

OPINION LETTER

regarding the rights and obligations
of the

Town of Sullivan's Island

under the

Settlement Agreement dated October 7, 2020

(as amended)

Submitted by

William W. Wilkins

Nexsen Pruet, LLC

November 30, 2021

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Mr. Andy Benke, Town Administrator
Town of Sullivan’s Island
2056 Middle Street
Sullivan’s Island, SC 29482

*Re: Opinion Letter Regarding the Rights and Obligations of the Town
Under the Settlement Agreement Dated October 7, 2020 (as amended)*

Dear Mr. Benke:

I have been requested to give my opinion regarding the rights and obligations of the Town of Sullivan’s Island (the “Town”) under the Settlement Agreement dated October 7, 2020 (as amended) (the “Settlement Agreement”).

Austin

Charleston

Charlotte

Columbia

Greenville

Greensboro

Bluffton / Hilton Head

Myrtle Beach

Raleigh

EXPLANATIONS AND DEFINITIONS OF CERTAIN TERMS

1. Legislative/Governmental Powers and Proprietary Functions – In judicial opinions and legal treatises the words “legislative or governmental powers or functions” are used to distinguish acts of an elected body like a municipality from the words “business or proprietary powers or functions.” Unless I am quoting from a prior opinion or publication, for clarity and simplicity I have elected to use “legislative/governmental powers” and “proprietary functions” when referring to these two distinct terms of art.

A. Legislative/Governmental Powers. The term “legislative/governmental powers” includes such other descriptive words as “legislative function,” “governmental function,” “authority to act,” “police powers,” “fiscal powers,” “authority to regulate,” and “zoning authority.” Legislative/governmental powers refer to services and acts that only a governing body can provide or do, such as restaurant inspections, animal control, issuance of health and safety permits and licenses, and the enactment of ordinances, to name a few.

B. Proprietary Functions. A proprietary function is one that a private entity can also perform. For example, proprietary functions include the capacity of a municipality to enter into business contracts with third parties.

2. Successor Town Council(s) – Town Councils are periodically elected by the citizens of Sullivan’s Island. A successor Town Council comes into being after an election and at the expiration of the term of the then-current Town Council. It may include members who served on the previous council as well as members who will be serving on it for the first time.

EXECUTIVE SUMMARY

The purpose of this letter is to provide my objective opinion regarding the validity and enforceability of the Settlement Agreement. After carefully examining the Settlement Agreement, relevant exhibits, and the applicable law, it is my opinion that the Settlement Agreement is invalid because its provisions improperly restrict the legislative/governmental powers of successor Town Councils, improperly divest the Town of legislative/governmental powers, and improperly restrict the proprietary functions of the Town. Were it otherwise, a plaintiff and a town council could “use a private settlement agreement” to render inapplicable long-standing principles of law that set forth the authority, including any restrictions on that authority, uniquely granted to a town and other elected bodies. This would have the effect of nullifying a town’s authority to freely carry out its present and future governance responsibilities. For these reasons, the Settlement Agreement is unenforceable in law or contract, as set forth below.

This opinion is based upon my five decades of legal experience, including but not limited to 25 years as a United States District Judge for the District of South Carolina and a United States Circuit Judge for the Fourth Circuit Court of Appeals, and my understanding of the applicable law.¹

This letter is not, and should not be construed as, a guarantee of any legal outcome related to the issues presented; nor does it attempt to determine or comment on the wisdom of any non-legal or political issues, such as policy decisions of the Town, or any past or present actions by the Town.

Furthermore, this Opinion should not be interpreted as a prohibition or restriction on the Town from taking such action as it determines to be “necessary for the health, safety or general welfare of the Town” and the public at-large to “further or

¹ I was assisted in the preparation of this opinion by attorneys Alexandra H. Austin of our Charleston office and Clarence R. Turner, IV of our¹Greenville office.

effect” the “Public Policies” enumerated in the covenants set forth in the deed from the Lowcountry Open Land Trust (Exhibit B).

Finally, in preparation for issuing this Opinion, I strictly adhered to an *objective* approach as opposed to a *result-oriented* one. That is to say that the Opinion offered is not necessarily one I personally desired to reach but is one I believe the relevant facts and applicable law compelled.

ISSUES PRESENTED

- (a) Whether any provision(s) of the Settlement Agreement constitute(s) an improper restriction of the legislative/governmental powers of successor Town Councils;
- (b) Whether any provision(s) of the Settlement Agreement constitute(s) an improper delegation and/or divestment of the legislative/governmental powers of the Town;
- (c) Whether the duration of any or all of the provisions of the Settlement Agreement unfairly, unreasonably, or improperly restrict the proprietary functions of the Town;
- (d) Whether, in light of the above, any provision(s) of the Settlement Agreement is likely to be unenforceable in law or contract;
- (e) Whether, in the event that any provision(s) is likely to be unenforceable, any such provision(s) can be severable from the Settlement Agreement; and
- (f) Whether there are any mechanism(s) available for obtaining a judicial determination of the rights and obligations of the Town under the terms of the Settlement Agreement in the event that my opinion is that any provision of the agreement may be unenforceable in law or contract.

TIMELINE OF RELEVANT EVENTS

- December 28, 1949 – The Town obtains fee simple ownership of certain accreted beachfront property (the “Accreted Land”) located along the Atlantic Ocean by deed from the War Assets Administration of the United States. This deed is recorded in the Register of Deeds Office for Charleston County in Book K51 at pages 271-286.
- 1981 – The Town passes a zoning ordinance restricting use of the Accreted Land. The ordinance states, in pertinent part:

There shall be no construction of any type, no destruction of vegetation (except trimming, cutting and pruning of bushes and trees as provided in this section), and no man-made changes of topography in [the] area. The Town Council may establish a program pursuant to which citizens may apply to the Town for permission to prune, trim and cut bushes and trees in the ... area as follows ... (5) in those areas where the height of trees or bushes are deemed objectionable, the trees or bushes may be pruned to a height of no less than three (3) feet, provided that the cumulative effect of the trimming, cutting or pruning shall not be detrimental to the safety, welfare, and health of the people of the Town. § 21-39A, Town Code of Ordinances.

- February 12, 1991 – The Town executes a deed conveying the Accreted Land to the Lowcountry Open Land Trust (“LOLT”). This deed is recorded in the Register of Deeds Office for Charleston County in Book K200 at pages 484-495, a copy of which is attached as “**Exhibit A**” and incorporated herein by reference.
- February 12, 1991 – LOLT executes a deed conveying the Accreted Land back to the Town, subject to certain terms, conditions, restrictions, and covenants. This deed is recorded in the Register of Deeds Office for Charleston County in Book K200 at pages 496-510, a copy of which is attached as “**Exhibit B**” and incorporated herein by reference. It provides, in pertinent part:
 1. Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the Property shall remain in its natural state, no changes shall be made to its topography or vegetation and no structures or improvements shall be erected on the Property.
 2. Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of Paragraph 4, the Town Council is given *the unrestricted authority to* trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean and providing views of the ocean and beaches to its citizens.
 3. Notwithstanding the provisions of Paragraph 1 hereof, and subject to the limitations of this Paragraph 3 and of Paragraphs 2 and 4, the Town Council of Sullivan’s Island (the “Council”)

shall have *the right to*² improve, change, modify or alter the Property only if such actions are to further or effect one or more of the following enumerated public objectives or policies (“Public Policies”):

- a) Drainage
- b) Mosquito control
- c) Public walkways and emergency access to the Atlantic Ocean
- d) Beach renourishment
- e) Erosion control
- f) Vegetation management
- g) Educational programs
- h) Public safety
- i) Public health; and
- j) Scenic enhancement.

Prior to taking any action affecting the Property to further or effect a Public Policy (“Public Action”), the Council shall make specific written findings of fact;

- 1) that the proposed Public Action is proposed solely for the purpose of furthering or effecting one or more of the enumerated Public Policies,
- 2) that the proposed Public Action is necessary for the health, safety or general welfare of the Town,
- 3) that the benefits of the proposed Public Action outweigh the damage done to the aesthetic, ecological, scientific, or educational value of the Property in its natural state, and
- 4) that in making its findings of fact, the Council has given due and reasonable consideration to

² The restrictive covenants set forth in the deed from the Lowcountry Open Land Trust to the Town of Sullivan’s Island remain in effect unless amended by “an affirmative vote of both (a) seventy-five (75%) percent of the registered voters of the Town who vote in the referendum held pursuant to the terms hereof, and (b) one hundred (100%) percent of the members of Town Council.” These covenants vest broad discretion in the Town Council.

- i) the cumulative effect of the proposed Public Action and past Public Actions on the natural state of the Property,
- ii) the alternative methods, if any, of furthering or effecting the proposed Public Policy which do not impact adversely on the natural state of the Property, and
- iii) the probable results of not taking the proposed Public Action.

The above described written findings of fact must be made prior to each individual Public Action relating to the Property and shall be specific to the circumstances of the proposed Public Action and not merely conclusive in nature.

....

6. During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of law for any person to violate the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof. The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions.
- 1995 – The Town amends the zoning ordinance to provide, in pertinent part, that “vegetation may be trimmed and pruned so as to have a maximum height of no less than seven feet (7’) above the ground.” § 21-39.1G, Town Code of Ordinances.
 - 2005 – The Town amends the zoning ordinance to provide, in pertinent part, that “vegetation may be trimmed and pruned so as to have a maximum height of no less than five (5) feet above the ground.” § 21-71(C)(3), Town Code of Ordinances. A copy of Section 21-71 of the Town Code of Ordinances is attached as “**Exhibit C**” and incorporated herein by reference. The ordinance further provides:

A. No construction or removal of vegetation.

There shall be no . . . destruction or removal of vegetation by any means except trimming and pruning of shrubs and trees as provided in this Ordinance. . . .

....

C. Permit for trimming and pruning of vegetation.

....

(3) The only vegetation that may be trimmed and pruned . . . is limited to the following: Southern Waxmyrtle (*Myrica Cerifera*), Eastern Baccharis (*Baccharis Halimifolia*), and Popcorn trees (Tallowtree, *Sapium Sebiferum*).

- June 15-23, 2010 – Landowners Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius (collectively, the “Plaintiffs”) apply to the Town for a permit to trim and prune ocean adjacent property to a height of no less than three (3) feet.
- June 21-24, 2010 – The Town denies the Plaintiffs’ permit applications, as failing to meet the requirements of Section 21-71(C) of the Town Code of Ordinances.
- July 8, 2010 – The Plaintiffs file a lawsuit in Charleston County Circuit Court against the Town captioned *Bluestein, et al. v. Town of Sullivan’s Island, et al.* and bearing case number 2010-CP-10-05449 (the “Lawsuit”). A copy of the Second Amended Complaint is attached as “**Exhibit D**” and incorporated herein by reference.
- November 10, 2015 – The Circuit Court grants summary judgment in the Lawsuit in favor of the Town and against the Plaintiffs.
- August 1, 2018 – The South Carolina Court of Appeals affirms the Circuit Court’s grant of summary judgment in the Lawsuit. *Bluestein v. Town of Sullivan’s Island*, 424 S.C. 362, 818 S.E.2d 239 (Ct. App. 2018).
- February 19, 2020 – The South Carolina Supreme Court reverses the grant of summary judgment in the Lawsuit on grounds that genuine issues of material fact exist as to the maintenance responsibilities of the Town toward the Accreted Land and remands to the Circuit Court for further proceedings. *Bluestein v. Town of Sullivan’s Island*, 429 S.C. 458, 839 S.E.2d 879 (2020). A copy of the Supreme Court’s opinion is attached as “**Exhibit E**” and incorporated herein by reference.
- October 7, 2020 – The Parties seek approval from the Circuit Court of a settlement agreement dated October 7, 2020 in the Lawsuit (the “Original Settlement Agreement”).

- October 15, 2020 – The Circuit Court enters a consent order³ approving the Original Settlement Agreement in the Lawsuit. A copy of the Court’s Order is attached as “**Exhibit F**” and incorporated herein by reference. The Original Settlement Agreement approved by the Court is attached as “**Exhibit G**” and incorporated herein by reference. The Original Settlement Agreement provides, in part:

The Town would implement selective thinning of the Accreted Land (AL), based on initial cut parameters set forth below for each of the four Zones (Transition Zone, Zone 1, Zone 2, and Zone 3.) In order to maintain similar conditions going forward, with the help of a naturalist the Town would review changes in the condition of the AL on a recurring basis (for instance, once every five years) with an eye towards making whatever changes might be necessary to maintain appropriate levels of density and diversity. This would provide a mechanism to deal with natural attrition, growth, or other changes to the natural environment. Primary funding for transition zone work will be from the Town. Funding for work in Zones 1-3 is subject to receipt of adequate donations or grants.

- April 6, 2021 – The Parties in the Lawsuit seek approval from the Circuit Court of an amendment to the Original Settlement Agreement to address anticipated third-party regulatory concerns.⁴
- April 12, 2021 – The Circuit Court enters an order in the Lawsuit amending its prior consent order and amending the Original Settlement Agreement. A copy of the Court’s Order amending the Original Settlement Agreement is attached as “**Exhibit H**” and incorporated herein by reference.

³ It bears noting that the Settlement Agreement, though termed a settlement agreement by the parties, is, in actuality, a consent decree, which is merely a judicial act based upon or reflecting the parties’ agreement. Thus, regardless of the label, the distinction is immaterial because the binding force of a consent decree comes from the agreement of the parties. Thus, consent decrees are to be interpreted as contracts. *See Nutramax Laboratories, Inc. v. Manna Pro Products, LLC*, No. 0:16-cv-01255, 2016 WL 11604340, at *3 (D.S.C. Dec. 1, 2016). *See also Johnson v. Robinson*, 987 F.2d 1043, 1046 (4th Cir. 1993). Indeed, it is axiomatic that a consent decree is enforceable only to the extent it is not improper. *See, e.g., Local No. 93, Intern. Ass’n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 526 (1986).

⁴ This amendment to the Original Settlement Agreement does not materially impact the legal analysis of the issues presented.

LEGAL OPINION

The Settlement Agreement is invalid because (A) its provisions constitute an improper restriction of the legislative/governmental powers of successor Town Councils, (B) its provisions constitute an improper delegation and/or divestment of the legislative/governmental powers of the Town, and (C) its provisions unfairly, unreasonably, or improperly restrict the proprietary functions of the Town. As a result, provisions of the Settlement Agreement are unenforceable in law or contract, and the unenforceable provisions of the Settlement Agreement are not severable or, if severable, would have no meaningful effect. Mechanisms are available for obtaining a judicial determination of the rights and obligations of the Town under the terms of the Settlement Agreement, as discussed below.

A. The Settlement Agreement Improperly Restricts the Legislative/Governmental Powers of Successor Town Councils.

The duration of the Settlement Agreement and the obligations of the Town thereunder extend beyond the term of the Town Council that entered into it. Specifically, and as discussed below, the Settlement Agreement imposes an ongoing obligation on the Town to maintain the vegetation on the Accreted Land pursuant to the Settlement Agreement, and places a prohibition of indefinite duration on the ability of the Town to adopt legislation inconsistent with the Settlement Agreement. “When a municipal contract extends beyond the term of the governing members of the municipality entering into the contract, the subject matter of the contract will determine its validity.” *City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority*, 325 S.C. 174, 178, 480 S.E.2d 728, 731 (1997) (“South Carolina courts have struck as invalid many different kinds of contracts binding successor governing bodies.”).

The general rule is that “if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils.” *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 132, 459 S.E.2d 876, 880 (Ct. App. 1995) (*Cowart I*). *See also Newman v. McCullough*, 212 S.C. 17, 25, 46 S.E.2d 252, 256 (1948) (“the acts of former councils relating to the governmental functions of said councils which involve a matter of discretion to be exercised by such councils are without force and effect upon succeeding councils.”). While “it is often difficult to determine whether a particular function is governmental or proprietary. . . the test. . . should be whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.” *Cowart I*, 319 S.C. at 133, 459 S.E.2d at 881 (citation and internal quotations omitted).

Here, the Settlement Agreement involves the legislative/governmental powers of the Town because it restricts the current and future ability of the Town to legislate freely on matters concerning the use and maintenance of the Accreted Land. *See*

McQuillin, *Municipal Corporations*, § 29:103 (3d ed.) (“To the extent that a governmental contract impinges on a municipality’s ability to legislate freely, the contract is ultra vires and void” because it violates the prohibition against municipal contracts binding successor councils with respect to a legislative/governmental function). As such matters involve public policy considerations, including public health and safety, the Town must retain its discretion to act in the public interest. *See Newman*, 212 S.C. at 25, 46 S.E.2d at 256 (“The power conferred upon municipal councils to exercise legislative or governmental functions is done so to be exercised as often as may be found needful or politic; and the council holding such powers is vested with no authority to circumscribe, limit or diminish their efficiency, but must transmit them unimpaired to their successors.”). Moreover, determinations concerning permissible uses of the Accreted Land are zoning issues, and “[z]oning is a legislative act.” *Knowles v. City of Aiken*, 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991). *See also Woodale Partnership v. City of Charleston*, No. 2:07-CV-2025-MBS, 2010 WL 11661386, at *10 (D.S.C. Sept. 17, 2010) (holding that the city did not have the power to forbid future city councils and zoning boards from exercising their legislative functions by forever freezing the zoning classification of the property).

Thus, because it restricts the legislative/governmental powers of future Town Councils, the Settlement Agreement is invalid.⁵

⁵ While “there is an exception to the rule that contracts involving a governmental function may not bind successor boards when enabling legislation *clearly authorizes* the local governing body to make a contract extending beyond its members’ own terms,” no such enabling legislation has been found to exist here. *West Anderson Water District v. City of Anderson*, 417 S.C. 496, 507, 790 S.E.2d 204, 209 (Ct. App. 2016) (citation and internal quotations omitted) (emphasis in original). Some jurisdictions have held a further exception to exist where the municipal body is a board or commission with staggered terms. *See, e.g., Daly v. Stokell*, 63 So.2d 644, 645 (Fla. 1953) (en banc). However, South Carolina courts have declined to recognize this exception. *See Cowart I*, 319 S.C. at 134, 459 S.E.2d at 882 (explaining that “[t]he rule that municipal corporations cannot bind successors to contracts involving governmental matters is very clearly and powerfully stated” by the South Carolina Supreme Court and that there is no suggestion of an exception to this rule for staggered boards). *See also Piedmont Public Service Dist. v. Cowart*, 324 S.C. 239, 241-42, 478 S.E.2d 836, 838 (1996) (*Cowart II*) (affirming *Cowart I* and holding “[w]e agree with the Court of Appeals that the policy considerations [underlying the general rule] are not changed by the bestowal of perpetual succession.”).

B. The Settlement Agreement Improperly Delegates and/or Divests the Legislative/Governmental Powers of the Town.

The Settlement Agreement delegates and/or divests the Town of certain legislative/governmental powers in violation of South Carolina law. Specifically, the Town is statutorily vested with certain powers, including but not limited to the power to enact ordinances, provide for the health, safety or general welfare of the people of the Town, and adopt the budget of the Town. S.C. Code Ann. § 5-7-30 (1986). These powers cannot be divested or delegated away by contract or otherwise. *See G. Curtis Martin Inv. Trust v. Clay*, 274 S.C. 608, 612, 266 S.E.2d 82, 85 (1980) (holding that, although the district could engage in discretionary contracting, it could not “delegate away those powers and responsibilities which give life to it as a body politic[;] [and] [a] municipal corporation or other corporate political entity created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise.”).

Among other things, the Settlement Agreement requires the Town to “implement selective thinning of the Accreted Land” pursuant to specific, enumerated parameters, and to “maintain similar conditions going forward. . . .” Ex. G at p. 3. Notably, many of the parameters directly violate the 2005 ordinance prohibiting the removal of vegetation in the Accreted Land, except for trimming and pruning to a height of no less than five (5) feet. *See* Ex. C at (A) and (C)(3). Moreover, primary funding for a portion of the work “will be from the Town.” Ex. G at p. 3. The direct effect of these provisions is to divest the Town of its legislative/governmental powers.

The Settlement Agreement infringes upon the legislative/governmental powers of the Town because it not only directly contradicts duly enacted and in-effect ordinances, namely the 2005 ordinance, but it also restricts the ability of the Town to enact ordinances concerning the use and maintenance of the Accreted Land in the future. Because the Town is vested with the power to enact ordinances, the effective nullification by the Settlement Agreement of preexisting ordinances and the prohibition of the enactment of future ordinances concerning the Accreted Land constitute an improper divestment of the legislative/governmental powers of the Town.

Relatedly, the Settlement Agreement restricts the ability of the Town to adopt regulations concerning the preservation, maintenance, or removal of vegetation on the Accreted Land pursuant to its legislative/governmental powers. The Settlement Agreement states that “the Town Council believes that thinning of vegetation will serve the interests of . . . enhanced public safety, improved public health . . . [and] [t]he settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town.” Ex. G at p. 2. This provision effectively “freezes” the Town’s position as to what will best serve the interests of the public as it relates to the Accreted Land. However, the Town must not be restricted from adopting in the future any regulations concerning the Accreted Land it deems appropriate for the

health, safety or general welfare of the people of the Town. “It is a fundamental principle of constitutional law that no legislative body may part with its right to exercise the police power, nor may a municipality to which such power has been delegated divest itself of same by contract or otherwise. It is a continuing power which may be exercised as often as required in the public interest and must always remain fluid.” *Sammons v. City of Beaufort*, 225 S.C. 490, 499, 83 S.E.2d 153, 157 (1954) (invalidating covenant requiring town to maintain on-street parking facilities throughout life of municipal bonds, on ground that such a covenant deprives future boards of legislative/governmental powers to adopt parking regulations necessary for the public safety and welfare). Accordingly, because it restricts the ability of the Town to regulate activities on the Accreted Land in the future, as it may determine to be in the public interest, the Settlement Agreement improperly divests the Town of its legislative/governmental powers.

Finally, by requiring the Town to fund a portion of the work, the Settlement Agreement also potentially delegates the legislative/governmental power of the Town to set and adopt a budget, *i.e.*, its fiscal power. As with its legislative/governmental powers, the authority of the Town to adopt a budget cannot be delegated away. *See Clay*, 274 S.C. at 612, 266 S.E.2d at 85. Because the Settlement Agreement requires that similar conditions be maintained going forward, it creates an ongoing financial obligation for the Town, thus removing this budgetary item from its discretion and, instead, delegating it by contract. This constitutes an improper delegation of the legislative/governmental powers of the Town—powers that cannot be “bartered” away. *Sammons*, 225 S.C. at 498, 83 S.E.2d at 157.

C. The Settlement Agreement Unfairly, Unreasonably, or Improperly Restricts the Proprietary Functions of the Town.

Even if the Settlement Agreement were found to involve only proprietary functions (*i.e.*, non-legislative/governmental powers)—although, for the reasons set forth above, it does not—municipal contracts must nonetheless, “at the time of their execution, be fair and of a reasonable duration.” *Cowart I*, 319 S.C. at 135, 459 S.E.2d at 882 (“[I]f the contract involves the exercise of the municipal corporation’s business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies if, at the time the contract was entered into, it was fair and reasonable and necessary or advantageous to the municipality.”). Such

municipal contracts “may be made for, but only for, such a term as is within the limitation imposed by statute or charter or, if no limitation is imposed, *for a reasonable time.*” *Id.* at 131, 459 S.E.2d at 880 (citation omitted) (emphasis added). Here, because there is no limitation imposed by statute or charter on the duration of municipal contracts, the duration must be *for a reasonable time.*

Whether or not the duration of a municipal contract is reasonable will depend upon the facts and circumstances of the contract at issue. *See Cowart I*, 319 S.C. at 136, 459 S.E.2d at 882 (holding that “[w]hile a twenty year duration may well be reasonable for some contracts,” it was not a reasonable duration for the contract at issue). Here, the Settlement Agreement is of *indefinite* duration, and obligates the Town to “maintain similar conditions going forward.” The *perpetual* nature of the agreement is further evidenced by the requirement that the Town “review changes in the condition of the [Accreted Land] on a recurring basis (for instance, once every five years).” Ex. G at p. 3. Moreover, the Settlement Agreement is binding upon and inures to the benefit of the parties, their heirs, successors and assigns, and “may not be modified or amended, nor may any of its provisions be waived, except upon mutual agreement” of all parties, except that “[t]he Town shall not unreasonably withhold consent to a proposed modification so long as the proposed modification would not result in cutting/trimming/pruning that is more aggressive than that” set forth in the original settlement agreement. Ex. G at pp. 8-9; Ex. H at ¶ 1.

Although this is a fact-intensive determination, the *perpetual duration* of the Settlement Agreement is unreasonable. It does not appear that South Carolina Courts have had the opportunity to consider this factual scenario, and, thus, while not binding upon our Courts, decisions from other jurisdictions are instructive. *See Town of Secaucus v. City of New Jersey*, 20 N.J. Tax 562, 567-68 (2003) (explaining that “[m]unicipal agreements having a perpetual term are not favored” and are generally void as against public policy unless expressly authorized by statute). *See also State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co.*, 83 N.W. 32, 34-35 (Minn. 1900) (contract between city and railway company whereby city agreed to maintain a bridge in perpetuity was void because such agreement is beyond municipal powers of the city and contrary to public policy); McQuillin, *Municipal Corporations*, § 29:104 (3d ed.) (“Municipal agreements having a perpetual term are not favored.”).

D. The Provisions of the Settlement Agreement Are Unenforceable in Law or Contract.

In light of the above, and given its subject matter and scope, the Settlement Agreement as a whole is unenforceable in law or contract.⁶ Indeed, the Settlement Agreement itself recognizes implementation of its provisions “is subject to compliance with law.” Ex. G at p. 6. For example, various substantive provisions in particular are unenforceable, including:

- The provisions of the Settlement Agreement in Section III in the paragraphs titled “General Approach,” “Zones,” “Beach Paths,” “Myrtles (All Zones),” and “Transition Zone” requiring the Town to “implement selective thinning of the Accreted Land” pursuant to the specific, enumerated parameters set forth therein are unenforceable as (1) an improper restriction of the legislative/governmental powers of successor Town Councils, (2) an improper delegation and/or divestment of the legislative/governmental powers of the Town, and (3) violative of the 2005 ordinance;
- The provision of the Settlement Agreement in Section III in the paragraph titled “General Approach” requiring the Town to “maintain similar conditions going forward” is unenforceable as (1) an improper restriction of the legislative/governmental powers of successor Town Councils, (2) an improper delegation and/or divestment of the legislative/governmental powers of the Town, and (3) an improper restriction on the proprietary functions of the Town;
- The provision of the Settlement Agreement in Section III in the paragraph titled “General Approach” requiring that “[p]rimary funding for transition zone work will be from the Town,” and any other provisions requiring the Town to incur or undertake financial obligations, are unenforceable as (1) an improper restriction of the legislative/governmental powers of successor Town Councils, (2) an improper delegation and/or divestment of the legislative/governmental powers of the Town, and (3) an improper restriction on the proprietary functions of the Town;⁷

⁶ As explained in footnote 3, the Settlement Agreement and Consent Decree are to be interpreted as contracts.

⁷ While it is true the Town has certain limited, preexisting financial responsibilities with respect to the Accreted Land, these provisions nonetheless increase the financial obligations of the Town with respect to the “Transition Zone” and restrict the Town’s legislative/governmental powers, its discretion, and its proprietary functions with respect to such finances specifically, and its financial budget generally.

