unfair Trade Practices; (7) Public and Private Nuisance; (8) Inverse Condemnation; (9) Violation of the Contract Clauses in both State and Federal Constitutions.

breach of the Restrictive Covenants and Promises found in Exhibit D is clearly not barred by being untimely. In fact, since the Town itself has engaged in acts that have to be labeled "unclean hands," due to the secret changing of its own purported survey – they are barred as a matter of equity from even raising various equitable defenses to begin with.

There is testimony before this Court in the form of Plaintiffs' retained expert Tommy Harnett's affidavit that the landowners, including the Plaintiffs, have suffered real harm, damages and prejudice by not having the view of the beach and Atlantic Ocean that they relied upon, were promised and which is part of their environment that existed in 1991. Because the Town has grievously hurt the Plaintiffs, and because it is highly doubtful that many of the Plaintiffs' claims are even subject to any statute of limitations defense at all, the Town's theory of a statute of limitations defense is misplaced. On this alternative ground as well, Plaintiffs respectfully move the Court to deny Defendants' statute of limitations defense.

IV. BLOOM V. TOWN OF SULLIVAN'S ISLAND BOARD OF ZONING APPEALS IS NO BAR TO PLAINTIFFS' CURRENT LITIGATION.

A. The Bloom Decision Is Highly Distinguishable. As Almost All of Plaintiffs' Underlying Claims Are Completely Different Than The Zoning Variance Claim Made In Bloom.

First, it is very clear that the Bloom case arose in an entirely different factual context. In Bloom, landowners filed an appeal to the Master In Equity, sitting as Special Circuit Court Judge, from their initial request for a zoning variance to cut trees on the Town's land seaward of the boundaries of beachfront lots to the low water mark on the Atlantic Ocean. They sought this tree-cutting variance under the Zoning law to preserve the "view of the ocean from the third floor of their house." Court Order, pg. 2.

However, they did not challenge the constitutionality of the zoning of the ordinance itself "as that issue was not raised before or ruled on by the BZA at the hearing or through any post-hearing motion. As such, it is not preserved for appeal." Court Order, Pg. 8.

Further, unlike this case, no wrongdoing or fraud was even alleged in Bloom. Nor, unlike in this case, was there a single sentence in the Court's Order in Bloom discussing restrictive covenants. Likewise, unlike in this case, nuisance was not discussed or addressed in Bloom.

Of course, this Court very properly cited Schroeder v. O'Neill, 179 S.C. 310, 184 S.E.2d 670 for the general rule that easements of view are not recognized in this State. The Plaintiffs in this case do not disagree or challenge this general property rule. However, that is not at issue here.

The true question (or at least one of them) is whether recorded restrictive covenants that were specifically designed to preserve the view of the beach and Atlantic Ocean are valid and enforceable. In short, Bloom is truly distinguishable at almost every possible level and therefore, as a matter of law, it is a different case, with a different set of theories, with different and utterly unrelated plaintiffs. Clearly, it does not resolve any of the questions found in this case.

V. CONCLUSION

For all the above reasons, Plaintiffs respectfully move that the Defendants' motion for summary judgment be denied on the basis that it would be obvious error of law to conclude that (a) the statute of limitations has run on any of the Plaintiffs' claims or (b) Bloom v. Town of Sullivan's Island Board of Zoning Appeals warrants a dismissal of Plaintiffs' claims. For the foregoing reasons, the Plaintiffs respectfully request that the Court deny Defendants' Motion for Summary Judgment.

Respectfully submitted,

Robert H Hood

Robert H. Hood, Sr. (SC# 2599)
S. Scott Bluestein (SC# 65103)
Michael J. Brickman (SC# 874)
Molly H. Craig (SC# 6960)
Robert H. Hood, Jr. (SC# 13491)
James B. Hood (SC# 70212)
Barry Krell (SC# 3573)
Jonathan F. Krell (SC# 16691)
Robert T. Lyles, Jr. (SC# 10299)
Alice F. Paylor (SC# 4380)
Stephen A. Spitz (SC # 5287)
A. Walker Barnes (SC #78485)

*Attorneys for the Plaintiffs, Nathan
Bluestein, Ettaleah Bluestein, M.D.,
Theodore Albenesius, III, and Karen
Albenesius*

February 28, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

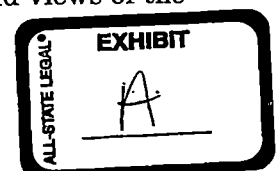
This *28* day of *Feb.*, 2014.

