THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Hon. Mikell Scarborough, Master in Equity

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

Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Abenesius and Karen Albenesius., Appellants,

v.

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

FINAL BRIEF OF THE RESPONDENT

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STATEMENT OF THE CASE

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

STATEMENT OF FACTS

"I want the view." - Appellant Theodore Albenesius.[1]

This case revolves around Appellants' desire to look across property they do not own and cut vegetation on property they do not own. Sullivan's Island is a barrier island. When house lots were initially sold decades ago the Town retained

[1] ROA p 471, Deposition of T. Albenesius, p. 30 lines 9-16 (agreeing that from his perspective "It's all about the view")

ownership of an additional, undeveloped parcel of land lying between Appellants' lots and the ocean (hereinafter "Accreted Land.")

The Town and Low Country Open Land Trust (hereinafter, "LOLT" or "Land Trust") worked together in 1991 to protect the Accreted Land from development. They arranged a round-trip transaction in which the Town deeded the Accreted Land to the LOLT and the LOLT then sold the Accreted Land back to the Town with Deed Restrictions in place. ROA at 84 - 115 (Deeds - Exhibits to SAC.) The Deed Restrictions were intended to prevent development and preserve the Accreted Land largely in its natural state. ROA at 80-82, (Summary of Deed Restrictions); ROA at 96, (Deed Restrictions, p. 1.) They grant to the Town authority to govern vegetation trimming. ROA pp. 97, 99(Deed Restrictions at Para. 2, 6.)

In 1991, Appellants lots were close to the beach and, after Hugo's Category IV Hurricane winds, no trees remained on the Accreted Land. ROA pp. 121-127, pp. 1029-35 (SAC Exh 6E – K) Today, decades later, natural shrubs and trees now exist in place of bare, hurricane ravaged sand. Similarly, sand has built up making Appellants' houses further away from the ocean.

Rather than accepting acts of nature for what they are, Appellants fault a Town zoning ordinance for their diminished view. In 1995 and 2005 the Town passed zoning amendments that were more restrictive about what plants could be cut on town-owned land. With less cutting nature took its course. Some vegetation has reached a height where Appellants' views across the Town-owned Accreted Land are no longer as good as they were just after Hurricane Hugo. ROA at p. 36

(Order Denying Plaintiffs' Summary Judgment Motion Regarding Breach of Contract filed Nov 5, 2015 at p. 6, Para. 13-14.)

Appellants did not challenge either of these ordinance amendments within the sixty (60) day window specified by S.C. Code Ann. 6-29-760(D). Instead, Appellants in 2010 sued the Town seeking to invalidate the 1995 and 2005 zoning ordinances and obtain other relief. See ROA p. 51, (SAC with 2010 CP number.)

The fact findings made by Judge Scarborough in his "Order Denying Plaintiffs' Summary Judgment Motion Regarding Breach of Contract" (signed October 27, 2015, filed November 5, 2015) succinctly set forth the vast majority of facts necessary for determination of this appeal. For convenience the words of Judge Scarborough[2] are reproduced in italics below:

> *"Plaintiffs sued the Town of Sullivan's Island complaining over the Town's management of Town-owned land. Naturally occurring plants located on the Town's land have grown to a height that partially obscures the Appellants' view of the beach.[3] Appellants contend that the Town has deprived them of a right to a view by failing to cut (or allow others to cut) trees and shrubbery growing on town-owned land that lies between Appellants' houses and the ocean. The Plaintiffs contend that the right they possess stems from a promise contained in 1991 deed restrictions. The Plaintiffs filed a Motion for Summary Judgment*

[2] Note that typographical errors have been corrected in this re-typing and hopefully no new ones introduced.

[3] *Plaintiffs describe their claim with various labels (right to have vegetation pruned, condemnation of their view or beachfront status, etc.), but in essence the dispute in this case revolves around whether the Plaintiffs can force the Town to engage in the vegetation cutting necessary to allow Plaintiffs to see the ocean. For ease of reference in this Order, regardless of Plaintiffs label, this will generally be termed "right to a view".*

asking for a ruling that the deed restrictions (contract) had been breached. This Court has reviewed the deed restrictions and the Plaintiffs' arguments and concludes that the claimed promise was never made to the Plaintiffs.

The relevant facts are not disputable. This is confirmed by the fact that both the Appellants and the Respondents both moved for Summary Judgment on this general issue. In so doing both parties implicitly represented to the Court that the question is a legal issue of contract interpretation.

The Court finds the following to be beyond challenge and sufficient to allow interpretation of the deed / contract and resolution of the question before the Court:

1) *The Plaintiffs own houses located at 2513 and 2411 Atlantic Avenue. See Para. 1, Second Amended Complaint (hereinafter, 'SAC'.)*

2) *The Plaintiffs houses are 'front row houses' meaning that they are in the row of houses closest to the beach. See generally, Para. 50, SAC. See also, following diagram herein.*

3) *The Plaintiffs house parcels are not the closest parcel to the beach. The Town-owned parcel (TMS 529-10-00-087), known as the Accreted Land ('AL'), lies between the Appellants properties and the beach. See Para. 35, SAC. The following diagram illustrates the layout.*