- The provision of the Settlement Agreement in Section VI that it “shall be binding upon and inure to the benefit of all the Parties, and their heirs, successors and assigns” is unenforceable as (1) an improper restriction of the legislative/governmental powers of successor Town Councils, (2) an improper delegation and/or divestment of the legislative/governmental powers of the Town, and (3) an improper restriction on the proprietary functions of the Town;
- The provisions of the Settlement Agreement in Section VIII(b) that it “is a legally binding contract” and that the individual signing it on behalf of the Town “has the authority to execute [the] Settlement Agreement and bind the Town and Town Council” are unenforceable because a municipal corporation “[cannot], in any manner, bind itself by any contract which is beyond the scope of its powers.” *City of North Charleston v. North Charleston Dist.*, 289 S.C. 438, 443, 346 S.E.2d 712, 715 (1986);
- The provision of the Settlement Agreement in Section VIII(f) that it “may not be modified or amended, nor may any of its provisions be waived, except upon mutual agreement of all Parties or their authorized agents in writing” is unenforceable as (1) an improper restriction of the legislative/governmental powers of successor Town Councils, (2) an improper delegation and/or divestment of the legislative/governmental powers of the Town, and (3) an improper restriction on the proprietary functions of the Town; and
- The provision in Paragraph 1 of the Order Amending Settlement that “[t]he Town shall not unreasonably withhold consent to a proposed modification so long as the proposed modification would not result in cutting/trimming/pruning that is more aggressive than that detailed on the subject in the Settlement Agreement and Order originally executed in this case” is unenforceable as (1) an improper restriction of the legislative/governmental powers of successor Town Councils, (2) an improper delegation and/or divestment of the legislative/governmental powers of the Town, and (3) an improper restriction on the proprietary functions of the Town.

E. The Unenforceable Provisions Cannot Be Severed from the Settlement Agreement.

An illegal contract is unenforceable. *Berkebile v. Outen*, 311 S.C. 50, 53 n.2, 426 S.E.2d 760, 762 n.2 (1993). “The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.” *Id.* Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties. *Scruggs v. Quality Elec. Servs., Inc.*, 282 S.C. 542, 545, 320 S.E.2d 49, 51 (Ct. App. 1984). But a contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are

common each to the other and interdependent. *See Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 65, 566 S.E.2d 863, 864 (Ct. App. 2002).

Because the Settlement Agreement is violative of public policy and material provisions are interdependent, I do not believe that severability would be viable. *See OrthAlliance, Inc. v. McConnell*, No. 8:08-2591-RBH, 2010 WL 1344988, at *6 (D.S.C. Mar. 30, 2010) (explaining that, even where a contract contains a provision for the severability of void or unenforceable terms, contractual provisions that are interdependent may not be severable).

More importantly, even if the unenforceable provisions are severed, the Settlement Agreement would then be reduced to an agreement with no meaningful substance or effect. Specifically, the provision in Section III of the Settlement Agreement requiring the Town to “maintain similar conditions going forward” must be severed in order to comply with the “reasonable duration” requirement. Moreover, any provisions inconsistent with other applicable law should be severed, including but not limited to those violative of the 2005 ordinance. Thus, any provisions requiring vegetation to be removed, or trimmed, cut, or pruned beyond what is permissible under the 2005 ordinance should be severed as unenforceable.

Finally, severance issues aside (as well as statutory and constitutional ones), because the Settlement Agreement primarily involves the legislative/governmental powers of the Town, this Settlement Agreement cannot extend beyond the term of the Town Council that was a party to it.

F. There Are Mechanisms Available for Obtaining a Judicial Determination of the Rights and Obligations of the Town Under the Terms of the Settlement Agreement.

The following legal mechanisms may be available to the Town to determine its rights and obligations under the terms of the Settlement Agreement:

1. The Town could file a declaratory judgment action pursuant to the Uniform Declaratory Judgments Act, codified at S.C. Code Ann. § 15-53-10, *et seq.*, against Plaintiffs in the Charleston County Court of Common Pleas seeking a determination as to the validity and enforceability of the Settlement Agreement, and the parties’ respective rights and responsibilities thereunder; or
2. The Town could file a motion in the Lawsuit pursuant to Rule 60(b)(4) or Rule 60(b)(5) of the South Carolina Rules of Civil Procedure asking for relief from the court orders approving the Settlement Agreement and for the court to vacate the Settlement Agreement; or

3. Should Plaintiffs seek to enforce the Settlement Agreement in the Lawsuit, the Town could file an opposition to enforcement of the Settlement Agreement. This action would also raise the issue of the validity of the Settlement Agreement.

CONCLUSION

Because various provisions of the Settlement Agreement as identified herein improperly restrict successor Town Councils' legislative/governmental powers, constitute an improper delegation of legislative/governmental powers by the Town, and unreasonably restrict the proprietary functions of the Town, the Settlement Agreement is invalid and unenforceable.

Finally, there are three possible ways identified herein by which the Town could attempt to obtain a judicial determination of the rights and obligations of the Town under the Settlement Agreement.

Very truly yours,


William W. Wilkins

Attachments

cc: Mayor of the Town of Sullivan's Island
Town Council Members
Town Attorney

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

TITLE TO REAL ESTATE

WHEREAS, the Town of Sullivan's Island is the owner in fee simple of certain real property, which has aesthetic, scientific, educational, and ecological value in its present state as a natural area, which has not been subject to development or exploitation, which property is described more specifically on Exhibit A attached hereto and incorporated herein by reference thereto.

WHEREAS, the Town of Sullivan's Island desires to convey said property to the Lowcountry Open Land Trust, which is a non-profit corporation whose purpose is to preserve and conserve natural areas.

WHEREAS, the Town Council and the Town of Sullivan's Island, in meetings duly assembled, enacted an Ordinance, ratified on the 15th day of January, 1991, which authorized the Town of Sullivan's Island to convey to the Lowcountry Open Land Trust the below described property and, further authorized and directed the Mayor and the Town Clerk to so execute the Deed of Conveyance on behalf of the Town Council and the Town of Sullivan's Island.

NOW KNOW ALL MEN BY THESE PRESENTS that the Town of Sullivan's Island in consideration of Ten and 00/100 (\$10.00) Dollars, and other valuable consideration to it in hand paid at and before the sealing of these presents by the Lowcountry Open Land Trust in the County and State aforesaid, the receipt whereof is hereby acknowledged have granted, bargained, sold, and released, and by these Presents do grant, bargain, sell, and release unto the said Lowcountry Open Land Trust, its successors and assigns, the following described property:

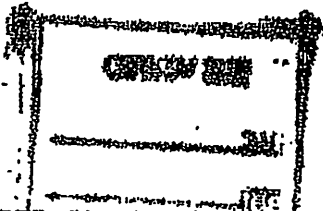
**FOR DESCRIPTION OF PROPERTY SEE EXHIBIT A
ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE**

Together with all and singular the rights, members, hereditaments, and appurtenances to the said Premises belonging, or in anywise, incident, or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said Lowcountry Open Land Trust, its successors and assigns, forever.



BK K 2006485



WITNESS Its hand and seal, this 12 day of February
in the year of our Lord one thousand nine hundred and ninety-one,
and in the two hundred and fifteenth year of the sovereignty and
independence of the United States of America.

In the Presence of

David P. Reef
[Signature]

TOWN OF GULLIVAN'S ISLAND

By: C. Melvin Anderegg
C. Melvin Anderegg, Mayor

Attest: Carolyn R. Kruger
Carolyn R. Kruger, Clerk

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

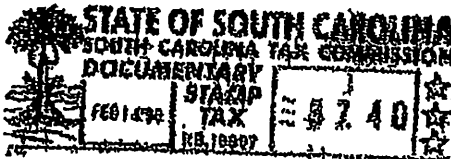
Personally appeared before me the undersigned witness and made
oath that he/she saw the within named Town of Sullivan's Island by
C. Melvin Anderegg, Mayor, and the Attested to by Carolyn R.
Kruger, Clerk, sign, seal, and as the act and deed of the Town of
Sullivan's Island and of the said Council deliver the foregoing
written deed, and that he/she with the other witness witnessed the
execution thereof.

SWORN to before me this 12
day of February, 1991.

[Signature]
Notary Public for South Carolina
My Commission Expires: 4-2-96

David P. Reef

200912



OK K 200PG486

EXHIBIT A

All those lots, parcels and pieces of property located within the Town of Sullivan's Island, County of Charleston, State of South Carolina, being more specifically described as follows:

Parcel 1

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Star of the West Street, Middle Street, Station 12 Street, and the mean high water mark of the waters of the Atlantic Ocean and Charleston harbor. Said property is also shown as Parcel #1 on the below described plat attached hereto and marked Exhibit B.
TMS: 523-06-00-073

Parcel 2

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Palmetto Street, Poe Avenue, Station 16 Street, and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #2 on the below described plat attached hereto and marked Exhibit B.

SPECIFICALLY SAVING AND EXCEPTING all that land now owned by the United States Government.

SPECIFICALLY SAVING AND EXCEPTING all those lots, parcels and pieces of land know as Tract A and Tract B on a plat by William Porcher, dated April 21, 1989, entitled "Plat Showing Battery Logan Owned by Sullivan's Island Board of Township Commissioners, Being Subdivided into Tract A and Tract B, Sullivan's Island, Charleston County, South Carolina" being duly recorded in the R.M.C. Office for Charleston County on the 24th day of May, 1989, in Plat Book BW, at Page 28.
TMS: 523-07-00-124

Parcel 3

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 16 Street, Atlantic Avenue, Station 18 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #3 on the below described plat attached hereto and marked Exhibit B.
TMS: 523-12-00-077

Parcel 4

All that real property not previously conveyed by the Board of

Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 18 Street, 1' on Street, Station 18-1/2 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #4 on the below described plat attached hereto and marked Exhibit B.

SPECIFICALLY SAVING AND EXCEPTING Lots M, N, M2, N2, and property presently owned by the United States Coast Guard, along with West Atlantic Avenue as shown on plat entitled "Town of Sullivan's Island, Charleston County, South Carolina", dated May 18, 1964, attached hereto and incorporated herein as Exhibit B.

TMS: 529-09-00-112

Parcel 5

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 18-1/2 Street, Tree Street, the western boundary of the lands now leased by Charleston County School District No. 2 and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #5 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-09-00-112

Parcel 6

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated seaward beyond the boundaries of all that real property leased under School District No. 2 of Charleston County, State of South Carolina as more specifically shown by Grant of Lease dated the 23rd day of April, 1954, and recorded in the R.M.C. Office for Charleston County in Book N58, at Page 150. Said property is also shown as Parcel #6 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-09-00-112

Parcel 7

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by the eastern boundaries of the lands now leased by Charleston County School District No. 2, Pettigraw Street, Station 22 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #7 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-09-00-112

Parcel 8

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 22 Street, East Atlantic Avenue and Station 22-1/2 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #8 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-09-00-112

Parcel 9

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 22-1/2 Street, Bayonne Street, Station 28 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #9 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-10-00-087

Parcel 10

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 28 Street, Marshall Boulevard, Station 32 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as parcel #10 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-11-00-109

Parcel 11

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated and lying seaward of those lots known and described as Lots 1 through 5, Block 16 and Lots 1 through 7, Block 17, as more specifically shown on the below described plat which is marked Exhibit B. Said property is also shown as Parcel #11 on the below described plat attached hereto and marked Exhibit B.

The above tracts of land are more specifically shown and delineated as the colored portion of a plat entitled "Sullivan's Island, Charleston County, South Carolina", dated May 18, 1964, which is attached hereto and incorporated herein by reference and marked Exhibit B.

TMS: 529-12-00-116

~~ON A 200PG489~~

3X K 200PG489

Being a portion of the same property by which the Grantor was given the right to sell and dispose in fee by Act Number 420 of the Acts of the Legislatures for 1953 and, also, a portion of the same property conveyed to the Grantor herein by the War Assets Administration of the United States by Deed dated December 28, 1949, and recorded in the RMC Office for Charleston County in Book K51, at Page 271-286.

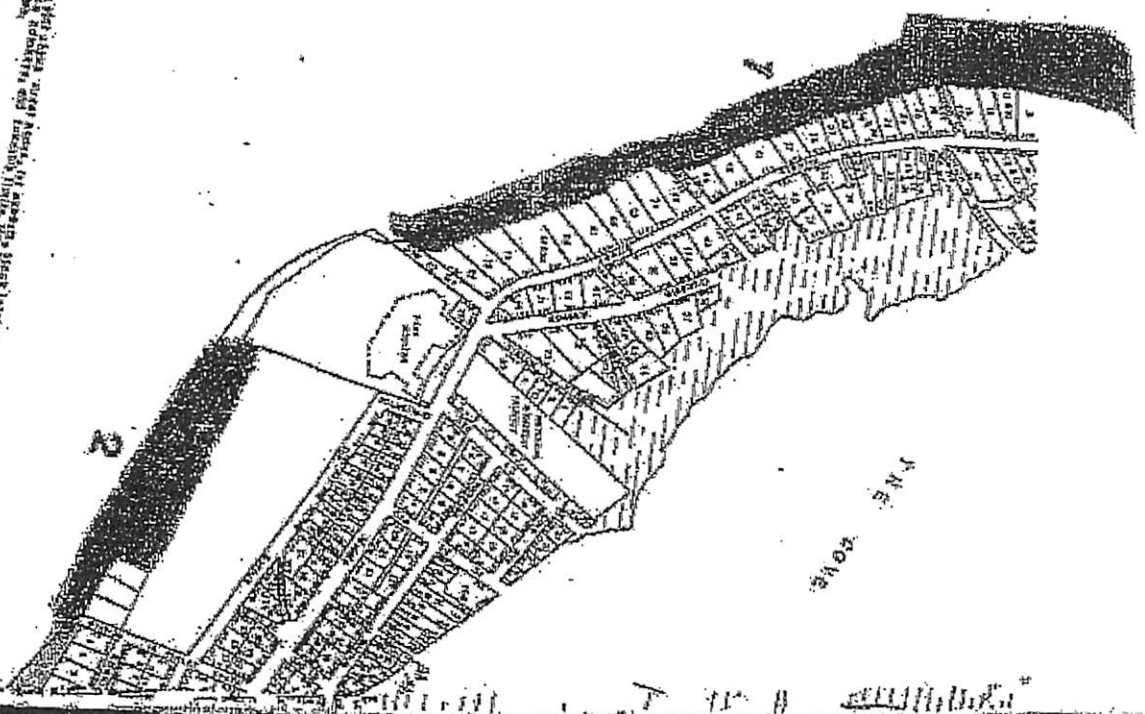
Grantees address:

P. O. Box 427
1610 Middle Street
Sullivan's Island, SC
29482

DK N 20896490

ENROUTE B

J.N.E. ROWS



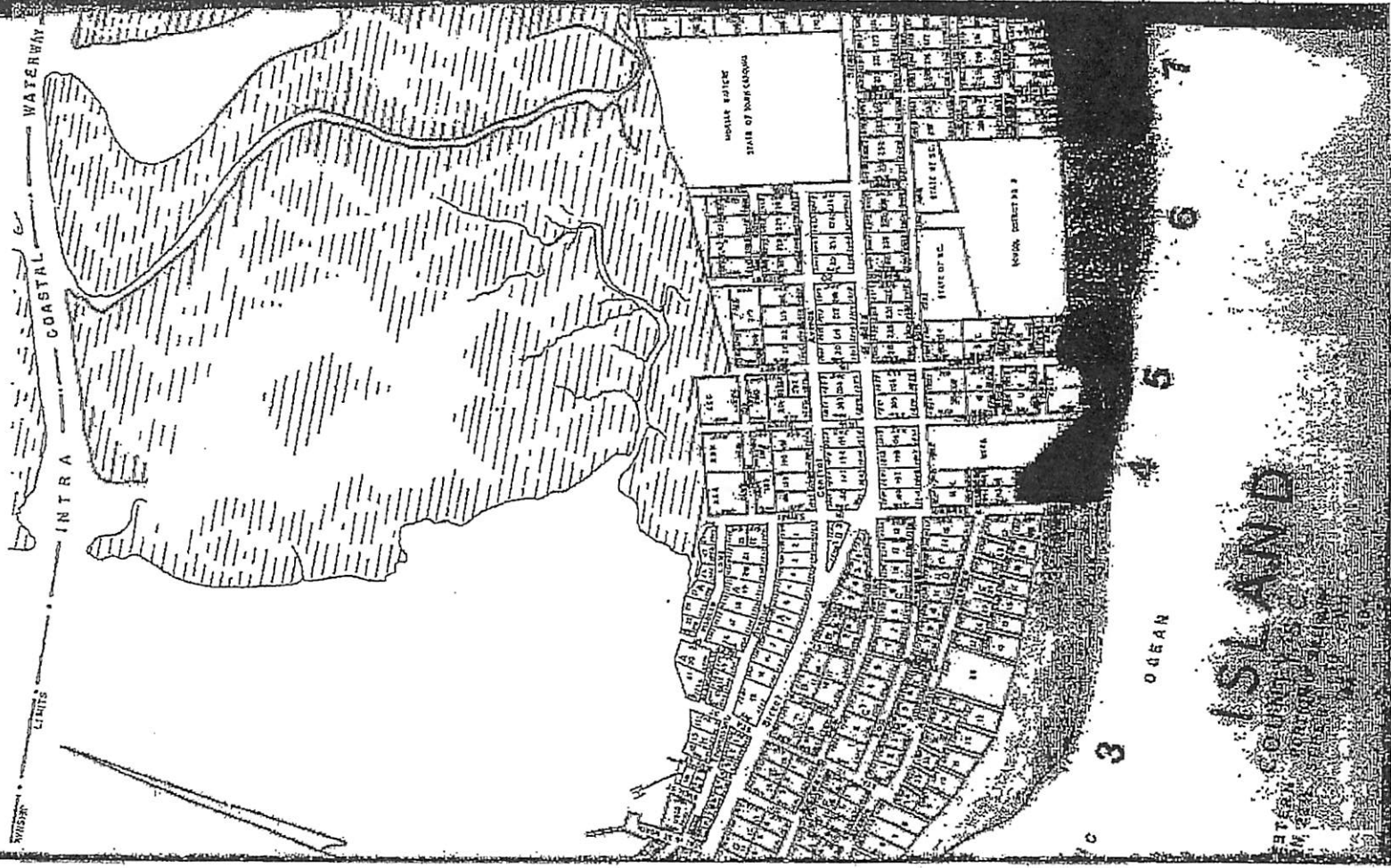
APPROVED: *[Signature]*
 SPECIAL AGENT IN CHARGE, NEW YORK OFFICE

[Signature]
 SPECIAL AGENT IN CHARGE, NEW YORK OFFICE

DATE: *[Handwritten]*

SULLIVAN

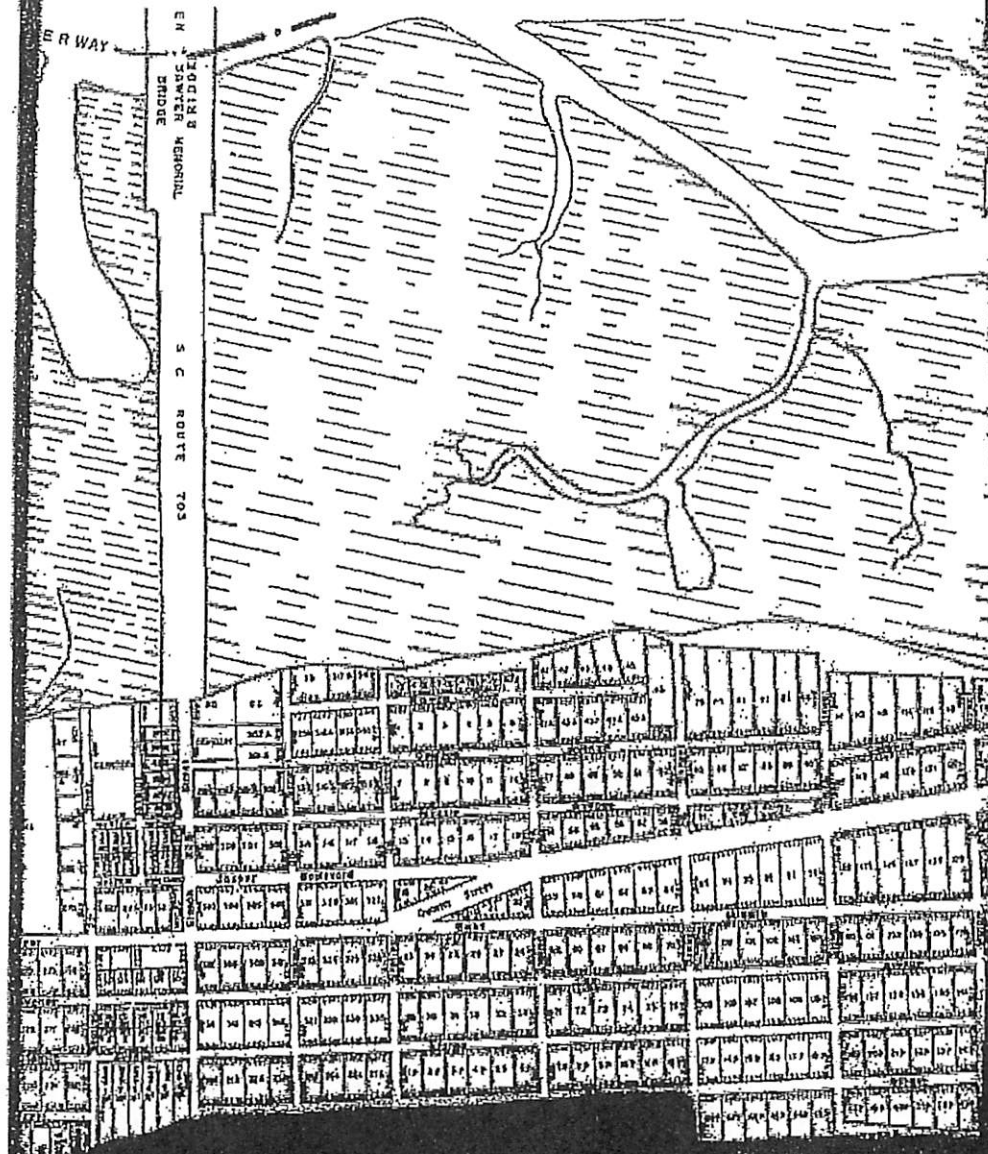
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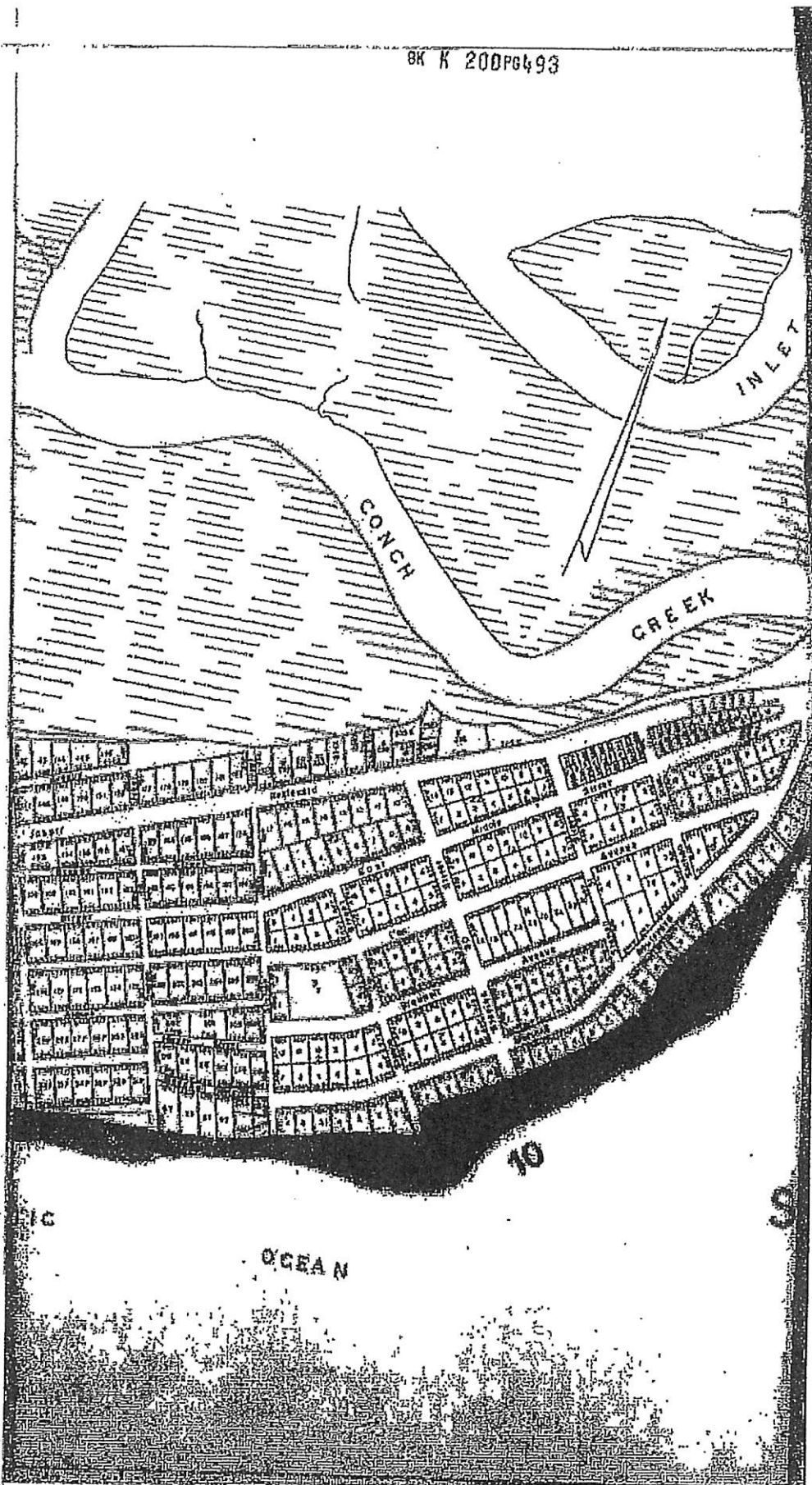
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ISLAND



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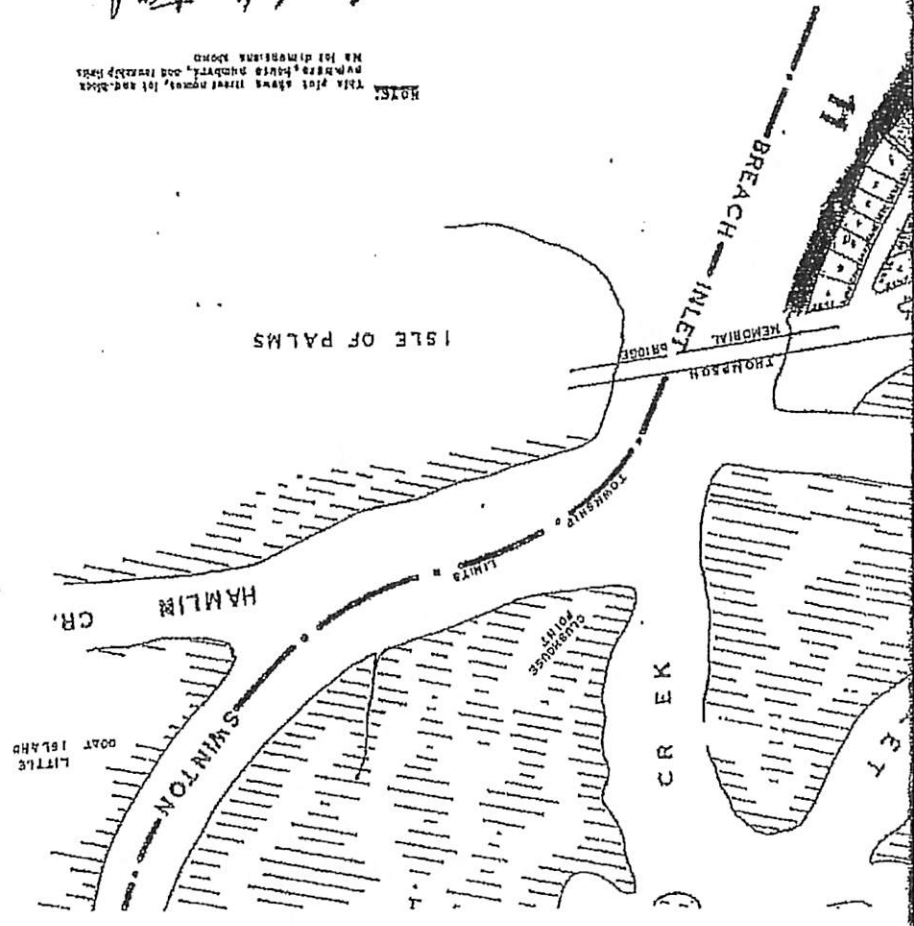
BK K 200Pg493



SULLIVAN'S ISLAND

APPROVED: *[Signature]*
Township Commission
DATE: *May 18, 1964*
[Signature]
Agate H. Merrill, Clerk

NOTES: This plot shows street names, lot and block numbers, house numbers, and township lines. No lot dimensions shown.



