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Jun 09 2022
SC Court of Appeals

The sentencing proceedings before Honorable Marvin Dukes, in the above-entitled cause, taken before Naomi McCracken, Stenographic Court Reporter and Notary Public, at Beaufort County Magistrate's Court, 104 Ribaut Road, Beaufort, South Carolina, on the 27th day of October, 2021, commencing at or about the hour of 10:08 a.m.

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I N D E X

PAGE

COURT PROCEEDINGS ----- 4

CERTIFICATE ----- 60
(NO EXHIBITS)



1 THE COURT: Good morning. We are
2 here in 2021-CP-07-01507. This is
3 Adams Outdoor Advertising, Limited
4 Partnership, and Bo Hodges versus
5 Beaufort County. This is an appeal by
6 Adams Outdoor Advertising and Bo Hodges
7 to a finding by -- I believe, it was
8 Judge Sadler in The Magistrate's Court.

9 Before we begin, I note for the
10 record that there was a pro hac vice
11 petition filed and granted in
12 Magistrate's Court for Mr. Bergthold,
13 and to the extent that needs to be
14 renewed and/or granted in the Circuit
15 Court pursuant to the Administrative
16 order granting the Circuit Court
17 powers, hereby do so for Mr. Bergthold.
18 And I don't know if that's even
19 necessary. But to the extent it needs
20 to be done -- well, let me ask: Any
21 objection from counsel to me doing so?
22 All right. Just do it?

23 And Mr. Tibbals, you're muted, I
24 think.

25 MR. TIBBALS: Yes. I don't have



1 an objection.

2 THE COURT: Okay. I see

3 Mr. Keaveny has joined us.

4 Ms. Ward, any objection?

5 All right. I got a no-nod. But
6 that will work.

7 MS. WARD: I apologize. I'm
8 keeping myself phone on mute.

9 THE COURT: No worries. So to the
10 extent that that needs done, and I
11 don't even know if does, it probably
12 does not. But to the extent it needs
13 to be done, it's done.

14 All right, then. Let's see. And
15 Mr. Keaveny, are you going to join us?
16 It looks like you're telephone only, so
17 make sure that will just be -- just be
18 audio, which is fine.

19 MR. KEAVENY: I'm with -- (audio
20 interruption) -- the county trying to
21 attempt a courthouse call, Judge.

22 THE COURT: Oh, okay. All right.
23 Well, good luck with that WiFi or
24 telephone or whatever.

25 MR. KEAVENY: Thank you.



1 THE COURT: Good. All right. So
2 who is going to -- are y'all going to
3 argue separately on -- for Adams and
4 Hodges or together, or how will the
5 petitioner or appellant --

6 MR. TIBBALS: Your Honor, I'm here
7 on behalf of both defendants and will
8 handle the appeal on behalf of those
9 defendants.

10 THE COURT: All right. I'm happy
11 to hear from you then, sir.

12 MR. TIBBALS: Okay. Your Honor, I
13 know that we have submitted a brief
14 detailing various grounds and arguments
15 where we believe that the magistrate
16 erred in this case. I specifically am
17 preserving all of those arguments. In
18 the interest of time, I may not address
19 each and every one today because I know
20 that we're all busy with things to do
21 and I don't want to take too much of
22 everybody's time.

23 But I do want to start by -- in a
24 little bit of an unusual way. But I
25 want to start because I think it's



1 important and I think that it's --
2 gives us clarity. I want to start by
3 looking at a particular section of the
4 Beaufort County CDC, the Community
5 Development Code. And I hope that my
6 computer will cooperate. We'll try to
7 do this here.

8 All right. So I have up on my
9 screen, at least, Section 9.4.50 of the
10 CDC entitled, "Failure to correct
11 violation."

12 Do you -- does everybody see this?

13 THE COURT: I see it.

14 MR. TIBBALS: Okay. So 9.4.50 is
15 the enforcement mechanism by which the
16 County is able to issue a uniform
17 summons ticket to a person who has
18 allegedly violated the CDC. And if we
19 look at it, we note that it has two
20 subsections. Subsection A was not at
21 issue in this case. There was no
22 allegation or evidence that health,
23 welfare, safety, or severe
24 environmental degradation was present.

25 And, therefore, that takes us to



1 B. And B is the power and authority by
2 which the County may issue the uniform
3 citations such as those that were
4 issued in this case.

5 And Subsection B says, under all
6 other circumstances, i.e., those
7 circumstances other than Subsection A,
8 which is not an issue. A person --
9 excuse me -- under all other
10 circumstances, if the person to whom a
11 warning notice has been given in
12 accordance with Section 9.4.40, notice
13 of violation, fails to removed or abate
14 the violation in the time specified in
15 the notice, the Code Enforcement
16 Department shall fill out and sign as
17 the complainant, a uniform summons
18 ticket in the appropriate court in
19 Beaufort County. And then it goes on
20 to detail a number of requirements for
21 the uniform summons ticket.

22 We understand, from South Carolina
23 law and, specifically, most recently in
24 the case of Town of Sullivan's Island
25 vs. Michael Murray, which was decided



1 this last month on September -- opinion
2 was issued on September 1st of 2021
3 reversing the affirmation by the
4 Circuit Court of a magistrate's
5 conviction for a violation of a
6 development ordinances or, in this
7 case, it was dock permit.

8 But -- we know from that case that
9 penal statutes must be strictly
10 construed. And when you apply strict
11 construction principles to this
12 particular part of the ordinances,
13 9.4.50, you see that it has a condition
14 precedent to the issuance of a uniform
15 summons ticket. That condition is that
16 the person has to be given a warning
17 notice in accordance with
18 Section 9.4.40.

19 And in this case, there was no
20 warning notice in accordance with
21 Section 9.4.40. So, naturally, we're
22 lawyers, and what do we do? We -- we
23 see the reference to 9.4.40, and as
24 lawyers and judges, we're chained and
25 bound to look at 9.4.40.



1 Let's make sure that I can get
2 that one up. All right. Do we see --
3 I'm going to blow it up, but I want to
4 make sure we see 9.4.40 on the screen.

5 Is that on everybody's screen?

6 Okay. So 9.4.40 is entitled
7 "Notice of Violation," and the language
8 in 9.4.40 is important because,
9 naturally, 9.4.50 says that the warning
10 notice must be in accordance with
11 9.4.40 in order for the uniform summons
12 to be issued.

13 9.4.40 states, "When the Code
14 Enforcement Department finds and
15 determines a violation of this
16 Development Code exists, the Code
17 Enforcement Department shall notify, in
18 writing, the person violating the code.
19 Such notification shall serve as a
20 warning notice of the violation. It
21 shall be delivered via U.S. Mail or
22 hand delivered to the last known
23 address of -- this is a typo -- of the
24 owner and/or any person occupying the
25 land or structure where the violation



1 occurs."

2 And it goes to give the
3 requirements of the notice. The
4 notices must -- must -- because it's
5 shall, we know it's mandatory language
6 -- the notice shall state the
7 following, "The address and legal
8 description of the land, the structure,
9 or sign that's in violation. The
10 nature of the violation. The
11 provisions of the Development Code
12 being violated, the necessary actions
13 to remove or abate the violation. C,
14 the date by which the violation should
15 be removed or abated. And, D, the
16 penalty for failing to remove or abate
17 the violation stating that if the
18 nuisance reoccurs, a notice to appear
19 in the appropriate court in Beaufort
20 County will be issued without further
21 notice," i.e., the summons.

22 In this case, Your Honor, the
23 County did not issue a notice of
24 violation pursuant to 9.4.40 and
25 there's no evidence in the record that



1 the County issued a notice of violation
2 in accordance with 9.4.40. And so the
3 County has two excuses for its
4 noncompliance with its own ordinances.

5 Number one, it says, Mr. Greenway,
6 who is the county administrator, sent
7 an e-mail telling them to stop. That
8 e-mail is in the record. It is
9 Exhibit 6, I think, at the trial.

10 And I don't know if this is pulled
11 up yet or not. Let me see. It's
12 Exhibit Number 5 in the trial. Let me
13 see if I can share this.

14 All right. All right. Do we have
15 it up?

16 THE COURT: Yes.

17 MR. TIBBALS: Okay. So this is
18 the e-mail that is contended to be the
19 warning notice pursuant to
20 Section 9.4.40. And, again, keeping in
21 mind that the penal statute by law
22 requires strict construction and,
23 therefore, requires an exacting
24 compliance. This is the document that
25 they contend to be the warning notice.



1 I'll say a few things about this
2 warning notice. It doesn't comply with
3 any of 9.4.40. It wasn't sent as
4 required by U.S. Mail or hand delivery.
5 It did not follow the finding of a --
6 and I can -- because we're strictly
7 construing it, we need to look back at
8 the language. And I know you're
9 looking at the e-mail, but I'll be
10 reading from 9.4.40.

11 It did not follow a Code
12 Enforcement Department finding and
13 determination of a violation of the
14 Development Code. It did not -- was
15 not delivered via U.S. Mail or hand
16 delivered. It does not state the
17 address or legal description of the
18 land. It does not address the
19 provisions of the Development Code
20 being violated. It does not state a
21 date by which the violation should be
22 removed or abated. And, most
23 importantly, perhaps, it doesn't state
24 the penalties for failing to remove or
25 abate the violation. And it doesn't --



1 it doesn't contain the language
2 mandated by Beaufort County's own
3 ordinance, that if the -- that a notice
4 to appear in the appropriate court of
5 Beaufort County will be issued if the
6 violation continues.

7 So faced with this, the magistrate
8 said -- made a clear error of law
9 because what she said is that this was
10 a harmless error. And so I think what
11 she meant, Your Honor, was substantial
12 compliance. But under the law,
13 interpreting penal statutes/penal
14 ordinances and the fact that they must
15 be strictly construed, substantial
16 compliance is not sufficient.

17 She said basically, you know, we
18 think that that was enough to put him
19 on notice. And -- and that's just not
20 consistent with Beaufort County's own
21 CDC, it's not consistent with the
22 ruling South Carolina law. And because
23 there was no exacting compliance, no
24 strict compliance, no real -- nothing
25 really even that close to compliance



1 with 9.4.40, there's no basis, there's
2 no satisfaction that the condition
3 that's necessary prior to issuing the
4 -- the uniform summons. And,
5 therefore, there was a code violation
6 and -- and the case should've been
7 dismissed.

8 The -- you know, the interest --
9 you know, the County makes a
10 fascinating argument in its brief
11 recently. They say, "Well, we don't
12 have to use 9.4.50 to issue a summons,
13 we can -- we can rely upon the
14 cumulative remedies provision in the
15 CDC, and we can basically do what we
16 want, when we want. We have no
17 restrictions or prohibitions on when we
18 can issue a ticket. We can issue a
19 ticket anytime we want.