Heather Perry

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Nathan Bluestein, Ettaleah Bluestein,	)	C/A No. 10-CP-10-5449
M.D., Theodore Albenesius, III, and	)	
Karen Albenesius,	)	
	)	
Plaintiffs,	)	
	)	
Versus	)	AFFIDAVIT OF
	)	THOMAS E. McCUTCHEN
Town of Sullivan's Island and Sullivan's	)	
Island Town Council,	)	
	)	
Defendants.	)	

PERSONALLY APPEARED BEFORE ME Thomas E. McCutchen, who after being sworn, states as follows:

1. My name is Thomas E. McCutchen.
2. I am over the age of eighteen (18) and am competent to make the following statements.
3. My family has a house at 2525 Atlantic Avenue ("home" or "property") on Sullivan's Island, adjacent to the Accreted Land (as defined in Plaintiffs' Second Amended Complaint in the above-referenced matter) at issue in this lawsuit.
4. In March 2011, a fire ignited in the Accreted Land and spread to my family's property. I was personally present when this fire took place. The Sullivan's Island Fire Department was called and was able to put out the fire prior to the fire coming in direct contact with any structure on my family's property. However, significant property damage resulted to my family's lawn as a result of the March 2011 fire.
5. Prior to 1991 and until recently, my family's property had views of the beach and Atlantic Ocean.



6. Prior to 1991 and until recently, the portions of the Accreted Land adjacent to my family's home were primarily comprised of sea oats and wildflowers, all three (3) feet or lower, with no trees or tall shrubs.

7. In recent years, due to the Defendants' actions and inaction with regard to the management of the Accreted Land, the very character and nature of the Accreted Land has dramatically changed.

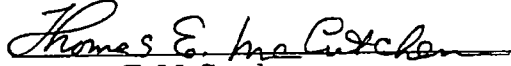
8. The Defendants have allowed the Accreted Land to become an unchecked overgrowth of vegetation and trees that have completely obstructed all views of the beach and Atlantic Ocean from my family's home.

9. The Defendants' interference with my family's enjoyment of our property is substantial.

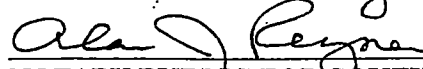
10. In addition to substantially interfering with my family's views of the beach and Atlantic Ocean, the Defendants' mismanagement of the Accreted Land, and the resulting unchecked overgrowth of vegetation and trees in the Accreted Land, has (a) diminished the property value of my family's home; (b) diminished the ocean breezes onto my family's property; (c) increased the potential of a fire hazard (both to my family's property and the rest of Sullivan's Island); (d) increased the mosquito population on my family's property; (e) increased the bug, raccoon, snake, rat, spider, coyote, and varmint populations (on my family's property and in the Accreted Land); (f) increased the quantity of poison ivy in the Accreted Land and on my family's property; and (g) increased security concerns on and around my family's property.

11. An ordinary person would be upset by the Defendants' interferences with my family's property as described above.

FURTHER AFFLIANT SAYETH NOT!


Thomas E. McCutchen

SWORN TO AND SUBSCRIBED before me
this 25th day of February, 2014


NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 4-12-2016

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT

;

) C/A No. 10-CP-10-5449

)

)

)

)

PERSONALLY APPEARED BEFORE ME Warren Tawes, who after being
 , states as follows:

1. My name is Warren Tawes.
2. I am over the age of eighteen (18) and am competent to make the following statements.
3. My wife (Sandra Tawes) and I reside at 2608 Atlantic Avenue ("home" or "property") on Sullivan's Island, which is not adjacent to the Accreted Land (as defined in Plaintiffs' Second Amended Complaint) at issue in this lawsuit. We have lived at our home for approximately thirty-three years.
4. Prior to 1991 and until recently, most of the Accreted Land consisted primarily of sea oats and wildflowers, all three (3) feet or lower, with no trees or tall shrubs.
5. In recent years, due to the Defendants' actions and inaction with regard to the management of the Accreted Land, the very character and nature of the Accreted Land has dramatically changed.