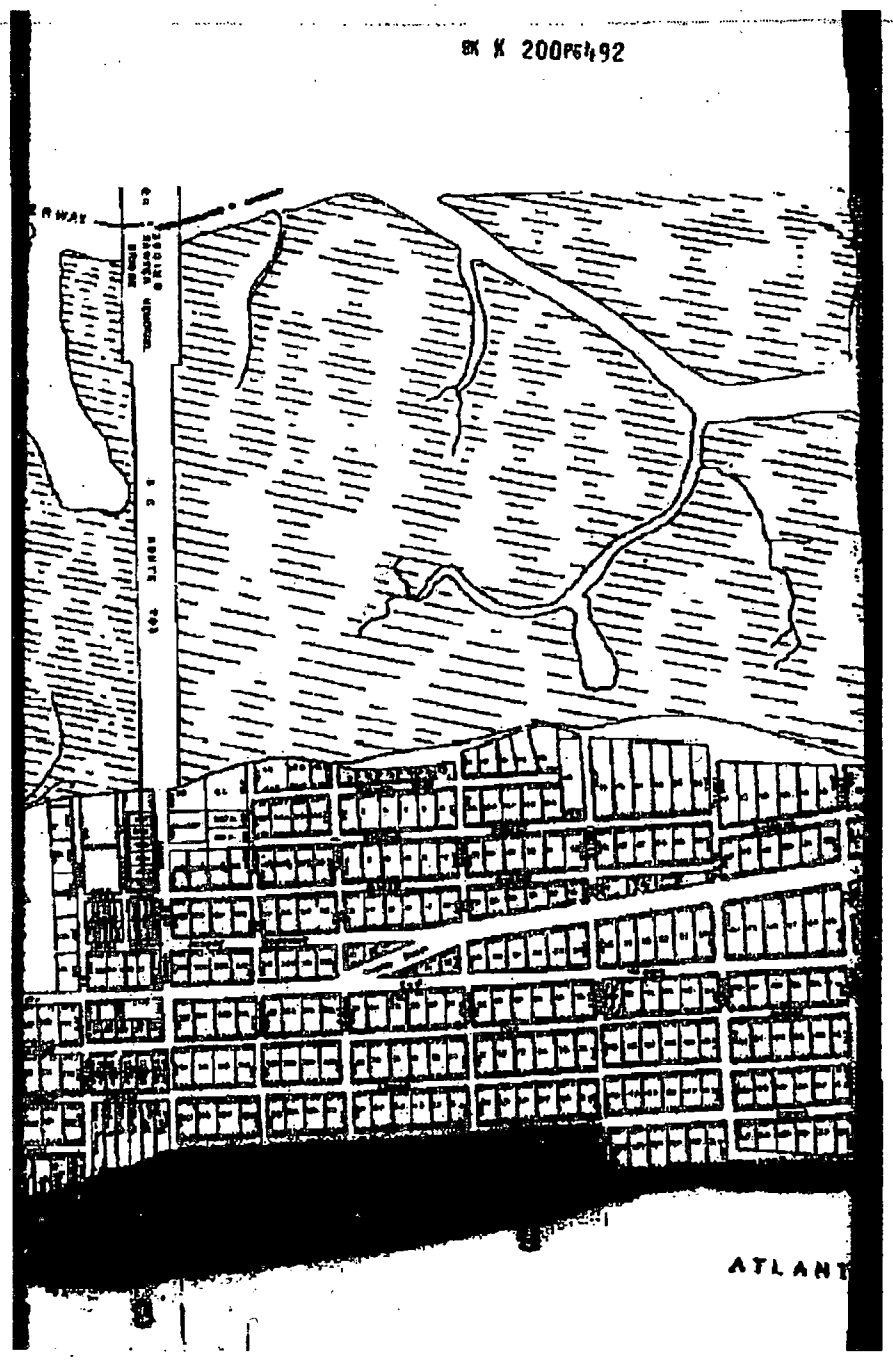

Diagram taken from Exh 3 to Second Amended Complaint[4]

[4] *An identical diagram is contained within Exh 4 to the Second Amended Complaint (deed from LOLT to Town), recorded Bk K 200 PG507. The version from Exh. 3 is reproduced herein as it has a higher photocopy quality.*

4) *The AL is subject to certain deed restrictions as a result of the 1991 deed. A copy of this deed is attached as an Exhibit to the SAC and incorporated by reference herein.*

5) *The deed restrictions do not cover the entirety of the AL. See prior diagram showing an 'unshaded' portion closest to Plaintiffs' properties.*

6) *In the vicinity of the Plaintiffs' properties, the 'unshaded' portion of the AL that immediately abuts the Plaintiffs' seaward property line is colloquially known as 'Bayonne Avenue Extension.' This area is not subject to the AL deed restrictions and lies between the Plaintiffs' properties and the deed-restricted property. See Diagram.*

7) *Photographs exist reflecting the appearance of the AL in 1991;*

8) *The condition of the AL today is not in controversy and that the appearance differs from the exact way it looked in 1991;*

9) *Both parties argued to the Court that the words of the Deed Restrictions are clear. (The parties differ on the interpretation they would attach to*

these words. This disagreement is not one of fact, but rather is a question of law.);

10) Both parties argued to the Court the following language quoted from the Deed Restriction Summary: 'The scenic value of this property is due to its visibility from the Atlantic Ocean and the public beach. Open space values derive from the undeveloped natural character of the entire property.' As both parties cite this language it is clearly not in dispute.[5]

11) The Low Country Open Land Trust has a right to enforce the deed restrictions;

12) The Plaintiffs' are 'third party beneficiaries' under the deed restrictions and that the deed restrictions permit such persons to seek enforcement of the deed.

In addition to the above, there are also certain other 'absolutes' that are not realistically capable of being disputed by either side in this case:

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[5] *See Plaintiffs' Memorandum in Support of Partial Summary Judgment, pg. 13, quoting the Lowcountry Open Land Trust's "Summary of Deed Restrictions."*

1) *The Lowcountry Open Land Trust (the grantor of the Deed Restrictions) has made annual inspection visits to the AL for the stated purpose of assuring that the Town has faithfully honored the deed restriction requirements. See Affidavit of Hagood.*

2) *The Lowcountry Open Land Trust has for more than a decade, after every such visit, issued a written report finding that the Town is in compliance with the deed restrictions. See Affidavit of Hagood.*

3) *The Deed Restrictions, at Paragraph 2, contain the language 'Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given the unrestricted authority to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean, and providing views of the ocean and beaches to its citizens.'*

4) *Paragraph 2 of the Deed Restrictions is the only paragraph in the Deed Restrictions which makes mention of a view of the ocean and beaches.*

5) *The Deed Restrictions contain the language 'The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Regulations or which are not inconsistent with these Restrictions.' Deed Restrictions, Para. 6.*

6) *The cutting ordinance in effect at the time of the 1991 deed restrictions was the Town's 1981 Ordinance. See Exh. 10 and 11, SAC.*

7) *The Town's 1981 Ordinance allowed for citizens to apply to the Town for permission to cut vegetation on the accreted land to trimmed height of not less than three (3) feet, provided the Town's Zoning Administrator made certain findings. See Exh. 9, SAC.*

8) *The Town's 1981 Ordinance did not expressly limit what species could be trimmed. See Exh. 9, SAC.*

9) *The Town's 1995 Ordinance raised the minimum trimmed height from three (3') feet to seven (7') feet. The 1995 Ordinance also added a species list limiting the plants that could be trimmed. See 1995 Ordinance attached as Exhibit to Defendants' Motion for Summary Judgment on All Causes of Action Due to* Plaintiffs' *Lack of Any Right to Control or Look Over Neighboring Parcels.*

10) The Town's 2005 Ordinance adjusted the minimum after-trimming height to five (5') feet and retained the same species list as in the 1995 ordinance. See 2005 Ordinance attached as Exhibit to Defendants' Motion for Summary Judgment on All Causes of Action Due to Plaintiffs' Lack of Any Right to Control or Look Over Neighboring Parcels.

11) The 1995 and 2005 Deed Restrictions allow less cutting than did the 1981 ordinance. As such, these ordinances are 'more restrictive.' See Para. 36, SAC; see also N. Bluestein Depo p. 71, lines 14-18; See also, 1981, 1995 and 2005 ordinances.

12) No cutting ordinance amendment has been passed since 2005. See Para. 133, SAC, seeking to invalidate 2005 ordinance as most recent listed version.

13) Since 1991, nature has caused plants to grow higher on the Accreted Land such that it no longer looks as it did in 1991. See Para. 37, SAC.

14) Since 1991 sand has naturally accreted on the Accreted Land such that the Accreted Land no longer looks exactly as it did in 1991. See Para. 19; SAC.