20 To my knowledge, 9.4.50 is the
21 only provision in the CDC that prevents
22 the issuance of a uniform summons, and
23 they would like for us to read out
24 of -- let me see if I can pull that
25 back up, again.



1 So they would like for us to
2 simply look at 9.4.50(b) and just sort
3 of say, you know what, this part says
4 doesn't matter, we can strike this,
5 Code Enforcement Department can fill
6 out and sign a uniform summons ticket
7 and the uniform ticket will contain the
8 following.

9 That's what they want you to do.
10 They want you to say you can strike
11 through the provision that they didn't
12 comply with.

13 I don't know that there's any
14 judge on the Court of Appeals who will
15 feel that way about their ignoring
16 their own ordinance. But I think it's
17 obvious that you can't just pick and
18 choose what it is that you want to
19 comply with and what you don't if you
20 are the County.

21 So, you know, I think it's obvious
22 that Beaufort County drafted and
23 approved the CDC, including this
24 language at issue. And now the County
25 is attempting to riddle out of its own



1 mandates. I think it's ironic to say
2 the least that the County is accusing
3 Adams and Mr. Hodges of violating its
4 ordinance while at the same time
5 ignoring its own duties and
6 requirements under that ordinances.

7 And why is the process important?
8 The process is important and, you know,
9 why must a warning notice be provided
10 before these criminal proceeding are
11 instituted? And I think the answer to
12 that is intuitive and it's critical,
13 really, to an understanding of the
14 entire CDC. And that is because we're
15 in a time, in an age right now where we
16 have unprecedented governmental
17 controls over land use and intrusion
18 into private property ownership.

19 So we don't want to see people
20 thrown in jail for painting their porch
21 swing the wrong color or having a roof
22 overhang or failing to meet a setback
23 requirement.

24 This is a criminal proceeding.
25 This is the deprivation of property in



1 the form of fines. It's the
2 depravation of liberty in form of
3 imprisonment. And, by the way, it was
4 not until the sentencing -- the warning
5 at the sentencing hearing that I was
6 finally notified, after several
7 attempts to understand what the
8 penalties Beaufort County were seeking,
9 that they decided to inform me of their
10 decision not to seek jail time for
11 Mr. Hodges.

12 Though not just saying, "Hey, this
13 could lead to jail time." They didn't
14 make a decision, and I didn't -- I
15 wasn't aware of the decision until the
16 morning of the sentencing hearing that
17 they were not going to seek to throw an
18 employee of this company in jail.

19 And so -- but they -- their
20 interpretation of their own CDC, if --
21 if that's true, if they can just issue
22 a citation that invokes criminal
23 penalties on a whim because their
24 director or county administer is doing
25 a drive-by, sees something that he



1 doesn't like, shoots an e-mail that
2 doesn't comply with any of the warning
3 notice provisions, and then they can
4 put somebody in jail, I think, that is
5 a failure of due process, and I think
6 that it renders the entire ordinance
7 unconstitutional, if they believe that
8 that is a proper interpretation.

9 You have to -- again, from the
10 Town of Sullivan Island's case, in
11 order for the -- this ordinance to work
12 and for any -- or any fair notice
13 issue, people are entitled to know
14 where the line is drawn between
15 innocent conduct and illegality. And
16 if -- I think the County wants to
17 portray Adams and Hodges in this case
18 as scofflaws.

19 I think that they overlook some
20 critical facts that are important for
21 you to understand as you review the
22 underlying petition, that is, that
23 Adams and Hodges didn't just go and do
24 repairs without authorization. They,
25 in fact, made application to the



1 governing body jurisdiction of sign
2 repairs and the -- and the government
3 authority that issues permits by which
4 those signs are permitted to stand, and
5 that is the South Carolina Department
6 of Transportation.

7 And they submitted permit
8 applications, they followed the
9 guidance and guidelines and regulations
10 that are in place that bears to those
11 signs, they obtained SCDOT approval.
12 And, furthermore, the record shows that
13 they actually notified Beaufort County
14 of their permit approvals and the fact
15 that they were going to do work.

16 Now, what criminal announces his
17 intent to commit a crime at the time
18 that it's planning to do it? I mean,
19 you know, it's just doesn't make any
20 sense. And I think one of the
21 underlying themes here as well is that
22 the criminal intent or mens rea is
23 absent in view of these defendants.
24 They believed what they were doing was
25 right and proper and in accordance with



1 the law.

2 If Beaufort County had a dispute
3 with that, they should have followed
4 their own ordinance and they should
5 have made a finding to the contrary,
6 and they should have issued a citation
7 only after a warning notice, in
8 accordance with their ordinance and
9 their own regulation. But what they
10 chose to do is they chose to wing it
11 and they chose to ignore, egregiously,
12 all of the protections that a criminal
13 defendant is entitled to receive under
14 their ordinance.

15 The -- there's a preemption issue
16 as well, Your Honor, and I'll just
17 touch on that. I'll try to be brief
18 with it. The SCDOT regulations allow
19 for repairs to signs in the event of
20 storm damage, potentially, if the
21 damage is not greater than 50 percent.
22 They have objective criteria, all of
23 this is in the record. DOT has
24 objective criteria to look at to see
25 whether or not that 50



1 percent-threshold is reached.

2 The DOT regulations in all of the
3 ways that Beaufort County claims that
4 its ordinance is more restrictive. In
5 all of those ways, the DOT contains
6 similar restrictions. Obviously, the
7 preemption issues is, if the Beaufort
8 County ordinance is more restrictive
9 than SCDOT regulations, then the
10 Beaufort County ordinance would still
11 have some power.

12 But, in this case, it's not
13 because all of the restrictions that
14 are contained in the Beaufort County
15 ordinance are also found in the DOT
16 regulations. And that's spelled out
17 for you in the brief that we filed.

18 They make another fascinating
19 argument, and they talk about the way
20 that their ordinance is more
21 restrictive. And they basically say,
22 our ordinance is more restrictive
23 because the director can do whatever
24 the director wants to do. If the
25 director finds that it's not 50 percent



1 or greater or isn't a 50 percent or
2 greater damage issue, then we can -- we
3 can say that it's a violation, and,
4 therefore, our ordinance is more
5 restrictive.

6 Well, when they use that argument,
7 Your Honor, they jump from the frying
8 pan into the fire because what they're
9 doing is they're giving the director
10 unbridled discretion to do whatever he
11 sees fit in an arbitrary and capricious
12 way, in a way that's not based upon any
13 evidence or any finding, and it's based
14 upon the whim of the director to make a
15 decision that's unsupported by any
16 evidence. And so if that's the way
17 that they think their ordinance should
18 be interpreted, then I've got news,
19 it's unconstitutional.

20 So, you know, either -- either way
21 you slice it, it's either not more
22 restrictive, or, if it is efface
23 restrictive, it's only because it's
24 either effacially and/or applied, it is
25 an abuse of power and it is



1 unconstitutional.

2 I know that there are other
3 issues, Your Honor.

4 I really think that the abject
5 failure of the County to follow it's
6 own provisions in the ordinance should
7 carry warning. And I -- I feel
8 confident that in the strict -- strict
9 interpretation is applied to the CDC,
10 that Your Honor will find that they
11 didn't follow their own requirements in
12 issuing the summonses and that the
13 magistrate made a clear error of law in
14 ignoring these failings.

15 THE COURT: Thank you so much.
16 Now can I hear -- Mr. Bergthold, am I
17 going to hear from you as well?

18 MR. BERGTHOLD: I think I will be
19 leading the argument this morning, Your
20 Honor.

21 THE COURT: Okay. All right. I'm
22 happy to hear from you, sir.

23 MR. BERGTHOLD: A couple
24 preliminary matters. First,
25 Mr. Tibbals, filed a brief or he



1 e-mailed us a brief about 5:25 p.m.
2 last night. There was 20 pages. And
3 so we read the statute as requiring the
4 grounds for the appeal to be set forth
5 in the notice of appeal that was filed
6 a couple of months ago. So we filed
7 our brief last week in response to
8 that. We're not really expecting
9 additional briefing.

10 And so we would ask that in
11 addition to hearing our argument today,
12 that Your Honor would receive a
13 response brief from us within ten days.

14 THE COURT: That -- that would be
15 fine.

16 MR. BERGTHOLD: Okay. Thank you,
17 Your Honor.

18 So I'm just going to quickly
19 highlight the standard of review and
20 then go through the chronology of what
21 happened with regard to these two
22 reconstructed signs and then address
23 Mr. Tibbal's arguments, and then we
24 will rely upon our briefing for the
25 remainder.



1 The standard review, of course,
2 Your Honor's well familiar with, and
3 that is if any evidence supports the
4 magistrate's findings of fact alone,
5 that that is to be credited and that is
6 the law of the case. And bind --
7 binding in this court sitting as an
8 appellate tribunal.

9 So I don't think that is in
10 dispute. What is in dispute is the
11 idea or notion that somehow Adams and
12 Mr. Hodges are not scofflaws. I think
13 the record shows that that is exactly
14 what they are and exactly what they
15 intended to do when they were told in
16 advance that they needed permits and
17 approvals for any work on these
18 billboards from the County.

19 And I want to share real quickly
20 what these documents look like or what
21 these poles look like going into the
22 relative time frame. This is -- this
23 is what they look like. Let me see
24 real quick. If you can see my screen
25 at this time. There's a picture of a



1 rotted pole. Can everybody see that?

2 Okay.

3 So these are actually photographs,
4 I believe, that Adams submitted to
5 SCDOT. And so what happened with these
6 poles, I copied them and Mr. Hodges
7 about it to tell me what wind event he
8 was talking to or trying to refer to as
9 the justification for doing the repairs
10 to these poles. He was unable to
11 identify any particular event.

12 And, really, all this was was the
13 dilapidation of two billboards that
14 were originally erected -- one was
15 erected in 1956, so more than 60 years
16 ago, approximately 65 years ago. The
17 other one was erected in 1981, so it
18 was still 40 years ago. And they were
19 basically coming to the end of their
20 useful life.

21 And under South Carolina law and
22 the Community Development Code in
23 Beaufort County, nonconforming land
24 uses are supposed to terminate at the
25 end of their useful life, when the



1 normal life of their structure is
2 dilapidated and it becomes, you know,
3 obsolete, then they are not supposed to
4 be rebuilt, reconstructed, re-erected
5 or anything like that.