BK K 200PG 95

DEBBS - BLANCK
ATTORNEYS AT LAW

Handwritten initials

FILED

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DATE	2-14-91

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A

ROBERT N. KING
REGISTER
CHARLESTON COUNTY SC

Recorded this 14 day of Feb 1991
On Property Record Card

Pauline S. Hoyer

Auditor Charleston County



BK K 200PG496

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

)
)
)

TITLE TO REAL ESTATE

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

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

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

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

A) The appropriate survey maps from the United States Geological Survey, showing the property line and other contiguous or nearby protected areas;

B) An aerial photograph of the Property at an appropriate scale taken as close as possible to the date hereof; and

C) On-site photographs taken at appropriate locations on the Property;

and other documentation, which documentation shall be sufficient to establish the condition of the Property as of the date hereof which documentation shall be maintained in duplicate by both the Grantor and the Grantee hereof and made available to interested members of the public upon reasonable request for purposes of enforcing the restrictions contained herein.

KNOW ALL MEN BY THESE PRESENTS THAT the Lowcountry Open Land Trust, a non-profit corporation, organized and existing under the laws of the State of South Carolina (the "Grantor"), in the state aforesaid in consideration of the sum of Ten and 00/100 (\$10.00) Dollars, and other valuable consideration, to it in hand paid at and before the sealing of these presents by the Town of Sullivan's Island, South Carolina (the "Town"/"Grantee"), in the State aforesaid the receipt whereof is hereby acknowledged, have granted, bargained, sold and released and by these Presents do grant, bargain, sell and release unto the said the Town of Sullivan's Island, South Carolina, its successors and assigns, the following described property:

FOR DESCRIPTION OF PROPERTY SEE EXHIBIT A ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE (THE "PROPERTY").

This conveyance is made subject to the following terms, conditions, restrictions, and covenants (hereinafter the "Restrictions"):

1. Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the Property shall remain in its natural state, no changes shall be made to its topography or vegetation and no structures or improvements shall be erected on the Property.

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

3. Notwithstanding the provisions of Paragraph 1 hereof, and subject to the limitations of this Paragraph 3 and of Paragraphs 2 and 4, the Town Council of Sullivan's Island (the "Council") shall have the right to improve, change, modify or alter the Property only if such actions are to further or effect one or more of the following enumerated public objectives or policies ("Public Policies"):

- a) Drainage
- b) Mosquito control
- c) Public walkways and emergency access to the Atlantic Ocean
- d) Beach renourishment
- e) Erosion control
- f) Vegetation management
- g) Educational programs
- h) Public safety
- i) Public health; and
- j) Scenic enhancement.

Prior to taking any action affecting the Property to further or effect a Public Policy ("Public Action"), the Council shall make specific written findings of fact;

1) that the proposed Public Action is proposed solely for the purpose of furthering or effecting one or more of the enumerated Public Policies,

2) that the proposed Public Action is necessary for the health, safety or general welfare of the Town,

3) that the benefits of the proposed Public Action outweigh the damage done to the aesthetic, ecological, scientific, or educational value of the Property in its natural state, and

4) that in making its findings of fact, the Council has given due and reasonable consideration to

i) the cumulative effect of the proposed Public Action and past Public Actions on the natural state of the Property,

ii) the alternative methods, if any, of furthering or effecting the proposed Public Policy which do not impact adversely on the natural state of the Property, and

iii) the probable results of not taking the proposed Public Action.

The above described written findings of fact must be made prior to each individual Public Action relating to the Property and shall be specific to the circumstances of the proposed Public Action and not merely conclusive in nature. In no event shall any Public Action violate the provisions of Paragraph 4 hereof.

4. In all events, the following activities, improvements and structures shall be prohibited on the Property:

- a) any building or structure with a roof
- b) Asphalt pavement, concrete pavement or pavement of a non-porous material
- c) electrical power lines, wires, conduit, stations or pads
- d) sewer lines, pipes or lift stations
- e) water lines, pipes or lift stations
- f) commercial activities in any way related to the buying or selling of things, goods or services.

Notwithstanding the provisions of Paragraph 4(c), (d) and (e) the Council may allow utility easements for electrical, sewer and water lines to cross through the Property, provided no utility services are provided as a result to any improvements on the Property.

5. These Restrictions may be enforced by the Town, any property owner within the Town, or by any voter registered within the Town. Such persons may seek any appropriate remedy for any violation, including, but not limited to, injunctive relief to force a termination of the violation or to permit restoration of the area damaged by an prohibited activity. The forbearance to

enforce the terms and provisions thereof in the event of a breach shall not be deemed a waiver of any rights granted hereunder. The Town shall not be liable to any person for any violation of these Restrictions by any person other than itself.

6. During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of law for any person to violate the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof. The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions.

7. If any provision of these Restrictions shall be invalid or for any reason become unenforceable, no other provision shall thereby be affected or impaired.

8. These Restrictions may be modified or repealed only upon an affirmative vote of both (a) seventy-five (75%) percent of the registered voters of the Town who vote in the referendum held pursuant to the terms hereof, and (b) one hundred (100%) percent of the members of Town Council. For purposes of these Restrictions, a registered voter in the Town shall mean any voter eligible to vote in Town elections who is registered 30 days prior to the referendum held pursuant to the terms hereof. At least 45 days prior to any referendum held pursuant to the terms hereof, the Council shall adapt reasonable regulations concerning the manner of voting hereunder. Nothing herein shall prohibit the Council from adopting regulations which allow voting by ballot on a designated day or days or by circulation of written petitions over a period of time.

9. These Restrictions shall remain in full force and effect for a period of 50 years and shall be automatically renewed and continued in effect for additional periods of 50 years each until such time as these Restrictions are repealed in accordance with the provisions of Paragraph 8 hereof. The terms of this Paragraph may be modified in accordance with the provisions of Paragraph 8 hereof.

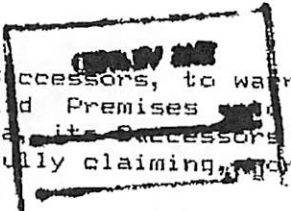
GRANTEE'S ADDRESS: Town of Sullivan's Island
Town Hall
P. O. Box 427
Sullivan's Island, SC 29482

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said Town of Sullivan's Island, South Carolina, its Successors and Assigns forever.

BK K 200PG500

AND it does hereby bind itself and its Successors, to warrant and forever defend, all and singular the said Premises ~~and~~ the said Town of Sullivan's Island, South Carolina, ~~its Successors~~ and Assigns, against it and its Successors, lawfully claiming, ~~or~~ to claim the same or any part thereof.



WITNESS its Hand and Seal, this 12 day of February, in the year of our Lord one thousand nine hundred and ~~ninety-one~~ and the two hundred and fifteenth year of the sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

LOWCOUNTRY OPEN LAND TRUST

David P. R...
[Signature]

By: [Signature]
Its: President

By: Mrs. A. Kidd
Its: Vice President

STATE OF SOUTH CAROLINA)

CHARLESTON COUNTY)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named LOWCOUNTRY OPEN LAND TRUST by its authorized officer(s), sign, seal and as its act and deed, deliver the within written Deed, and that (s)he with the other witness named above witnessed the execution thereof.

SWORN to be fore me this 12
day of February A.D. 1991

[Signature] (SEAL)
Notary Public for South Carolina
My commission expires: 4-2-96

David P. R...
(Signature of Witness)

BK K 200PG501

EXHIBIT A

All those lots, parcels and pieces of property located within the Town of Sullivan's Island, County of Charleston, State of South Carolina, being more specifically described as follows:

Parcel 1

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Star of the West Street, Middle Street, Station 12 Street, and the mean high water mark of the waters of the Atlantic Ocean and Charleston harbor. Said property is also shown as Parcel #1 on the below described plat attached hereto and marked Exhibit B.

TMS: 523-06-00-073

Parcel 2

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Palmetto Street, Poe Avenue, Station 16 Street, and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #2 on the below described plat attached hereto and marked Exhibit B.

SPECIFICALLY SAVING AND EXCEPTING all that land now owned by the United States Government.

SPECIFICALLY SAVING AND EXCEPTING all those lots, parcels and pieces of land know as Tract A and Tract B on a plat by William Porcher, dated April 21, 1989, entitled "Plat Showing Battery Logan Owned by Sullivan's Island Board of Township Commissioners, Being Subdivided into Tract A and Tract B, Sullivan's Island, Charleston County, South Carolina" being duly recorded in the R.M.C. Office for Charleston County on the 24th day of May, 1989, in Plat Book BW, at Page 28.

TMS: 523-07-00-124

Parcel 3

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 16 Street, Atlantic Avenue, Station 18 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #3 on the below described plat attached hereto and marked Exhibit B.

TMS: 523-12-00-077

Parcel 4

All that real property not previously conveyed by the Board of

BK K 200PG502

Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 18 Street, Iron Street, Station 18-1/2 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #4 on the below described plat attached hereto and marked Exhibit B.

SPECIFICALLY SAVING AND EXCEPTING Lots M, N, M2, N2, and property presently owned by the United States Coast Guard, along with West Atlantic Avenue as shown on plat entitled "Town of Sullivan's Island, Charleston County, South Carolina", dated May 18, 1964, attached hereto and incorporated herein as Exhibit B.

TMS: 529-09-00-112

Parcel 5

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 18-1/2 Street, Thee Street, the western boundary of the lands now leased by Charleston County School District No. 2 and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #5 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-09-00-112

Parcel 6

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated seaward beyond the boundaries of all that real property leased under School District No. 2 of Charleston County, State of South Carolina as more specifically shown by Grant of Lease dated the 23rd day of April, 1954, and recorded in the H.M.C. Office for Charleston County in Book N58, at Page 150. Said property is also shown as Parcel #6 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-09-00-112

Parcel 7

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by the eastern boundaries of the lands now leased by Charleston County School District No. 2, Pettigrew Street, Station 22 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #7 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-09-00-112

BK K 200PG503

Parcel 8

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 22 Street, East Atlantic Avenue and Station 22-1/2 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #8 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-09-00-112

Parcel 9

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 22-1/2 Street, Bayonne Street, Station 28 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as Parcel #9 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-10-00-087

Parcel 10

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated within the boundaries created by Station 28 Street, Marshall Boulevard, Station 32 Street and the mean high water mark of the waters of the Atlantic Ocean. Said property is also shown as parcel #10 on the below described plat attached hereto and marked Exhibit B.

TMS: 529-11-00-109

Parcel 11

All that real property not previously conveyed by the Board of Township Commissioners, Town Council of Sullivan's Island, the State of South Carolina or their predecessors in title, located and situated and lying seaward of those lots known and described as Lots 1 through 5, Block 16 and Lots 1 through 7, Block 17, as more specifically shown on the below described plat which is marked Exhibit B. Said property is also shown as Parcel #11 on the below described plat attached hereto and marked Exhibit B.

The above tracts of land are more specifically shown and delineated as the colored portion of a plat entitled "Sullivan's Island, Charleston County, South Carolina", dated May 18, 1964, which is attached hereto and incorporated herein by reference and marked Exhibit B.

TMS: 529-12-00-116

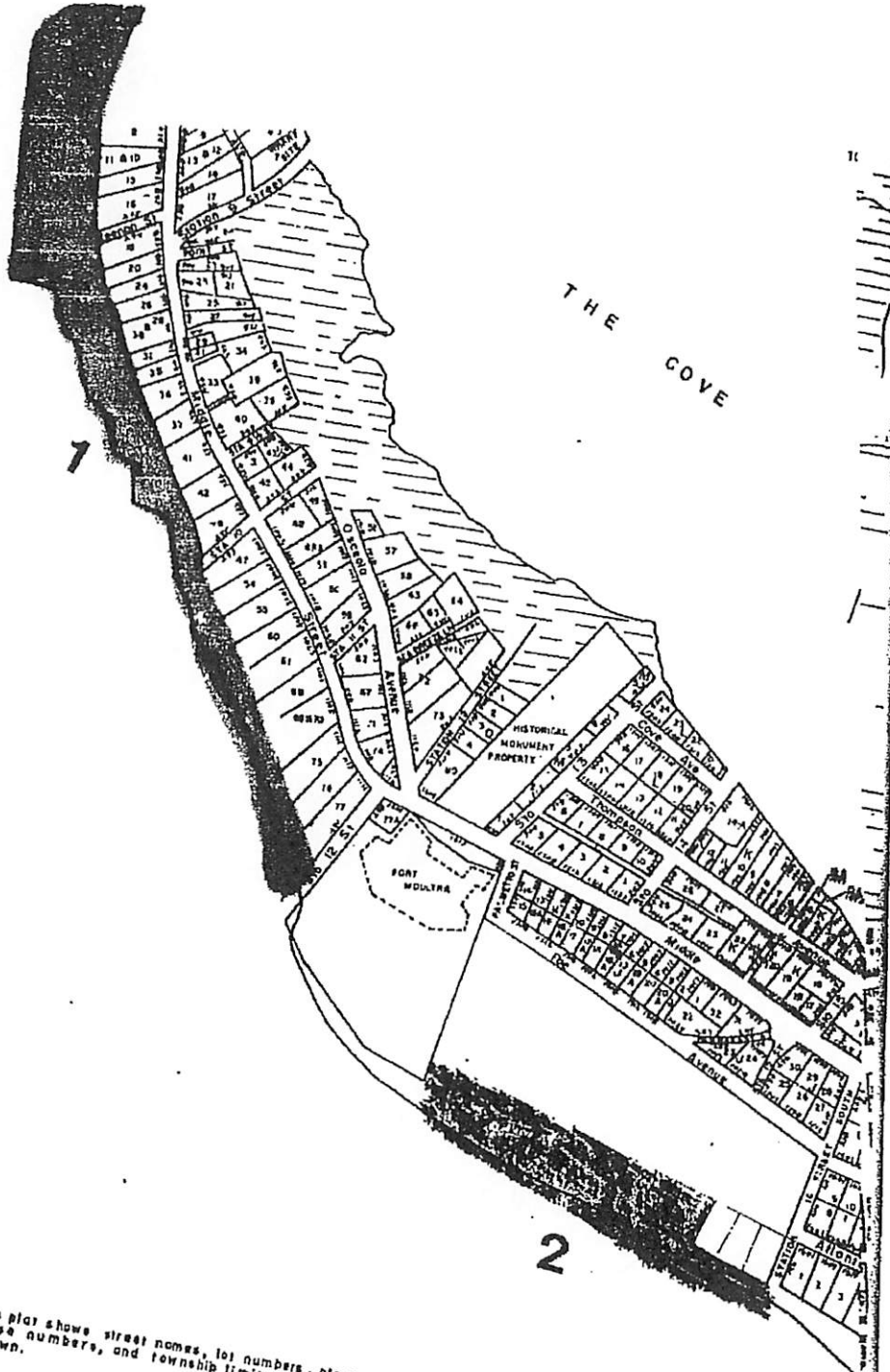
BK K 200PG504

Being the same property conveyed to the Grantor herein by Deed of even date from the Town of Sullivan's Island which is recorded in the RMC Office for Charleston County prior to the recording of this deed but simultaneously herewith in Book _____ at Page _____.

Grantees address: P. O. Box 1293
450 King Street
Charleston, SC 29402

BK K 200PG505

EXHIBIT B

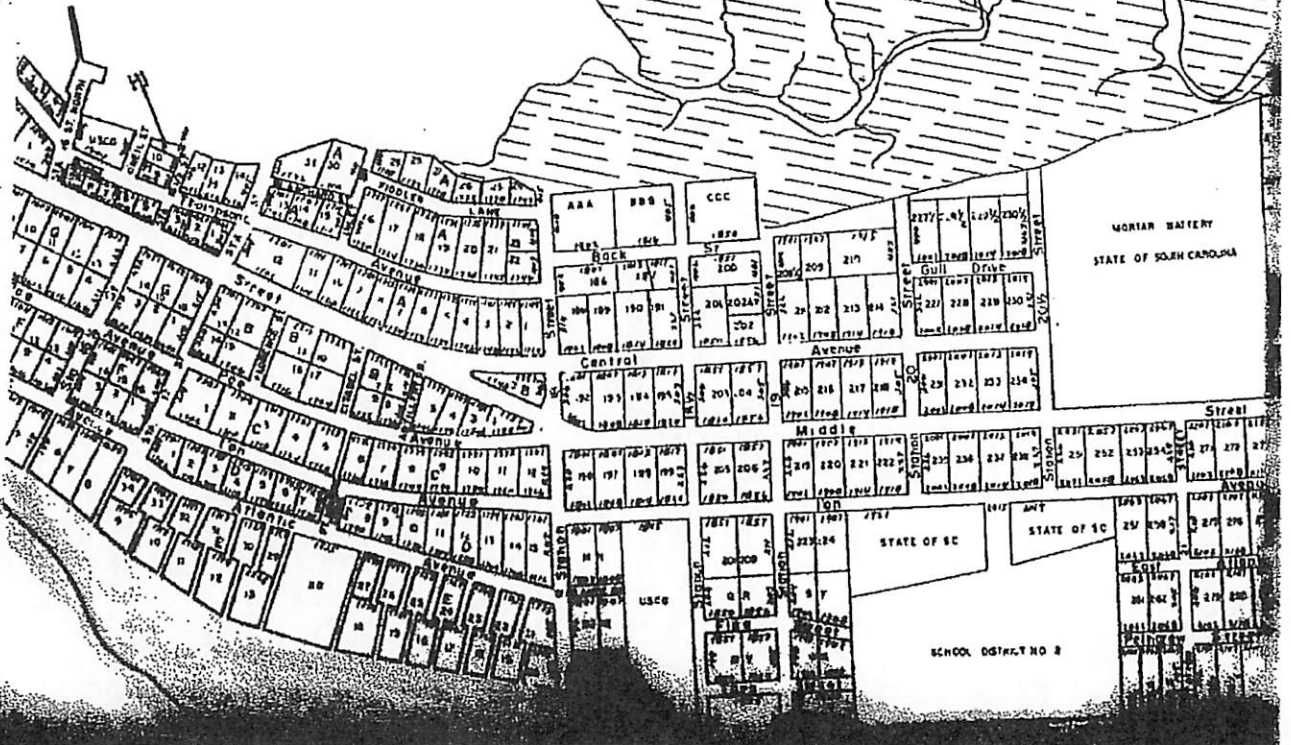
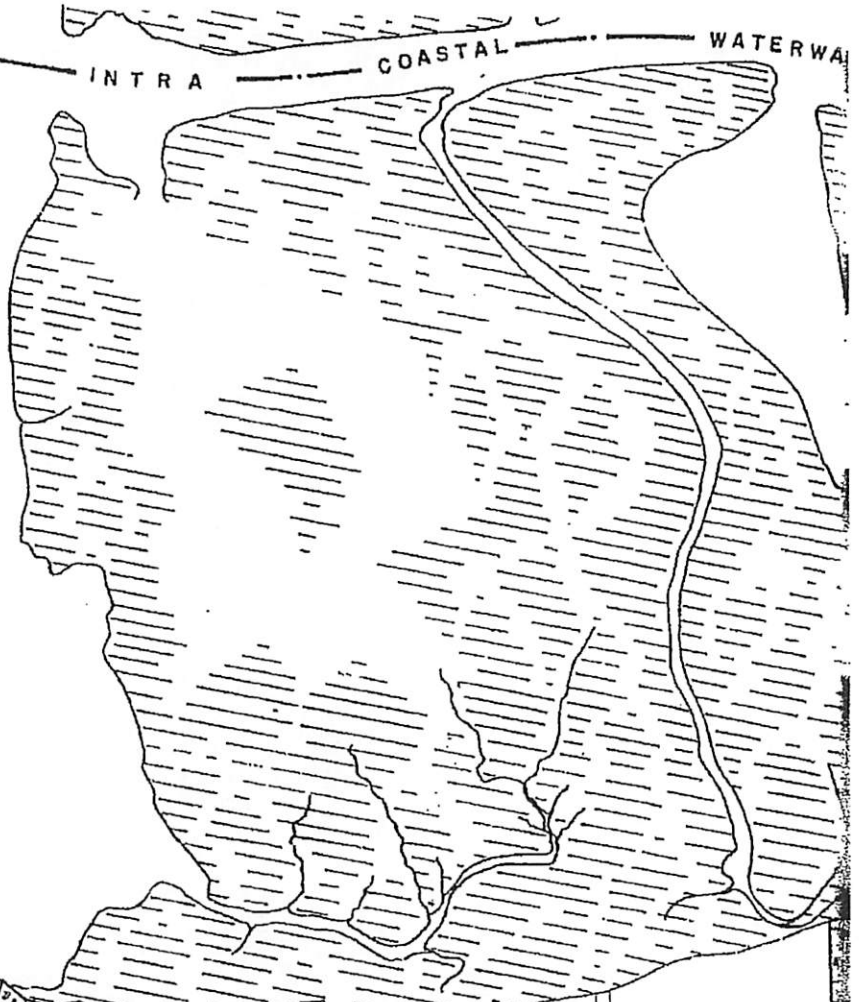
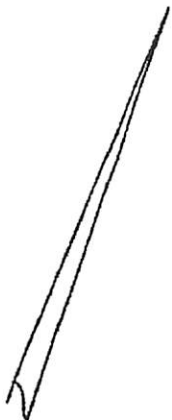


NOTE. This plat shows street names, lot numbers, block letters, house numbers, and township limits. No lot dimensions shown.

APPROVED: *George G. D. ...*
George G. D. ... Chairman Board of
Township Commissioners
Agatha P. Mueller

BK K 200PG506

WNSHIP LIMITS INTRA COASTAL WATERWAY

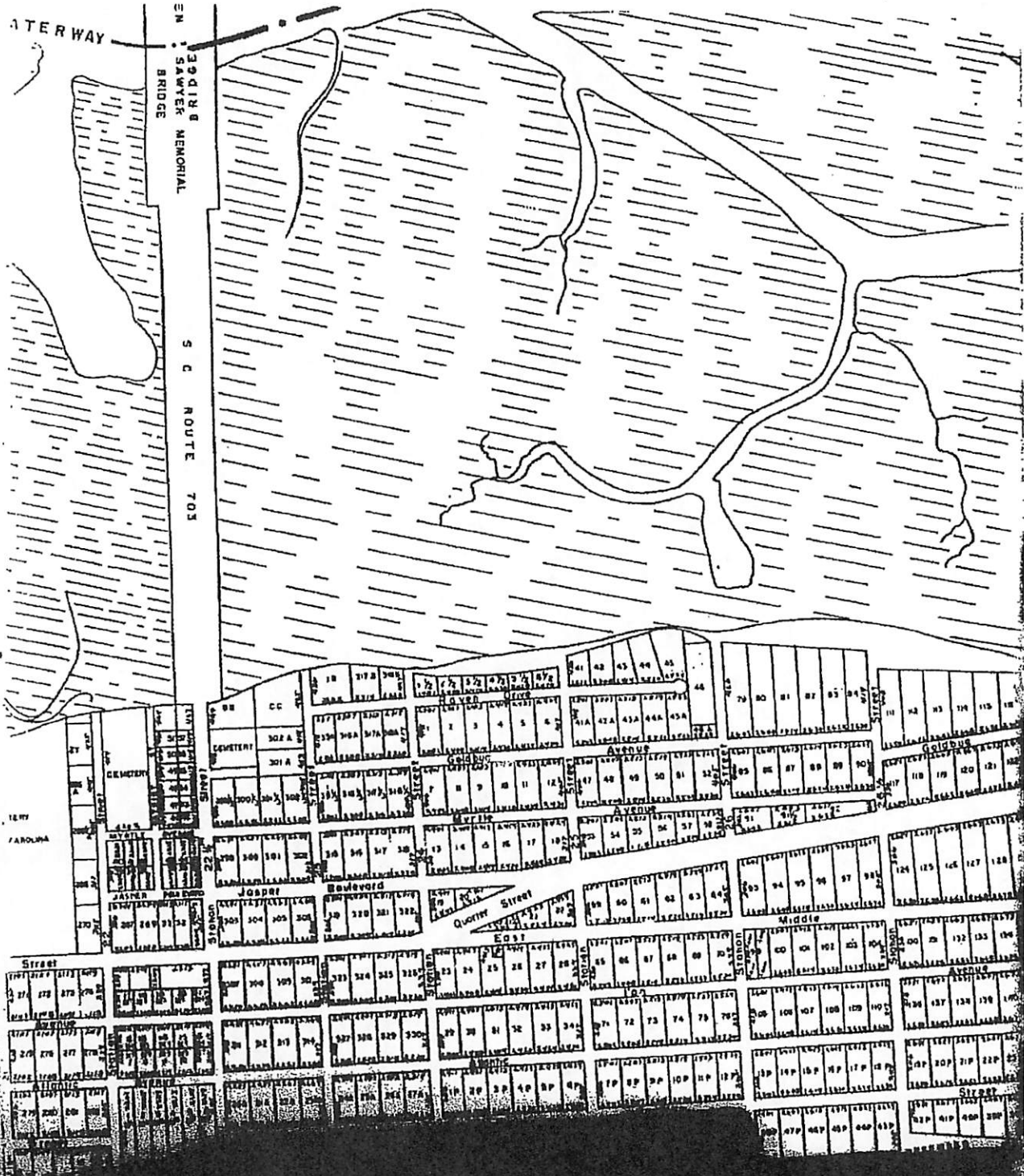


BK K 200PG507

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EDDIE B
SAWYER
MEMORIAL
BRIDGE