15) *The AL remains undeveloped. See Photographs attached to SAC."*

ROA p.31-36

Additional Facts

The facts above address the vast majority of the Appellants' Causes of Action. However, a few additional facts are relevant to specific claims.

Breach of Contract Accompanied by Fraudulent Act

The Appellants' Complaint sought damages for Breach of Contract accompanied by Fraudulent Act. The alleged "fraud" revolved around the distribution of a public opinion questionnaire by Respondent. See ROA pp. 70-72. (SAC, Para. 93 – 103.)

In 2009 the Town considered the possibility of amending the 2005 ordinance. See ROA, p 3-4 (Dec. 4, 2014 Order Granting Summary Judgment to Defendants Regarding Breach of Contract [] Accompanied by Fraudulent Act, p. 1) The Town hired a consultant who, among other things, proposed language for a public opinion survey. See Id. The opinion survey ultimately circulated by the Town differed in language somewhat from the language proposed by the consultant. See Id. The proposed survey was performed years after the challenged Accreted Land ordinances were enacted. See Id. and ROA p.6, Footnote 3. The 2009 proposed amendment to which the survey related was never enacted into law.

Monetary Damages

The Appellants sought monetary damages from the Respondent / Town, basically claiming that, but for the Town's 1995 and 2005 amended ordinances, Appellants would be able to see the ocean and enjoy higher house values. See ROA p. 63-64, 69-70 (SAC, para. 58, 88-91.) Judge Scarborough made several relevant fact findings in the course of determining that no damages could yet be attributable to anything the Respondent Town had done because the Plaintiffs lacked OCRM permission to cut. Specifically, Judge Scarborough found:

- The Appellants received a letter from Chief Counsel to OCRM informing them that they would not be permitted to cut seaward of the critical line absent OCRM approval. ROA, p. 26 (July 30, 2015 Order Granting Defendant's Motion to Strike Damages Claims Due to Location of OCRM Critical Line, p. 5.) See also ROA, p. 359 (OCRM Letter)

- The Plaintiffs have received no permits from the State that would permit them to cut vegetation seaward of the "critical line." See ROA, p. 25 (July 30, 2015 Order Granting Defendants' Motion to Strike Damages Claim Due to Location of OCRM Critical Line, p. 4.)

- The critical line has moved over the years and now protects the overwhelming majority of the land on which the Plaintiffs wish to cut vegetation. See ROA, p. 24 (July 30, 2015 Order Granting Defendants' Motion to Strike Damages Claim Due to Location of OCRM Critical Line, p. 3.) See Also, Appellant's

Brief at pg. 36 (claiming critical line is more than 600' inland of primary dune.)

- The cutting of vegetation landward of the critical line would not materially improve the Plaintiffs' view absent OCRM approval to also cut seaward of the critical line. See ROA, p. 26 (July 30, 2015 Order Granting Defendants' Motion to Strike Damages Claim Due to Location of OCRM Critical Line, p. 5.)

- The OCRM critical and setback lines for a relevant portion of the beach are shown at ROA p. 1023 (OCRM Map), See ROA, p. 25 (July 30, 2015 Order Granting Defendants' Motion to Strike Damages Claim Due to Location of OCRM Critical Line, p. 4) (incorporating diagram into Order.))

ARGUMENTS[6]

1. THE APPELLANTS CLAIMS ARE TIME BARRED.[7]

Appellants claims are untimely pursuant to S.C. Code 6-29-760(D). "Statutes of Limitations are not simply technicalities." Stokes-Craven Holding Co. v. Robinson, Shearouse Adv. Sheets No. 21, Op. No. 27572, -- S.E.2d --, 2016 WL 3040160, at *4 (SC 2016)Challenges to the validity of zoning ordinances must be filed within sixty (60) days.[8] There is no question that the Appellants' lawsuit is about invalidating zoning ordinances. Appellants' lead cause of action sought an order "invalidating all ordinances relating to the Accreted Land passed since February 12, 1991." ROA, p. 67, SAC, Para. 73. It is beyond dispute that the 1995 and 2005 cutting ordinances are "zoning ordinances" that appear as such in the Town's published zoning code.[9]

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[6] The Town objects to each and every argument raised by Appellants unless agreement is specifically indicated herein.

[7] This argument is authorized under S.C.A.R. 220(c). Further, pursuant to that same rule the Town would respectfully request that the Court uphold the decision below if there is any ground appearing in the record that would support the outcome.

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

[9] See http://www.sullivansisland-sc.com/Files/Town%20Codes/Sec21%20Zoning%20AMENDED%20111715%20(Conservation%20Easement%20Uses-Structures).pdf Challenged ordinances found beginning

Finally, it is beyond dispute that the Appellants waited more than sixty (60) days to file suit. In fact, the Appellants missed the Statute of Limitations by at least five (5) years. The caption of this case bears a 2010 Common Pleas civil action number and the most recent ordinance being challenged is the "2005" ordinance.

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

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on Page 41 of the website text. Also, note that the topic of the ordinance, protecting ecologically sensitive areas, is specifically authorized by S.C. Code 6-29-710(A)

in 1994, six years after S.C. Code 15-3-520, and therefore would take priority to the extent conflict exists. The heart of the Appellants claims are time barred.

Appellants also can't avoid this result by arguing that their claims are labeled as something other than a challenge to the legitimacy of a zoning ordinance. The fundamental basis of every one of Appellants' causes of action is that they want the 1995 and 2005 Zoning Ordinances stricken. Paragraph 60 of the SAC alleges "[t]he Town Council does not have the power to enact ordinances in ways other than those allowed by the easements and restrictive covenants clearly stated in the contract and/or deed restrictions....." ROA at p. 64. This allegation is incorporated into every cause of action in the Complaint. See ROA pp. 65, 68-70, 72-73, 75-76, SAC para. 63, 76, 83, 88, 93, 108, 115, 123 and 127. In Paragraphs 80 and 82 the Appellants seek an injunction against Council enforcing the zoning ordinance. See ROA p. 68, (SAC). And Paragraphs 84-87, while styled as Mandamus, clearly ask that the zoning ordinance be set aside. ROA. p. 69. The same may be said of the Nuisance allegation. ROA p. 74, SAC at Para. 122. The list goes on and on. While pled under differing names the various causes of action all, in one form or another, seek to invalidate the zoning ordinance.[10] This is explicitly confirmed in the Prayer for Relief which asks in part "(c) That this Court invalidate the 1995 and 2005 Town Ordinances which limit what can be cut, trimmed or pruned, so as to put back into place the ordinance... as it was of February 12, 1991." ROA at p. 77 (SAC).

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

2. THE TOWN CANNOT HAVE BREACHED THE PROMISE APPELLANTS CLAIM BECAUSE THAT PROMISE NEVER EXISTED.

A. The interpretation given the Deed by the "Grantor" Land Trust ends the Appellants arguments.

In addition to considering the Appellants' interpretation, Judge Scarborough wisely considered how the actual grantor of the deed interpreted the language. He noted that the Land Trust "has made annual inspection visits to the Accreted Land for the stated purpose of assuring that the Town has faithfully honored the deed restriction requirements" and has "for more than a decade, after every such visit, issued a written report finding that the Town is in compliance with the deed restrictions." See ROA at p.35, (Order Denying Plaintiffs' Summary Judgment Motion Regarding Breach of Contract, filed Nov. 5, 2015 at p 5, Para 1-2.), See also, ROA p. 361, (Affidavit of Hagood.) Appellants do not appeal the accuracy of these facts.

