

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 843-720-5270
Facsimile 843-720-5240
SouthernEnvironment.org

P.O. Box 609
Charleston, SC 29402-0609

Street Address:
38 Broad Street, Suite 200
Charleston, SC 29401-3042

Charlottesville, VA
Chapel Hill, NC
Atlanta, GA

November 25, 2009

VIA EMAIL AND U.S. MAIL - CERTIFIED AND RETURN RECEIPT REQUESTED

Roy E. Belser
EBC, LLC D/B/A/ EBCSC, LLC
407 N. Pike East
Sumter, SC 29153

Re: Lynn Vicary, Kent Prouse, and South Carolina Coastal Conservation League v. Town
of Awendaw and EBC, LLC

Dear Mr. Belser:

Please find the enclosed copies in connection with the above-referenced matter:

1. A summons;
2. A complaint; and
3. Plaintiffs' Notice of Intent to Contest Extension of Town of Awendaw's Municipal Limits.

If you have any questions regarding these documents, please do not hesitate to contact me.

Yours very truly,



Christopher K. DeScherer

Enclosures

cc: W. Jefferson Leath, Esq.
Thomas S. Tisdale, Esq.
M. Jeffrey Vinzani, Esq.

STATE OF SOUTH CAROLINA,)
)
COUNTY OF CHARLESTON)
)
Lynne Vicary, Kent Prause, and South)
Carolina Coastal Conservation League)
Plaintiff,)

IN THE COURT OF COMMON PLEAS

SUMMONS

vs.)
)
Town of Awendaw, and EBC, LLC)
Defendant.)

FILE NO. 09-CP-10-2399
BY
JUDGE J. ARMSTRONG
CLERK OF COURT
2009 NOV 25 AM 10:55
FILED

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Charleston, South Carolina

C. DeScheer

Plaintiff/Attorney for Plaintiff

Dated: 11-25-09

Address: 38 Broad Street, Suite 200
Charleston, SC 29401

P.O. Box 609
Charleston, SC 29402

vs.

CIVIL ACTION COVERSHEET

09 -CP-10 - 7399

(Please Print)

Submitted By: Christopher K. DeScherer

Address: 38 Broad Street, Suite 200

Charleston, SC 29401

SC Bar #: 77753

Telephone #: 843. 720. 5270

Fax #: 842. 720. 5240

Other:

E-mail: cdescherer@selcsc.org

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint.
NON-JURY TRIAL demanded in complaint.
This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts: Constructions (100), Debt Collection (110), Employment (120), General (130), Breach of Contract (140), Other (199)
Torts - Professional Malpractice: Dental Malpractice (200), Legal Malpractice (210), Medical Malpractice (220), Previous Notice of Intent Case # 20 -CP- -, Notice/ File Med Mal (230), Other (299)
Torts - Personal Injury: Assault/Slander/Libel (300), Conversion (310), Motor Vehicle Accident (320), Premises Liability (330), Products Liability (340), Personal Injury (350), Wrongful Death (360), Other (399)
Real Property: Claim & Delivery (400), Condemnation (410), Foreclosure (420), Mechanic's Lien (430), Partition (440), Possession (450), Building Code Violation (460), Other (499)
Inmate Petitions: PCR (500), Mandamus (520), Habeas Corpus (530), Other (599)
Judgments/Settlements: Death Settlement (700), Foreign Judgment (710), Magistrate's Judgment (720), Minor Settlement (730), Transcript Judgment (740), Lis Pendens (750), Transfer of Structured Settlement Payment Rights Application (760), Other (799)
Administrative Law/Relief: Reinstate Driver's License (800), Judicial Review (810), Relief (820), Permanent Injunction (830), Forfeiture-Petition (840), Forfeiture-Consent Order (850), Other (899)
Appeals: Arbitration (900), Magistrate-Civil (910), Magistrate-Criminal (920), Municipal (930), Probate Court (940), SCDOT (950), Worker's Comp (960), Zoning Board (970), Public Service Commission (990), Employment Security Comm (991), Other (999)
Special/Complex /Other: Environmental (600), Automobile Arb. (610), Medical (620), Other (699), Pharmaceuticals (630), Unfair Trade Practices (640), Out-of State Depositions (650), Motion to Quash Subpoena in an Out-of-County Action (660), Sexual Predator (510)

Submitting Party Signature: [Signature]

Date: 11-25-09

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

LYNNE VICARY, KENT PRAUSE, and
SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,

Plaintiffs,

v.

TOWN OF AWENDAW, and EBC, LLC,

Defendants.