S C ROUTE 703



NEW
FAROUNA

Street

Almond

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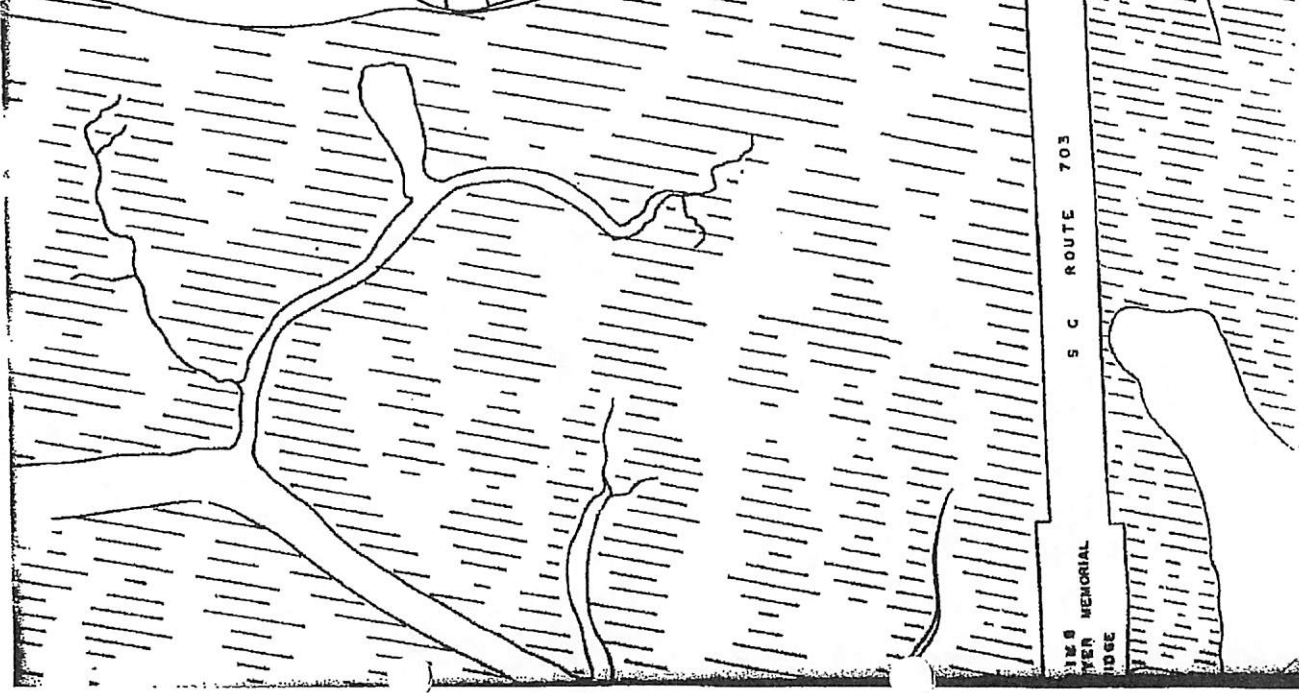
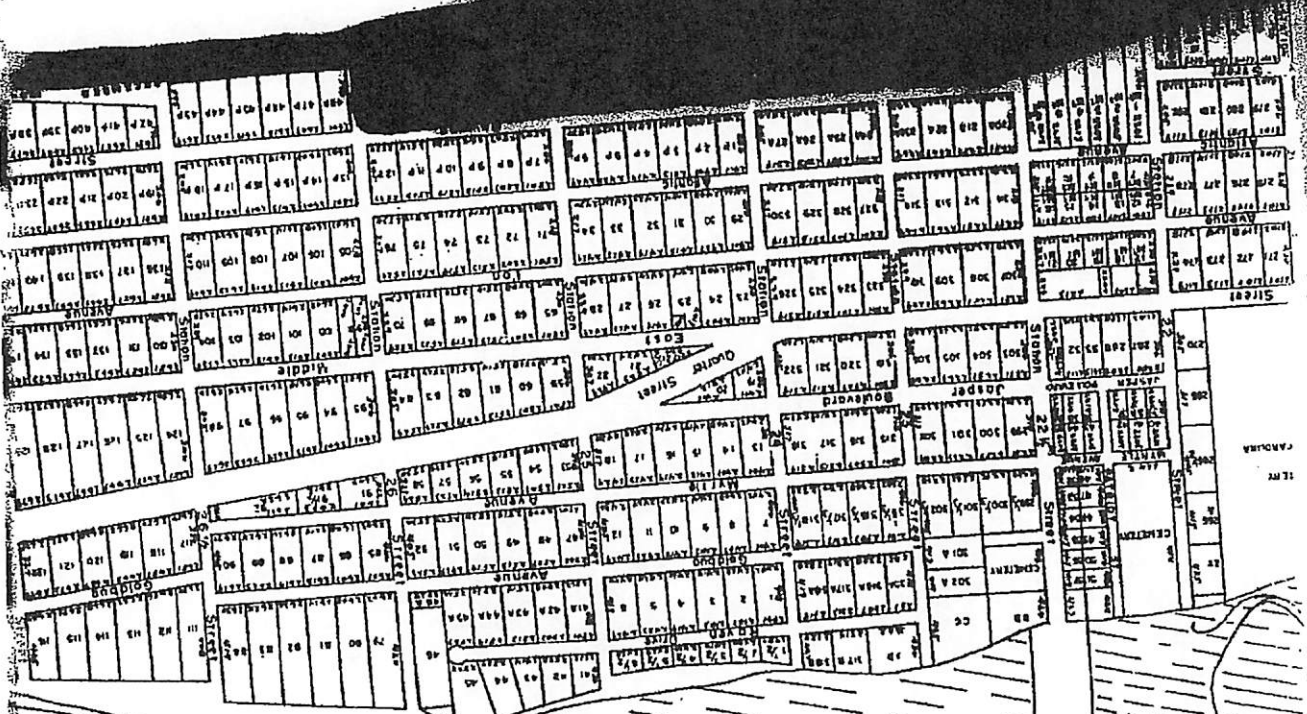
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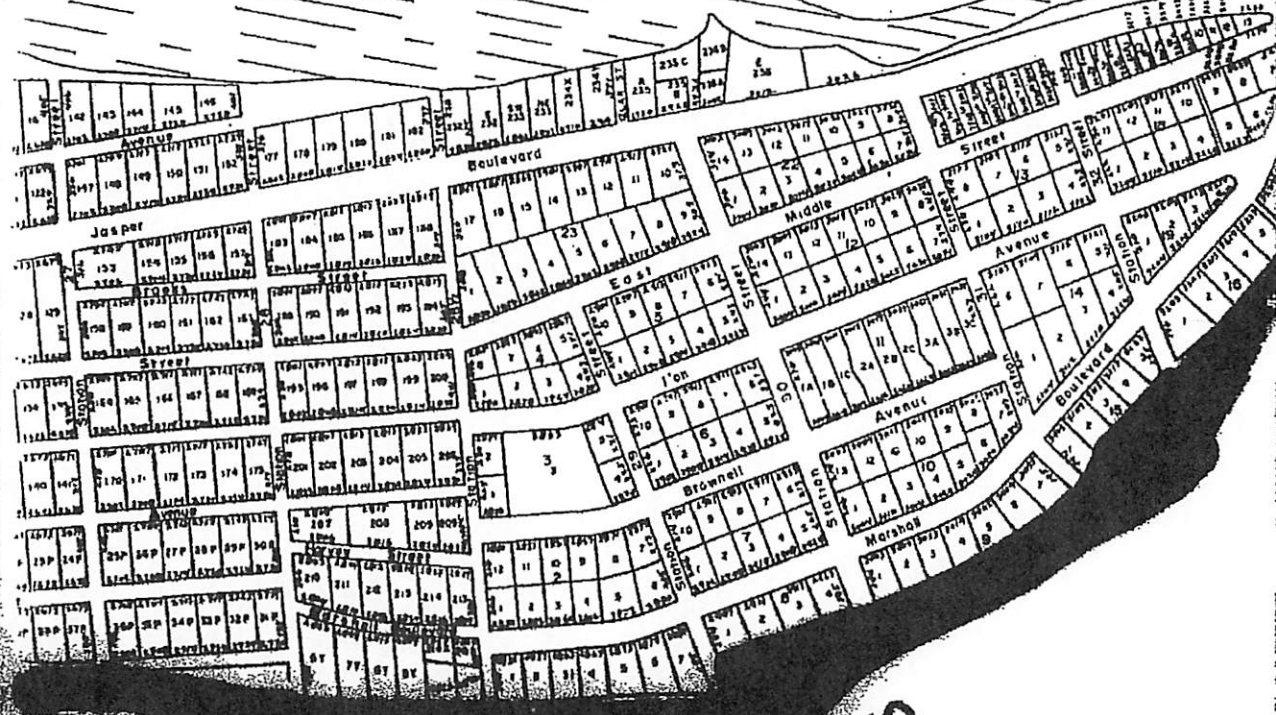
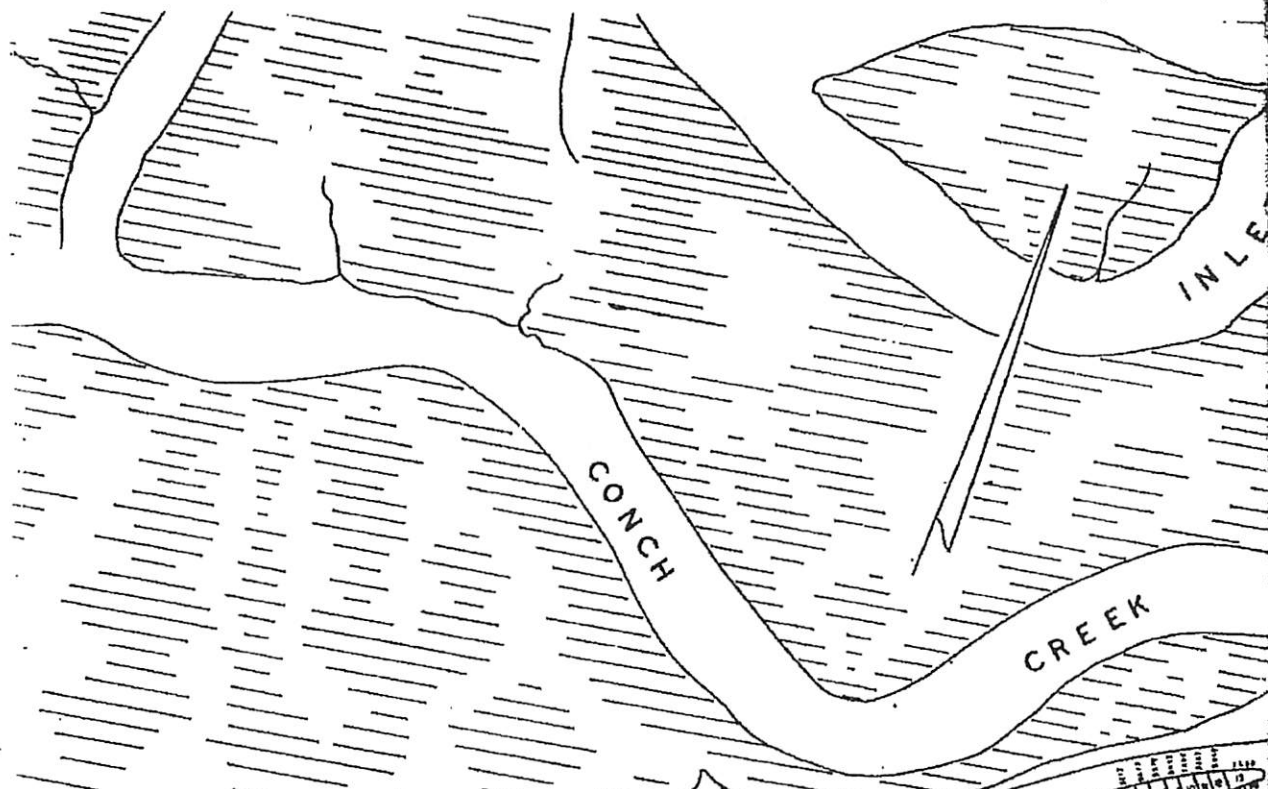
7

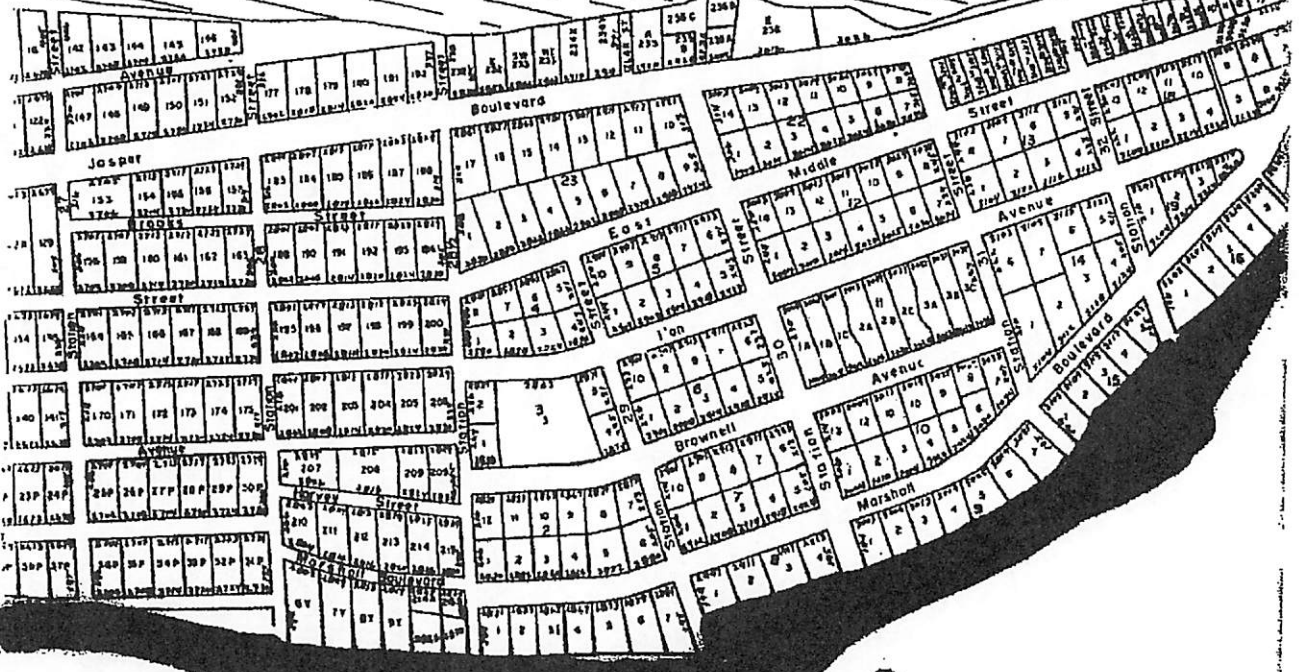
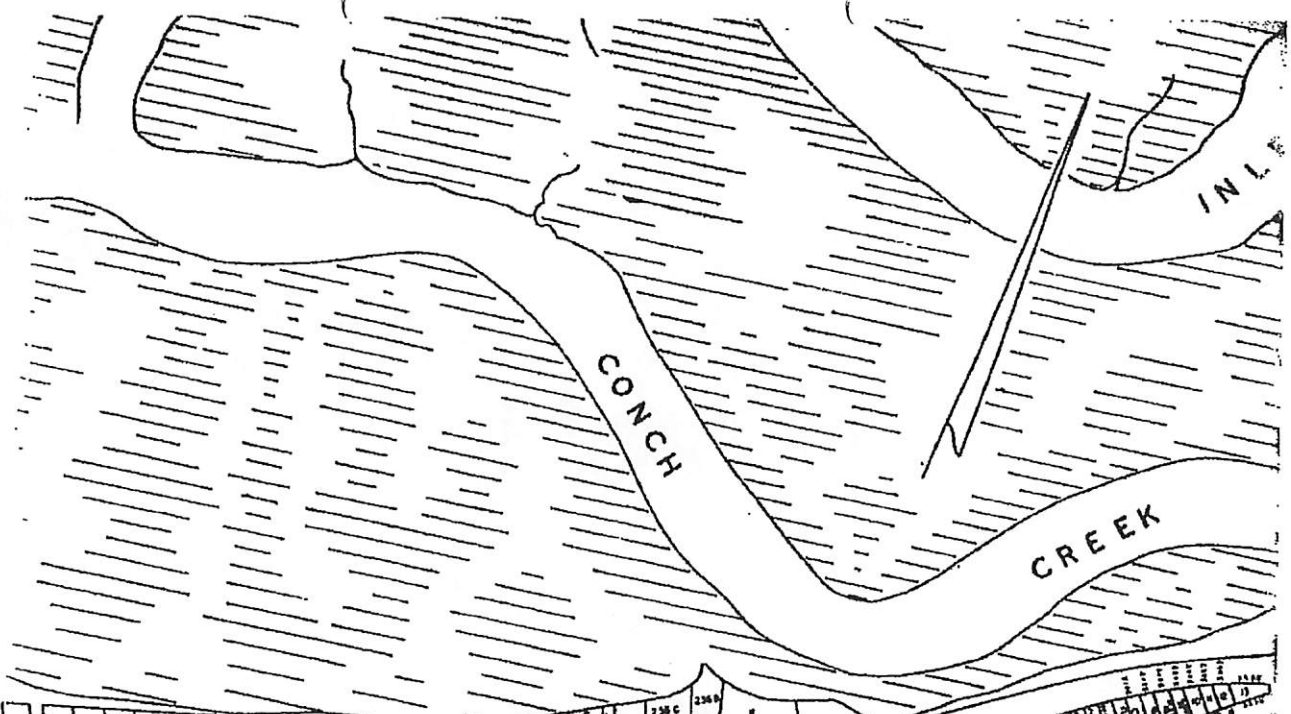


S C ROUTE 703

THE MEMORIAL LODGE

BK K 200PG508



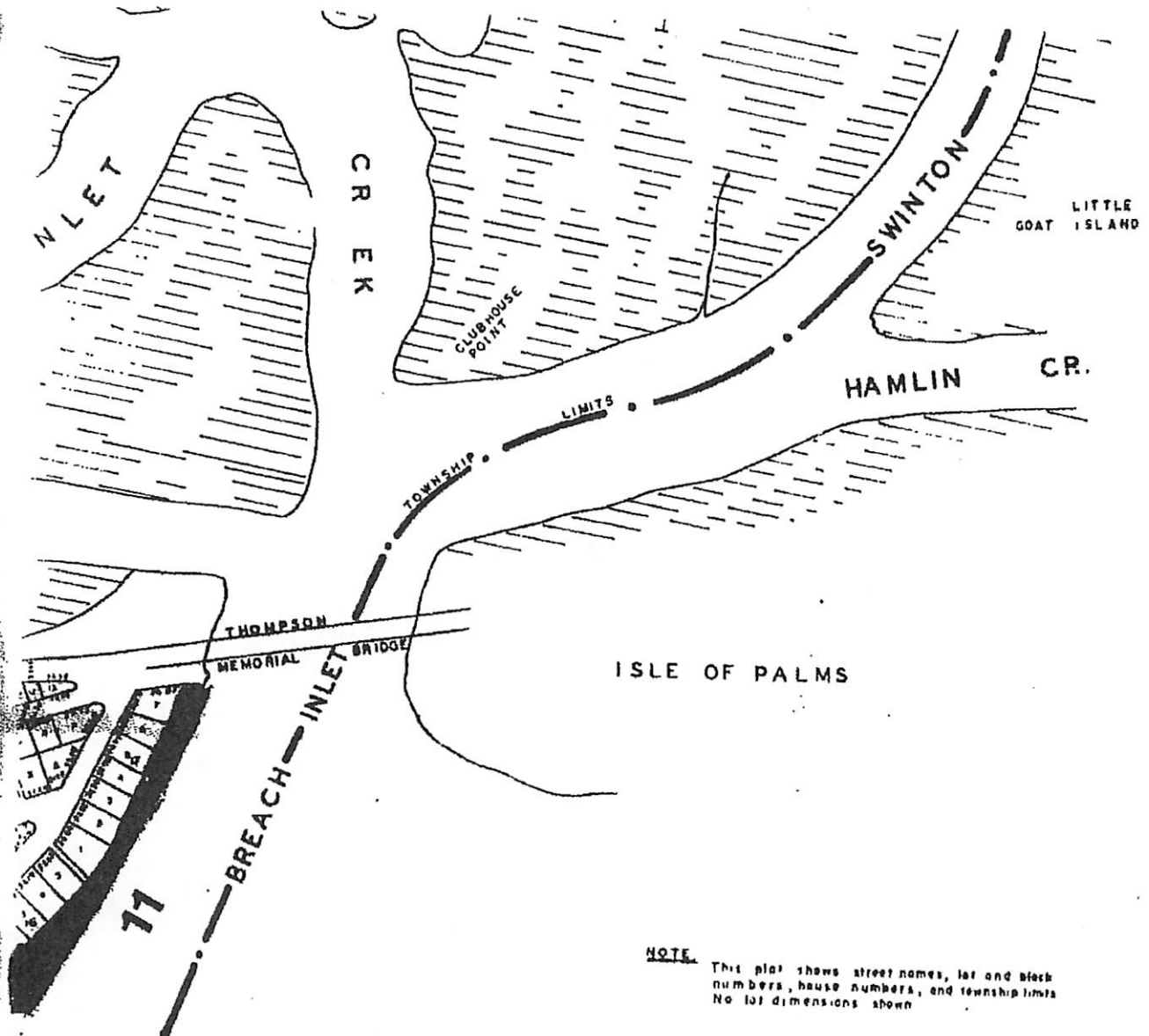


10

ANTIC

OCEAN

BK K 200P6509



NOTE: This plat shows street names, lot and block numbers, house numbers, and township limits. No lot dimensions shown.

APPROVED: George A. Durst, M.D.
George A. Durst, M.D. Chairman Board of
Township Commissioners

Agatha P. Mueller
Agatha P. Mueller Clerk

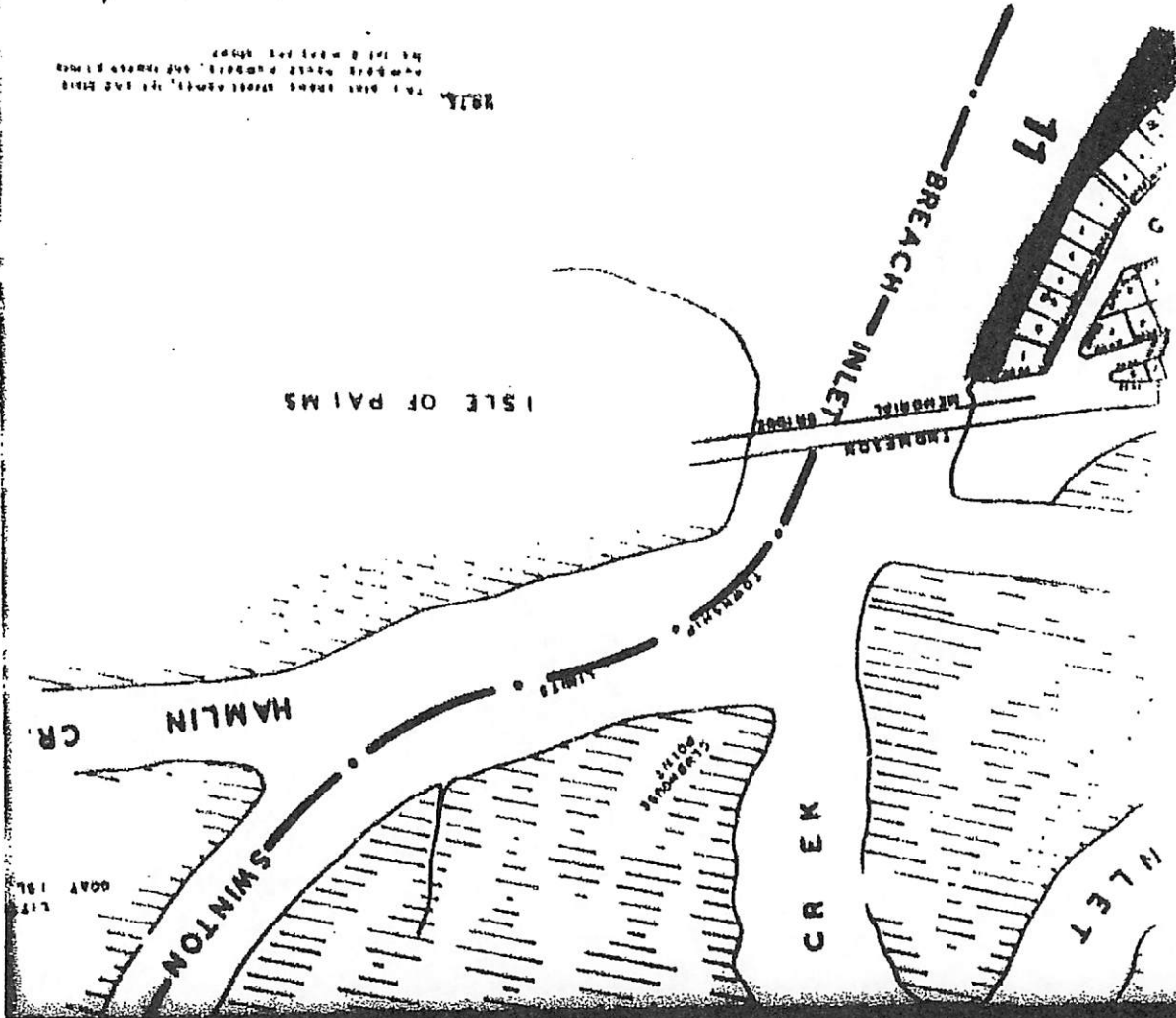
DATE: May 18, 1964

SULLIVANS ISLAND

CHARLESTON COUNTY, S.C.
 PLAT SHOWING EASTERN PORTION OF
 SULLIVANS ISLAND FROM STATION 22V,
 STREET TO BEACH INLET.
 SCALE: 1" = 400'
 MAY, 1964

APPROVED
[Signature]
 DATE: May 18, 1964

NOTE: THE DISTRICT ENGINEER, AT THE TIME OF
 THIS PLAT, HAS REVIEWED THE PLAT AND
 HAS FOUND IT TO BE CORRECT AND
 ACCORDING TO THE RECORDS OF THE
 DISTRICT ENGINEER.



Woods - HENNESSY
ATTORNEYS AT LAW

BK K 200PG510

hl
AMV

FILED
K200-496
91 FEB 14 AM 9:51
ROBERT H. KING
REGISTER
CHARLESTON COUNTY SC

FILED

26.00

K200-496

91 FEB 14 AM 9:51

ROBERT H. KING
REGISTER
CHARLESTON COUNTY SC

Recorded this 14 day of Feb - 1991
On Property Record Card

Pauline S. Hoyer

Auditor Charleston County

ORDINANCE TO AMEND CHAPTER 21
OF THE
ZONING ORDINANCES FOR THE TOWN OF SULLIVAN'S ISLAND

WHEREAS, Chapter 21 of the Town of Sullivan's Island Ordinance which is cited as "The Zoning Ordinance" was originally enacted in 1977; and

WHEREAS, the Town of Sullivan's Island has, from time to time, amended certain sections of The Zoning Ordinance; and

WHEREAS, the Town of Sullivan's Island was mindful to make comprehensive revisions to The Zoning Ordinance and sought plans and procedures whereby professional zoning consultation, citizen input and Town staff would come together to make the comprehensive revisions needed to The Zoning Ordinance; and

WHEREAS, the Town of Sullivan's Island retained the services of Cooper Consulting, Inc. who are known as Planning and Zoning experts; and

WHEREAS, Cooper Consulting, Inc. held three (3) public workshops whereby citizen input was invited and accepted and after reviewing the existing Zoning Ordinances together with the citizens input at public meetings and further citizen and Town staff input by way of written and verbal communications, Cooper Consulting, Inc. produced a proposed draft of a comprehensive amendment to the Town of Sullivan's Island Zoning Ordinances; and

WHEREAS, upon receipt of the proposed draft, the Town Council directed the Planning Commission to hold public hearings and to make further review and recommendations; and

WHEREAS, the Planning Commission held numerous public hearings and after review it rendered its recommendations to the Town Council; and

WHEREAS, the Town Council for the Town of Sullivan's Island has reviewed the proposed draft by Cooper Consulting, Inc. and the proposed recommendations and revisions of the Planning Commission and now are mindful of adopting the following comprehensive revisions to the Town Zoning Ordinance and are of the opinion that the following comprehensive amendments are in the best interest of the Town.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND TOWN COUNCIL IN MEETING DULY ASSEMBLED,

that Chapter 21 The Ordinances for the Town of Sullivan's Island be amended to read as follows:

upland source and shall be approved by the OCRM as beach-compatible. The timing and location of renourishment sand placement shall be governed by Town and OCRM regulations.