6 They are supposed to live their
7 natural life as a nonconforming use,
8 and then die and go away and be
9 removed. And determination of the
10 nonconforming use is what the state
11 law, what the regulations of the South
12 Carolina Advertising Highway Act, HACA,
13 and the state law contemplates.

14 It's also what the state law
15 contemplates would happen under local
16 regulations. These are two billboards
17 that were definitely at that place.
18 They were at the place where they were
19 structurally unsound. In fact,
20 evidence in the record shows that prior
21 to this reconstruction, that they were
22 illegally braced and supported with
23 boards and 2x4s and things like that,
24 which is illegal.

25 But even all the bracing that



1 Adams has done over the years was
2 proving ineffectual. So what you have
3 is, you have pictures in the record
4 that I'm showing the Court now that
5 show groundwater basically rotting
6 these poles from the inside out such
7 that they had to attach boards to them
8 in times past and then strap them and
9 do more bracing boards and -- and wrap
10 them in steal wire to keep those
11 bracing boards on. Essentially, these
12 were rotten poles.

13 And when I cross-examined
14 Mr. Hodges at the trial in this matter,
15 he said, quote, "Wood poles cannot be
16 repaired." So he understands that when
17 it gets to this point, you don't repair
18 wood pole. The only thing you can do
19 is replace, if you're allowed, these
20 structural supports for the billboard.
21 And it's obvious under the state law
22 and the local Community Development
23 Code in Beaufort County that that is
24 prohibited.

25 So what they did was they -- they



1 knew that they couldn't do this with
2 County approval or that they would have
3 to get the County approval, so they
4 went to the state. They claimed that
5 there was a wind damage event, even
6 though they could identify none at the
7 trial in this matter. And they got
8 approval letters from SCDOT.

9 The first communication that
10 Beaufort County had about this was in
11 an e-mail that Bo Hodges, where he
12 described himself as the face of Adams
13 Outdoor in Beaufort County, he
14 described himself as the person in
15 charge of permitting.

16 He described himself as the person
17 who handles governmental relations for
18 Adams Outdoor, send Ms. -- Ms. Audra
19 Antonacci, the code enforcement
20 officer, this e-mail on Tuesday, April
21 6th late in the afternoon. Said,
22 "Please see attached. If you have any
23 questions, contact me." And attached
24 was a letter from SCDOT along with the
25 approval documents from SCDOT for these



1 two billboards.

2 Interesting to note, however, that
3 even in these documents -- and I'll
4 scroll to the bottom of one of these
5 approval statutes, it says -- and I'll
6 blow it up so that everybody can see it
7 a little bit better.

8 It says, "The undersigned hereby
9 agrees that the existing or proposed
10 structure described above was
11 constructed" -- I guess is going to be
12 constructed -- "in accordance with the
13 existing state laws, local ordinances,
14 and regulations."

15 In other words, even when they
16 issue approvals, SCDOT contemplates
17 that the applicant has to get the
18 appropriate approvals from the local
19 government, and that's because most
20 local governments in the state of South
21 Carolina do have their additional
22 permitting procedures and review
23 procedures.

24 And that's because there's a
25 provision in state law that



1 specifically allows for that. And I
2 have that up on the screen. This is
3 South Carolina Code Annotated
4 57-25-220. And it says, "Nothing in
5 this article" -- meaning the State
6 Highway Advertising Control Act --
7 "abrogates or affects provisions of a
8 lawful ordinance, regulation or
9 resolution which is more restrictive
10 than the provisions of this article."

11 So that's the framework under
12 which the SCDOT approvals are issued,
13 knowing that local governments have
14 their own additional -- meaning more
15 restrictive than the baseline of the
16 state because it's additional
17 restrictions on top of the state
18 regulation.

19 And even when they issue an
20 approval, they -- they make the person
21 certify that they're aware of those
22 local ordinances and that they are
23 complying and that they have to comply
24 with those local ordinances.

25 So what you have is a letter from



1 Bo Hodges with these approvals,
2 including the local ordinance
3 compliance conditions contained in them
4 to Ms. Antonacci. And what she says in
5 response on April 7th of the next
6 morning at 7:54 in the morning, she
7 said she spoke with Eric Greenway,
8 the -- at that time, the interim county
9 zoning enforcement officer, and he
10 advised that prior to any repairs being
11 done, Zoning will need to review the
12 billboards and give approval for any
13 repairs. Also, what storm are you
14 referring to that damaged the
15 billboards?

16 And then she informs Mr. Hodges
17 that Hillary Austin, the community
18 development director is who you need to
19 contact for any repair approvals or the
20 Zoning and Planning Division person.

21 And so what you see next, the very
22 next thing chronologically, is an
23 e-mail from Mr. Hodges on April 7th
24 that says, "Good morning. Audra
25 mentioned you're the person I need to



1 send this to. Please see our approval
2 from SCDOT about this. The wind" --
3 you know, "the wind damage rule and the
4 50 percent."

5 She said, "Hello, Bo Hodges,
6 please send me a picture of the sign as
7 it stands now. I will make the
8 decision after I have reviewed the
9 photograph."

10 So before the weekend even started
11 -- this is on Wednesday around
12 lunchtime -- Adams, Mr. Hodges, the
13 area representative and the person in
14 charge of governmental relations and
15 permitting is on notice. Wait a
16 second. We need to look at this. We
17 need to -- show us the pictures where
18 you're talking about. Give us the
19 opportunity to review these billboards.

20 What does Adams do to comply with
21 this clear request? They're clearly on
22 notice that they've got to comply with
23 County ordinances. What they do is
24 they wait until the weekend. They just
25 wait until everybody in Code



1 Enforcement's gone home on Friday for
2 the weekend and they start the work on
3 Saturday. And they do it in the middle
4 of the weekend.

5 So what happens is, when you --
6 when Mr. Greenway is coming back
7 through on a trip to Charleston on
8 Saturday night about 6:00, 7:00 in the
9 evening, he gets there and he sees the
10 rotten poles have been removed from the
11 ground.

12 What you see on the screen here in
13 the circle is across the road, you see
14 the old billboard structure, they've
15 already erected brand new structural
16 supports in the ground about 6 feet in
17 front of the old billboard. So they
18 not old reconstructed the billboard,
19 they've actually moved it closer to the
20 road. It's not in the same location.
21 That's another thing the SC -- even
22 SCDOT laws prohibits that.

23 But they're -- they've got this
24 new structure up. They've got the old
25 billboards shown behind it, and they're



1 about ready to take it down. And so
2 this shows them doing the construction
3 of the new structural supports in front
4 of the old sign. And this is at the
5 end of the day, they go out and you can
6 see the date on this, it's -- it's
7 April 12th, the Monday following the
8 weekend. A lot happened over the
9 weekend. And Mr. Tibbals kind of jumps
10 over a lot of what went on.

11 So I want to point the Court to
12 our Exhibit 5, or the Prosecution
13 Exhibit 5. Over the weekend, after the
14 April 6th and 7th correspondence
15 happened is correct, Mr. Greenway -- of
16 course nobody's in the office, no code
17 enforcement people are working, and he
18 writes Mr. Hodges as well as Elizabeth
19 Mitchum, who's also with Adams Outdoor,
20 Mr. Romera, he's also with Adams
21 Outdoor, and then all the people in the
22 County, puts everybody on notice and
23 says, "Look, I'm returning from
24 Charleston today. To my knowledge of
25 the highway report, Beaufort County has



1 issued no approvals for Adams to
2 conduct this work and will not issue
3 approval for the complete rebuild of
4 these signs because doing so will
5 violate the Community Development
6 Code."

7 He said, "The on-site contractor
8 called this a quote/unquote "repair,"
9 but he had no paperwork other than a
10 letter from SCDOT, which, as you should
11 know, is not a local permit nor a
12 proper authorization to reconstruct an
13 outdoor advertising display."

14 And this is what he said next.
15 This is when he was present at the site
16 when the work was illegally being done.
17 He says, "My attempts through the
18 on-site contractor at getting Mr.
19 Romera," which is the Adams person --
20 another Adams person, "to stop the work
21 failed repeatedly. And I repeatedly
22 asked him, you don't have permits, we
23 have to do a review, we have to see
24 what the scope of work is. You have to
25 comply with the Community Development



1 Code. All those efforts failed
2 repeatedly."

3 And then he says, "As did my
4 attempted phone calls to you. I tried
5 calling Bo Hodges. I had his number
6 and I tried Ms. Mitchum, and so I'm
7 sending this e-mail for you to
8 immediately cease and desist any
9 additional work on these two sites
10 until we've got a chance to discuss
11 this matter and decide on any course of
12 action."

13 That was at 9:18 on Saturday
14 night. Well, about an hour later, he
15 writes Ben Armitage, which was another
16 contact that he had for Adams Outdoor
17 in the region, he says, "Look, this is
18 very atypical. I'm shocked at the
19 blatant disregard for our approval
20 process and my request for work to
21 stop."

22 And then after that, Mr. Romera
23 from Adams Outdoor refused to talked
24 to -- (audio interruption) -- after
25 discovering that your Beaufort staff



1 appears to have started the work
2 without proper permits. So all this is
3 going on. Then basically we get a
4 letter from -- or an e-mail on Sunday
5 morning from Adams's lawyer in Michigan
6 that basically said pound sand.

7 You look at the state code
8 provision, look at the Beaufort code
9 provision, I think this Beaufort code
10 provision is unconstitutional. And, by
11 the way, your e-mail and your e-mail
12 stop-work order has no legal effect.

13 He basically knew, hey, if we can
14 get in over the weekend, then we're
15 going to, you know, try to put the
16 County in a bind where, you know, the
17 work's going to be done and it's going
18 to be too late. They knew exactly what
19 they were doing.

20 And so Mr. Greenway wrote back to
21 him and said, "I forwarded this to my
22 legal counsel, but I would advise Adams
23 to hold off on any more construction
24 until this issue can be appropriately
25 resolved." And, of course, they say



1 pound sand, and they continue to do the
2 work. So we go out have a picture on
3 the morning of April 12th which shows
4 the completed construction.

5 I think that's the record that's
6 most important here, that everybody was
7 involved, everybody was on notice,
8 Adams Outdoor and Mr. Hodges knew
9 exactly what they were doing,
10 strategically chose when to do it, and
11 now what they want to do -- and
12 Mr. Tibbal's argument -- is rely upon a
13 section of the code that talked about
14 how to bring about voluntary
15 compliances to the ordinances. He
16 misreads the section to require
17 affirmatively a written warning that
18 they have -- that's not required, and
19 we'll look at that language in a
20 minute.