6. The Defendants have allowed the Accreted Land to become an unchecked overgrowth of vegetation and trees that have negatively impacted my and my family's enjoyment of the beach at Sullivan's Island.

7. The Defendants' interference with my enjoyment of the Accreted Land and the beach at Sullivan's Island is substantial.

8. The Defendants' mismanagement of the Accreted Land, and the resulting unchecked overgrowth of vegetation and trees in the Accreted Land, has (a) increased the potential of a fire hazard (both to our property and the rest of Sullivan's Island) and (b) increased the bug, raccoon, snake, rat, spider, coyote, and varmint populations (on our property and in the Accreted Land).

9. An ordinary person would be upset by the Defendants' interferences with our property as described above.

FURTHER AFFIANT SAYETH NOT!

Warren Tawes
Warren Tawes

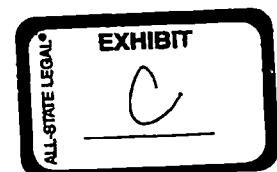
SWORN TO AND SUBSCRIBED before me
this 25TH day of FEBRUARY, 2014

Clarence A. James
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 3/21/2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Nathan Bluestein, Ettaleah Bluestein,	)	C/A No. 10-CP-10-5449
M.D., Theodore Albenesius, III, and	)	
Karen Albenesius,	)	
	)	
Plaintiffs,	)	
	)	
Versus	)	AFFIDAVIT OF
	)	NATHAN BLUESTEIN
Town of Sullivan's Island and Sullivan's	)	
Island Town Council,	)	
	)	
Defendants.	)	

PERSONALLY APPEARED BEFORE ME Nathan Bluestein, who after being sworn, states as follows:

1. My name is Nathan Bluestein.
2. I am over the age of eighteen (18) and am competent to make the following statements.
3. I am a Plaintiff in the above-referenced matter.
4. My wife (Plaintiff Ettaleah Bluestein, M.D.) and I reside at 2513 Atlantic Avenue ("home" or "property") on Sullivan's Island, adjacent to the Accreted Land (as defined in Plaintiffs' Second Amended Complaint) at issue in this lawsuit.
5. Prior to 1991 and until recently, my wife and I had views of the beach and Atlantic Ocean from our home.
6. Prior to 1991 and until recently, the portions of the Accreted Land adjacent to our home were primarily comprised of sea oats and wildflowers, all three (3) feet or lower, with no trees or tall shrubs.



7. In recent years, due to the Defendants' actions and inaction with regard to the management of the Accreted Land, the very character and nature of the Accreted Land has dramatically changed.

8. The Defendants have allowed the Accreted Land to become an unchecked overgrowth of vegetation and trees that have completely obstructed, or imminently will obstruct, all views of the beach and Atlantic Ocean from our home.

9. The Defendants' interference with my enjoyment of my property is substantial.

10. In addition to substantially interfering with my view of the beach and Atlantic Ocean, the Defendants' mismanagement of the Accreted Land, and the resulting unchecked overgrowth of vegetation and trees in the Accreted Land, has (a) diminished the property value of our home; (b) diminished the ocean breezes onto our property; (c) increased the potential of a fire hazard (both to our property and the rest of Sullivan's Island); (d) increased the mosquito population on our property; (e) increased the bug, raccoon, snake, rat, spider, coyote, and varmint populations (on our property and in the Accreted Land); (f) increased the quantity of poison ivy in the Accreted Land and on our property; and (g) increased security concerns on and around our property.

11. An ordinary person would be upset by the Defendants' interferences with our property as described above.

FURTHER AFFIANT SAYETH NOT!

Nathan Bluestein
Nathan Bluestein

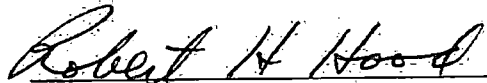
SWORN TO AND SUBSCRIBED before me
this 2nd day of January, 2014

Debra M. Pedron
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 12-4-22

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

The undersigned further certifies that the Record on Appeal has been redacted in compliance with the Order of the South Carolina Supreme Court, dated April 15, 2014, RE: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, Appellate Case No. 2013-002681.


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October 6, 2016