Sec. 21-70. General provisions for RC-1 Area District.

- A. The provisions of this Article are applicable to the RC-1 Area District land area of the Town. The Town of Sullivan's Island retains full authority over RC-1 Area District land, subject to the conditions, restrictions, and covenants set forth in the Title to Real Estate dated February 12, 1991, conveying said land to the Town of Sullivan's Island. The permits allowed herein for the trimming and pruning of vegetation upon application of private landowners as set forth herein are not intended by the Town, and the provisions shall not be construed as granting to any private landowner, the unrestricted right to trim and prune vegetation in the RC-1 Area District. The trimming and pruning provided herein is granted as an accommodation to landowners living immediately adjacent to RC-1A, RC-1C or RC-1E areas, and the Town retains full authority to amend and/or revoke any portion of these provisions.
- B. The permits allowed herein do not obviate the need or requirement of any landowner obtaining a permit under this Article from any other required permit or authorization from any governmental or regulatory body that may have jurisdiction over the RC-1 Area District. Any landowner obtaining a permit shall agree to indemnify the Town for any action taken pursuant to said permit in derogation of any County, State, or Federal law or regulation, including costs, fines and attorney's fees.
- C. Nothing in this Article shall be construed to prevent the Town of Sullivan's Island from erecting or having erected signs in the RC-1 Area District for regulatory or instructional purposes.

Sec. 21-71. Trimming and pruning in the RC-1 District.

A. No construction or removal of vegetation.

There shall be no construction of any type, no destruction or removal of vegetation by any means except trimming and pruning of shrubs and trees as provided in this Ordinance, and no manmade changes to topography in an RC-1 Area District, except as provided herein and in the Title to Real Estate dated February 12, 1991, conveying said land to the Town of Sullivan's Island.

B. Retaining of a town vegetation consultant.

The Town shall engage a qualified consultant to monitor trimming and pruning of shrubs and trees in the RC-1 Area District. The consultant shall agree to visit each site during the trimming and pruning permitted hereunder to ensure that work is being done according to the highest professional standards and the requirements of this Ordinance. The cost of the consultant's visits shall be included in the permit fee that shall be paid by each applicant.

C. Permit for trimming and pruning of vegetation.

- (1) Any landowner living immediately adjacent to the RC-1A, RC-1C or RC-1E Area shall upon application to the Zoning Administrator be issued a permit, subject to the other terms and conditions of this Ordinance, to trim and prune the shrubs and trees enumerated herein in an area from the applicant's lot line towards the ocean within the extension of the landowner's side lot lines projected towards the ocean.
- (2) The trimming and pruning allowed herein shall only be permitted between November 1st and the following February 28th.
- (3) The only vegetation that may be trimmed and pruned in the RC-1A, RC-1C or RC-1E Areas is limited to the following: Southern Waxmyrtle (*Myrica Cerifera*), Eastern Baccharis (*Baccharis Halimifolia*), and Popcorn trees (*Tallowtree, Sapium Sebiferum*). This vegetation may be trimmed and pruned so as to have a maximum height of no less than five (5) feet above the ground and shall be trimmed and pruned in accordance with the highest professional standards and in accordance with the guidelines promulgated by the Town of Sullivan's Island. In the case of Popcorn trees, cutting can extend below five (5) feet if recommended by the consultant hired under this Ordinance and approved by the Tree Commission.
- (4) The trimming and pruning allowed and all work performed shall be accomplished without the use of any heavy machinery, vehicles or other such machinery being brought into the RC-1 Area District or onto the beach front.
- (5) There shall be no trimming, cutting or pruning of any vegetation of any sort in the RC-1B and RC-1D Areas.

D. Trimming and pruning by a licensed commercial contractor.

- (1) Only a commercial contractor licensed by the Town of Sullivan's Island specifically for such purpose shall accomplish all trimming and pruning.
- (2) The Town shall make a list of qualified licensed commercial contractors available to those who apply for a permit pursuant to the terms of this Ordinance.
- (3) Both the landowner and the qualified contractor hired or retained by the landowner shall make the permit application.
- (4) To qualify, the contractor shall demonstrate to the Town that he/she has the experience to perform the trimming and pruning in accordance with the highest professional standards that he/she is capable of identifying the vegetation that may be trimmed and that he/she has read the Ordinance and is familiar with its conditions, regulations and penalties.
- (5) Each commercial contractor licensed by the Town of Sullivan's Island to perform the work allowed by this Ordinance shall, prior to the issuance of a permit, be required to sign an agreement to perform all work in a manner consistent with the provisions and restrictions of the Ordinance and guidelines set forth by the Town and the consultant as identified below.
- (6) The contractor shall file a certificate of insurance with the Town evidencing workers' compensation coverage and public liability coverage of at least One Million Dollars (\$1,000,000). The contractor shall also post a performance bond in the amount of Five Thousand Dollars (\$5,000) wherein he/she guarantees faithful performance of his/her duties and obligations hereunder in a manner consistent with this Ordinance and instruction by the Town's consultant. Additionally, the principal of each contractor shall agree to be personally liable for compliance with the terms of this Ordinance.

E. Fees and posting of permit.

- (1) A fee of Two Hundred Fifty Dollars (\$250) shall be paid by the applicant to the Town of Sullivan's Island for the granting of a permit to perform the work allowed hereunder.
- (2) The applicant shall also pay the costs charged by the licensed contractor for the actual cutting done pursuant to the application.
- (3) The permit shall be posted on the Lot facing the street in plain view of the street at all times that any work is undertaken pursuant to said permit. Said permit shall be valid for the time specified in the permit with only one permit per Lot allowed for each cutting season.

F. Performance.

- (1) All work performed pursuant to this permit, and all methods of trimming and pruning shall be performed in accordance with the highest professional standards and shall be monitored by and subject to the approval of the Town of Sullivan's Island and its consultant.
- (2) The Town and its consultant shall have the right to immediately stop any work being performed in a manner not allowed, permitted or approved by removing and revoking the permit posted pursuant to E.
- (3) At the conclusion of the trimming and pruning permitted herein, the consultant shall visit each site and issue a certificate to the Town and to the landowner certifying that the trimming and pruning has been performed in accordance with the terms and provisions of this Ordinance and highest professional standard. The cost of the consultant's site visits shall be included in the permit fee that shall be paid by each applicant.
- (4) All cuttings shall be removed from the RC-1 Area District by said commercial contractor upon the completion of said work and hauled off of the Island to an appropriate recycling dump by said contractor or used on the Island in such use as specifically approved by the Tree Commission.
- (5) Any person not complying with the terms of this Ordinance shall immediately forfeit said bond and shall be subject to all other terms and provisions of this Ordinance relating to fines and penalties in addition to the forfeiting of said bond.

G. Fines for violations.

- (1) The violation of the terms of this Ordinance shall constitute a criminal offense and shall be punishable by the Municipal Court of the Town of Sullivan's Island or other Court of competent jurisdiction.

- (2) Each tree or shrub which is trimmed or pruned in violation hereof, or poisoned or destroyed in any manner, shall subject the person so violating this Ordinance to a fine of Five Hundred Dollars (\$500) and/or thirty (30) days in jail.
- (3) Each other violation of this Ordinance shall subject the person so violating to a fine of Five Hundred Dollars (\$500) and/or thirty (30) days in jail.
- (4) Penalties prescribed herein shall be in addition to the forfeiture of the bond specified above. In addition, the violator shall pay for the replacement of vegetation in like species and volume as determined to be appropriate by the Town upon the professional recommendation of its consultant.
- (5) The fees generated by the permit application and fines from any violations of this Ordinance, as well as forfeiture of any bonds for violations hereof shall be set aside by the Town in a dedicated fund and used to pay its consultant and for such matters as appropriate studies and surveys of the land, its vegetation, wildlife and natural processes, mapping and photographing, also information and education programs and materials, as well as mitigation described in H.

H. Mitigation.

- (1) If any violation of the provisions and restrictions of this Ordinance and the guidelines for trimming and cutting occurs, wherein the perpetrator is not known, the Town shall undertake mitigation to replace the vegetation with like species and volume, upon the recommendation of the consultant, from funds available from fines and fees generated pursuant to this Ordinance as established in G(5).
- (2) If the perpetrator is known, then in addition to fines levied by the Town pursuant to this Ordinance, the Town shall institute civil proceedings to require said perpetrator to pay the cost of mitigation and to collect such other damages as are allowed by law. Fines and fees generated shall be used by the Town to replant vegetation in the specific area where any such loss occurred. It is the intent of this Ordinance to replace any vegetation so damaged or destroyed with like kind and volume.

Sec. 21-72. Maintenance of footpaths in the RC-1 Area District.

- A. Landowners living immediately adjacent to the RC-1 Area District may maintain existing dirt footpaths through the RC-1 Area District to the beach.
- B. Existing dirt footpaths shall not exceed six and one-half (6 ½) feet in width; new paths shall not be created.
- C. Footpaths shall follow the natural contours of the land and dunes.
- D. No trees or branches one and one half (1 ½) inches in diameter or larger shall be cut or destroyed without first receiving permission from the Town of Sullivan's Island Zoning Administrator or Building Official.
- E. No fill or any other material whatsoever shall be brought in for said paths.
- F. Nothing contained in this section shall restrict the Town from maintenance of public constructed walkovers and emergency access through the RC-1 Area District.

Sec. 21-73. Tree Commission assistance with RC-1 Area District.

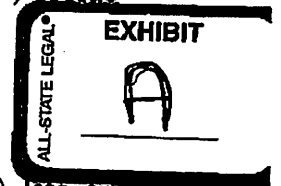
- A. The Town may seek the assistance of the Sullivan's Island Tree Commission to support the activities of this Ordinance as they pertain to the gathering, organizing and dissemination of information about the RC-1 Area District, and to the replacement of vegetation under mitigation.
- B. The Tree Commission is hereby given the following responsibilities in addition to those it already has:
 - (1) Provide guidance with the management of tree pruning and trimming within the RC-1 District;
 - (2) To study and monitor the impact of the pruning and trimming allowed under Sec. 21-71 with regard to the flora and fauna located within the RC-1 Area District;
 - (3) To study and monitor the impact of the pruning and trimming allowed under Sec. 21-71 as to the integrity of the RC-1 Area District as it relates to erosion control and beach stability, drainage, mosquito control, and the public welfare, safety, and health of the Town; and
 - (4) To study and make recommendations to the Town as to the management of all RC-1 Area District so as to preserve and maintain RC-1 Area District in accordance with the public welfare, safety, and health of the Town and the covenants and restrictions set forth in the Title to Real Estate dated February 12, 1991, conveying said land to the Town of Sullivan's Island.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	
Nathan Bluestein, Ettaleah Bluestein,)	C/A No. 10-CP-10-5449
M.D., Theodore Albenesius, III, and)	
Karen Albenesius, individually and as)	
taxpayers of Charleston County and the)	
Municipality of the Town of Sullivan's)	
Island,)	
)	
Plaintiffs,)	
)	
Versus)	SECOND AMENDED COMPLAINT
)	(Non-Jury)
Town of Sullivan's Island and Sullivan's)	
Island Town Council,)	
Defendants.)	

INTRODUCTION

The Plaintiffs, Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius (collectively hereinafter "Plaintiffs"), individually and among many others similarly situated,¹ and as taxpayers of Charleston County and as taxpayers, residents, property owners and registered voters of the Municipality of the Town of Sullivan's Island, complaining of the Defendants, the Town of Sullivan's Island (hereinafter "Town") and the Sullivan's Island Town Council (hereinafter "Town Council") (collectively hereinafter "Defendants"), would respectfully show unto this Honorable Court as follows:

1. Plaintiffs Nathan Bluestein and Ettaleah Bluestein, M.D. (hereinafter "Bluesteins") reside at 2513 Atlantic Avenue on Sullivan's Island. Plaintiffs Theodore Albenesius, III and Karen Albenesius (hereinafter "Albenesiuses") reside at 2411 Atlantic Avenue on Sullivan's Island.



¹ To date, property owners of approximately one hundred and eighteen (118) lots on Sullivan's Island have endorsed this lawsuit. A map of the endorsers' properties is attached as **Exhibit 1**. Of those endorsing this lawsuit, a majority (64 of 118) own lots which are not on the "front row" of houses closest to the Atlantic Ocean.

2. The Town is a municipal governmental entity of the State of South Carolina which has a Council / Mayor form of government.

3. The Town Council is the Town's legislative body which adopted and approved the transfer of real properties at issue in this lawsuit. The Town Council is composed of a Mayor and six (6) council members elected at large. These officials enact ordinances and resolutions relative to municipal sources, levy taxes, establish appropriations, issue debt and institute other fees and regulations. Under the Council form of government, the Mayor acts as chief executive officer.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the declaratory and injunctive claims of this Complaint pursuant to Section 15-53-10, *et seq.*, of the South Carolina Code of Laws and Rule 57 of the South Carolina Rules of Civil Procedure to settle a justiciable controversy between the parties.

5. This Court has jurisdiction over the inverse condemnation, public and/or private nuisance and constitutional violation claims of this Complaint pursuant to state and federal constitutional law, as well as Section 28-2-10, *et seq.*, of the South Carolina Code of Laws.

6. Venue is proper in this Honorable Court because the properties at issue are located in, the property rights were acquired in, the contract and/or deed restrictions and/or prior vested property rights at issue were agreed to in, and the conduct complained of in this lawsuit is and has been occurring in Charleston County.

GENERAL ALLEGATIONS

7. Plaintiffs, as taxpayers, residents, registered voters and property owners, have a direct and personal interest in the proper use and allocation of tax receipts by Defendants.

8. Improper use and allocation of tax receipts by Defendants is a matter of immense public importance.

9. Plaintiffs have sustained, are sustaining and are in danger of further sustaining, prejudice from invalid and illegal legislative action by Defendants, including truly individual injuries unique to their real property.

10. Plaintiffs have a private interest in this suit in equity, which they have brought against public authorities, to set aside and prevent illegal acts.

11. Plaintiffs have suffered harm from the *ultra vires* acts of Defendants as hereinafter alleged.

12. The injuries charged herein are as a result of Defendants' actions and inaction are private injuries which the Town's taxpayers and the County of Charleston are the individual sufferers, rather than the general public.

13. The Town's taxpayers and the County of Charleston constitute a class specially damaged by the alleged unlawful acts and therefore the said taxpayers have a special interest in the subject matter of this suit, distinct from that of the general public.²

14. Public policy demands a system of checks and balances whereby taxpayers can hold public officials accountable for their acts, and this lawsuit seeks to

² Although, at the present time, Plaintiff makes no allegation or claim of a formal class-action lawsuit.

hold Defendants accountable for unlawful actions and inaction and provide future guidance.

15. Plaintiffs have standing not only as taxpayers but also as third-party beneficiaries to a contract and/or deed into which the Town agreed on behalf of the residents, registered voters and property owners of Sullivan's Island.

SPECIFIC ALLEGATIONS

16. By deed dated December 28, 1949 by the War Assets Administration of the United States recorded in the Register Mesne Conveyance Office for Charleston County in Book K51 at page 271-286 and through enactment of South Carolina Act Number 420 of the Acts of the Legislatures for 1953, the Town was given the right to sell and dispose in fee simple over ninety (90) acres of accreted beach-front property (hereinafter "Accreted Land").

17. Upon information and belief, in the late 1960s or early 1970s, the Town offered to its resident property owners the opportunity to purchase certain property rights to the lands directly in front of the ocean front row properties.

18. Upon information and belief, certain resident property owners purchased in the late 1960s or early 1970s the rights to insure there would never be any houses built directly in front of their ocean front row properties.

19. In the 1980s, a 40-year study conducted by the South Carolina Coastal Council showed an annual accretion rate of the Accreted Land ranging from one (1) foot of erosion to 17.3 feet of accretion. This high accretion rate placed Sullivan's Island as one of a handful of barrier islands in South Carolina that has actually gained sand and land mass during the past century.

20. In the late 1980's and early 1990's, the Town decided to enact measures in order to protect the Accreted Land from commercial development. The Town entered into a deed restriction and transfer plan. The value of the Accreted Land at that time was estimated to be fifty million (\$50,000,000.00) Dollars.

21. The Town's deed restriction and transfer plan first involved selling the Accreted Land to the Lowcountry Open Land Trust, (hereinafter "LOLT"), a non-profit corporation organized and existing under the laws of the State of South Carolina and dedicated to the preservation of scenic vistas and open space. LOLT's purpose is to preserve and conserve natural areas.

22. The Town's deed restriction and transfer plan then involved having the LOLT place restrictions on the Accreted Land in a deed upon a subsequent transfer of the Accreted Land back to the Town, with the LOLT retaining third-party enforcement rights. According to the LOLT's own "Deed Restriction Summary," (attached as Exhibit 2), the transfer of ownership of the accreted land was "necessary to ensure enforceability of the restrictions and prevent a future Town Council with different motivations from changing or weakening the restrictions or doing away with them altogether." Paragraph 3, Page 1, Exhibit 2.

23. The Town's deed restriction and transfer plan involved raising money to give to the LOLT so that it could purchase the Accreted Land.

24. In late 1990, upon information and belief, the Town concluded a fundraising effort which collected approximately \$17,000.00. The Town then gave these funds to the LOLT for the purchase of the Accreted Land, with the understanding that the LOLT would transfer the Accreted Land back to the Town.

25. At least ten of the donations which were solicited by the Town were from individuals who currently endorse the Plaintiffs' position in this lawsuit. Upon information and belief, at least \$3,300.00 of the total donations collected by the Town used to transfer the Accreted Land to the LOLT, and thus protect the Accreted Land from commercial development, were given by endorsers of Plaintiffs' position in this lawsuit.

26. On February 12, 1991, in formal consideration of ten (\$10.00) Dollars, the Town executed a deed and/or contract granting the Accreted Land to the LOLT. On February 14, 1991, this deed and/or contract was recorded in the Register Mesne Conveyance Office for Charleston County in Book K200 at pages 484-495. (Attached as Exhibit 3).

27. Simultaneously, on February 12, 1991, in consideration of ten (\$10.00) Dollars, the LOLT executed a deed and/or contract subject to certain easements and restrictions, conveying the Accreted Land back to the Town. On February 14, 1991, this deed and/or contract was recorded in the Register Mesne Conveyance Office for Charleston County in Book K200 at pages 496-510. The rights and obligations of the LOLT, Town, and Town residents with regard to the Accreted Land are set forth in the deed and/or contract and incorporated herein by reference. (Attached as Exhibit 4).

28. According to the LOLT's own "Deed Restriction Summary," the primary purpose of the Town/LOLT deed restriction plan was to "maintain[n] the natural character of the property and protec[t] the [Accreted Land] from future development and commercialization." Paragraph 5, Page 2, Exhibit 2.

29. Upon information and belief, in April 1989 the Town, through its Real Estate Committee, divided the Accreted Land into eleven (11) parcels.

30. The parcels comprising the Accreted Land are shown on an aerial map of Sullivan's Island taken in October 1989 by photographers employed by the South Carolina Department of Natural Resources. (Attached as Exhibit 5).

31. This lawsuit applies exclusively to those portions of the Accreted Land marked as areas "A", "C", and "E" on the map attached as Exhibit 5. The areas on the attached map marked "B" and "D" represent portions of the Accreted Land adjacent to Fort Moultrie and the Sullivan's Island Elementary School, areas which do not relate to any of the Plaintiffs' causes of action in this lawsuit.

32. In October of 1989, shortly *before* the deed and/or contract was entered into by the Town and LOLT, several photographs were taken by the National Oceanic and Atmospheric Administration. These photographs show high-resolution images of the Accreted Land. (Attached as Exhibits 6-A, 6-B, 6-C and 6-D).

33. As was required by the deed and/or contract that was entered into by the Town and LOLT, the Town and/or LOLT took on-site photographs of the Accreted Land as it existed in February 1991. As the attached photographs show, there were no trees or vegetation taller than three (3) feet between the front or ocean front row properties and the Atlantic Ocean. (Attached Exhibits 6-E, 6-F, 6-G, 6-H, 6-I, 6-J and 6-K).

34. In 1992 and 1994, several photographs were taken by an endorser of this lawsuit. (Attached as Exhibits 7-A, 7-B, 7-C, 7-D, 7-E and 7-F).

35. The Plaintiffs' properties are located immediately adjacent to the Accreted Land shown in Exhibits 6-A, 6-B, 6-C, 6-D, 6-E, 6-F, 6-G, 6-H, 6-I, 6-J, and

6-K, 7-A, and 7-B. As the pictures plainly depict, there was no unchecked overgrowth which completely obstructed any view of the Atlantic Ocean and beach. Instead, the accreted land was comprised of sea oats and wildflowers, all three (3) feet or lower, with no trees or tall shrubs in the portions of the Accreted Land adjacent to what are now Plaintiffs' properties.

36. Acting under the guise of its legislative and executive powers, Defendants enacted, and have since enforced, ordinances in 1995 and 2005 pertaining to the management of the Accreted Land.

37. In 2010, ten (10) photographs were taken which portray the current state of unchecked overgrowth in the Accreted Land. (Attached as Exhibit 8-A, 8-B, 8-C, 8-D, 8-E, 8-F, 8-G, 8-H, 8-I and 8-J). Among the many other concerns enunciated in this Complaint, these photographs clearly show that the unchecked overgrowth has completely obstructed, or imminently will obstruct, all views of the Atlantic Ocean and beach affecting a substantial portion of the residents of Sullivan's Island.

38. By the terms of the contract and/or deed restrictions and/or prior vested property rights, the LOLT and the Town agreed to:

- (a) place restrictions upon the [Accreted Land] for the purposes of, inter alia retaining land or water areas predominantly in their natural, scenic, open, or wooded condition.³
- (b) 'Natural, scientific, educational, aesthetic, scenic and recreational resource' [would] mean the condition of the [Accreted Land] at the time of this grant, evidenced by:
 - a) The appropriate survey maps . . .
 - b) An aerial photograph of the [Accreted Land];

³ (Page 1 of the contract and/or deed restrictions and/or prior vested property rights, third paragraph) (attached as Exhibit 4) (Emphasis added).

- c) On-site photographs taken at appropriate locations on the [Accreted Land];

and other documentation . . . to establish the condition of the [Accreted Land] as of the date hereof which documentation shall be maintained in duplicate by both the [LOLT] and the [Town] hereof and made available to interested members of the public upon reasonable request for purposes of enforcing the restrictions contained herein. ⁴

- (c) these Restrictions may be enforced by the Town, any property owner within the Town, or by any voter registered within the Town. Such persons may seek any appropriate remedy for any violation, including, but not limited to, injunctive relief to force a termination of the violation or to permit restoration of the area damaged by [a] prohibited activity.⁵
- (d) these Restrictions may be modified or repealed only upon an affirmative vote of both (a) seventy-five (75%) percent of the registered voters of the Town who vote in the referendum held pursuant to the terms hereof, and (b) one hundred (100%) percent of the members of Town Council. . . These Restrictions shall remain in full force and effect for a period of 50 years.⁶
- (e) the [Accreted Land] shall remain in its natural state, [and] no changes shall be made to its topography or vegetation . . . [T]he 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.⁷

39. To date, the Town has not conducted a vote or referendum of its registered voters with regard to modifying the contract and/or deed restrictions and/or prior vested property rights and the Town's obligations concerning the Accreted Land. The Town has also not conducted a vote of the Town Council with regard to modifying

⁴ (Page 1 of the contract and/or deed restrictions and/or prior vested property rights, fourth through eighth paragraphs) (attached as Exhibit 4) (Emphasis added).

⁵ (Paragraph 5 of the contract and/or deed restrictions and/or prior vested property rights) (attached as Exhibit 4) (Emphasis added).

⁶ (Paragraphs 8-9 of the contract and/or deed restrictions and/or prior vested property rights) (attached as Exhibit 4) (Emphasis added).

⁷ (Paragraphs 1-2 of the contract and/or deed restrictions and/or prior vested property rights) (attached as Exhibit 4) (Emphasis added).

the contract and/or deed restrictions and/or prior vested property rights concerning the Accreted Land.

40. According to the LOLT's own "Deed Restriction Summary" (attached as Exhibit 4), the first listed "Conservation Value Associated with [the Accreted Land]", and listed as a "Very Significant" priority, is . . . "Scenic Views and Open Space Values." Paragraph 6, Page 2, Exhibit 2.

41. The Accreted Land is intended by Defendants to be subject to specific zoning restrictions and limitations of the Town Code and Ordinances.

42. The zoning ordinances in place at the time of the execution of the contract and/or deed restrictions and/or prior vested property rights permitted Town citizens residing where Plaintiffs currently reside to prune, cut and trim, at any time or times, all varieties of trees and bushes "to a height of no less than three [3] feet, provided that the cumulative effect of the trimming, cutting or pruning shall not be detrimental to the safety, welfare, and health of the people of the Town." §21-39(A)(5), Sullivan's Island Town Code and Ordinances (ratified 1981). (Attached as Exhibit 9).

43. The zoning ordinances currently in effect place many limitations regarding vegetation height, vegetation type, and the time of the year allowed for pruning, cutting and trimming, which render the Town in breach of its obligations under the contract and/or deed restrictions and/or prior vested property rights.

44. Upon information and belief and despite the duties and obligations under the contract and/or deed restrictions and/or prior vested property rights, and the provisions of the Town Code in place in February 1991, the Town Council is currently considering an "accreted land management plan" ("ALMP").

45. Several of the alternative proposals the Town Council is currently considering for the ALMP would allow the Town to amend improperly and invalidly the Town Code and further render the Town in breach of its obligations under the contract and/or deed restrictions relating to the Accreted Land.

46. Upon information and belief, among the alternative proposals, the Town Council is considering further restricting property owners of land immediately adjacent to the Accreted Land, including Plaintiffs, from trimming, cutting and pruning the shrubs and trees located in the Accreted Land.

47. On June 15, 2010, the Bluesteins applied with the Town for a permit to cut, trim and prune, at any time or times, to a height of no less than three [3] feet, all variety of shrubs and trees located in the portion of the Accreted Land immediately adjacent to the Bluesteins' lot line towards the ocean, within the extension of the Bluesteins' side lot lines projected towards the ocean. (Attached as Exhibit 10). On June 23, 2010, the Albenesiuses applied with the Town for an identical permit. (Attached as Exhibit 11)

48. On June 21, 2010, the Town denied the Bluesteins' application. (Attached as Exhibit 12). On June 24, 2010, the Town denied the Albenesiuses' application. (Attached as Exhibit 13).