21 But more importantly on the issue
22 of harmless error, even if it were
23 required, it's not a -- even if it's a
24 technical requirement of the Community
25 Development Code and Beaufort County



1 said you have to issue a warning before
2 you ever issue a citation, it doesn't
3 say that, and we'll look at that in a
4 moment.

5 But even if it did, that is not a
6 constitutional problem. The Beaufort
7 County Community Development Code does
8 not set the constitutional standard for
9 due process. Due process is, very
10 simply, notice and an opportunity to be
11 heard.

12 They were very clearly on notice.
13 Everybody from April 6th, Bo Hodges
14 sending letters to the County telling
15 them, "Hey, this is the work we're
16 going to do," being told to hold off,
17 you need to get our approval, send us
18 pictures, let us do our process and go
19 through our permitting procedures, if
20 that's going to be allowed. Everybody
21 was on full notice.

22 And when they were cited for
23 violating this provision blatantly,
24 then they were given the opportunity to
25 be heard at trial. They were



1 represented by counsel. They put on
2 evidence. They subjected the County's
3 witnesses to cross-examination.

4 So there's no due process issue
5 here. Notice and opportunity to be
6 heard was had in spades. The problem
7 here is Adams Outdoor ignored the
8 County's processes that gave them the
9 full opportunity to be heard on their
10 application, and, instead, waited to
11 the cover of the weekend to do the
12 work.

13 Here's why that is not required by
14 code. And this is the Community
15 Development Code, Section 9.4. This
16 the overall arching -- call it a
17 directive on how to interpret the code.

18 9.9.10. Permits. "This article
19 establishes procedures to ensure
20 compliance with the provisions of this
21 Development Code and obtain corrections
22 for code violations. It also sets
23 forth the remedies and penalties that
24 apply to violations of this Development
25 Code. The provisions of this article



1 are intended to encourage the voluntary
2 correction of violations where
3 possible."

4 Obviously, the County is not going
5 to hamstring itself and say, "We always
6 have to wait for this process for
7 certified mail, which might take eight
8 or nine days in today's world -- in the
9 COVID world, that's the postal
10 service -- to fine someone when they
11 see a violation in the very act, when
12 they see a violator committing an
13 illegal reconstruction of the sign at
14 the time that it's happening.

15 So the whole idea of this is, this
16 is what it's intended to encourage
17 where that's possible. And obviously,
18 it contemplates circumstances where
19 it's not possible. And that's why in
20 the remedies to the section of 9.5.40,
21 the code says, "Whether civil or
22 criminal, these remedies may be
23 exercised in any order."

24 In other words, we don't have to
25 go through all these different steps,



1 if we have a clear violation, we can
2 issue a citation. And when you go to
3 the Section that is 9.4.50, which
4 Mr. Tibbals reads as requiring a
5 warning, it actually doesn't say that.
6 It says, "If the person to whom a
7 warning had been given notice in this
8 section fails to remove it, the Code
9 Enforcement Department shall fill out
10 and sign a complaint."

11 In other words, this is a
12 sufficient condition for issuance of a
13 ticket. In other words, in those
14 circumstances, which obviously, in 95
15 percent of the cases, the normal
16 circumstance of the code, that
17 someone's made aware by code
18 enforcement that, hey, that violated --
19 you extended your awning too far, it's
20 over the setback provision for the
21 property line, for example, and you
22 need to trim that back 2 feet so you're
23 not encroaching on the setback
24 provision or whatever the case may be.
25 And then they failed to do it, then



1 they can be cited.

2 But this does not say the County
3 shall not ever issue a uniform citation
4 or a uniform summons because -- where
5 an advance warning has not been given.
6 And that's why when Judge Sadler looked
7 at this and heard all the evidence, she
8 said this about the harmless error.

9 She said, "I find, however, that
10 the failure to issue a warning
11 according to that provision is harmless
12 in that the defendants were served
13 immediately after they had clear notice
14 and warning that the signs were issued
15 a violation. The communication between
16 the parties, Defendant Hodges, other
17 employees of Adams Outdoor, and the
18 administrative staff of Beaufort
19 County" -- sorry. I want to put it on
20 the right screen so you can see that.

21 "That communication which began
22 with Defendant Hodges's e-mail and
23 Ms. Antonacci on April 6th and
24 continued until Mr. Zecchino's e-mail
25 to Mr. Greenway on the morning of April



1 11th clearly showed that the defendants
2 received actual notice of the
3 violation, had actual knowledge of the
4 location of the violation. The
5 County's failure to adhere to the
6 formal notice requirements were
7 harmless errors on its part."

8 I will say they weren't even
9 errors to the extent that 9.5 -- or
10 9.1.10 said this was intended to -- be
11 construed as to get voluntary
12 compliance where possible, but not that
13 it's always required. Certainly, if
14 you look at the cumulative penalties
15 provision, it says these remedies can
16 be exercised in this order.

17 So I think there's no error there.
18 This is literally a -- a scofflaw who's
19 been told three days in advance of any
20 of the work starting that the County
21 will have to review and determine
22 whether approvals will occur. And then
23 when they don't do that and they
24 illegally start the work and the county
25 administrator happens to catch them in



1 the act over the weekend and says, my
2 repeated attempts to warn you and to
3 get you to stop the work that you had
4 illegally commenced failed, so now I'm
5 issuing a stop-work order.

6 Everybody was on notice and Adams
7 cannot hide behind a provision in
8 intended to encourage voluntary
9 compliance. But certainly, it's not a
10 requirement of constitutional due
11 process. All that is required is
12 notice and an opportunity to be heard,
13 and they clearly had that.

14 I want to make a quick comment
15 about the recent decision of the Town
16 of Sullivan Island versus Murray. That
17 was not a procedural due process case.
18 That was not a claim about whether the
19 process was -- the Town of Sullivan
20 Island's ordinance was followed.
21 Rather, it was a vagueness claim
22 against as-applied -- an as-applied
23 challenge to a zoning board.

24 What happened there, Your Honor,
25 was someone asked -- they sought a



1 building permit to build a dock and the
2 local zoning board said that you could
3 not build a dock that interferes with
4 the navigation of the waterway. That
5 was the law. That was all that the law
6 said, though shall not build a dock
7 that interferes with the navigation of
8 the waterway.

9 All the parties involved agreed
10 that there was no interference with the
11 navigation of the waterway by the dock
12 that Mr. Murray constructed, so there
13 was no legal violation of the code as
14 written. What happened was, when the
15 permit was granted, the building
16 official put a notation on there that
17 said, "Don't build past the neighbor's
18 dock."

19 Okay? So there was an argument
20 that they added a -- they made up a
21 condition on the fly and they said do
22 not build past your neighbor's dock.
23 Well, what he did was he built a dock
24 that did not interfere with the
25 navigation of the waterway, as all



1 parties agreed and the trial court
2 found, but it did step past the
3 protrusion of the neighbor's dock. So
4 if you see the dock, it comes out a
5 little bit past the neighbor's dock.

6 And when the County found out
7 about it, they went out and arrested
8 the guy and they arrested his
9 contractor. And eventually they were
10 fined for the violation. And when it
11 got to the South Carolina Court of
12 Appeals, they reversed the conviction
13 because they said the penal statute
14 issued, the zoning ordinance had one
15 standard, and the standard was don't
16 interfere with the navigation of the
17 waterway. And that didn't happen at
18 all.

19 All parties -- and the evidence
20 below showed it didn't happen.
21 Therefore, we reverse the conviction.
22 And as it applied to him, it would be
23 unconstitutional and vague to allow an
24 administrative official to basically
25 change the law or to add an unwritten



1 condition that the law itself does not
2 give the person notice of.

3 That's not an issue here. There's
4 not a question that completely
5 reconstructing the poles was against
6 the law in the County because this is
7 what the law says. And these are
8 provisions, by the way, that I've
9 highlighted in CDC Section 5.6.5082
10 that are not in state law.

11 Yes, it is true that some of the
12 Community Development Code Provisions
13 mirror or track somewhat those
14 provisions that are in state law. But
15 that doesn't help Adams, if anything,
16 it only shows that their reconstruction
17 of their billboards violated state law
18 also.

19 But it doesn't escape the
20 requirements that they comply with the
21 additional requirements of the
22 Community Development Code because that
23 obviously is an -- as an additional
24 requirement, is more restrictive than
25 the baseline of state law.



1 But here's two sections that are
2 not reflected in the regulations,
3 63-350, which is the state highway
4 regulations. E(2) says, "Commercial
5 off-premises signs may be maintained
6 only by painting or refinishing the
7 surface of the sign base or sign
8 structure so as to keep the appearance
9 of the sign as when it was originally
10 permitted."

11 There's nothing like that in state
12 law, but they obviously didn't just
13 paint the face of the sign or paint the
14 wooden poles that were rotting from the
15 inside out. They ripped them down, and
16 because there were cement footings in
17 the ground, they had to move the sign
18 and put them in a different location
19 closer to the road. That also made it
20 illegal.

21 So that's something they exceeded.
22 And then it says, "Any structural or
23 other substantive maintenance to a sign
24 shall be deemed an abandonment of the
25 sign, shall render the prior permit



1 void, and shall result in the removal
2 of the sign without compensation. Cost
3 and expenses of such removal shall be
4 paid by the owner of such sign."

5 I looked through 63-350 and I
6 didn't see the word -- a word about,
7 you know, doing this structural work,
8 substantive maintenance. Rather, this
9 is an additional condition that exists
10 in the Community Development Code in
11 Beaufort County that they violated.

12 So throughout his supplemental
13 brief, I did get a chance to read the
14 20-page brief Mr. Tibbals submitted at
15 the 11th hour after close of business
16 last night, and he's trying to really
17 direct the Court toward this 50-percent
18 rebuild, Your Honor.

19 That's not what we're dealing with
20 here. That's sort of a tertiary thing.
21 If you had hadn't reconstructed your
22 sign and if you hadn't completely
23 replaced the pole structures that
24 lengthened the life of the device for
25 decades, we might get into was there



1 wind damage, did you have to do some
2 additional repair beyond normal wear
3 and tear, and look at that 50-percent
4 rule.

5 But this is a violation not
6 just of before, the failure to get
7 approval from the County, it's a
8 violation of E(2), and Judge Sadler
9 found that, Your Honor, because this is
10 the holding in her verdict.

11 She said, "The Beaufort County
12 Code clearly prohibits restoration of
13 signs that have become structurally
14 unsound."

15 Okay. That's in E(2). It states
16 that any structural or other
17 substantive maintenance to a sign shall
18 be deemed an abandonment of the sign.
19 That's also the language in E(2), and
20 prohibits -- meaning the Community
21 Development Code prohibits -- quote,
22 "Replacement, rebuilding, or
23 re-erection of the sign."