The documentary record overwhelmingly supports the fact that the Grantor Land Trust was interested in nature preservation rather than preservation of Appellants' porch views. Appellants at page 21 of their brief mention the Summary of Deed Restrictions (ROA pp. 80 - 82) as evidence of the parties' original intent.[11] The Town agrees. The Summary tells us:

> "The primary design elements revolved around maintaining the natural character of the property and protecting the accreted beach

[11] The Appellants attribute this document to the Town. However, the text of the document makes it appear that it was actually prepared by the Land Trust. Either way, the document was prepared by the parties years prior to litigation commencing and thus gives good insight as to original intent. Further, even if it were prepared by the Town, Appellants even go so far as to say at one point that, in the case of the Accreted Land deed, "the Town's intent is key." Appellant's Brief at p 19.

> from future development and commercialization. The accreted beach also serves as a protective barrier from high tides associated with coastal storms and hurricanes. The restrictions also need to allow for public enjoyment to ensure public support. Of the project." ROA 81 (Summary of Deed Restrictions)

Further, we are told that the

> "scenic value of this property is due to its visibility ***from*** the Atlantic Ocean and the public beach. Open space values derive from the undeveloped natural character of the entire property. These conservation values are protected by the limitations on subdivision, building and commercial use." ROA p. 81. (Summary of Deed Restrictions)(Emphasis added.)

There are two landmarks to guide us in the language above. *First,* there is no mention of protecting the view of homeowners towards the water. In fact, the Summary says just the opposite. *Second,* the Summary tells us that the particular deed restrictions intended to protect the view and open space are "the limitations on subdivision, building and commercial use." There is no mention that porch views were to be protected by way of freezing the 1991 vegetation trimming rule in place.

The Summary goes on to say "The property consists of vegetated dunes, wetlands and white sand beaches which provide habitat and nesting grounds to a variety of birds and animals .... These conservation values will be protected by limitation on subdivision, building, and commercial use, as well as the limited ability to alter vegetation." ROA at p. 82 (Summary of Deed Restrictions) Significantly, the deed restriction says that wildlife is protected by the "limited ability" to alter vegetation. Clearly trimming is not encouraged, but rather discouraged, and certainly the Summary does not say the Deed intends to impose a *requirement* that vegetation be continually pruned and altered as Appellants allege. See also, ROA p.

96 (Deed Restriction Preamble) (the parties "desire to place restrictions on the property for the purposes of ... retaining land or water areas predominantly in their natural state, scenic or wooded condition or as suitable habitat for fish, plants and wildlife.")

The Appellants' own legal authority highlights why the Land Trust inspections and intentions are so compelling. "First, the intention of the grantor must be ascertained an effectuated...." See Appellants' brief, p. 19, quoting Wayburn v. Smith, 270 S.C. 38, 41-41, 239 S.E.2d 890, 892 (1977). Appellants' brief goes on to describe how the normal rule in contract interpretation is for the court to "give effect to the intention of the parties." Id. Accordingly, the Land Trust's interpretation and opinion on the matter is close to conclusive.

The Appellants' attempt to give their own interpretation equal weight to that of the Land Trust fails. The Deed / contract has two parties – the Town ("grantee") and the Land Trust ("Grantor"), who are collectively referred to as "the parties". See ROA p. 96 (LOLT to Sullivan's Island Deed, page 1.) Paragraph 5 of the Deed Restrictions does give property owners and registered voters standing to seek enforcement of the Deed restrictions. ROA p. 98 (Deed Restrictions.) However, Paragraph 5 does not call such people "parties." ROA p. 98 (Deed Restrictions.) This makes sense. Standing allows residents to file an enforcement lawsuit, but having standing to sue is fundamentally different than being a "party" that negotiated a contract.[12]

[12] A hypothetical illustrates the difference. Imagine Parent goes to Dealer and leases a Toyota expressly for the benefit of Daughter. If Dealer fails to deliver the Toyota the

It is also important to remember that Appellants interpretation is held by only a minority of residents. Paragraph 5 of the deed restrictions does not empower a special class of near-beach property owners to enforce and interpret the deed. Had the Grantor Land Trust really intended the Deed Restrictions to protect the "view" of near-beach residents then Paragraph 5 could easily have been written to grant such property owners special or heightened enforcement rights. The Land Trust did not do so. Instead, *all* island residents and property owners are similarly situated. This is important because the various votes of Town Council make clear that a majority of the island's residents do not agree with the interpretation put forth by the Appellants. So not only are Appellants wrong that Paragraph 5 allows them to substitute a resident's interpretation of the Deed in place of the intent of the drafters, even if residents did have such a right the "collective will" of island residents favors the drafter's interpretation.

B. The deed restrictions never promised that the natural state of the accreted land, or the vegetation cutting rules, would remain unchanged.

The Appellants sued to enforce a promise that never existed. They point to language describing the protected "natural state" as being what was documented at the time the deed was recorded. Contrary to the interpretation of the Grantor Land Trust, Appellants argue that the intent was "to literally and figuratively take a snapshot in time

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Daughter may have standing to sue to enforce the contract between Parent and Dealer. But it would be absurd to think that the Daughter could sue Dealer and Parent on a claim that the intent of the Toyota lease document was that she is entitled to drive a Lexus because her preference should prevail over that of the parties that negotiated the contract. That is exactly what the Appellants try to do here.

and preserve the accreted land in the same condition as it existed in Feburary 1991...." Brief of the Appellant, p. 9, See also Appellants' Brief, p. 15 ("Those photographs – which constitute a virtual snapshot in time – are expressly intended to set the standard for the Town's obligations and the rights of the Plaintiffs....")

The implications of this are startling. Appellants position would mean that the Deed Restrictions promised them a never-changing Bonsai garden where a bush 3' high in 1991 would remain 3' high today, a 2" blade of grass in 1991 would remain 2" high today, and an un-vegetated patch of sand in 1991 would remain un-vegetated today, more than 25 years later. Moreover, what of accreted sand adding distance between the Appellants' homes and the ocean? Appellants reading would obligate the Town to dredge. What of changes made over the years to AL dunes and vegetation by Hurricane Fran, Hurricane Floyd, Hurricane Gaston and others? If Appellants are correct that the Deed and accompanying photographs were intended "to literally and figuratively take a snapshot in time and preserve the accreted land in the same condition as it existed in Feburary 1991..."[13] then the Town promised the impossible – to stop nature and Acts of God. The absurdity of this demonstrates the obvious: the Deed Restrictions did not, and were not intended to, promise what the Appellants claim.