49. As was specifically allowed by the ordinance in existence when the contract and/or deed restrictions and/or prior vested property rights were agreed to on February 12, 1991 (See Exhibits 4 and 10), Plaintiffs desire to cut, trim and prune, at any time or times, to a height of no less than three [3] feet all variety of shrubs and trees located in the portion of the Accreted Land immediately adjacent

to the Plaintiffs' lot line towards the ocean, within the extension of the Plaintiffs' side lot lines projected towards the ocean.

50. Plaintiffs' properties are appraised, assessed and classified as "beach front and ocean view" properties according to county tax appraisals and assessments.

51. However, the classification of Plaintiffs' properties as "beach front and ocean view" properties is no longer correct, or is imminently in danger of no longer being correct, because of the Town and Town Council's violation of the contract and/or deed restrictions and/or prior vested property rights.

52. The Plaintiffs' properties have been reduced in fair market value by at least one million (\$1,000,000.00) to one million five hundred thousand (\$1,500,000.00) Dollars each. (See opinion letter of Thomas F. Hartnett, G.A.A., C.R.B., a South Carolina Certified General Real Estate Appraiser.) (Attached as Exhibit 14).

53. On February 3, 2009, consultants hired by the Town Council to implement an "Accreted Land Management Plan" (hereinafter referred to as "ALMP") submitted a proposed questionnaire or "opinion matrix" for the Town Council to initiate a series of community forums to discuss the various advantages and disadvantages of various alternatives for the ALMP.

54. The consultants' own draft questionnaire/opinion matrix included "Ocean Views" and "Property Values" as distinct issues of importance to be considered in any alternative ALMP. (Attached as Exhibit 15).

55. An earlier proposed questionnaire/opinion matrix, which was never submitted to the residents of Sullivan's Island, listed "View of the Ocean" as the

first issue to consider when determining how to manage the Accreted Land. (Attached as Exhibit 16).

56. However, the Town's final draft of its questionnaire/opinion matrix which was submitted to Town residents in 2009 completely deleted and categorically reduced in importance the issues of "Ocean Views" and "Property Values." (Attached as Exhibit 17).

57. On January 20, 2010, Defendants, through the Town Administrator Andy Benke, the Town Mayor Carl Smith, Town of Sullivan's Island Mayor *Pro Tem* Mike Perkis, and Town Council member Patrick M. O'Neil, Ph.D., specifically instructed Timothy W. Kana, Ph.D., President of Coastal Science & Engineering and the consultant hired by the Town to prepare the ALMP, to refrain from considering any correspondence or opinions expressed by any Sullivan's Island residents, property owners and registered voters with regard to the management of the Accreted Land. (See attached Exhibit 18)

58. The actions and inactions of the Town and Town Council with regard to the management of the Accreted Land have been, and continue to be, damaging to and in derogation of Plaintiffs' property, contractual and constitutional rights in the following manners:

- (a) Eliminating the Plaintiffs' views of the beaches and the Atlantic Ocean;
- (b) Diminishing the Plaintiffs' property values;
- (c) Diminishing the ocean breezes onto the Plaintiffs' properties;
- (d) Increasing the potential of a fire hazard;
- (e) Increasing the mosquito population on the Plaintiffs' properties;

- (f) Increasing the bug, raccoon, snake, rat, spider, coyote, and varmint populations;⁸
- (g) Increasing the quantity of poison ivy in the Accreted Land and on the Plaintiffs' properties;
- (h) Increasing the security concerns on Plaintiffs' properties due to the taller trees and shrubs in the Accreted Land which provide increased cover for criminals and dangerous animals/varmints to hide;⁹

Instituting ordinances and plans which constitute an invasion of the rights of "beach front and ocean view" property owners;

- (i) Supporting regulations and ordinances which discount the values of "beach front and ocean view" property owners while benefitting from the higher taxes which are based upon the so-called "beach front and ocean view" location.

59. The concerns enunciated in Paragraph 58(a) through 57(j) are or should be a major concern to the Town Council in their function as elected representatives of the taxpayers, residents, property owners and registered voters of Sullivan's Island.

60. The Town Council does not have the power to enact ordinances which affect the Accreted Land in ways other than those allowed by the easements and restrictive covenants clearly stated in the contract and/or deed restrictions and/or prior vested property rights (attached as Exhibit 4) and which deprive Plaintiffs of what they had and/or acquired as owners of so-called "beach front and ocean view" properties.

⁸ Upon information and belief, there have been numerous instances of pets, children and adults being attacked by dangerous animals and varmints in or near the Accreted Land, which can be attributed to the unchecked overgrowth of the Accreted Land and the cover such overgrowth provides to such dangerous animals and varmints.

⁹ Upon information and belief, there has been at least one attempted rape, which occurred in the Accreted Land within the past few years which can in part be attributed to the unchecked overgrowth of the Accreted Land and the cover such overgrowth provides to criminals.

61. As is clearly stated in the terms of the contract and/or deed restrictions and/or prior vested property rights and above paragraphs, the Town and LOLT have an affirmative duty to maintain and produce to Plaintiffs all aerial photographs, on-site photographs, survey maps and any other documentation establishing the condition of the Accreted Land as it existed on February 12, 1991. Upon information and belief, the Town has failed to follow this promise, and has neither produced nor maintained these photographs.

62. As a matter of law, Defendants have no right to a jury trial in this matter.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

63. Plaintiffs repeat and re-allege all of the foregoing paragraphs as if fully repeated and restated.

64. The Town and Town Council does not have the power to enact any changes to the topography or vegetation of the Accreted Land other than 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,

65. The Town and Town Council's current regulation of the Accreted Land is unreasonable, arbitrary and capricious, and renders the Town in breach of the contract and/or deed restrictions and/or prior vested property rights.

66. Any zoning classifications or restrictions which disallow Plaintiffs from trimming, cutting or pruning, at any time or times, all varieties of shrubs and trees to a height of no less than three [3] feet above the ground, render the Town in breach of the contract and/or deed restrictions and/or prior vested property rights.

67. The Town's current zoning classifications and restrictions render the Town in violation of the contract and/or deed restrictions and/or prior vested property rights.

68. The Town's violation of the contract and/or deed restrictions and/or prior vested property rights substantially affects the rights of Plaintiffs as to their real property, inhibits the planned and intended use and enjoyment of Plaintiffs' real property, and poses a major financial detriment to Plaintiffs.

69. The clear language of the contract and/or deed restrictions and/or prior vested property rights mandates that the Town and Town Council shall only make changes to the topography or vegetation of the Accreted Land, *as it was on February 12, 1991*, "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." (Page 2, Paragraphs 1-2 of the contract and/or deed restrictions and/or prior vested property rights) (attached as Exhibit 4) (Emphasis added).

70. Furthermore, the restrictions contained in the contract and/or deed restrictions and/or prior vested property rights may only be modified or repealed "upon an affirmative vote of both (a) seventy-five (75%) percent of the registered voters of the Town who vote in the referendum . . . and (b) one hundred (100%) percent of the members of Town Council." (Paragraph 8 of the contract and/or deed restrictions and/or prior vested property rights) (attached as Exhibit 4).

71. To date, the Town has not conducted a vote or referendum of its registered voters, nor has it conducted a vote of the Town Council, with regard to

modifying the contract and/or deed restrictions and/or prior vested property rights and the Town's obligations concerning the Accreted Land.

72. The contract and/or deed restrictions and/or prior vested property rights "shall remain in full force and effect for a period of 50 years." (Paragraph 9 of the contract and/or deed restrictions and/or prior vested property rights) (attached as Exhibit 4).

73. The Plaintiffs seek an Order from the Court declaring that the Town and Town Council have violated the terms of the contract and/or deed restrictions and/or prior vested property rights (attached as Exhibit 4) and issue a declaratory judgment invalidating all ordinances relating to the management of the Accreted Land passed since February 12, 1991.

74. The Plaintiffs seek an Order from the Court declaring that any of the Town citizens, including Plaintiffs, who own property adjacent to those portions of the Accreted Land not adjacent to Fort Moultrie or the Sullivan's Island Elementary School, may trim, cut and prune, at any time or times, all variety of trees and shrubs located in the Accreted Land to a height of no less than three feet above the ground.

75. Plaintiffs seek an Order from the Court declaring that, by the terms of the contract and/or deed restrictions and/or prior vested property rights (attached as Exhibit 4), the Town has an affirmative duty to produce to Plaintiffs all aerial photographs, on-site photographs, survey maps and other documentation establishing the condition of the Accreted Land as it existed on February 12, 1991.

FOR A SECOND CAUSE OF ACTION
(Temporary and Permanent Injunctive Relief)

76. Plaintiffs repeat and re-allege all of the foregoing paragraphs as if fully repeated and restated.

77. The Town and Town Council's violation of the contract and/or deed restrictions and/or prior vested property rights has caused Plaintiffs undue hardship and substantial costs.

78. Plaintiffs' real property has been adversely affected in the ways enumerated in Paragraph 58.

79. Plaintiffs believe immediate action is necessary to save the undue hardship and costs of enforcement of the contract and/or deed restrictions and/or prior vested property rights (attached as Exhibit 4).

80. Plaintiffs seek a temporary and permanent injunction against the Town Council prohibiting it from further rendering the Town in breach of the contract and/or deed restrictions and/or prior vested property rights.

81. To the extent of their authority, the Town and Town Council should be restrained from accepting taxes based upon a so-called "beach front and ocean view" location so long as the Town and Town Council continue to frustrate, block, reduce and/or eliminate "beach front and ocean view" properties as such.

82. Plaintiffs seek a temporary and permanent injunction against the Town Council ordering the Town and Town Council to refrain from interfering with Plaintiffs' right to trim and prune, at any time or times, all variety of shrubs and trees in the Accreted Land to a height of no less than three feet above the ground.

FOR A THIRD CAUSE OF ACTION
(Writ of Mandamus)

83. Plaintiffs repeat and re-allege all of the foregoing paragraphs as if fully repeated and restated.

84. As previously described above, Plaintiffs have contractual, property and constitutional rights for which Defendants have a clear duty of performance to abide by the easements and restrictive covenants of the contract and/or deed restrictions (attached as Exhibit 4), thereby allowing Plaintiffs to enforce their rights with regard to those portions of the Accreted Land adjacent to their properties.

85. As a matter of law, Defendants' actions and inactions, with regard to those portions of the Accreted Land immediately adjacent to Plaintiffs' properties, are ministerial acts.

86. Plaintiffs have a specific legal right – enforcing the contract and/or deed restrictions and/or prior vested property rights (attached as Exhibit 4) – for which discharge of Defendants' duty to allow Plaintiffs' applications to cut, trim and prune is necessary.

87. Town officials are bound to follow the terms of the contract, and Plaintiffs seek to enforce and established rights in that document.

FOR A FOURTH CAUSE OF ACTION
(Breach of Contract)

88. Plaintiffs repeat and re-allege all of the foregoing paragraphs as if fully repeated and restated.

89. Plaintiffs are intended beneficiaries of the contract between the Lowcountry Land Trust and the Town.

90. The Town has failed and refused, and continues to fail and refuse, to perform or tender its performance as required by the contract and deed restrictions

by failing to trim the vegetation in the Accreted Land and prohibiting Plaintiffs from trimming those portions of the Accreted Land adjacent to their properties.

91. The failure and refusal of the Town to perform its obligations under the contract has damaged Plaintiffs in the aforementioned manners reiterated in Paragraph 58.

92. Plaintiffs are entitled to actual damages, reasonable attorneys' fees, legal fees, and such other and further relief as the court may deem just and proper.

FOR A FIFTH CAUSE OF ACTION
(Breach of Contract with a Fraudulent Act)

93. Plaintiffs repeat and re-allege all of the foregoing paragraphs as if fully repeated and restated.

94. On February 12, 1991, in consideration of ten (\$10.00) Dollars, the LOLT offered and the Town accepted a contract subject to certain easements and restrictions, conveying the Accreted Land to the Town.

95. Defendants breached, or in the alternative have unjustifiably failed to perform, the contract dated February 12, 1991 between the LOLT and the Town, by, among other acts and omissions, failing to enforce restrictions upon the Accreted Land to retain the land in its natural, scenic, open and wooded condition.

96. Plaintiffs have suffered damages as a direct and proximate result of the breach of, or unjustifiable failure to perform, the contract dated February 12, 1991, in manners enumerated in Paragraph 58.

97. As previously discussed, on February 3, 2009, consultants hired by the Town Council, at a cost to taxpayers in the hundreds of thousands of dollars, to implement an ALMP submitted a proposed questionnaire or "opinion matrix" for the Town Council to initiate a series of community forums to discuss the various

advantages and disadvantages of various alternatives for the ALMP and to gauge the opinions of its citizens as to what they considered to be issues of importance.

98. The consultants' own draft questionnaire/opinion matrix included "Ocean Views" and "Property Values" as distinct issues of importance to be considered in any alternative ALMP. (Attached as Exhibit 15). In fact, "View of the Ocean" was the first issue listed for consideration when determining how to manage the Accreted Land. (Attached as Exhibit 16).

99. However, the questionnaire/opinion matrix that the Town actually submitted to the community at large and the public was not the version that its own consultants recommended to be submitted.

100. According to a series of emails dated April 22, 2009, there was debate among members of Town Council about whether or not to alter the ALMP as drafted by the Town's own consultants. Council members discussed the trouble that could arise from "monkeying" with the report. (Attached as Exhibit 19)

101. In the final draft in 2009, one or more person(s) acting for or on behalf of the Defendants submitted to Town residents a questionnaire/opinion matrix that completely deleted and categorically reduced in importance the issues of "Ocean Views" and "Property Values." (Attached as Exhibit 17).

102. On January 20, 2010, Defendants, through the Town Administrator Andy Benke, the Town Mayor Carl Smith, Town of Sullivan's Island Mayor *Pro Tem* Mike Perkis, and Town Council member Patrick M. O'Neil, Ph.D., specifically instructed Timothy W. Kana, Ph.D., President of Coastal Science & Engineering and a consultant hired by the Town to prepare a plan for the management of the Accreted Land, to refrain from considering any correspondence or opinions

expressed by any Sullivan's Island residents, property owners and registered voters with regard to the management of the Accreted Land. (See attached Exhibit 18).

103. The above-described acts represent fraudulent intent specifically related to the breaching of the contract.

104. Defendants have, upon information and belief, made false representations as to the circumstances related to the breaching of the contract as described above.

105. The fraudulent acts described above were made, upon information and belief, based on Defendants' dishonesty in fact, unfair dealing and/or unlawful appropriation of Plaintiffs' property and property rights by design.

106. The purposeful alterations of the work performed by the consultants Defendants themselves had hired, was performed, upon information and belief, in order to diminish the importance of property values, scenic views and breezes to Town residents and property owner, all to the direct and proximate detriment of Plaintiffs.

107. Plaintiffs are entitled to such additional consequential, actual and/or punitive damages as the Court may see fit for the independent tortious wrong associated with the breach of the contract.

FOR A SIXTH CAUSE OF ACTION
(Unfair Trade Practices Act)

108. Plaintiffs repeat and re-allege all of the foregoing paragraphs as fully repeated and restated.

109. Defendants' conduct, as described above, is unfair, deceptive, offensive to the public policy, immoral, unethical and/or oppressive.

110. Defendants have violated S.C. Code Ann. § 39-5-140. Defendants' acts have substantially interfered with the real estate trade or industry by significantly diminishing the property values of homeowners who have lost their classification of "breach-front" property because of Defendants' bad faith refusal to trim or let Plaintiffs trim sections of the Accreted Land adjacent to their properties.

111. Defendants have directly harmed not only Plaintiffs, but also Charleston County, by failing to maintain, and prohibiting Plaintiffs from maintaining, their ocean views due to the diminution in property values and the resulting decrease in taxes collected as a direct result of the diminution of properties assessed and classified as "ocean front."

112. Defendants' unfair and deceptive trade practices have damaged Plaintiffs and those similarly situated.

113. Defendants' unfair and deceptive trade practices are having an adverse impact on the public interest, in the use and enjoyment of not only Plaintiffs, but also all residents of Sullivan's Island.

114. Plaintiffs are entitled to actual damages, treble damages and attorneys' fees.

FOR A SEVENTH AND/OR FIRST ALTERNATIVE CAUSE OF ACTION
(Public and/or Private Nuisance)

115. Plaintiffs repeat and re-allege all of the foregoing paragraphs as if fully repeated and restated.

116. The unchecked overgrowth of vegetation in the Accreted Land, adjacent to Plaintiffs' properties has led to a succession of serious and special public and private harms to Plaintiffs' properties, including but not limited to, the owners' inability to reasonably use their own properties for normal and conventional uses.

117. Specifically, Plaintiffs have suffered unreasonable interference with the use and enjoyment of their properties. The vast unchecked vegetation, coupled with the Town's deliberate and intentional failure to grant their respective applications to cut, trim and prune, to a height of no less than three feet, vegetation located on the Accreted Land directly adjacent to their properties, has led to an inability to use their properties as they are entitled to use them.

118. The unchecked vegetation has led to serious public and private concerns of safety, including the ability of unwanted other persons and dangerous animals and varmints to hide in the Accreted Land and pose potential grievous harm to their very safety and use of their own property, all of which is proximately caused by the wrongful interference of Defendants with Plaintiffs' private property rights.

119. The injuries described herein are explicitly different in kind, and not merely in degree, from those suffered by the general public, and the injuries materially impair Plaintiffs' access to the Atlantic Ocean.

120. The impacted Accreted Land has become a "breeding ground" for an enormous and highly undesirable increase in the bug, raccoon, snake, rat, spider and other wildlife and varmint populations and other unwanted and dangerous animals hiding in the Accreted Land, which has caused and continues to cause actual, potential and foreseeable harm to Plaintiffs' properties.

121. This issue is of very significant public and private importance so as to require its resolution for future guidance.

122. Plaintiffs ask that the Court direct that the Town abate the nuisance or give Plaintiffs the authority to abate the nuisance.

FOR AN EIGHTH AND/OR SECOND ALTERNATIVE CAUSE OF ACTION
(Inverse Condemnation)

123. Plaintiffs repeat and re-allege all of the foregoing paragraphs as if fully repeated and restated.

124. By a series of affirmative, overt and positive conduct, Defendants have embarked on a course of action, including denying Plaintiffs' requests to cut, trim and prune, which has resulted in the wrongful taking of the affected areas contrary to Plaintiffs' property, contractual and constitutional rights. Defendants' wrongful taking of Plaintiffs' properties has caused harm to Plaintiffs and their rights with regard to an area that is now dedicated to public use.

125. The character of the governmental action, and the severe economic impact of these overt actions and threatened future actions have unreasonably and wrongfully interfered with Plaintiffs' distinct "investment-backed" expectations, including Defendants' insistence (to the extent of their authority) to continue to assess and tax Plaintiffs' properties as "beach front and ocean view" properties when they are no longer actually entitled to that label.

126. The governmental action described herein has resulted in the wrongful taking of private property without adequate consideration for public use, and Plaintiffs are informed and believe they are entitled to now bring an action for inverse condemnation to seek reimbursement for damages resulting from Defendants' wrongful acts, including but not limited to compensation for the significant diminution in value of their respective properties, reasonable costs and expenses, reasonable attorneys' fees incurred in pursuing this matter, and appraisal and engineering fees incurred as a result of pursuing this action.

FOR A NINTH AND/OR THIRD ALTERNATIVE CAUSE OF ACTION
(Violation of the Contract Clauses of the S.C. and U.S. Constitutions)

127. Plaintiffs repeat and re-allege all of the foregoing paragraphs as if fully repeated and restated.

128. Acting under the guise of its legislative and executive powers, Defendants enacted, and have since enforced, ordinances in 1995 and 2005 pertaining to the management of the Accreted Land.

129. The 1995 and 2005 changes in the law pertaining to the management of the Accreted Land directly impair the pre-existing contractual relationship between Defendants and Plaintiffs by materially altering the reasonable expectations of the contracting parties and/or attempting to make material alterations in the character or the legal effect of the existing contract.

130. The 1995 and 2005 changes in the law pertaining to the management of the Accreted Land were not enacted to curtail a pressing emergency justifying the impairment of the pre-existing contractual relationship between Defendants and Plaintiffs.

131. The 1995 and 2005 changes in the law pertaining to the management of the Accreted Land are not narrowly tailored to any pressing emergency at hand and are not reasonable.

132. The impairment of the contractual relationship between Defendants and Plaintiffs is substantial. Due to Defendants' actions and inactions pertaining to their obligations under the contract and/or deed restrictions and/or prior vested property rights at issue in this case, Plaintiffs' real property has been adversely affected in the ways enumerated in Paragraph 58.

133. The 1995 and 2005 changes in the law pertaining to the management of the Accreted Land are unconstitutional.

WHEREFORE, Plaintiffs ask this Court for relief as follows:

- (a) Reasonable costs, disbursements and expenses, including attorneys' fees, appraisal and engineering fees, actually incurred on behalf of this proceeding;
- (b) That the Town and Town Council be enjoined and restrained from interfering with the rights of the citizens of Sullivan's Island who own property immediately adjacent to the Accreted Land, including Plaintiffs, to cut, trim and prune, at any time or times, all variety of shrubs and trees in the Accreted Land to a height of no less than three (3) feet above the ground;
- (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 in place the ordinance (Exhibit 9) that was applicable to the Accreted Land when it was conveyed by the LOLT to the Town of Sullivan's Island, whereby the parties agreed to maintain the Accreted Land as it was as of February 12, 1991;
- (d) Actual and compensatory damages in an amount to be made more definite and certain by the time of trial; and
- (e) For any and all other relief, whether in law or in equity, as this Court deems just and equitable.

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

_____, 2013
Charleston, South Carolina

429 S.C. 458
Supreme Court of South Carolina.

Nathan BLUESTEIN, Ettaleah Bluestein, M.D., Theodore **Albenesius** and Karen **Albenesius**, Petitioners,
v.
TOWN OF SULLIVAN’S ISLAND and Sullivan’s Island Town Council, Respondents.

Appellate Case No. 2018-001888

|
Opinion No. 27947

|
Heard November 21, 2019

|
Filed February 19, 2020

Synopsis

Background: Coastal property owners brought action against town for breach of contract, breach of contract accompanied by a fraudulent act, a violation of the South Carolina Unfair Trade Practices Act (SCUTPA), nuisance, and inverse condemnation, based on town’s failure to trim vegetation on accreting land along coast. The Court of Common Pleas, Charleston County, Mikell R. Scarborough, Master-In-Equity, 2015 WL 13681041, granted town’s motion for summary judgment, and property owners appealed. The Court of Appeals, 424 S.C. 362, 818 S.E.2d 239, affirmed. Property owners sought writ of certiorari, which the Supreme Court granted.

[Holding:] The Supreme Court, Kittredge, J., held that genuine issues of material fact existed as to town’s maintenance responsibilities, thus precluding summary judgment.

Reversed and remanded.

West Headnotes (8)

[1]	Appeal and Error Review using standard applied below
	When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court. S.C. R. Civ. P. 56(c).

[2]	Judgment Presumptions and burden of proof
	When determining if any triable issues of fact exist, as would preclude summary judgment, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. S.C. R. Civ. P. 56(c).

[3]	Contracts Ambiguity in general
	It is a question of law for the court whether the language of a contract is ambiguous.

[4]	Real Property Conveyances Ambiguity
	A deed is ambiguous when the terms of the deed are reasonably susceptible of more than one interpretation.

[5]	Real Property Conveyances Intent of parties
	In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy.

[6]	Real Property Conveyances Intent of parties Real Property Conveyances Entire Instrument; Construction as a Whole Real Property Conveyances Giving effect to every part; construing together
	In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the

	law.
--	------

[7]	Real Property Conveyances Extrinsic facts and circumstances
	When the deed is ambiguous the court may take into consideration the circumstances surrounding its execution in determining the intent.

[8]	Judgment Particular Cases
	Genuine issues of material fact existed as to town's maintenance responsibilities towards accreting land along coast under deed transferring ownership of land to town with a number of deed restrictions, thus precluding summary judgment in action by abutting property owners, who were third party beneficiaries of the deed, for breach of contract and other claims arising from town's failure to trim vegetation on accreting land.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County, Mikell R. Scarborough, Master-in-Equity

Attorneys and Law Firms

Robert H. Hood, James B. Hood, and Deborah H. Sheffield, all of Hood Law Firm, LLC, of Charleston, for Petitioners.

Derk Van Raalte and J. Brady Hair, both of the Law Offices of J. Brady Hair, of North Charleston, for Respondents.

Opinion

ACTING CHIEF JUSTICE KITTREDGE:

****880 *460** We granted a writ of certiorari to review the court of appeals' decision in *Bluestein v. Town of Sullivan's Island*,

424 S.C. 362, 818 S.E.2d 239 (Ct. App. 2018). The court of appeals affirmed the trial court's entry of summary judgment for the Town of Sullivan's Island and the Sullivan's Island Town Council (collectively, the Town). We reverse and remand to the trial court.

This case concerns accreting land along the South Carolina coast that is owned by the Town. Petitioners Nathan and Ettaleah Bluestein and Theodore and Karen Albenesius (collectively, Petitioners) bought property in the Town that abuts the accreting land. Petitioners' properties were once considered oceanfront lots only a short distance from the beach, but due to accretion, the properties are now a substantial distance (perhaps 500 feet or more) from the shoreline. The accreting land is subject to a 1991 deed, which sets forth certain rights and responsibilities respecting the condition of the property and the Town's duties concerning upkeep of the land. Petitioners are third party beneficiaries of the 1991 deed.

*461 Petitioners argued the 1991 deed mandated the Town keep the vegetation on the land in the same condition as existed in 1991, particularly as to the height of shrubs and vegetation. Conversely, the Town contended the 1991 deed granted it unfettered discretion to allow unchecked growth of the vegetation on the accreting land. The parties have cherry-picked language from the 1991 deed which ostensibly supports their respective interpretations of the deed. Contrary to the holding of the court of appeals and the trial court's findings, the deed is far from unambiguous; because the 1991 deed is ambiguous in terms of the Town's maintenance responsibilities, the court of appeals erred in affirming the entry of summary judgment for the Town. As a result, we remand this case to the trial court for further proceedings.

I.

The Bluesteins and the Albenesiuses each separately bought front row property on Sullivan's Island, a barrier island off the coast of South Carolina.¹ The Town owned (and still owns) the land between Petitioners' properties and the Atlantic Ocean. That land continues to grow each year through sediment transport, a process known as accretion.²

Beginning in the mid-1980s, the Town expressed concern about the future of the accreting land. Other coastal towns in South Carolina had chosen to develop their own accreting land, and, according to the Town, that development had a negative impact on the communities involved. As a result, the Town explored options for protecting the accreting land from development.

In 1991, in the aftermath of the damage wrought by Hurricane Hugo, the Town worked with Lowcountry Open Land Trust (LOLT)—a non-profit organization whose purpose was to conserve and preserve natural areas—to protect the accreting land. Ultimately, the Town and LOLT entered into an *462 agreement, in which the Town deeded the accreting land to LOLT, and LOLT then transferred the land back to the Town subject to a number of deed restrictions. At the time the 1991 deed was executed, the vegetation on the accreting land was no taller than three feet, consisting mostly of sea oats and wild flowers. In contrast, in certain areas along the coastline today, including in front of Petitioners' properties, the accreting land is now thickly wooded, creating a habitat for coyotes and other varmints.