24 That, Your Honor, is in part E(3)
25 of the code, which is on the next page.



1 That's the part I'm blowing up right
2 here that says, "Enlargement,
3 extension, rebuilding, or re-erection
4 of the sign are prohibited." So she's
5 relying on E(2), she's relying on
6 E(3) -- didn't mean to pull that
7 away -- and then she quotes the
8 language from E(4) and says, "The Code
9 does allow for repairs to damage in
10 excess of normal wear."

11 And, of course, that allowance is
12 for wind events. But at trial,
13 Mr. Hodges could identify no wind event
14 that caused any such damage that was
15 rotting wood from groundwater. The
16 Code does allow for repairs to damage
17 in excess of normal wear, but only upon
18 notification, the Code Enforcement
19 Department of the damage -- receipt of
20 a written notice from the Code
21 Enforcement Department authorizing the
22 repairs.

23 It is clear that the defendants
24 had actual notice of the requirement
25 that the County approve any work



1 undertaken by them to the signs in
2 question and that the defendants chose
3 to perform the work in spite of their
4 failure to obtain the proper approvals
5 from Beaufort County.

6 So even if we were to get down to
7 E(4) and talk about the 50 percent
8 rule, or 50 percent -- (audio
9 interruption) -- to be a precise
10 number. We can talk about whether you
11 use the local standards and cost
12 pricing in Beaufort County or if you
13 want to use the state's rule. But we
14 don't even have to get to that because
15 what they did in this case was
16 replacement, rebuilding or re-erection,
17 and it was structural or substantive
18 maintenance to the sign that under the
19 Code is deemed an abandonment of the
20 sign.

21 And so we don't even need to get
22 to the addition, but if we did, there's
23 no unconstitutional prior restraint.
24 He claims unbridled discretion. Those
25 are some buzzwords in a person



1 (unintelligible) for, Your Honor, and I
2 litigate persons all over the country
3 and we've had some of those cases in
4 South Carolina. The most recent, the
5 case in the Court of Appeals out of
6 Columbia and some cases pending now in
7 the Supreme Court of South Carolina for
8 Greenville County.

9 But the buzzwords don't apply here
10 because all the provision of
11 nonconforming use, dilapidated
12 structures, and the 50 percent rule
13 looked at is the physical condition of
14 the structure. There's nothing about
15 that provision that requires the Code
16 Enforcement Department or the community
17 development director to look at speech.

18 Whether they're advertising
19 McDonald's or a political campaign has
20 nothing to do with it. There's nothing
21 in the ordinance that talks about that.
22 So all we're dealing with is the
23 structure of a sign and whether the
24 wind damage from a hurricane event or a
25 storm event has caused more than 50



1 percent of damage.

2 And the reality is, that's not
3 what the problem was here. Mr. Hodges
4 testified -- couldn't testify to any
5 wind event. When he submitted his
6 pictures to SCDOT because those
7 applications and all the submittals are
8 in the record as Defendant's Exhibits 6
9 and 7, those contained the same exact
10 pictures of rotted wood at the base of
11 the pole that's caused by groundwater.

12 So that when the County prosecuted
13 it's case at the trial court, it not
14 only took it's own pictures of those
15 signs and the pictures that Mr.
16 Greenway took over the weekend while he
17 was there (unintelligible) admits that
18 they're illegally reconstructing them
19 and re-erecting brand new structural
20 supports, but they also included in
21 their exhibits, the pictures that Adams
22 supplied to SCDOT because it shows,
23 clearly, the reason they needed to
24 after the bracing, which was already
25 illegal, didn't work, the reason they



1 needed to replace the rotting poles was
2 because they were rotted from the
3 ground up because of groundwater. This
4 was not anything about a wind event,
5 which is where you get down to this
6 E(4) provision.

7 Therefore, Your Honor, we would
8 ask that this Court affirm the judgment
9 of the trial court, which is based on
10 violations of Section E(2) that are
11 highlighted here in yellow, based on
12 violations of E(3), and then even if
13 you got to a wind event requiring
14 repair more than normal wear and tear,
15 they clearly did not give the written
16 notice that Code Enforcement requires
17 authorizing that repair.

18 And we think the evidence is
19 clear, it's abundant that the trial
20 court's judge, the evidence, facts --
21 (audio interruption) -- Thank you.

22 THE COURT: Okay. Thank you very
23 much. Some jets are about go by behind
24 me. Hopefully they won't knock the
25 sound completely out.



1 Let me take a -- I'm supposed to
2 have an 11:00 live hearing starting
3 downstairs. Let me make sure Jerod's
4 got that under control. I'm just going
5 to mute y'all for just a second.

6 (Technical difficulties.)

7 (Whereupon, the proceeding was
8 adjourned 11:15 a.m.)

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1 C E R T I F I C A T E

2

3 STATE OF SOUTH CAROLINA:

4 DORCHESTER COUNTY:

5

6 I, Naomi McCracken, Court Reporter and Notary
7 Public in and for the above county and state, do
8 hereby certify that the foregoing testimony was
9 taken before me at the time and place
10 herein-before set forth; that the witness was by
11 me first duly sworn to testify to the truth, the
12 whole truth, and nothing but the truth, that
13 thereupon the foregoing testimony was later
14 reduced by computer transcription; and I certify
15 that this is a true and correct transcript of my
16 stenographic notes so taken.

17 I further certify that I am not of counsel to
18 either party, nor interested in the event of
19 this cause.

20

21

Naomi McCracken

22

Naomi McCracken

23

Court Reporter

24

Notary Public

25

Beaufort, South Carolina



1	6:00 35:8 6th 30:21 36:14 41:13 45:23	accordance 8:12 9:17, 20 10:10 12:2 20:25 21:8 31:12 accusing 17:2 act 28:12 32:6 43:11 47:1 action 38:12 actions 11:12 actual 46:2,3 54:24 Adams 4:3,6 6:3 17:3 19:17,23 26:11 27:4 29:1 30:12,18 34:12,20 36:19,20 37:1,19,20 38:16,23 39:22 40:8 42:7 45:17 47:6 50:15 57:21 Adams's 39:5 add 49:25 added 48:20 addition 25:11 55:22 additional 25:9 31:21 32:14,16 38:9 50:21,23 52:9 53:2 address 6:18 10:23 11:7 13:17,18 25:22 adhere 46:5 adjourned 59:8 administer 18:24 administrative 4:15 45:18 49:24 administrator 12:6 46:25 admits 57:17 advance 26:16 45:5 46:19 advertising 4:3,6 28:12 32:6 37:13 56:18 advise 39:22 advised 33:10 affects 32:7 affirm 58:8	affirmation 9:3 affirmatively 40:17 afternoon 30:21 age 17:15 agreed 48:9 49:1 agrees 31:9 allegation 7:22 allegedly 7:18 allowance 54:11 allowed 29:19 41:20 and/or 4:14 10:24 23:24 Annotated 32:3 announces 20:16 Antonacci 30:19 33:4 45:23 anytime 15:19 apologize 5:7 appeal 4:5 6:8 25:4,5 Appeals 16:14 49:12 56:5 appearance 51:8 appears 39:1 appellant 6:5 appellate 26:8 applicant 31:17 application 19:25 42:10 applications 20:8 57:7 applied 23:24 24:9 49:22 apply 9:10 42:24 56:9 appropriately 39:24 approval 20:11 30:2,3, 8,25 31:5 32:20 33:12 34:1 37:3 38:19 41:17 53:7 approvals 20:14 26:17 31:16,18 32:12 33:1,19
2	9 9.1.10 46:10 9.4 42:15 9.4.40 8:12 9:18,21,23, 25 10:4,6,8,11,13 11:24 12:2,20 13:3,10 15:1 9.4.50 7:9,14 9:13 10:9 15:12,20 44:3 9.4.50(b) 16:2 9.5 46:9 9.5.40 43:20 9.9.10 42:18 95 44:14 9:18 38:13		
4	A a.m. 59:8 abandonment 51:24 53:18 55:19 abate 8:13 11:13,16 13:25 abated 11:15 13:22 abject 24:4 abrogates 32:7 absent 20:23 abundant 58:19 abuse 23:25		
5			
6	6 12:9 35:16 57:8 60 27:15 63-350 51:3 52:5 65 27:16		

37:1 46:22 55:4	awning 44:19	board 47:23 48:2	CDC 7:4,10,18 14:21 15:15,21 16:23 17:14 18:20 24:9 50:9
approve 54:25		boards 28:23 29:7,9,11	
approved 16:23	B	body 20:1	cease 38:8
approximately 27:16	back 13:7 15:25 35:6 39:20 44:22	bottom 31:4	cement 51:16
April 30:20 33:5,23 36:7,14 40:3 41:13 45:23,25	base 51:7 57:10	bound 9:25	certified 43:7
arbitrary 23:11	based 23:12,13 58:9,11	braced 28:22	certify 32:21
arching 42:16	baseline 32:15 50:25	bracing 28:25 29:9,11 57:24	chained 9:24
area 34:13	basically 14:17 15:15 22:21 27:19 29:5 39:3, 6,13 49:24	brand 35:15 57:19	challenge 47:23
argue 6:3	basis 15:1	briefing 25:9,24	chance 38:10 52:13
argument 15:10 22:19 23:6 24:19 25:11 40:12 48:19	bears 20:10	bring 40:14	change 49:25
arguments 6:14,17 25:23	Beaufort 4:5 7:4 8:19 11:19 14:2,5,20 16:22 18:8 20:13 21:2 22:3,7, 10,14 27:23 29:23 30:10,13 36:25 38:25 39:8,9 40:25 41:6 45:18 52:11 53:11 55:5,12	build 48:1,3,6,17,22	charge 30:15 34:14
Armitage 38:15	began 45:21	building 48:1,15	Charleston 35:7 36:24
arrested 49:7,8	begin 4:9	built 48:23	choose 16:18
article 32:5,10 42:18,25	behalf 6:7,8	business 52:15	chose 21:10,11 40:10 55:2
as-applied 47:22	believed 20:24	busy 6:20	chronologically 33:22
attach 29:7	Ben 38:15	buzzwords 55:25 56:9	chronology 25:20
attached 30:22,23	Bergthold 4:12,17 24:16,18,23 25:16	call 5:21 42:16	circle 35:13
attempt 5:21	billboard 29:20 35:14, 17,18	called 37:8	Circuit 4:14,16 9:4
attempted 38:4	billboards 26:18 27:13 28:16 31:1 33:12,15 34:19 35:25 50:17	calling 38:5	circumstance 44:16
attempting 16:25	bind 26:6 39:16	calls 38:4	circumstances 8:6,7, 10 43:18 44:14
attempts 18:7 37:17 47:2	binding 26:7	campaign 56:19	citation 18:22 21:6 41:2 44:2 45:3
atypical 38:18	bit 6:24 31:7 49:5	capricious 23:11	citations 8:3
audio 5:18,19 38:24 55:8 58:21	blatant 38:19	Carolina 8:22 14:22 20:5 27:21 28:12 31:21 32:3 49:11 56:4,7	cited 41:22 45:1
Audra 30:18 33:24	blatantly 41:23	carry 24:7	civil 43:21
Austin 33:17	blow 10:3 31:6	case 6:16 7:21 8:4,24 9:7,8,19 11:22 15:6 19:10,17 22:12 26:6 44:24 47:17 55:15 56:5 57:13	claim 47:18,21
authority 8:1 20:3	blowing 54:1	cases 44:15 56:3,6	claimed 30:4
authorization 19:24 37:12	Bo 4:4,6 30:11 33:1 34:5 38:5 41:13	catch 46:25	claims 22:3 55:24
authorizing 54:21 58:17		caused 54:14 56:25 57:11	clarity 7:2
aware 18:15 32:21 44:17			clear 14:8 24:13 34:21 44:1 45:13 54:23 58:19
			close 14:25 52:15
			closer 35:19 51:19
			code 7:5 8:15 10:13,16, 18 11:11 13:11,14,19 15:5 16:5 27:22 29:23