The language of the Deed Restrictions also presents a fatal problem for the Appellants' "Bonsai Garden" reading. Paragraph 2 specifically gives the Town the "unrestricted authority" over trimming vegetation. ROA p.97 (Para 2, Deed

[13] Brief of Appellant, pg. 9.

Restrictions.)[14] This "unrestricted authority" is granted "notwithstanding paragraphs 1 and 3", which limit the Town's ability to change the AL property in other ways.[15] In other words, the drafters of the Deed Restrictions not only said that the Town's authority to trim vegetation was "unrestricted", the drafters confirmed this again by specifically saying that the Town would not have to comply with certain limitations found elsewhere within the Deed when it exercised its "unrestricted authority."[16] So, far from violating the Deed Restrictions, the Town was precisely following them as it adopted the cutting rule about which Appellants complain.

The "more restrictive" clause contained within Paragraph 6 of the Deed Restrictions further confirms that the Appellants have no argument under the Deed Restrictions. The Appellants' basic complaint is that the Town allows them to trim less

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

[15] The term "notwithstanding" is widely recognized to mean "in spite of the fact that" or "without prevention or obstruction from or by." See generally Bolin v. SC Dept of Corrections, 415 S.C. 276, 282, 781 S.E.2d 914, 917(SC App. 2016)("The legislature's use of the phrase "Notwithstanding any other provision of law," in the amendments ... expresses its intent to repeal [pre-existing] sections ... *to the extent* it conflicts with amended sections....")

[16] Appellants cannot argue that the Town's "authority" to trim amounts to a "duty" or "obligation" to trim for their benefit. First, the word "authority" is not an obligation, but rather a discretionary choice given to Council. Second, the inclusion of the word "unrestricted" would negate any such argument. For if the "authority" was an "obligation" to keep the vegetation trimmed to a certain height then the power of Council to control vegetation by way of Paragraph 2 would be "restricted" since Council would not be able to choose any set of rules other than those rules in effect in 1991.

vegetation now than when the Deed Restrictions were imposed.[17] In other words, the Town's current rules are "more restrictive" and, as a result, impair their view of the ocean, allow for more bugs, etc.[18] Paragraph 6 of the Deed Restrictions, however, allows the Town to do *exactly* what the Plaintiffs are complaining about. Paragraph 6 states in pertinent part that the "Town may enact ordinances which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions." ROA p. 99, (Deed Restrictions, Para. 6.)

There can be no argument that the 1995 and 2005 ordinances complained about by the Appellants are "more restrictive." The Appellants admitted at deposition that this is why they don't like the challenged ordinance.[19] Their pleadings take the same position.[20] The Appellants' whole case is their desire to be relieved from the more restrictive current regulations and instead be governed by the older more permissive

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

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

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

[20] See ROA p. 77. Second Amended Complaint, Para. 133(b)(asking that the Town be enjoined from interfering (through the challenged zoning ordinance) with their "right" to cut all variety of trees and shrubs to a height of no less than 3 feet); See also, Para. 133(c) (asking the court to declare invalid all ordinances which limit what can be cut so as to put back in place the rules existing in 1991 when the deed restrictions were imposed.); see also Eighth Cause of Action "Inverse Condemnation" (claiming basically that Towns action denied them of the right to cut in the manner they believed existed in 1991 – in other words that the new rules were "more restrictive.")

"three (3') rule"[21] that allowed them to cut more.[22] Since the Deed Restrictions allow the Town to enact more restrictive rules on tree cutting the Appellants cannot show that the Town violated them by so doing.

With Appellants' "Bonsai Garden" reading cast aside, it is time to consider what the Deed Restrictions actually promised. The Deed Restrictions were intended to keep the Accreted Land largely an undeveloped plant / wildlife habitat. This promise has been kept. Photos from 1991 show the land wild and undeveloped. ROA at pp. 121-27, 1029-35. (SAC Exh. 6E – K.) Photos submitted in 2010 show still show a wild and undeveloped state. ROA pp. 134-43, 1042-51 (SAC Exh 8A-J.) In fact, Appellants' complaint here is really that the Town has done *too good* of a job of limiting human intervention.

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[21] Ironically, as Judge Scarborough noted, the Appellants did not even have a "right" to cut under their preferred ordinance that existed in 1991. That ordinance gave the Town the ability to grant them cutting permits if the Town were satisfied that "the cumulative effect of the trimming, cutting or pruning shall not be detrimental to the safety, welfare and health of the people of the Town." ROA p.147. (Exh 9 to SAC) So the Town had the discretion to deny Appellants permission to cut even under the 1981 / 1991 Ordinance. That ordinance therefore cannot be the basis of Appellants' claimed "right" to cut under the Deed Restrictions.

[22] Appellants on pages 24-25 of their brief advance an Alice in Wonderland argument that "more restrictive" cutting ordinances in the context of the Deed Restrictions would actually mean ordinances that allow more aggressive, lower cutting of vegetation. In other words, they claim that if a 3' minimum height was allowed in 1991 the Land Trust's deed told the Town that a lawnmower would be okay too. There are two problems with this. *First*, Appellants evidently forget that the deed was drafted by a land / nature conservation organization, not a beachfront homeowner's association. *Second*, the Appellants themselves testified at deposition that they believed the challenged ordinances were "more restrictive" than the version they favor. See ROA p. 467-68. Deposition of T. Albenesius p 17, lines 4 – 7; p 18, line 15 – p 22, line 22. See also, See ROA p. 589-90. Deposition of N. Bluestein p. 70, line 8 – 25; p 72, line 24 – p 74, line 2.

C. Appellants' proposed reading of the Deed would constitute an impermissible impairment of legislative power.

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

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

The same logic applies here to thwart Appellants' interpretation of the deed restrictions. The passage of a zoning ordinance is unquestionably a governmental

power. See Title 6, Chapter 29, Article 5 of the South Carolina Code of Laws. If one accepted the Appellants' claim that Deed Restrictions gave them a right bar amendment of the 1991 zoning ordinance then the Deed Restrictions would effectively have stripped fifty (50) years' worth of City Councilmen of a core governmental power.[23]

3. JUDGE SCARBOROUGH CORRECTLY RECOGNIZED THE SIGNIFICANCE OF BAYONNE AVENUE EXTENSION.

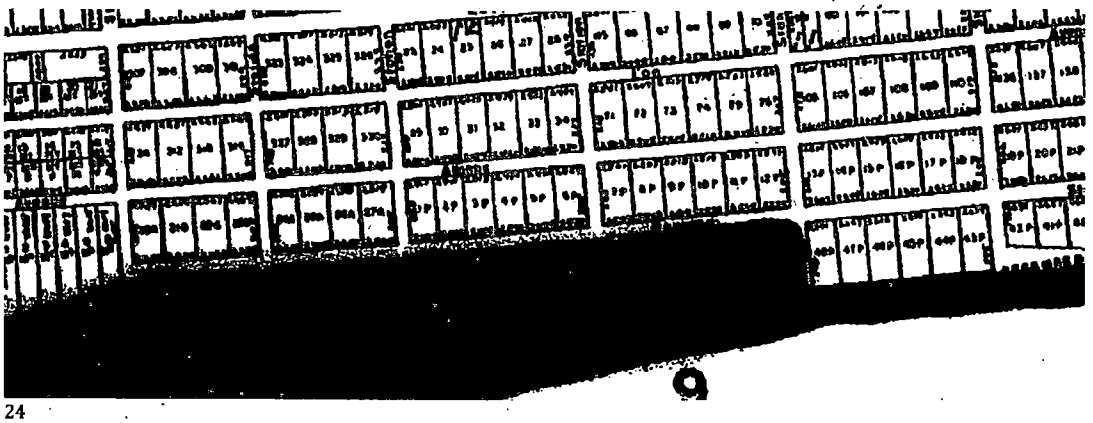
Bayonne Avenue Extension is an unpaved Right of Way segment, not governed by Deed Restrictions, that lies between the Appellants' parcels and the Accreted Land. As such, it eliminates Appellants' claim of right to an ocean view.