The dispute in this case revolves around the language and intent of the 1991 deed restrictions, specifically the responsibility of the Town to maintain the accreting land. The parties construe the Town's rights and obligations under the 1991 deed differently. In granting summary judgment, the trial court effectively agreed with the Town's interpretation that the 1991 deed gives the Town **881 complete discretion to allow the vegetation on the accreting land to grow unchecked. The court of appeals affirmed.

II.

¹ ²“When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP.” *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). “Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” *Id.* at 122, 708 S.E.2d at 769. “When determining if

any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” *Id.* (citation omitted).

¹⁴¹ ¹⁴¹“It is a question of law for the court whether the language of a contract is ambiguous.” *S.C. Dep’t of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001). “A [deed] is ambiguous when the terms of the [deed] are reasonably susceptible of more than one interpretation.” *Id.* at 623, 550 S.E.2d at 302.

¹⁵¹ ¹⁶¹ ¹⁷¹“In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention *463 contravenes some well settled rule of law or public policy.” *K & A Acquis. Grp., L.L.C. v. Island Pointe, L.L.C.*, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009) (internal quotation marks and citations omitted). “In determining the grantor’s intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law.” *Id.* (citation omitted). “When the [deed] is ambiguous the court may take into consideration the circumstances surrounding its execution in determining the intent.” *Williams v. Teran, Inc.*, 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976).

III.

¹⁸¹Petitioners argue the 1991 deed requires the Town to keep the accreting land in the same condition as existed in 1991, in the aftermath of Hurricane Hugo. It appears Petitioners’ main complaint is the unchecked growth of trees and vegetation that has fostered the influx of coyotes and has blocked the oceanfront views they once enjoyed. In support of their interpretation of the deed, Petitioners focus on the purpose of the agreement, which was to preserve the accreting land “in its present state [in 1991] as a natural area which has not been subject to development or exploitation.” To establish the condition of the property at the time the deed was executed in 1991, the deed references an aerial photograph of the accreting land. The deed further references photographs and other documentation, which the Town and LOLT deemed “sufficient to establish the condition of the [accreting land] as of the date” the deed was executed.

In contrast, the Town argues the 1991 deed grants it “unrestricted authority” to trim or not trim the vegetation on the accreting land. In essence, the Town posits that the 1991 deed grants it unfettered discretion to allow the vegetation on the accreting land to grow completely unchecked.

Both parties’ interpretations are based on the premise that the 1991 deed is unambiguous. However, these two interpretations lead to very different results. While we acknowledge that both parties make compelling arguments when they are allowed to isolate deed provisions that support their respective positions, the 1991 deed, when read in its entirety, is not a model of clarity.

*464 On one hand, the 1991 deed has no language limiting the height of trees and shrubs to a maximum of three feet, which is a central feature of Petitioners’ case. Similarly, the deed language setting forth the purpose of retaining the land in its “natural” condition in no manner mandates that the types and amounts of vegetation and growth be frozen in time as existed in 1991.

On the other hand, the Town’s “unrestricted authority” argument is far from dispositive, for that seemingly wide discretion is confined to “trim[ming] and control[ling] 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.”

**882 In sum, the 1991 deed is ambiguous in terms of the Town’s maintenance responsibilities towards the accreting land. Based on the current record and limiting our analysis to the four corners of the 1991 deed, this dispute may not be resolved as a matter of law. Genuine issues of material fact exist, precluding summary judgment. Accordingly, we reverse the grant of summary judgment to the Town and remand to the trial court for further proceedings.

REVERSED AND REMANDED.

Bluestein v. Town of Sullivan's Island, 429 S.C. 458 (2020)	
839 S.E.2d 879	

HEARN, FEW, JAMES, JJ., and Acting Justice Stephanie Pendarvis McDonald, concur.

All Citations

429 S.C. 458, 839 S.E.2d 879

Footnotes	
1	The Bluesteins purchased front row property located on Atlantic Avenue around 1980. The Albenesiuses purchased front row property located on Atlantic Avenue in 2009. It appears the Albenesiuses have sold their property since filing this lawsuit.
2	According to the record, the land accretes at a rate of approximately seventeen feet per year.

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

Nathan Bluestein, Ettaleah Bluestein, Theodore) C/A No. 10-CP-10-5449
Albenesius and Karen Albenesius)

Plaintiffs,) **ORDER APPROVING SETTLEMENT**

Versus)

Town of Sullivan’s Island and Sullivan’s)
Island Town Council,)

Defendants.)

UPON Motion of all Parties, and it appearing that the said Parties deem the offer of settlement acceptable, advantageous, and to the best interest of all Parties and

IT FURTHER APPEARING in the discretion of this Court that such settlement is proper and in the best interest of all Parties, it is

ORDERED, ADJUDGED AND DECREED that the Parties are hereby authorized to consummate the settlement referred to in the within Settlement Agreement and General Release (Exhibit 1) and to execute and deliver to the Defendants an appropriate Release terminating, releasing, and ending any and all claims and actions asserted or brought under or by virtue of any South Carolina Statute or by common law against the Defendants, Town of Sullivan’s Island and Sullivan’s Island Town Council, including their Mayor, council, officers, directors, employees, agents, servants, attorneys, partners and representatives, predecessors and successor corporations or entities and their attorneys, heirs, assigns, executors, administrators, successors, subsidiaries, affiliated companies, parent companies, insiders, and any other indemnitors.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each side bear and pay their own costs, including court costs and attorneys’ fees.

ELECTRONIC SIGNATURE PAGE TO FOLLOW.



Charleston Common Pleas

Case Caption: Nathan Bluestein, plaintiff, et al VS Sullivans Island Town Of Etc, defendant, et al
Case Number: 2010CP1005449
Type: Order/Approval Of Settlement

So Ordered

s/Jennifer B. McCoy #2764

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (“Settlement Agreement”) is given by Nathan Bluestein and Theodore Albenesius, III (Plaintiffs) to the Town of Sullivan’s Island and Sullivan’s Island Town Council (“Town”), collectively referred to as “Parties”, as of this 7th day of October, 2020.

Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius filed a lawsuit against the Town of Sullivan’s Island and Sullivan’s Island Town Council in the Court of Common Pleas for Charleston County, Case No. 2010-CP-10-5449, which was appealed and heard in the South Carolina Court of Appeals, App. No. 2015-002550 and the South Carolina Supreme Court, App. No. 2018-001888 (“Lawsuit”), concerning the municipal ordinances and restrictions regarding the land along the Atlantic Ocean in the Town under a conservation easement and donation to the Town in 1991. Since the Lawsuit was filed, Ettaleah Bluestein, M.D. passed away and Karen Albenesius was divorced from Theodore Albenesius and is no longer a participating Plaintiff in the litigation.

The Parties have now agreed to a resolution of this long-standing dispute, pursuant to the following terms and conditions that have been approved and adopted by the Town Council. This settlement agreement balances the competing needs of beachfront and inland island residents and the ecological and natural interests on the one hand and human needs and safety on the other.

I. RECITALS

Whereas, the Town owns property along the Atlantic Ocean which is known generally as The Accreted Land (AL); and

Whereas, the Town obtained title to the AL by way of a deed from the Low Country Open Land Trust; and

Whereas, the deed contained certain restrictions and covenants, both procedural and substantive; and

Whereas, the deed provides the Town with the unrestricted authority to trim and control the growth of vegetation; and

Whereas, after a decade of litigation the Town and Plaintiffs have reached a voluntary settlement; and

Whereas, the Town recognizes the need to develop a detailed implementation plan to use in conjunction with OCRM; and

Whereas, after preliminary consultation with the Land Trust the Town has received feedback that the Land Trust does not object to the settlement; and

Whereas, the Town is permitted to undertake activity on the AL to enhance mosquito control, engage in scenic enhancement, and to control vegetation pursuant to the following specific written findings of fact;

II. Findings of Fact:

- a. The settlement, and implementing steps associated therewith, are solely undertaken to further specific enumerated, permissible public purposes under the Deed. In this instance, the Town Council believes that thinning of vegetation will serve the interests of improved mosquito control, improved vegetation management, enhanced public safety, improved public health, and scenic enhancement. The current thickness of vegetation, in significant part caused by the "hedging effect" of prior cutting rules, makes it extremely difficult for anti-mosquito treatments to penetrate. There is also an increased prevalence of pests correlated to the growth of the AL over past years with the 2005 cutting rule in effect. Additionally, the level of thickness significantly impedes airflow causing stagnant conditions that is not conducive to healthful and enjoyable living. Further, the thickness of vegetation on the AL allows for rapid spread of wildfire should favorable fire conditions exist. The thinning of myrtles and trees would improve all of these shortcomings. In addition, the cumulative effect of decades of growth has been to alter views from what existed at the time of deed signing. The proposed action would help restore views to a level closer to what were enjoyed at the time the Deed Restrictions were implemented. Finally, excessive plant density (stems per acre) can retard desirable maturation of plant life on the AL and that the thinning proposed herein will allow those stems retained to develop more fully and beneficially. The combination of these factors will not only improve the safety of human habitation on the island, but also improve the overall condition of flora and fauna on the island. The utilization of environmentally sensitive means (use of appropriate equipment, thinning techniques, naturalist approved seeding, etc) can avoid material problems with erosion, particularly in light of the decades of documented natural accretion in this area.
- b. The settlement, and implementing steps associated therewith, are necessary for the health, safety and general welfare of the Town. Reduction in pests and mosquitoes benefits public health, as does fire hazard reduction. Improved airflow is also beneficial, allowing for (among other things) increased opportunities to avoid the need for artificial climate control during the course of a year.
- c. The benefits of the proposed settlement, and implementing steps associated therewith, outweigh any potential damage done to the aesthetic, ecological, scientific and education value of the property in its natural state. The AL is proposed to remain in an undeveloped state. The proposed changes are intended to improve aesthetic conditions. They are also intended to improve wildlife habitat and allow maturation of retained vegetation. Given the diversity and number of stems remaining under the proposed plan, the scientific and educational value of the property will not be undermined but will be enhanced.

d. The Parties have considered

- i. The cumulative effect of actions pursuant to the proposed settlement and past AL related actions on the natural state of the Property. The Town's cutting rules have been unchanged for fifteen years and, in fact, bear striking resemblance to the rules in place at the time the deed restrictions were enacted. Consequently, there is no significant "cumulative" action to be considered. Regardless, the changes proposed here will either not harm or enhance the natural environment of the AL for flora and fauna and will do so in a manner that benefits the island as a whole.
- ii. There are no suitable alternative methods of furthering the stated public benefits that would not adversely impact the natural state of the AL. The principle concern being addressed here is excessive vegetation growth and density leading to all of the problems previously enumerated. The only way to address excessive vegetation growth and density is selective thinning. The current plan represents a selective thinning plan carefully tailored to address these stated concerns while maximizing retained ecological, educational and scientific goals.
- iii. First, the existing conditions (and trend toward increasing vegetation thickness and growth) will continue to mature into an increasing problem. In that sense, taking no action at this point would amount to "action" furthering the undesirable attributes. Second, failure to undertake the proposed settlement would subject the Town and residents to the uncertainty inherent in a trial.

III. Settlement of this litigation is agreed to on terms stated below:

General Approach:

- The Town would implement selective thinning of the Accreted Land (AL), based on initial cut parameters set forth below for each of the four Zones (Transition Zone, Zone 1, Zone 2, and Zone 3.) In order to maintain similar conditions going forward, with the help of a naturalist the Town would review changes in the condition of the AL on a recurring basis (for instance, once every five years) with an eye towards making whatever changes might be necessary to maintain appropriate levels of density and diversity. This would provide a mechanism to deal with natural attrition, growth, or other changes to the natural environment. Primary funding for transition zone work will be from the Town. Funding for work in Zones 1-3 is subject to receipt of adequate donations or grants.
- To facilitate resolution of this case, the Town retained Thomas and Hutton to perform a tree survey which is reflected in the attachments hereto. Due to the lapse of time from the tree survey to the actual performance of the work described herein, the Parties recognize the potential for further tree

growth from the time of the tree survey to the time of the work described. The trees meeting the dimensions for trimming described below and identified in the attached tree survey are the specific trees to be trimmed, cut or removed notwithstanding any growth during that interval.

Zones:

- Zone 1: Station 16 beach path to western edge of property line at 1715 Atlantic (TMS# 523-12-00-014)
- Zone 2: Eastern edge of Zone 1 to Eastern Edge of SIES property
- Zone 3: Eastern edge of Zone 2 to Station 28.5 beach path
- Transition Zone (TZ)

Beach Paths:

- All vegetation to be removed 4' on either side of town owned beach paths/boardwalks
- Private beach paths to be maintained at a width of 6.5' plus additional understory may be cleared to a maximum of 2' on either side (per draft plan 3a.) Cutting and maintenance shall be subject to the receipt by the Town of sufficient grants or donations.

Myrtles (All Zones):

- Allow for 50% of myrtles seaward of TZ to be removed with focus on saving myrtles located in low-lying topography areas
- All remaining myrtles may be cut to a height of 5'
- Property owners abutting town owned beach paths may trim myrtles from non-adjacent property line to beach path (eliminating "no man's land" currently existing in certain areas)
- Current town procedures will apply for annual cutting and payment thereof will apply

Zone 1:

- Keep all Live Oaks, Magnolias, Palmettos
- Remove all Cedar, Pine, Hackberry trees under 12" DBH

- Remove all other tree species under 6" DBH
- Limbing of trees >16" DBH will be allowed with TOSI approval so long as proposed limbing would not harm health of tree.
- Vines on trees may be removed with TOSI approval for health of tree
- All non-native or invasive species may be removed

Zone 2:

- Keep all Live Oaks, Magnolias, Palmettos >6" DBH
- Remove all Cedar, Pine, Hackberry trees under 16" DBH
- Remove all other tree species under 8" DBH
- Limbing of trees allowed with TOSI approval so long as proposed limbing would not harm health of tree.
- Vines located on trees may be removed with TOSI approval for health of tree
- All non-native or invasive species may be removed

Zone 3:

- Keep all Live Oaks, Magnolias, Palmettos >6" DBH
- Remove all Cedar, Pine, Hackberry trees under 18" DBH
- Remove all other tree species under 10" DBH
- Limbing of trees will be allowed with TOSI approval so long as proposed limbing would not harm health of tree.
- Vines on trees may be removed with TOSI approval for health of tree
- All non-native or invasive species may be removed

Transition Zone:

- Trees to be preserved are only Live Oaks, Magnolias, Palm Trees 16" DBH or greater
- All other vegetation to be removed

- 100' seaward of property line of adjacent properties (includes Bayonne right of way)
- Heavy machinery allowed landward of OCRM setback line

Permitting:

Permitting will be required through OCRM. Continued consultation with OCRM and the Land Trust will be important as the Town develops its implementation plan and permit application. The Town will need to engage an engineer and/or technical consultant to develop an appropriate, detailed plan specifying methods and objectives, and to make appropriate regulatory applications. We would expect environmentally appropriate overseeding to be a part of any such plan in order to assure continued soil stability. The Parties agree to cooperate as required to obtain any such permit. The Parties covenant and agree to work in good faith to obtain all permits and complete the work agreed to and described herein. Neither of the Parties shall directly or indirectly, individually or through others, endeavor to interfere with the permitting process.

Funding and Timing:

Thinning of the 2500 Block of Atlantic will proceed with all deliberate speed after formal settlement approval by Council and the funding of the block thinning cost by Plaintiff and/or homeowners in that block. The work shall be done by way of a contract signed by the Town and a vegetation management contractor as appropriate under the Town's procurement process.

Homeowners shall have the right to enter into an agreement with the Town whereby they must provide sufficient funds with the Town within 12 months of the settlement of Bluestein v. Town of Sullivan's Island to cut the property within their block in accordance with the zone specifications contained herein. As described above, using such funds the Town shall hire the approved contractor to complete the thinning. Such cutting will be done on a block by block basis after sufficient funds to thin a particular block are on-hand.

Appeals:

No party shall appeal the issuance of any permits issued for completion of work consistent with the settlement.

Compliance with Law required:

Implementation is subject to compliance with law.

Good Faith and Fair Dealing:

The Parties covenant and agree to work in good faith to obtain all permits and complete the work agreed to and described herein. No Party shall directly or indirectly, individually or through others, endeavor to interfere with the permitting process or the completion of the work described herein.

Incorporation of Charts and Diagrams:

The supporting Charts and Diagrams are attached hereto and shall be incorporated as if set forth fully herein.

Submission of Applications:

The Town agrees to (1) authorize the necessary procurement actions in accordance with Town policy, (2) the development of detailed plans and applications, and (3) the submittal of applications necessary to effectuate this settlement.

IV. Mutual Release

In consideration of the covenants contained in this Settlement Agreement, Nathan Bluestein and Theodore Albanesi, III, their heirs, legal representatives, and assigns, do hereby release, cancel, acquit, relinquish and forever discharge the Town, together with its agents, representatives, attorneys, assigns, affiliates, predecessors, successors, officers, directors, employees, and any and all persons or entities in privity with them ("Releasees") from any and all claims, rights, demands, debts, liabilities, controversies, or causes of action, known or unknown, asserted or unasserted, liquidated or unliquidated, fixed or contingent, of any nature whatsoever including, but not limited to, those pertaining to (a) the Deed for AL; (b) the Ordinances related to the AL; (c) all claims under the Deed or Ordinances and the manner in which the Town interpreted those documents; (d) any claim asserted or assertable in the Lawsuit including, without limitation, claims in contract or in tort, common law or statutory, for actual, multiple, or punitive damages, attorneys' fees, interest and costs; and (e) all claims arising out of any act, transaction, or occurrence through the date hereof relating in any manner to the issues raised in the Lawsuit or which could have been raised in the Lawsuit.

In consideration of the covenants contained in this Settlement Agreement, the Town does hereby release, cancel, acquit, relinquish and forever discharge Nathan Bluestein and Theodore Albanesi, III, their heirs, legal representatives, and assigns, together with their agents,

representatives, attorneys, assigns, affiliates, predecessors, successors, officers, directors, employees, and any and all persons or entities in privity with them (“Releasees”) from any and all claims, rights, demands, debts, liabilities, controversies, or causes of action, known or unknown, asserted or unasserted, liquidated or unliquidated, fixed or contingent, of any nature whatsoever including, but not limited to, those pertaining to (a) the Deed for AL; (b) the Ordinances related to the AL; (c) all claims under the Deed or Ordinances and the manner in which the Town interpreted those documents; (d) any claim asserted or assertable in the Lawsuit including, without limitation, claims in contract or in tort, common law or statutory, for actual, multiple, or punitive damages, attorneys’ fees, interest and costs; and (e) all claims arising out of any act, transaction, or occurrence through the date hereof relating in any manner to the issues raised in the Lawsuit or which could have been raised in the Lawsuit.

V. Dismissal with Prejudice

Nathan Bluestein and Theodore Albenesius, III, agree that the Lawsuit shall be dismissed with prejudice, with each side bearing and paying their own costs, including court costs and attorneys’ fees.

VI. Binding

This Settlement Agreement shall be binding upon and inure to the benefit of all the Parties, and their heirs, successors and assigns.

VII. Disputes


Any Party may commence a legal proceeding to enforce this Settlement Agreement. Any such action shall be brought exclusively in the Court of Common Pleas located in Charleston County, South Carolina.

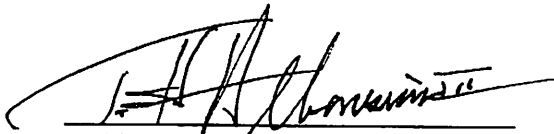
VIII. Miscellaneous Provisions.

- a) Fees and Costs. Each Party shall be solely responsible for the fees and costs he, she, or it has incurred in connection with the Lawsuit.
- b) Acknowledgements. Each Party acknowledges and agrees that this Settlement Agreement was negotiated and drafted with the full participation of the Parties and the Parties' respective counsel; that this Settlement Agreement was negotiated at arms' length and in good faith; that this Settlement Agreement was voluntarily executed after consultation with experienced legal counsel; that the Parties have carefully read the contents of this Settlement Agreement and understand its terms; that the consideration provided to the Parties under this Settlement Agreement is adequate; and that this Settlement Agreement is a legally binding contract with which the Parties will faithfully comply. Each individual signing this Settlement Agreement on behalf of one of the Parties to this Agreement has the authority to execute this Settlement Agreement and bind the entity or person on whose behalf this Settlement Agreement is executed.
- c) Governing Law and Jurisdiction. This Settlement Agreement shall be interpreted and enforced, in all respects, according to the laws of the State of South Carolina.
- d) Time is of the Essence. Time is of the essence as to every provision of this Settlement Agreement.
- e) Interpretation and Severability. The paragraph headings contained in this Settlement Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Settlement Agreement. In interpreting this Settlement Agreement and construing its terms, neither of the Parties shall be deemed to have drafted this Settlement Agreement, and no drafting presumption against either of the Parties shall be applicable to this Settlement Agreement. Should any portion, word, clause, phrase, sentence or paragraph of this Settlement Agreement be declared void or unenforceable, such portion shall be considered independent and severable from the remainder, the validity of which shall remain unaffected.
- f) Modification. This Agreement may not be modified or amended, nor may any of its provisions be waived, except upon mutual agreement of all Parties or their authorized agents in writing.
- g) Counterparts. This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original, all of which together shall constitute one and the same instrument. The Parties agree that as to this Settlement Agreement, electronic copies and signatures have the same force and effect as originals.
- h) Entire Agreement. Each of the Parties acknowledge and agree that this Settlement Agreement constitutes the entire agreement of the Parties hereto with respect to the subject matter of this Settlement Agreement, and each of the Parties further acknowledge and agree that this Settlement Agreement supersedes any and all other agreements, understandings, negotiations, or discussions, either oral or in writing,

express or implied, between one or more of the Parties. The Parties each acknowledge that no representations, inducements, promises, agreements, or warranties, oral or otherwise, have been made by them, or anyone acting on their behalf, which are not embodied in this Settlement Agreement; that they have not executed this Settlement Agreement in reliance on any representation, inducement, promise, agreement, warranty, fact or circumstances, not expressly set forth in this Settlement Agreement; and that no representation, inducement, promise, agreement, or warranty not contained in this Settlement Agreement shall be valid or binding unless executed in writing and signed by all Parties to this Settlement Agreement.

IN WITNESS WHEREOF, we have hereunto set our hand this 7th day of October, 2020.


Nathan Bluestein
2513 Atlantic Ave.
Sullivan's Island, SC 29482


Teddy Albenesius
P.O. Box 60477
North Charleston, SC 29419

IN WITNESS WHEREOF, I have hereunto set my hand this 7th day of October, 2020.

ON BEHALF OF *Town of Sullivan's Island
and Sullivan's Island Town Council*
(*"Town"*):



Derk Van Raalte, Esquire

derk@bradyhair.com

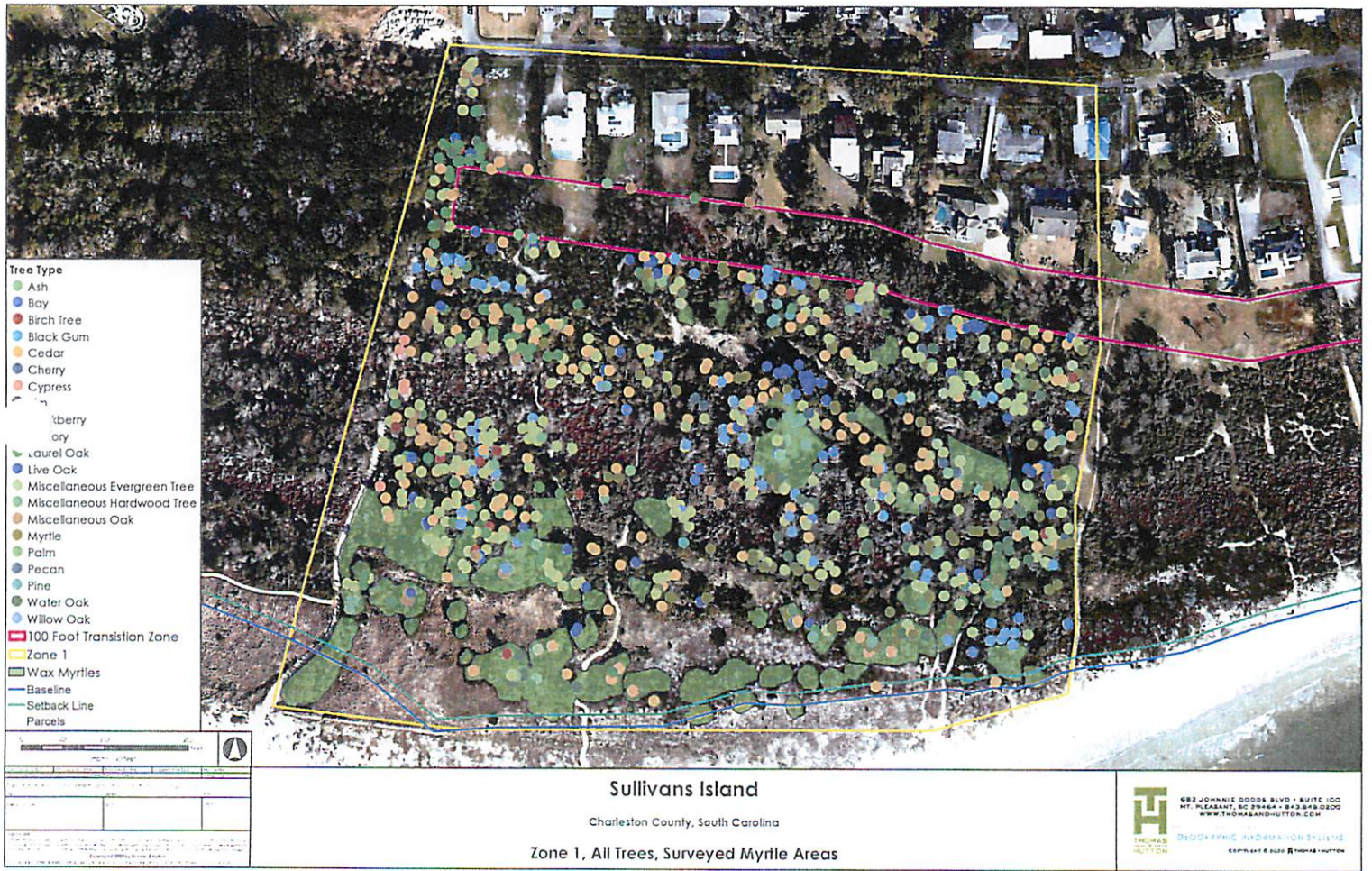
Law Offices of Brady Hair

2500 City Hall Lane (29406)

P. O. Box 61896

North Charleston, SC 29419

P: (843) 572-8700/F: (843) 745-1082



- Tree Type**
- Ash
 - Bay
 - Birch Tree
 - Black Gum
 - Cedar
 - Cherry
 - Cypress
 - Dogwood
 - Hackberry
 - Live Oak
 - Magnolia
 - Myrtle
 - Palm
 - Pecan
 - Pine
 - Water Oak
 - Willow Oak
- 100 Foot Transition Zone
- Zone 1
- Wax Myrtles
- Baseline
- Setback Line
- ▭ Parcels

Scale	1" = 100'
North Arrow	
Legend	
Project Name	Sullivan's Island
Client	Charleston County, South Carolina
Date	2023
Author	Thomas & Hutton
Reviewer	Thomas & Hutton
Scale	1" = 100'
North Arrow	
Legend	
Project Name	Sullivan's Island
Client	Charleston County, South Carolina
Date	2023
Author	Thomas & Hutton
Reviewer	Thomas & Hutton