BEAUFORT COUNTY vs BO HODGES and ADAMS
2021-CP-07-01507 - 10-27-2021 HEARING 63Index: color–development

30:19 32:3 34:25 36:16
 37:6 38:1 39:7,8,9
 40:13,25 41:7 42:14,15,
 17,21,22,25 43:21 44:8,
 16,17 48:13 50:12,22
 52:10 53:12,21,25 54:8,
 16,18,20 55:19 56:15
 58:16

color 17:21

Columbia 56:6

commenced 47:4

comment 47:14

Commercial 51:4

commit 20:17

committing 43:12

communication 30:9
 45:15,21

community 7:4 27:22
 29:22 33:17 37:5,25
 40:24 41:7 42:14 50:12,
 22 52:10 53:20 56:16

company 18:18

compensation 52:2

complainant 8:17

complaint 44:10

complete 37:3

completed 40:4

completely 50:4 52:22
 58:25

compliance 12:24
 14:12,16,23,24,25 33:3
 42:20 46:12 47:9

compliances 40:15

comply 13:2 16:12,19
 19:2 32:23 34:20,22
 37:25 50:20

complying 32:23

computer 7:6

condition 9:13,15 15:2
 44:12 48:21 50:1 52:9
 56:13

conditions 33:3

conduct 19:15 37:2

confident 24:8

consistent 14:20,21

constitutional 41:6,8
 47:10

constructed 31:11,12
 48:12

construction 9:11
 12:22 36:2 39:23 40:4

construed 9:10 14:15
 46:11

construing 13:7

contact 30:23 33:19
 38:16

contained 22:14 33:3
 57:9

contemplates 28:13,
 15 31:16 43:18

contend 12:25

contended 12:18

continue 40:1

continued 45:24

continues 14:6

contractor 37:7,18
 49:9

contrary 21:5

control 32:6 59:4

controls 17:17

conviction 9:5 49:12,
 21

cooperate 7:6

copied 27:6

correct 7:10 36:15

correction 43:2

corrections 42:21

correspondence
 36:14

cost 52:2 55:11

counsel 4:21 39:22
 42:1

country 56:2

county 4:5 5:20 7:4,16
 8:2,19 11:20,23 12:1,3,
 6 14:5 15:9 16:20,22,24
 17:2 18:8,24 19:16
 20:13 21:2 22:3,8,10,14
 24:5 26:18 27:23 29:23
 30:2,3,10,13 33:8 34:23
 36:22,25 39:16 40:25
 41:7,14 43:4 45:2,19
 46:20,24 49:6 50:6
 52:11 53:7,11 54:25
 55:5,12 56:8 57:12

County's 14:2,20 42:2,
 8 46:5

couple 24:23 25:6

court 4:1,8,12,15,16
 5:2,9,22 6:1,10 7:13
 8:18 9:4 11:19 12:16
 14:4 16:14 24:15,21
 25:14 26:7 29:4 36:11
 49:1,11 52:17 56:5,7
 57:13 58:8,9,22

court's 58:20

courthouse 5:21

cover 42:11

COVID 43:9

credited 26:5

crime 20:17

criminal 17:10,24
 18:22 20:16,22 21:12
 43:22

criteria 21:22,24

critical 17:12 19:20

cross-examination
 42:3

cross-examined
 29:13

cumulative 15:14
 46:14

D

damage 21:20,21 23:2
 30:5 34:3 53:1 54:9,14,

16,19 56:24 57:1

damaged 33:14

date 11:14 13:21 36:6

day 36:5

days 25:13 43:8 46:19

dealing 52:19 56:22

decades 52:25

decide 38:11

decided 8:25 18:9

decision 18:10,14,15
 23:15 34:8 47:15

deemed 51:24 53:18
 55:19

defendant 21:13
 45:16,22

Defendant's 57:8

defendants 6:7,9
 20:23 45:12 46:1 54:23
 55:2

degradation 7:24

delivered 10:21,22
 13:15,16

delivery 13:4

Department 8:16
 10:14,17 13:12 16:5
 20:5 44:9 54:19,21
 56:16

depravation 17:25
 18:2

description 11:8 13:17

desist 38:8

detail 8:20

detailing 6:14

determination 13:13
 28:9

determine 46:21

determines 10:15

development 7:5 9:6
 10:16 11:11 13:14,19
 27:22 29:22 33:18 37:5,
 25 40:25 41:7 42:15,21,



24 50:12,22 52:10
53:21 56:17
device 52:24
die 28:8
difficulties 59:6
dilapidated 28:2 56:11
dilapidation 27:13
direct 52:17
directive 42:17
director 18:24 22:23,
24,25 23:9,14 33:18
56:17
discovering 38:25
discretion 23:10 55:24
discuss 38:10
dismissed 15:7
display 37:13
dispute 21:2 26:10
disregard 38:19
Division 33:20
dock 9:7 48:1,3,6,11,
18,22,23 49:3,4,5
document 12:24
documents 26:20
30:25 31:3
DOT 21:23 22:2,5,15
downstairs 59:3
drafted 16:22
drawn 19:14
drive-by 18:25
due 19:5 41:9 42:4
47:10,17
duties 17:5

E

E(2) 51:4 53:8,15,19
54:5 58:10
E(3) 53:24 54:6 58:12

E(4) 54:8 55:7 58:6
e-mail 12:7,8,18 13:9
19:1 30:11,20 33:23
38:7 39:4,11 45:22,24
e-mailed 25:1
efface 23:22
effacially 23:24
effect 39:12
efforts 38:1
egregiously 21:11
Elizabeth 36:18
employee 18:18
employees 45:17
encourage 43:1,16
47:8
encroaching 44:23
end 27:19,25 36:5
enforcement 7:15
8:15 10:14,17 13:12
16:5 30:19 33:9 36:17
44:9,18 54:18,21 56:16
58:16
Enforcement's 35:1
Enlargement 54:2
ensure 42:19
entire 17:14 19:6
entitled 7:10 10:6
19:13 21:13
environmental 7:24
erected 27:14,15,17
35:15
Eric 33:7
erred 6:16
error 14:8,10 24:13
40:22 45:8 46:17
errors 46:7,9
escape 50:19
Essentially 29:11
establishes 42:19

evening 35:9
event 21:19 27:7,11
30:5 54:13 56:24,25
57:5 58:4,13
events 54:12
eventually 49:9
everybody's 6:22 10:5
evidence 7:22 11:25
23:13,16 26:3 28:20
42:2 45:7 49:19 58:18,
20
exact 57:9
exacting 12:23 14:23
exceeded 51:21
excess 54:10,17
excuse 8:9
excuses 12:3
exercised 43:23 46:16
Exhibit 12:9,12 36:12,
13
exhibits 57:8,21
existing 31:9,13
exists 10:16 52:9
expecting 25:8
expenses 52:3
extended 44:19
extension 54:3
extent 4:13,19 5:10,12
46:9

F

face 30:12 51:13
faced 14:7
fact 14:14 19:25 20:14
26:4 28:19
facts 19:20 58:20
failed 37:21 38:1 44:25
47:4

failing 11:16 13:24
17:22
failings 24:14
fails 8:13 44:8
failure 7:10 19:5 24:5
45:10 46:5 53:6 55:4
fair 19:12
familiar 26:2
fascinating 15:10
22:18
feel 16:15 24:7
feet 35:16 44:22
filed 4:11 22:17 24:25
25:5,6
fill 8:16 16:5 44:9
finally 18:6
find 24:10 45:9
finding 4:7 13:5,12
21:5 23:13
findings 26:4
finds 10:14 22:25
fine 5:18 25:15 43:10
fined 49:10
fines 18:1
fire 23:8
fit 23:11
fly 48:21
follow 13:5,11 24:5,11
footings 51:16
form 18:1,2
formal 46:6
forwarded 39:21
found 22:15 49:2,6
53:9
frame 26:22
framework 32:11
Friday 35:1
front 35:17 36:3



frying 23:7

full 41:21 42:9

G

gave 42:8

give 11:2 33:12 34:18
50:2 58:15

giving 23:9

good 4:1 5:23 6:1 33:24

governing 20:1

government 20:2
31:19

governmental 17:16
30:17 34:14

governments 31:20
32:13

granted 4:11,14 48:15

granting 4:16

greater 21:21 23:1,2

Greenville 56:8

Greenway 12:5 33:7
35:6 36:15 39:20 45:25
57:16

ground 35:11,16 51:17
58:3

grounds 6:14 25:4

groundwater 29:5
54:15 57:11 58:3

guess 31:11

guidance 20:9

guidelines 20:9

guy 49:8

H

hac 4:10

HACA 28:12

hamstring 43:5

hand 10:22 13:4,15

handle 6:8

handles 30:17

happen 28:15 49:17,20

happened 25:21 27:5
36:8,15 47:24 48:14

happening 43:14

happy 6:10 24:22

harmless 14:10 40:22
45:8,11 46:7

health 7:22

hear 6:11 24:16,17,22

heard 41:11,25 42:6,9
45:7 47:12

hearing 18:5,16 25:11
59:2

hey 18:12 39:13 41:15
44:18

hide 47:7

highlight 25:19

highlighted 50:9 58:11

highway 28:12 32:6
36:25 51:3

Hillary 33:17

Hodges 4:4,6 6:4 17:3
18:11 19:17,23 26:12
27:6 29:14 30:11 33:1,
16,23 34:5,12 36:18
38:5 40:8 41:13 45:16
54:13 57:3