A. Bayonne Avenue Extension most certainly exists

Appellants at page 32 of their brief challenge whether the existence of Bayonne Avenue Extension is established in the record. That challenge is disposed of easily. The deed from the Land Trust to the Town clearly shows Bayonne Avenue

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

Extension. The Deed Diagram for "Section 9" shows "unshaded" Bayonne Avenue running from Station 22 ½ to Station 26, despite the fact that paving only currently exists between Stations 26 and 28. ROA p. 110.



[24]

This is consistent with the written description on Bk K 200 pg 503 which says that the relevant boundary for Section 9 is Bayonne – not Appellants' property lines. ROA p. 103 (SAC, Exh 4) The Appellants cannot credibly challenge the existence of Bayonne Avenue Extension.

B. Bayonne Avenue Extension Was Property Analyzed in Regards to the Inverse Condemnation Portion of the July 30th Order

Appellants next challenge Judge Scarborough's ruling that the existence of Bayonne Avenue Extension was one reason the Appellants' could not prevail on the inverse condemnation claim they pled.

The Appellants repeatedly argued below that they possessed a deed-based right to see the ocean. See ROA, p 60, 75 (SAC at para. 43, 124-126.) Loss of an ocean view was and is the principle basis on which they claim monetary loss. See

[24] Excerpt from ROA p. 110 (SAC Exh 4 - Land Trust Deed Bk K 200pg507)

ROA p. 886; (Transcript of Nov. 25, 2013 Hearing, pp. 3) See also, Appellants' Brief, p. 17.

The existence of Bayonne Avenue Extension was certainly relevant to analyzing such a claimed damage. Even assuming arguendo there were deed restrictions to limit vegetation from growing on the bulk of the Accreted Land, Bayonne Avenue Extension is an additional, unrestricted strip of land lying between Appellants and the deed-restricted area. Given that there is no common-law right to a view, the Town was free to let vegetation rise on that unrestricted strip to the point where the Appellants could not even see the most landward edge of the Accreted Land, much less see all the way across the Accreted Land to the ocean. Put another way, the presence of the Bayonne Avenue Extension means the Appellants cannot possess any right to a view of the ocean because they don't even have a right to look across the street.[25]

The impact of this is enormous. It basically eliminates Appellants' chief theory for monetary damages and claim for inverse condemnation because, as Appellant Theodore Albenius agreed, at the heart of Appellants' case "it's all about the view." ROA p. 471, Deposition of T. Albenesius, p. 30 lines 9-16. Bayonne Avenue Extension makes clear that the Appellants don't actually possess any right to the ocean view.

The law cannot compensate them with monetary damages for being deprived of something they didn't own to begin with. See McQueen v. SC Coastal Council, 354 SC 142, 149, 580 S.E.2d 116, 119 (SC 2003); Lucas v. SC Coastal Council,

[25] "Street" is used colloquially as the right of way section in question is actually unpaved.

505 US 1003, 1027 (1992). See ROA, p. 20 (Order of July 30, 2015 Granting Summary Judgment to Defendants Based On Plaintiffs' Lack of Right to a View, p. 14.)

C. Bayonne Avenue Extension Was Property Analyzed in Regards to the Nuisance Portion of the July 30th Order

The only other cause of action formally dismissed by way of the challenged July 30, 2015 Order was the injunctive relief claim. The limited excerpt in Appellants' Brief from Page 8 of the Order seems to imply that the dismissal was specifically a result of Bayonne Avenue Extension. In fact, page 13 of the Order makes clear that dismissal was necessary regardless of Bayonne Avenue Extension because "[t]he Town has not violated the deed restrictions or any other law. Accordingly, there is no basis for the issuance of an injunction to stop the Town from operating in its current, lawful fashion." ROA p. 19 (Order of July 30, 2015 Granting Summary Judgment to Defendants Based On Plaintiffs' Lack of Right to a View, p 13.)[26]

[26] Appellants' argument also ignores the fact that South Carolina courts will not grant injunctive relief that compels a city council to enact an ordinance as would be required here to change the repeal the 1995/2005 cutting rule about which Appellants complain. See Horry Telephone Cooperative, Inc. v. City of Georgetown, 408 S.C. 348, fnt. 5, 759 S.E.2d 132, fnt. 5 (SC 2014)("This requested relief is fundamentally improper, as it would require this Court to compel a city council to enact an ordinance, which would consist of a violation of the separation of powers.")

4. THE APPELLANTS' LACK OF OCRM CUTTING APPROVAL MADE DAMAGE CLAIMS UNRIPE AGAINST THE TOWN.

State permission is required before trimming may occur seaward of the critical line. See Appellants' Brief at p. 33. The current line includes a large portion of the Accreted Land. Appellants' Brief at p.36 (claiming line is more than 600' inland of the primary dune.) See also ROA p. 1023, (OCRM map). There is no dispute that Appellants have not applied for State permission to work seaward of the critical line.

Despite this, Appellants argue that the critical line shouldn't legally change what behavior the Deed Restrictions require from the Town. Brief of Appellant at p. 37. The problem with this appeal ground is that Judge Scarborough did not rule that the critical line had a bearing on what conduct the Deed Restrictions required, nor did he dismiss any cause of action. See July 30, 2015 Order Granting Defendants Motion to Strike Damages Due to Location of OCRM Critical Line. Judge Scarborough's ruling was much more narrow. He merely ruled on how the critical line impacted the availability / amount of monetary damages.

A. The OCRM Critical Line was relevant to the topic of monetary damage availability / calculation.

Judge Scarborough correctly recognized that the OCRM critical line gutted any damages claim. The Appellants' damages claims have overwhelmingly been based on the claimed "lack of ocean view" attributable to plants growing on the Accreted Land. See ROA at pp. 61-64 and 75-77 (SAC Para. 47-52, 58, 124-125, and

132.), See ROA p. 886 (Transcript of Nov. 25, 2013 hearing, pg. 3.) After all, in this case "It's all about the view." See ROA p. 471, Deposition of T. Albenesius, p. 30 lines 9-16 (Appellant agreeing with the preceding statement).