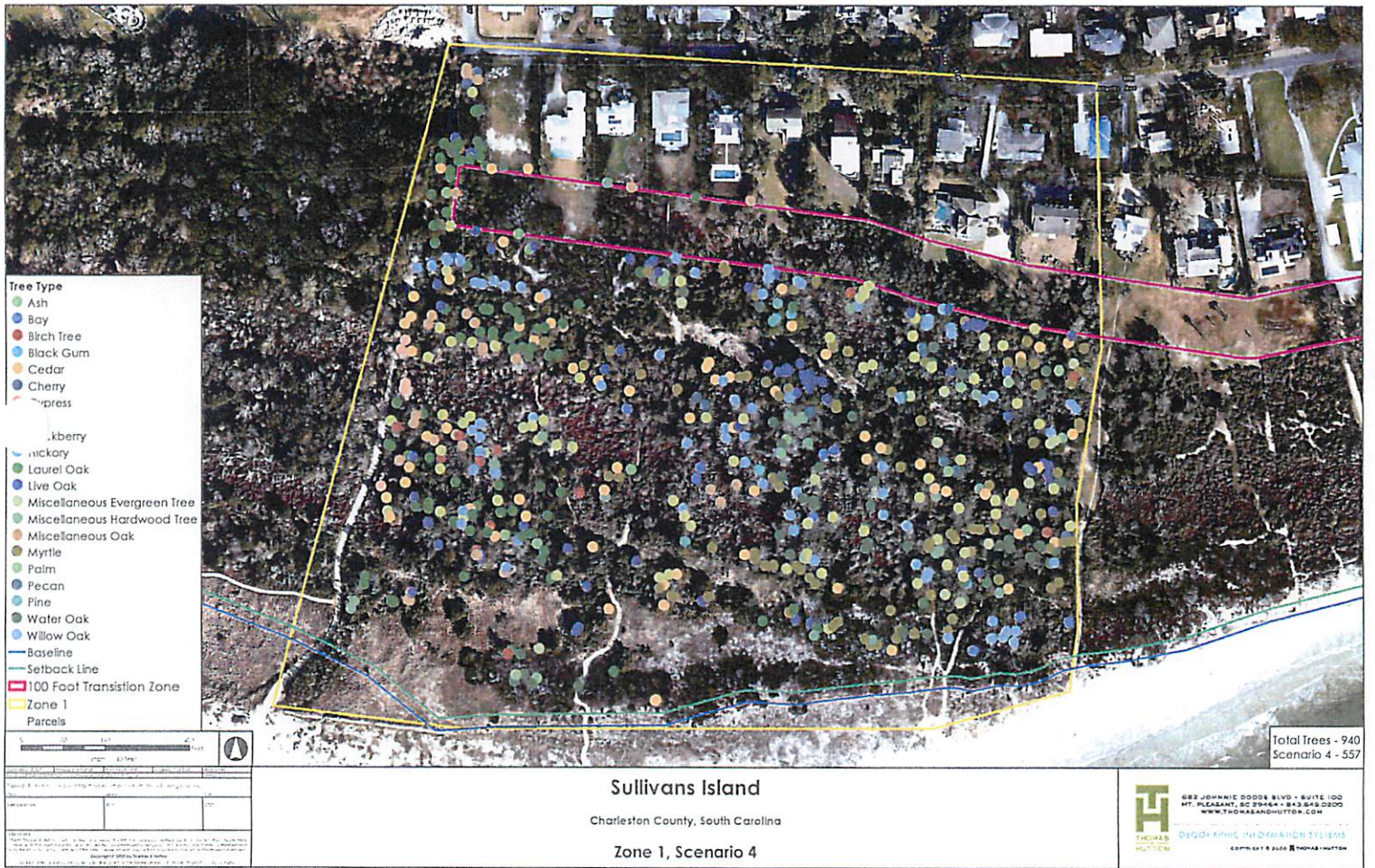
Sullivan's Island

Charleston County, South Carolina

Zone 1, All Trees, Surveyed Myrtle Areas

THOMAS & HUTTON
 682 JOHNNIE DODD BLVD - SUITE 100
 MT. PLEASANT, SC 29464 • 843.848.0200
 WWW.THOMASANDHUTTON.COM

DESCRIPTIVE INFORMATION SYSTEMS
 1000 W. 10TH ST. SUITE 100
 CHARLOTTE, NC 28202 • 704.375.1100







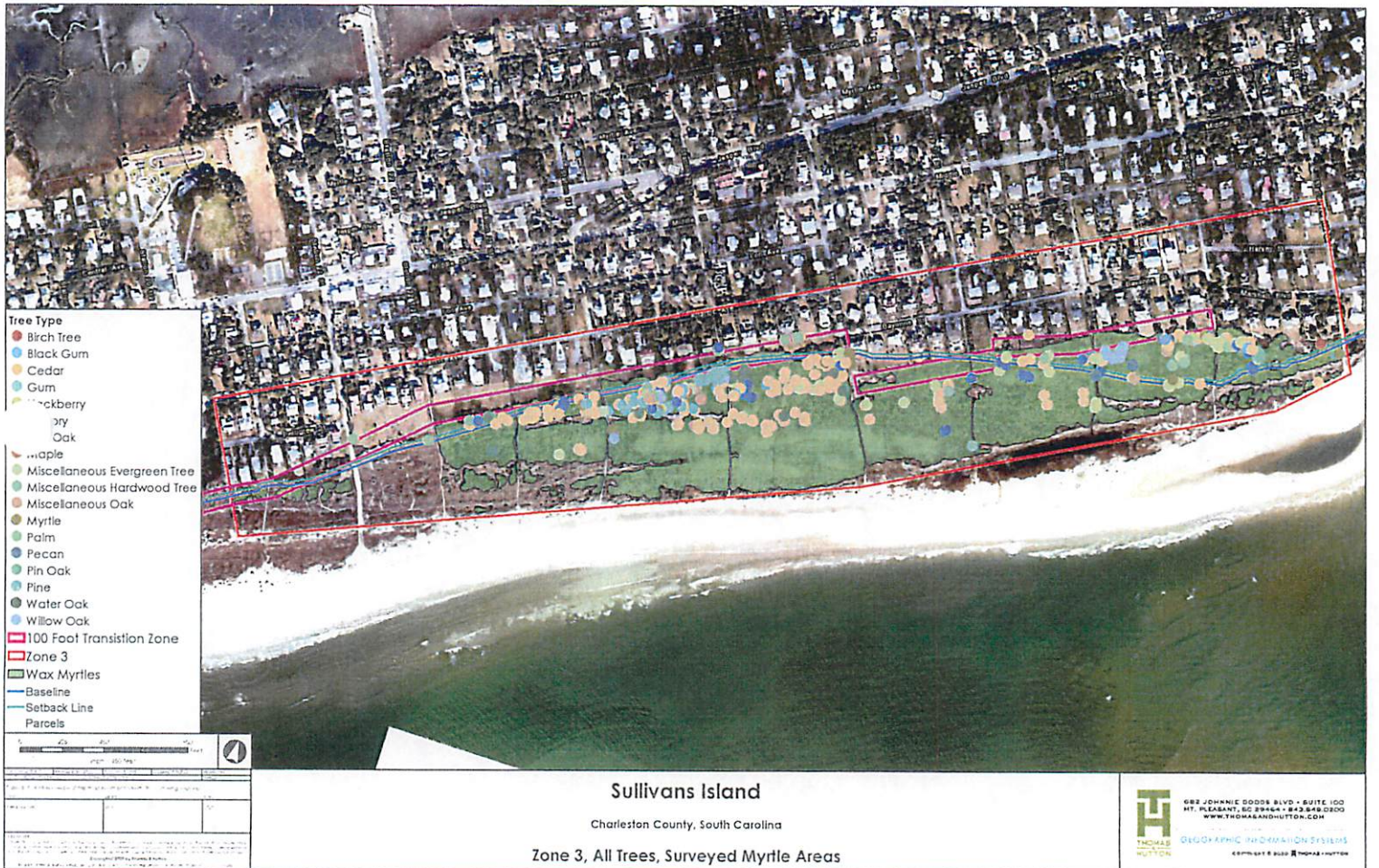
Sullivan's Island

Charleston County, South Carolina

Zone 2, Scenario 4

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Total Trees - 388
Scenario 4 - 88

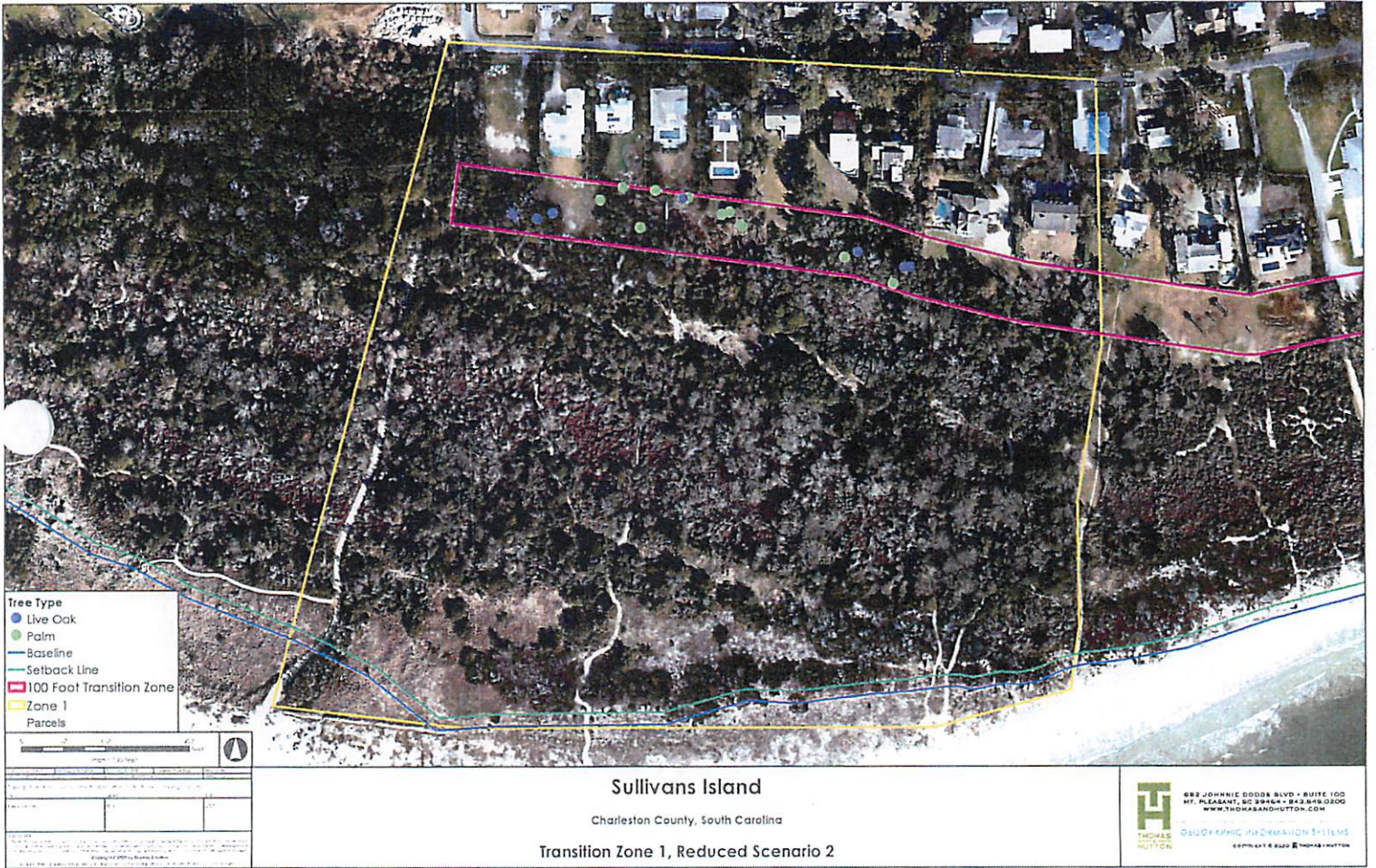
Sullivan's Island

Charleston County, South Carolina

Zone 3, Scenario 4 Revision


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Sullivans Island

Charleston County, South Carolina

Transition Zone 1, Reduced Scenario 2


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 DEPARTMENT OF AGRICULTURE AND FORESTRY
 DIVISION OF FORESTRY
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- Tree Type**
- Ash
 - Birch Tree
 - Cedar
 - Cherry
 - Cypress
 - Laurel Oak
 - Live Oak
 - Miscellaneous Evergreen Tree
 - Miscellaneous Hardwood Tree
 - Miscellaneous Oak
 - Myrtle
 - Palm
 - Pecan
 - Pine
 - Water Oak
 - Willow Oak
- 100 Foot Transition Zone
- Zone 2
- Wax Myrtles
- Baseline
- Setback Line
- ▭ Parcels

Scale		North Arrow	
0	100	Feet	
<p>PROJECT: Sullivan's Island, Charleston County, South Carolina</p> <p>DATE: 10/15/2010</p> <p>BY: Thomas & Hutton</p> <p>PROJECT NO: 10-001</p> <p>DATE: 10/15/2010</p> <p>BY: Thomas & Hutton</p> <p>PROJECT NO: 10-001</p>			

Sullivan's Island

Charleston County, South Carolina

Transition Zone 2, All Trees, Surveyed Myrtle Areas

THOMAS & HUTTON

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 WWW.THOMASANDHUTTON.COM

GIS GEOGRAPHIC INFORMATION SYSTEMS


ESTABLISHED 1980



- Tree Type**
- Live Oak
 - Palm
 - Baseline
 - Setback Line
 - ▭ 100 Foot Transition Zone
 - ▭ Zone 2
 - ▭ Parcels

Scale: 1 inch = 200 feet		North Arrow

Sullivans Island
 Charleston County, South Carolina
 Transition Zone 2, Reduced Scenario 2


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 GEOSPATIAL INNOVATION SYSTEMS
CELEBRATING 60 YEARS



Sullivan's Island

Charleston County, South Carolina

Transition Zone 3, All Trees, Surveyed Myrtle Areas


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 DESIGN AND INFORMATION SYSTEMS
 CONSULTING & SOLUTIONS



- Tree Type**
- Live Oak
 - Magnolia
 - Palm
- Baseline**
- Setback Line**
- 100 Foot Transition Zone**
- Zone 3**
- Parcels**

Scale: 1" = 100'		North Arrow
0	100	
<p>Map Date: 10/15/2019</p> <p>Map Title: Sullivan's Island - Transition Zone 3, Reduced Scenario 2</p> <p>Map Author: Thomas Hutton</p> <p>Map User: Thomas Hutton</p> <p>Map Project: Sullivan's Island - Transition Zone 3, Reduced Scenario 2</p> <p>Map Status: Final</p> <p>Map Scale: 1" = 100'</p> <p>Map Units: Feet</p> <p>Map Projection: NAD 83 / UTM Zone 18N</p> <p>Map Datum: NAD 83</p> <p>Map Contour Interval: 10'</p> <p>Map Contour Style: Dotted</p> <p>Map Contour Color: Green</p> <p>Map Contour Width: 2px</p> <p>Map Contour Offset: 0'</p> <p>Map Contour Label: 10'</p> <p>Map Contour Label Color: Black</p> <p>Map Contour Label Size: 10pt</p> <p>Map Contour Label Angle: 0</p> <p>Map Contour Label Placement: Inside</p> <p>Map Contour Label Offset: 0'</p> <p>Map Contour Label Offset Angle: 0</p> <p>Map Contour Label Offset Distance: 0'</p> <p>Map Contour Label Offset Angle Distance: 0'</p> <p>Map Contour Label Offset Distance Angle: 0'</p> <p>Map Contour Label Offset Angle Distance Angle: 0'</p>		

Sullivan's Island

Charleston County, South Carolina

Transition Zone 3, Reduced Scenario 2


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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
)	
Nathan Bluestein, Ettaleah Bluestein, Theodore)	C/A No. 10-CP-10-5449
Albenesius and Karen Albenesius)	
)	
)	ORDER AMENDING SETTLEMENT
)	
<i>Plaintiffs,</i>)	
)	
Versus)	
)	
Town of Sullivan’s Island and Sullivan’s)	
Island Town Council,)	
)	
<i>Defendants.</i>)	

WHEREAS, this Court previously entered a Consent Order approving settlement of the above-captioned litigation based upon terms and conditions jointly agreed upon by the Parties; and

WHEREAS, the execution of the terms of that settlement Order required the Parties to obtain various permits and authorizations from State and/or Federal regulatory agencies; and

WHEREAS, based on field conditions encountered during the preparation of regulatory applications, all Parties agree that amendment of the Settlement terms and conditions would be mutually beneficial in order to properly address anticipated third-party regulatory concerns; and

WHEREAS, based on the above, it appears that relief under Rule 60(b)(5) is appropriate because it would not be equitable or desirable for the parties to further seek to implement the settlement as originally written and the Parties are in agreement that the revised terms attached hereto further the spirit of the original settlement agreement and allow the flexibility needed to conform with guidance from third-party regulatory agencies.

IT FURTHER APPEARING in the discretion of this Court that such settlement, as amended, is proper and in the best interest of all Parties, it is

ORDERED, ADJUDGED AND DECREED that this Court's Prior Order be Amended as follows:

1. The Work Plan attached hereto as Exhibit A shall replace the scope of work described in the original Settlement Order. Should third-party regulatory feedback or guidance be received suggesting further work plan changes the Parties may jointly agree to further modify this plan to address such feedback or guidance. Should one Party decline a modification suggested based on third-party regulatory feedback or guidance the other Party shall not be deemed at-fault or held responsible if permitting fails on that basis. The Town shall not unreasonably withhold consent to a proposed modification so long as the proposed modification would not result in cutting/trimming/pruning that is more aggressive than that detailed on the subject in the Settlement Agreement and Order originally executed in this case.
2. The twelve (12) month period referenced on page 6 of the Original Settlement Agreement, which originally commenced as of the date of original settlement, shall now commence on the date the Town receives necessary regulatory approvals to allow the proposed scope of work to proceed.
3. For the purpose of clarification, tree measurements referenced in this document and the Settlement Agreement refer to the size of specific trees as reported in geothinQ by the name "Sullivan's Island Tree Survey, 2015."
4. The Parties' statements of general intent, goals, and desire to balance various interests as described in the original Settlement Agreement remain valid.

5. As a guiding principle, it is generally intended that trees and other vegetation designated for removal under the original settlement plan that will now be retained under this work plan will be trimmed / pruned by TOSI in a manner to promote adequate views and breezes, provided a Town arborist opines that the proposed extent of such trimming / pruning will not likely endanger the long-term survival of the plant.

ELECTRONIC SIGNATURE PAGE TO FOLLOW.



Charleston Common Pleas

Case Caption: Nathan Bluestein, plaintiff, et al VS Sullivans Island Town Of Etc,
defendant, et al
Case Number: 2010CP1005449
Type: Order/Amend

So Ordered

s/Jennifer B. McCoy #2764



682 JOHNNIE DODDS BOULEVARD, SUITE 100 | POST OFFICE BOX 1522
MT. PLEASANT, SC 29464 | 843.849.0200
WWW.THOMASANDHUTTON.COM

TO: USACOE, OCRM, SCDHEC-BOW
FROM: Tony M. Woody, PE
Thomas & Hutton
DATE: March 10, 2021
SUBJECT: Sullivan's Island Accreted Lands
Work Plan
JOB NO.: 25357.0002

1.0 NARRATIVE

On October 7, 2020 the Town of Sullivan's Island entered into a Settlement Agreement to end a decade long lawsuit and agreed to thin the vegetation on the Accreted Lands to serve the interest of improved mosquito control, improved vegetation management, enhanced public safety, improved public health, and scenic enhancement. The vegetation thinning will be accomplished by utilization of environmentally sensitive means (use of appropriate equipment, thinning techniques, naturalist approved seeding, etc) and can avoid material problems with erosion, particularly in light of documented natural accretion in the area.

The Accreted Lands are located on the southern portion of Sullivan's Island in TMS #523-12-00-077, 529-09-00-112 (two parcels), 529-10-00-087, and a portion of TMS #529-09-00-068. The total area is approximately 147 acres, and is divided into three Zones... 1, 2, and 3, and a Transition Zone that is part of all three Zones. The Zones were established to identify different thinning approaches to better represent the different environments of each zone.

The attached Work Plan Exhibit identifies the three Zones, and the Transition Zone, the Beach Front Baseline and Setback Line, the Dune Line (in Zone 3), and the delineated Freshwater Wetlands (pending USACOE review). The description below identifies the work to be accomplished along with the means and methods within each zone, inside and outside of the Freshwater Wetlands, landward and seaward of the Beach Front Setback Line, and landward and seaward of the Dune Line.

The goal of this technical paper is to describe the work (thinning and removal of existing vegetation) along with the means and methods of accomplishing the work with enough clarity and in enough detail to allow Federal and State agencies with permitting authority to determine if the proposed activities will require a permit.

2.0 GENERAL

- A. In order to be respectful of habitat during breeding seasons, work to be planned to commence and conclude during the period between November 1st and February 28th. If field or other unexpected conditions delay progress on work commenced during this period then such work will be completed as near as possible to February 28th.
- B. TOSI will retain expertise to determine on a daily basis if conditions are suitable to work during the work period identified above. The determination will include weather patterns and soil moisture condition.
- C. When present, stumps will remain in place and treated with a herbicide approved for use in the associated environment to prevent new growth.
- D. No removal of vegetation that disturbs the soil will occur and no fill including incidental fill will be placed in Freshwater Wetlands.
- E. Unless otherwise specified below, trees and other vegetation removed from the Accredited Lands will be transferred to an inland site on Sullivan's Island outside of the Accreted Lands, chipped, and disposed of in accordance with Local and State regulations.
- F. Existing beach access paths will be used to the maximum extent practicable. Alternate routes and dispersed routes may be utilized where it appears that geographically dispersed activity, rather than concentrated activity, would be more protective of the natural environment.

3.0 TRANSITION ZONE LANDWARD OF SETBACK LINE IN ZONES 1, 2, AND LANDWARD OF DUNE LINE IN ZONE 3

- A. Retain all Live Oaks, Magnolias, and Palm trees 16" DBH or greater. Lesser size species and other species will be cut to the extent reasonably practicable given existing field conditions.
- B. Trees and shrubs 3" DBH and smaller shall be cut at ground level and mulched in place if located outside of wetland or removed if located inside a wetland. Cutting of such material will be by chainsaw or similar device if located inside a wetland.
- C. Trees and shrubs removed greater than 3" DBH shall be cut by chainsaw and carried offsite with small non powered equipment.
- D. Stumps will remain in place.
- E. Vines will be removed as determined by TOSI.

4.0 TRANSITION ZONE SEAWARD OF SETBACK LINE IN ZONES 1, 2, AND SEAWARD OF DUNE LINE IN ZONE 3

- A. No tree or shrub removal proposed.
- B. Vegetation will be pruned or trimmed by TOSI after receipt of an arborist opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant material.
- C. Vines will be removed as determined by TOSI.

5.0 ZONE 1 OUTSIDE OF TRANSITION ZONE AND LANDWARD OF THE SETBACK LINE

- A. Myrtles that are inside Freshwater Wetlands – All myrtles to be trimmed to a minimum height of 3 feet.
- B. Myrtles that are outside of Freshwater Wetlands – 50% of myrtles to be cut at the ground. Remaining 50% to be trimmed to 5 feet. TOSI to identify the areas to be cut and retained based on field conditions, aesthetics, habitat, and natural considerations.
- C. Trees and shrubs 3" DBH and smaller that are specified for removal shall be cut at ground level and mulched in place outside of wetland areas, and shall be cut at ground level and removed from the site inside wetland areas.
- D. Trees specified for removal that are greater than 3" DBH shall be cut at ground level and removed from the site.
- E. Retain all Live Oaks, Magnolias and Palmettos. Retain all non-specified tree species if 6" DBH or larger. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.
- F. Retain all non-specified tree species if 6" DBH or larger. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.
- G. Retain all Cedar, Pine, and Hackberry Trees 12" DBH or greater. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.
- H. Remaining plant material will be trimmed or pruned as determined by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant.
- I. Vines will be removed as determined by TOSI.

6.0 ZONE 2 OUTSIDE OF TRANSITION ZONE AND LANDWARD OF SETBACK LINE

- A. Myrtles that are inside Freshwater Wetlands - All myrtles shall be trimmed to a minimum height of 3 feet.
- B. Myrtles that are outside of Freshwater Wetlands - 50% of myrtles shall be cut at the ground. Remaining 50% shall be trimmed to 5 feet. TOSI to identify the areas to be cut and retained based on field conditions, aesthetics, habitat, and natural considerations.
- C. Trees and shrubs 3" DBH and smaller that are specified for removal shall be cut at ground level and mulched in place outside of wetland areas, and shall be cut at ground level and removed from the site inside wetland areas.
- D. Trees and shrubs specified for removal that are greater than 3" DBH shall be cut at ground level and removed from the site.
- E. Retain all Live Oaks, Magnolias and Palmettos 6" DBH or greater. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.
- F. Retain all non-specified tree species if 8" DBH or larger. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.
- G. Retain all Cedar, Pine, and Hackberry Trees 16" DBH or greater. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.
- H. Remaining plant material will be trimmed or pruned as determined by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant.
- I. Vines will be removed as determined by TOSI.

7.0 ZONES 1 AND 2 SEWARD OF SETBACK LINE

- A. Myrtles shall be trimmed to a minimum height of 3'.
- B. No tree or shrub removal proposed.
- C. Vines will be removed as determined by TOSI.
- D. Vegetation other than myrtles will be pruned or trimmed by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant material.

8.0 ZONE 3 OUTSIDE OF TRANSITION ZONE AND LANDWARD OF DUNE LINE

- A. Myrtles that are inside Freshwater Wetlands - All myrtles shall be trimmed to a minimum height of 3 feet.
- B. Myrtles that are outside of Freshwater Wetlands - 50% of myrtles shall be cut at the ground. Remaining 50% shall be trimmed to 5 feet. TOSI to identify the areas to be cut and retained based on field conditions, aesthetics, habitat, and natural considerations.
- C. Retain all Live Oaks, Magnolias and Palmettos 6" DBH or greater. Lesser size specimens will be removed to the extent reasonably practicable given existing field conditions.
- D. Non-specified species 10" DBH or greater shall be retained. Lesser size specimens may be cut at ground level to the extent reasonably practicable given existing field conditions.
- E. Retain all Cedar, Pine, and Hackberry Trees 18" DBH or greater. Lesser size specimens may be cut at ground level to the extent reasonably practicable given existing field conditions.
- F. Trees and shrubs 3" DBH and smaller shall be cut at ground level and mulched in place outside of freshwater wetland areas, and shall be cut at ground level and removed from the site inside freshwater wetland areas.
- G. Remaining plant material will be trimmed or pruned as determined by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant.
- H. Vines will be removed as determined by TOSI.

9.0 ZONE 3 SEAWARD OF THE DUNE LINE

- A. Myrtles shall be trimmed to a minimum height of 3'.
- B. No trees or shrubs to be removed.
- C. Vegetation other than myrtles will be trimmed or pruned as determined by TOSI after receipt of an arborist's opinion that the proposed trimming or pruning will not likely endanger the long-term survival of the plant.