Hodges's 45:22

hold 39:23 41:16

holding 53:10

home 35:1

Honor 6:6,12 11:22
14:11 21:16 23:7 24:3,
10,20 25:12,17 47:24
52:18 53:9,24 56:1 58:7

Honor's 26:2

hope 7:5

hour 38:14 52:15

hurricane 56:24

I

i.e. 8:6 11:21

idea 26:11 43:15

identify 27:11 30:6
54:13

ignore 21:11

ignoring 16:15 17:5
24:14

illegal 28:24 43:13
51:20 57:25

illegality 19:15

illegally 28:22 37:16
46:24 47:4 57:18

immediately 38:8
45:13

important 7:1 10:8
17:7,8 19:20 40:6

importantly 13:23
40:21

imprisonment 18:3

included 57:20

including 16:23 33:2

ineffectual 29:2

inform 18:9

informs 33:16

innocent 19:15

inside 29:6 51:15

instituted 17:11

intended 26:15 43:1,16
46:10 47:8

intent 20:17,22

interest 6:18 15:8

Interesting 31:2

interfere 48:24 49:16

interference 48:10

interferes 48:3,7

interim 33:8

interpret 42:17

interpretation 18:20
19:8 24:9

interpreted 23:18

interpreting 14:13

interruption 5:20
38:24 55:9 58:21

intrusion 17:17

intuitive 17:12

invokes 18:22

involved 40:7 48:9

ironic 17:1

Island 8:24 47:16

Island's 19:10 47:20

issuance 9:14 15:22
44:12

issue 7:16,21 8:2,8
11:23 15:12,18 16:24
18:21 19:13 21:15 23:2
31:16 32:19 37:2 39:24
40:21 41:1,2 42:4 44:2
45:3,10 50:3

issued 8:4 9:2 10:12
11:20 12:1 14:5 21:6
32:12 37:1 45:14 49:14

issues 20:3 22:7 24:3

issuing 15:3 24:12
47:5

J

jail 17:20 18:10,13,18
19:4

Jerod's 59:3

jets 58:23

join 5:15

joined 5:3

judge 4:8 5:21 16:14
45:6 53:8 58:20

judges 9:24



BEAUFORT COUNTY vs BO HODGES and ADAMS

2021-CP-07-01507 - 10-27-2021 HEARING

66Index: judgment—obtain

judgment 58:8
jump 23:7
jumps 36:9
jurisdiction 20:1
justification 27:9

K

Keaveny 5:3,15,19,25
keeping 5:8 12:20
kind 36:9
knew 30:1 39:13,18
 40:8
knock 58:24
knowing 32:13
knowledge 15:20
 36:24 46:3

L

land 10:25 11:8 13:18
 17:17 27:23
language 10:7 11:5
 13:8 14:1 16:24 40:19
 53:19 54:8
late 30:21 39:18
law 8:23 12:21 14:8,12,
 22 21:1 24:13 26:6
 27:21 28:11,13,14
 29:21 31:25 48:5 49:25
 50:1,6,7,10,14,17,25
 51:12
lawful 32:8
laws 31:13 35:22
lawyer 39:5
lawyers 9:22,24
lead 18:13
leading 24:19
legal 11:7 13:17 39:12,
 22 48:13
lengthened 52:24

letter 30:24 32:25 37:10
 39:4
letters 30:8 41:14
liberty 18:2
life 27:20,25 28:1,7
 52:24
Limited 4:3
literally 46:18
litigate 56:2
live 28:6 59:2
local 28:15 29:22
 31:13,18,20 32:13,22,
 24 33:2 37:11 48:2
 55:11
location 35:20 46:4
 51:18
looked 45:6 52:5 56:13
lot 36:8,10
luck 5:23
lunchtime 34:12

M

made 14:8 19:25 21:5
 24:13 44:17 48:20
 51:19
magistrate 6:15 14:7
 24:13
magistrate's 4:8,12
 9:4 26:4
mail 10:21 13:4,15 43:7
maintained 51:5
maintenance 51:23
 52:8 53:17 55:18
make 5:17 10:1,4 18:14
 20:19 22:18 23:14
 32:20 34:7 47:14 59:3
makes 15:9
mandated 14:2
mandates 17:1
mandatory 11:5

matter 16:4 29:14 30:7
 38:11
matters 24:24
Mcdonald's 56:19
meaning 32:5,14 53:20
meant 14:11
mechanism 7:15
meet 17:22
mens 20:22
mentioned 33:25
Michael 8:25
Michigan 39:5
middle 35:3
mind 12:21
minute 40:20
mirror 50:13
misreads 40:16
Mitchum 36:19 38:6
moment 41:4
Monday 36:7
month 9:1
months 25:6
morning 4:1 18:16
 24:19 33:6,24 39:5 40:3
 45:25
move 51:17
moved 35:19
Murray 8:25 47:16
 48:12
mute 5:8 59:5
muted 4:23

N

natural 28:7
naturally 9:21 10:9
nature 11:10
navigation 48:4,7,11,

25 49:16
needed 26:16 57:23
 58:1
neighbor's 48:17,22
 49:3,5
news 23:18
night 25:2 35:8 38:14
 52:16
no-nod 5:5
nobody's 36:16
noncompliance 12:4
nonconforming 27:23
 28:7,10 56:11
normal 28:1 44:15 53:2
 54:10,17 58:14
notation 48:16
note 4:9 7:19 31:2
notice 8:11,12,15 9:17,
 20 10:7,10,20 11:3,6,
 18,21,23 12:1,19,25
 13:2 14:3,19 17:9 19:3,
 12 21:7 25:5 34:15,22
 36:22 40:7 41:10,12,21
 42:5 44:7 45:13 46:2,6
 47:6,12 50:2 54:20,24
 58:16
notices 11:4
notification 10:19
 54:18
notified 18:6 20:13
notify 10:17
notion 26:11
nuisance 11:18
number 8:20 12:5,12
 38:5 55:10

O

objection 4:21 5:1,4
objective 21:22,24
obsolete 28:3
obtain 42:21 55:4



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BEAUFORT COUNTY vs BO HODGES and ADAMS
2021-CP-07-01507 - 10-27-2021 HEARING 67Index: obtained-questions

obtained 20:11
obvious 16:17,21
 29:21
occupying 10:24
occur 46:22
occurs 11:1
off-premises 51:5
office 36:16
officer 30:20 33:9
official 48:16 49:24
on-site 37:7,18
opinion 9:1
opportunity 34:19
 41:10,24 42:5,9 47:12
order 4:16 10:11 19:11
 39:12 43:23 46:16 47:5
ordinance 14:3 16:16
 17:4 19:6,11 21:4,8,14
 22:4,8,10,15,20,22
 23:4,17 24:6 32:8 33:2
 47:20 49:14 56:21
ordinances 9:6,12
 12:4 14:14 17:6 31:13
 32:22,24 34:23 40:15
originally 27:14 51:9
outdoor 4:3,6 30:13,18
 36:19,21 37:13 38:16,
 23 40:8 42:7 45:17
overhang 17:22
overlook 19:19
owner 10:24 52:4
ownership 17:18

P

p.m. 25:1
pages 25:2
paid 52:4
paint 51:13
painting 17:20 51:6

pan 23:8
paperwork 37:9
part 9:12 16:3 46:7
 53:24 54:1
parties 45:16 48:9
 49:1,19
Partnership 4:4
past 29:8 48:17,22
 49:2,5
penal 9:9 12:21 14:13
 49:13
penalties 13:24 18:8,
 23 42:23 46:14
penalty 11:16
pending 56:6
people 17:19 19:13
 36:17,21
percent 21:21 22:25
 23:1 34:4 44:15 55:7,8
 56:12 57:1
percent-threshold
 22:1
perform 55:3
permit 9:7 20:7,14
 37:11 48:1,15 51:25
permits 20:3 26:16
 37:22 39:2 42:18
permitted 20:4 51:10
permitting 30:15 31:22
 34:15 41:19
person 7:17 8:8,10
 9:16 10:18,24 30:14,16
 32:20 33:20,25 34:13
 37:19,20 44:6 50:2
 55:25
persons 56:2
petition 4:11 19:22
petitioner 6:5
phone 5:8 38:4
photograph 34:9
photographs 27:3

physical 56:13
pick 16:17
picture 26:25 34:6 40:2
pictures 29:3 34:17
 41:18 57:6,10,14,15,21
place 20:10 28:17,18
planning 20:18 33:20
point 29:17 36:11
pole 27:1 29:18 52:23
 57:11
poles 26:21 27:6,10
 29:6,12,15 35:10 50:5
 51:14 58:1
political 56:19
porch 17:20
portray 19:17
postal 43:9
potentially 21:20
pound 39:6 40:1
power 8:1 22:11 23:25
powers 4:17
precedent 9:14
precise 55:9
preemption 21:15 22:7
preliminary 24:24
present 7:24 37:15
preserving 6:17
prevents 15:21
pricing 55:12
principles 9:11
prior 15:3 28:20 33:10
 51:25 55:23
private 17:18
pro 4:10
problem 41:6 42:6 57:3
procedural 47:17
procedures 31:22,23
 41:19 42:19

proceeding 17:10,24
 59:7
process 17:7,8 19:5
 38:20 41:9,18 42:4 43:6
 47:11,17,19
processes 42:8
prohibited 29:24 54:4
prohibitions 15:17
prohibits 35:22 53:12,
 20,21
proper 19:8 20:25
 37:12 39:2 55:4
property 17:18,25
 44:21
proposed 31:9
prosecuted 57:12
Prosecution 36:12
protections 21:12
protrusion 49:3
provided 17:9
proving 29:2
provision 15:14,21
 16:11 31:25 39:8,9,10
 41:23 44:20,24 45:11
 46:15 47:7 56:10,15
 58:6
provisions 11:11
 13:19 19:3 24:6 32:7,10
 42:20,25 50:8,12,14
pull 15:24 54:6
pulled 12:10
pursuant 4:15 11:24
 12:19
put 14:18 19:4 39:15
 42:1 45:19 48:16 51:18
puts 36:22

Q

question 50:4 55:2
questions 30:23



quick 26:24 47:14
quickly 25:18 26:19
quote 29:15 53:21
quote/unquote 37:8
quotes 54:7