Appellants' lawsuit blames this solely on the Town's passage of the challenged ordinances in 1995 and 2005. Judge Scarborough realized, however, that until the Appellants had State OCRM permission in hand it really didn't matter whether the Town ordinance existed or not. The Town wasn't the last hold-up and hence couldn't be viewed as responsible for damages until OCRM prerequisites were met.[27]

B. Appellants' claim that OCRM might one day approve an application for them, or might one day redraw the critical line more to their liking, is irrelevant since Appellants have not even applied for State permission.

Appellants argue (basically) that OCRM would approve what Appellants want to do if they asked and that OCRM might move the critical line one day. Appellants miss the point. These arguments reinforce Judge Scarborough's position. OCRM might or might not approve an application in the future. But no matter what, until

[27] Appellants fault Judge Scarborough for concluding that they wouldn't see material improvement if they only cut landward of the critical line and argue that the deed restrictions contain no requirement of improved view. Such arguments might work better in some other case with other facts, but not here. The OCRM map shows the critical line is virtually at the backyard of some front-row owners. See ROA p. 1023. The Appellants themselves claim the line is more than 600' inland of the primary dune. See Appellant's Brief, pg. 36. Further, while there may be no "material view improvement" standard when talking about potential specific performance remedies, the degree of view improvement / degradation attributable *to the Town's ordinance* is absolutely relevant to determining monetary damages based on lost view as Appellants claim.

Appellants apply to OCRM they cannot obtain OCRM permission. And until the Appellants have OCRM permission the Town's ordinance cannot be the cause of the claimed damages that Judge Scarborough correctly struck.

C. Appellants' argument that the Town made it futile for them to apply to OCRM is a recognition that the Deed Restrictions did not clearly convey them with any right to force cutting of the Accreted Land.

Appellants attempt to avoid the Critical Line by claiming that they were ineligible for OCRM approval because the Town wouldn't cooperate. App. Brief at 36. Appellants' argument actually supports the Town's position. Appellants concede that "[t]he Plaintiffs do not own the accreted land and the Town, as owner, will not give permission." Appellants' Brief, p 36. They also acknowledge that OCRM will not give an applicant permission to cut on a neighboring property unless the applicant can show a "'certified copy of the deed, lease, or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the proposal.'" Appellants' brief, p. 35 (quoting SC Reg. 30-2). This is exactly the Town's point! Appellants do not own the Accreted Land and Appellants do not have any deed, lease or other instrument (including the Deed Restrictions) that they can present to OCRM to demonstrate they have a right to cut.

Appellants respond that it would have been futile for them to present the Deed and Deed Restrictions to OCRM as documentary support for their cutting application. Appellants' brief p. 36. Admittedly, nowhere in the Deed Restrictions does it say Appellants have a right to keep the Accreted Land trimmed. Even the Appellants begrudgingly acknowledge this. See Brief of Appellant at p. 22 ("... even

if there be no explicit promise that the trimming ordinances would remain unchanged....") Appellants' candor in this regard torpedoes not only this OCRM "futility" argument, but the vast majority of their brief in which they claim that the Deed Restrictions clearly give them a right to have the AL cut to three (3').[28]

5. APPELLANTS ARE NOT ENTITLED TO A TRIAL ON THE CLAIM OF BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT.

A. There can be no breach of a promise that never existed.

Appellants attempt to avoid the Tort Claims Act bar on fraud claims by focusing on the contract aspects of "Breach of Contract Accompanied by Fraudulent Act" (hereinafter "BCAFA"). Yet this focus throws them out of the frying pan and into the fire.

Breach of contract requires a promise that is subsequently dishonored. Appellants *wish* the Deed Restrictions gave them a promise that the Accreted Land would forever remain subject to the three (3') cutting rule in place in 1991. As previously detailed, however, the language of the Deed Restrictions does not say this. See App. Brief p. 22 ("... even if there be no explicit promise that the trimming ordinances would remain unchanged....") To the contrary, the Deed Restrictions explicitly promise that the Town shall retain "unrestricted authority" to control the cutting of vegetation on the Accreted Land. ROA p. 97 (Deed Restrictions, Paragraph 2). The Deed Restrictions promise that the Town, if it passes an amendment, shall be sure that the amendment is the same or

[28] Appellants assert that OCRM would not be the venue to litigate rights under the deed. That's true, but Appellants miss the point. OCRM specifically will accept a deed as documentation of permission. See SC Reg 30-2. No litigation would be required if the deed said Appellants' possess the right they claim. It does not.

more restrictive than the 1991 ordinance. ROA p. 99 (Deed Restrictions, Paragraph 6.) The Deed Restrictions promise that the Town will allow the Accreted Land to remain a natural habitat for plants and animals. All these promises have been kept. The Town has exercised its authority to control cutting on the Accreted Land. The Town passed 1995 and 2005 cutting rule amendments that were, without question, "more restrictive" than the 1991 rule. The Town has kept the Accreted Land to this day in an undeveloped state that harbors plants and animals. The only thing the Town has not done is maintain a perpetually unchanged 3' cutting rule that the Deed never promised in the first place.

B. Appellants' own pleading of the claim brings it within the reach of the Tort Claims Act.

There does not appear to be a dispute that Judge Scarborough was right that the Tort Claims Act bars fraud claims against governmental entities. Appellants instead argue that their claim for BCAFA should be considered a contract claim exempt from that rule. The flaw in Appellants' argument can be found in their own Second Amended Complaint.

While it may well be possible to plead BCAFA as a contract claim outside the reach of Tort Claims Act immunity, the Appellants didn't do it here. The Second Amended Complaint specifically included a Breach of Contract claim. See ROA at p 69-70. SAC, para. 88 – 92. It then went on to add a BCAFA claim. ROA at p 70-72. Id. at para. 93 – 107. In regards to the BCAFA claim, Appellants described the damages sought under BCAFA as being "for the independent tortious wrong associated with the breach of contract." ROA at p 72 (SAC para. 107.) This phrasing is significant. Appellants did not ask to be compensated for the breach of contract (with heightened

damages) as one would expect in a true BCAFA claim.[29] They asked only to be compensated for an "independent tortious wrong" that was "*associated with*" the breach of contract. In other words, they asked for damages *for a tort* they say happened to be committed in proximity to an alleged breach of contract.

C. The Allegedly "Fraudulent Acts" to which Appellants Point Are Remote in Time and Do Not Even Relate to Any Alleged Breach In This Case.

The Appellants' claimed "fraudulent acts" are not actionable as they are remote in time and unrelated to any alleged breach in this case. Appellants Complaint says that the Town, by passing 1995 and 2005 zoning ordinance amendments, breached the deed restrictions by detrimentally changing the 1991 cutting rule. Appellants claim that the "fraud" consisted of edits made to a citizen survey circulated by the Town ***in 2009*** when the Town considered (but did not adopt) additional cutting rule changes.