R

re-erected 28:4
re-erecting 57:19
re-erection 53:23 54:3 55:16
rea 20:22
reached 22:1
read 15:23 25:3 52:13
reading 13:10
reads 44:4
ready 36:1
real 14:24 26:19,24
reality 57:2
reason 57:23,25
rebuild 37:3 52:18
rebuilding 53:22 54:3 55:16
rebuilt 28:4
receipt 54:19
receive 21:13 25:12
received 46:2
recent 47:15 56:4
recently 8:23 15:11
reconstruct 37:12
reconstructed 25:22 28:4 35:18 52:21
reconstructing 50:5 57:18
reconstruction 28:21 43:13 50:16
record 4:10 11:25 12:8 20:12 21:23 26:13

28:20 29:3 40:5 57:8
refer 27:8
reference 9:23
referring 33:14
refinishing 51:6
reflected 51:2
refused 38:23
regard 25:21
region 38:17
regulation 21:9 32:8, 18
regulations 20:9 21:18 22:2,9,16 28:11,16 31:14 51:2,4
relations 30:17 34:14
relative 26:22
rely 15:13 25:24 40:12
relying 54:5
remainder 25:25
remedies 15:14 42:23 43:20,22 46:15
removal 52:1,3
remove 11:13,16 13:24 44:8
removed 8:13 11:15 13:22 28:9 35:10
render 51:25
renders 19:6
renewed 4:14
reoccurs 11:18
repair 29:17 33:19 37:8 53:2 58:14,17
repaired 29:16
repairs 19:24 20:2 21:19 27:9 33:10,13 54:9,16,22
repeated 47:2
repeatedly 37:21 38:2
replace 29:19 58:1

replaced 52:23
replacement 53:22 55:16
report 36:25
representative 34:13
represented 42:1
request 34:21 38:20
require 40:16
required 13:4 40:18,23 42:13 46:13 47:11
requirement 17:23 40:24 47:10 50:24 54:24
requirements 8:20 11:3 17:6 24:11 46:6 50:20,21
requires 12:22,23 56:15 58:16
requiring 25:3 44:4 58:13
resolution 32:9
resolved 39:25
response 25:7,13 33:5
restoration 53:12
restraint 55:23
restrictions 15:17 22:6,13 32:17
restrictive 22:4,8,21, 22 23:5,22,23 32:9,15 50:24
result 52:1
returning 36:23
reverse 49:21
reversed 49:12
reversing 9:3
review 19:21 25:19 26:1 31:22 33:11 34:19 37:23 46:21
reviewed 34:8
riddle 16:25

ripped 51:15
road 35:13,20 51:19
Romera 36:20 37:19 38:22
roof 17:21
rotted 27:1 57:10 58:2
rotten 29:12 35:10
rotting 29:5 51:14 54:15 58:1
rule 34:3 53:4 55:8,13 56:12
ruling 14:22

S

Sadler 4:8 45:6 53:8
safety 7:23
sand 39:6 40:1
satisfaction 15:2
Saturday 35:3,8 38:13
SC 35:21
SCDOT 20:11 21:18 22:9 27:5 30:8,24,25 31:16 32:12 34:2 35:22 37:10 57:6,22
scofflaw 46:18
scofflaws 19:18 26:12
scope 37:24
screen 7:9 10:4,5 26:24 32:2 35:12 45:20
scroll 31:4
section 7:3,9 8:12 9:18,21 12:20 40:13,16 42:15 43:20 44:3,8 50:9 58:10
sections 51:1
seek 18:10,17
seeking 18:8
sees 18:25 23:11 35:9
send 30:18 34:1,6



41:17	slice 23:21	steps 43:25	supplied 57:22
sending 38:7 41:14	someone's 44:17	stop 12:7 37:20 38:21 47:3	supported 28:22
sense 20:20	sort 16:2 52:20	stop-work 39:12 47:5	supports 26:3 29:20 35:16 36:3 57:20
sentencing 18:4,5,16	sought 47:25	storm 21:20 33:13 56:25	supposed 27:24 28:3,6 59:1
separately 6:3	sound 58:25	strap 29:8	Supreme 56:7
September 9:1,2	South 8:22 14:22 20:5 27:21 28:11 31:20 32:3 49:11 56:4,7	strategically 40:10	surface 51:7
serve 10:19	spades 42:6	strict 9:10 12:22 14:24 24:8	swing 17:21
served 45:12	specifically 6:16 8:23 32:1	strictly 9:9 13:6 14:15	T
service 43:10	speech 56:17	strike 16:4,10	takes 7:25
set 25:4 41:8	spelled 22:16	structural 29:20 35:15 36:3 51:22 52:7 53:16 55:17 57:19	talk 22:19 55:7,10
setback 17:22 44:20,23	spite 55:3	structurally 28:19 53:13	talked 38:23 40:13
sets 42:22	spoke 33:7	structure 10:25 11:8 28:1 31:10 35:14,24 51:8 56:14,23	talking 27:8 34:18
severe 7:23	staff 38:25 45:18	structures 52:23 56:12	talks 56:21
share 12:13 26:19	stand 20:4	subjected 42:2	tear 53:3 58:14
shocked 38:18	standard 25:19 26:1 41:8 49:15	submittals 57:7	technical 40:24 59:6
shoots 19:1	standards 55:11	submitted 6:13 20:7 27:4 52:14 57:5	telephone 5:16,24
should've 15:6	stands 34:7	Subsection 7:20 8:5,7	telling 12:7 41:14
show 29:5 34:17	start 6:23,25 7:2 35:2 46:24	subsections 7:20	ten 25:13
showed 46:1 49:20	started 34:10 39:1	substantive 51:23 52:8 53:17 55:17	terminate 27:24
showing 29:4	starting 46:20 59:2	substantial 14:11,15	tertiary 52:20
shown 35:25	state 11:6 13:16,20,23 28:10,13,14 29:21 30:4 31:13,20,25 32:5,16,17 39:7 50:10,14,17,25 51:3,11	sufficient 14:16 44:12	testified 57:4
shows 20:12 26:13 28:20 36:2 40:3 50:16 57:22	state's 55:13	Sullivan 19:10 47:16, 19	testify 57:4
sign 8:16 11:9 16:6 20:1 34:6 36:4 43:13 44:10 51:7,9,13,17,23, 25 52:2,4,22 53:17,18, 23 54:4 55:18,20 56:23	states 10:13 53:15	Sullivan's 8:24	themes 20:21
signs 20:4,11 21:19 25:22 37:4 45:14 51:5 53:13 55:1 57:15	stating 11:17	summons 7:17 8:17,21 9:15 10:11 11:21 15:4, 12,22 16:6 45:4	thing 29:18 33:22 35:21 52:20
similar 22:6	statute 12:21 25:3 49:13	summonses 24:12	things 6:20 13:1 28:23
simply 16:2 41:10	statutes 9:9 31:5	Sunday 39:4	throw 18:17
sir 6:11 24:22	statutes/penal 14:13	supplemental 52:12	thrown 17:20
site 37:15	steal 29:10		Tibbal's 25:23 40:12
sites 38:9	step 49:2		Tibbals 4:23,25 6:6,12 7:14 12:17 24:25 36:9 44:4 52:14
sitting 26:7			ticket 7:17 8:18,21 9:15 15:18,19 16:6,7 44:13

BEAUFORT COUNTY vs BO HODGES and ADAMS
2021-CP-07-01507 - 10-27-2021 HEARING

70Index: time—zoning

time 6:18,22 8:14 17:4,
15 18:10,13 20:17
26:22,25 33:8 43:14

times 29:8

today 6:19 25:11 36:24

today's 43:8

told 26:15 41:16 46:19

top 32:17

touch 21:17

Town 8:24 19:10 47:15,
19

track 50:13

Transportation 20:6

trial 12:9,12 29:14 30:7
41:25 49:1 54:12 57:13
58:9,19

tribunal 26:8

trim 44:22

trip 35:7

true 18:21 50:11

Tuesday 30:20

typo 10:23

U

U.S. 10:21 13:4,15

unable 27:10

unbridled 23:10 55:24

unconstitutional 19:7
23:19 24:1 39:10 49:23
55:23

underlying 19:22
20:21

undersigned 31:8

understand 8:22 18:7
19:21

understanding 17:13

understands 29:16

undertaken 55:1

uniform 7:16 8:2,17,21
9:14 10:11 15:4,22
16:6,7 45:3,4

unintelligible 56:1
57:17

unprecedented 17:16

unsound 28:19 53:14

unsupported 23:15

unusual 6:24

unwritten 49:25

V

vague 49:23

vagueness 47:21

verdict 53:10

versus 4:4 47:16

vice 4:10

view 20:23

violate 37:5

violated 7:18 11:12
13:20 44:18 50:17
52:11

violating 10:18 17:3
41:23

violation 7:11 8:13,14
9:5 10:7,15,20,25 11:9,
10,13,14,17,24 12:1
13:13,21,25 14:6 15:5
23:3 43:11 44:1 45:15
46:3,4 48:13 49:10
53:5,8

violations 42:22,24
43:2 58:10,12

violator 43:12

void 52:1

voluntary 40:14 43:1
46:11 47:8

W

wait 34:15,24,25 43:6

waited 42:10

Ward 5:4,7

warn 47:2

warning 8:11 9:16,20
10:9,20 12:19,25 13:2
17:9 18:4 19:2 21:7
24:7 40:17 41:1 44:5,7
45:5,10,14

waterway 48:4,8,11,25
49:17

ways 22:3,5

wear 53:2 54:10,17
58:14

Wednesday 34:11

week 25:7

weekend 34:10,24
35:2,4 36:8,9,13 39:14
42:11 47:1 57:16

welfare 7:23

whim 18:23 23:14

Wifi 5:23

wind 27:7 30:5 34:2,3
53:1 54:12,13 56:24
57:5 58:4,13

wing 21:10

wire 29:10

witnesses 42:3

wood 29:15,18 54:15
57:10

wooden 51:14

word 52:6

words 31:15 43:24
44:11,13

work 5:6 19:11 20:15
26:17 35:2 37:2,16,20,
24 38:9,20 39:1 40:2
41:15 42:12 46:20,24
47:3 52:7 54:25 55:3
57:25

work's 39:17

working 36:17

world 43:8,9

worries 5:9

wrap 29:9

writes 36:18 38:15

writing 10:18

written 40:17 48:14
54:20 58:15

wrong 17:21

wrote 39:20

Y

y'all 6:2 59:5

years 27:15,16,18 29:1

yellow 58:11

Z

Zecchino's 45:24

zoning 33:9,11,20
47:23 48:2 49:14