There is no legal or logical link that can be made between the 2009 survey and the alleged breaches in this case. Assuming arguendo that the Town breached the deed restrictions when it amended the 1991 cutting ordinance, that alleged breach / amendment occurred in 1995 and perhaps 2005. There is no way an action in 2009 can have been a part of a breach that occurred in 1995 or 2005. See Smith, 269 S.E.2d at 350 (noting that alleged fraudulent act must not be too remote

[29] See Appellants' cited case of Smith v. Canal Ins. Co., 275 S.C. 256, 260, 269 S.E. 2d 348, 350 (SC 1980)("There is no cause of action distinct from Breach of Contract for Breach of Contract Accompanied by Fraudulent Act.")

in time from the breach.) Further, the 2009 survey related potential changes *that were never adopted* by the Town and hence never had any impact on the Appellants.

6. NO ACTIONABLE NUISANCE EXISTS.

The Plaintiffs' claims that the Accreted Land constitutes a "nuisance" fails as a matter of law. The Plaintiffs basically argue that plant growth on the AL constitutes a nuisance by blocking their views and providing wildlife habitat. See ROA at p 73-74. (SAC para 116 - 118.) Obviously the Town doesn't directly grow trees or reproduce mosquitos. These are acts of nature. The Complaint tries to tie this back to the Town by alleging that the problem was created when the Town enacted the 1995 and 2005 ordinance amendments. See ROA at p. 58 (SAC at Para. 36.)

The Plaintiffs' allegations of nuisance boil down to a legally impermissible claim that a duly enacted *law* constitutes a nuisance. The Appellants complain that the Town passed ordinances that changed the cutting rules. See ROA at p 58. (SAC para 36.) The Complaint then cites all the ways in which Appellants claim this change in the law has harmed them - more mosquitos, less ocean view, etc. Regardless of the consequences, the *"action" by the Town* can only be the passage and enforcement of the 1995 and 2005 zoning laws. Yet a law cannot constitute a "nuisance." "Nothing is a public nuisance which the law itself authorizes." Home Sales, Inc. v. City of North Myrtle Beach, 299 S.C. 70, 81, 382 S.E.2d 463, 469 (SC App. 1989); See also, Brading v. County of Georgetown, 327 S.C. 107, 115, 490 S.E.2d 4, 8 (SC 1997). A "lawful act" is simply not a wrongful act upon which

nuisance may be predicated. Id. Here the Town's legislative passage of a law certainly is a "lawful act".

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

The logic of Home Sales and Brading fully disposes of Plaintiffs' nuisance claim in this case. The 1995 and 2005 zoning ordinances were zoning laws passed by the Town. State law gives Towns the authority to enact zoning ordinances. See S.C. Code Ann. Title 6, Chpt 29. Thus, there was clearly nothing "wrongful" about Town council voting to pass the cutting ordinance. Council's passage of a law was the only "act" that the Town took in this instance. That act cannot, as a matter of law, be a "nuisance." As discussed in Brading and Home Sales, it might be possible that negative effects (such as trees growing to obscure views) might later develop after the Town amended the ordinances in 1995 and 2005. But

there is no evidence that Council planted trees, fertilized bushes, or imported wildlife. Since the Town did not perform those acts of nature, those acts of nature cannot be a wrongful act *by the Town.* A nuisance action will not work under such circmstances.[30]

Finally, to the extent the Appellants might seek monetary damages, the South Carolina Tort Claims Act bars nuisance damages from being awarded against the Town. "The governmental entity is not liable for a loss resulting from: (7) a nuisance." S.C. Code Ann. 15-78-60(7).

7. THE TRIAL COURT CORRECTLY DISMISSED APPELLANTS' CONTRACT CLAUSE CLAIMS BECAUSE THE TOWN FULLY HONORED THE CONTRACT.

The Appellants cannot prevail on a "Contract Clause" claim where, as here, the Town fully honored the contract in question. As more fully discussed above, the 1991 Deed Restrictions promised that the Town would keep the Accreted Land in an undeveloped natural state, would retain unrestricted authority to control pruning on the Accreted Land, and would ensure that any subsequent ordinance amendments were at least as restrictive as the rules in place in 1991. The Town has

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

done all of these things. The Accreted Land remains undeveloped and the current ordinance which limits Accreted Land cutting heights to 5' is *more protective* of natural plant life than the 3' rule in effect in 1991. The Plaintiffs complain that the Town isn't cutting enough to preserve their view – but the Deed Restrictions never promised that the Town would do so. To the contrary, the Deed Restrictions left the Town with unrestricted authority in this regard. See ROA, p. 97 (Deed Restriction, Para. 2.) The Town has honored the contract. Consequently, there can be no "Contract Clause" violation.

Appellants attempt to reverse Judge Scarborough by advancing a befuddling and (in light of the above) irrelevant argument about I'On LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (SC 2000) and the propriety of zoning by referendum. The challenged portion of Judge Scarborough's Order reads:

> The acts of one council cannot serve to bind subsequent council's actions. There is nothing wrongful about the Town Council enacting these [challenged cutting] ordinances. Nor is there a breach of contract or contract clause violation here. There is no lawful provision allowing for zoning by referendum. I'On LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (SC 2000).

The essence of Appellants' Contract Clause claim is that the Town would be liable if it passed an otherwise valid law in order to obviate a (nonexistent) Town duty not to amend circa 1991 laws. For the Appellants' logic to work here it would require holding that Town Council's 1991 deed/contract suspended Council's responsibility to regulate Accreted Land zoning in the future. Judge Scarborough recognized that the I'On case, in a larger sense, says that Council cannot deviate

from the zoning process required by Title 6, Chapter 29 of the South Carolina Code of Law by replacing that procedure with a contractual promise to freeze zoning.

CONCLUSION

The "Big Picture" position of the Appellants is simple. They are unhappy with the well-established law that no one has a right to look across someone else's property. They are unhappy with the zoning laws passed by Town Council in accordance with the provisions of State law and Town ordinances. They failed to challenge the ordinances within the Statute of Limitations and have been unable to change the laws through the political process of forming a majority coalition capable of electing representatives supportive of their positions.

Faced with this reality, Appellants filed a "kitchen sink" complaint trying create arguments to get around the well-established law.

- They rely on a contractual promise that never existed, in a document to which they are not a party.
- They attempt to impose their own interpretation of the document in direct opposition to the interpretation given the words by the two parties to the contract.
- They argue that nature is a nuisance.
- The argue that the Town can, and should, make nature "stand still" for their benefit.

The trial judge patiently and carefully considered all of their arguments and found that none of the arguments had merit. He found that the Appellants have no

right to look across the Accreted Land owned by the Town and, just like the Grantor Land Trust, he found that that the Town has faithfully honored the Deed.

For the foregoing reasons stated, this Court should affirm the trial court's decision.

Respectfully submitted,

October 14, 2016

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Hon. Mikell Scarborough, Master in Equity

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

Nathan Bluestein, Ettaleah Bluestein, M.D.,
Theodore Abenesius and Karen Albenesius., Appellants,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCAR.

Oct 19, 2016

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