CASE NO. 09-CP-10-7309

COMPLAINT
(Declaratory and Injunctive Relief Sought)

FILED
2009 NOV 25 AM 10:11
JULIE J. ARNOLD
CLERK OF COURT

SUMMARY OF CLAIMS

1. In this Complaint, Plaintiffs challenge three actions undertaken by the Town of Awendaw (the "Town") through three separate ordinances to (1) approve a development agreement for a private in-holding in the Francis Marion National Forest, the "Nebo Tract," (2) amend the Town's Comprehensive Plan to include the agreed-upon development, and (3) rezone the Nebo Tract. The Town approved all three actions at an October 1, 2009 Town Council Meeting, but it had no authority to do so for several reasons, each of which is fatal to the actions complained of by the Plaintiffs. First, the Town has no authority over the Nebo Tract, which lies outside its incorporated limits and is not contiguous to the Town. Having no jurisdiction over the property, the Town cannot lawfully rezone it or authorize its development. Second, the Town deprived the public of the opportunity to provide meaningful input and to fully use the public process to stop its illegal actions by failing to follow the notice-and-hearing procedures required by statute to precede approval of the development agreement and the amendment of the Comprehensive

Plan. Finally, each of the three contested actions violates the specific substantive laws governing each action.

INTRODUCTION

2. In this Complaint, Plaintiffs Lynne Vicary, Kent Prause, and the South Carolina Coastal Conservation League (“League”) allege that actions taken by Defendant Town of Awendaw, including but not limited to, the entering into of a development agreement (the “Development Agreement”) relating to the Nebo Tract – an in-holding in the Francis Marion National Forest owned by Defendant EBC, LLC D/B/A EBCSC, LLC (“EBC”); the amendment of the Town’s Comprehensive Plan; and the rezoning of the Nebo Tract violate the South Carolina Local Development Agreement Act., S.C. Code Ann. § 6-31-10 *et seq.*, Title 6, Chapter 29 of the S.C. Code, and other applicable South Carolina laws and regulations. The Town of Awendaw, South Carolina, is located about 20 miles north of Charleston and is sandwiched between two federally-protected areas, the Francis Marion National Forest and Cape Romain National Wildlife Refuge. This area is one of the most valuable ecological zones remaining on the Atlantic coast. The Francis Marion National Forest is comprised of many important natural habitats, including longleaf pine forests, freshwater swamps, pitcher plant flats, and rare Carolina Bays. As well as providing habitat for a number of uncommon species, such as the Swallow-tailed Kite, it is, most significantly, home to one of the world’s largest populations of the federally-protected red-cockaded woodpecker and is designated as one of the species’ core recovery populations. In addition, this unique area supports a number of other federally-protected and sensitive species, including the Flatwoods salamander, which has been nearly extirpated from South Carolina but was last documented in the Francis Marion. Not only is the Nebo Tract

mostly surrounded by the Francis Marion, it is also close to Cape Romain National Wildlife Refuge, which provides habitat for federally protected species and has been classified as an Outstanding Resource Water by the state of South Carolina. By allowing for intensive residential and commercial development of the Nebo Tract, the violations of law alleged herein have negatively impacted and will continue to harm one of the most important ecological areas on the Atlantic coast, including the Francis Marion, a sensitive resource of national significance that is owned and managed for the benefit of the public.

JURISDICTIONAL FACTS AND PARTIES

3. This Court, pursuant to S.C. Code Ann. § 6-29-760 and other law, has jurisdiction over the Plaintiffs' claims, and venue for this action is proper in Charleston County.
4. Plaintiffs Lynne Vicary and Kent Prause are residents and owners of real property in Awendaw, South Carolina. Ms. Vicary owns property bearing Charleston County Parcel Identification Numbers 700-00-00-178 and 700-00-00-050. Mr. Prause owns property bearing Charleston County Parcel Identification Number 680-00-00-076.
5. Plaintiff Coastal Conservation League is a not-for-profit corporation organized and existing under the laws of South Carolina with approximately five thousand members, including members who reside and own property in the Town of Awendaw.
6. The Defendant Town of Awendaw is a municipality incorporated under the laws of South Carolina and is located in Charleston County.
7. The Defendant EBC, LLC D/B/A EBCSC, LLC is, upon information and belief, a limited liability company organized under the laws of Illinois that owns a private in-holding that is surrounded on three sides by the Francis Marion National Forest. This property is approximately 359.51 acres in size and is known as the "Nebo Tract." The

property can be identified by Charleston County Parcel Identification Numbers 625-00-00-004, -006, & a portion of -041.

BACKGROUND

8. On July 10, 2009, EBC filed two petitions with the Town of Awendaw to annex two portions of the Nebo Tract (Charleston County Parcel Identification Numbers 625-00-00-004 and 006) into the Town. On September 14, 2009, EBC filed a third petition seeking annexation of another piece of the Nebo Tract (a portion of the property bearing Charleston County Parcel Identification Number 625-00-00-041). Upon information and belief, these petitions were made on the theory that the Nebo Tract was contiguous with parcels that had been the subject of previous annexation attempts by the Town: a ten-foot wide strip of the Francis Marion National Forest (extending along the frontage of Charleston County Parcel Identification Numbers 629-00-00-224, 303, & 305 and continuing to Number 625-00-00-005) (hereinafter the "Ten-Foot Strip of the Francis Marion") and the Nebo Church tract (Charleston County Parcel Identification Number 625-00-00-005) (hereinafter the "Nebo Church Tract").

9. In 2004, the Town attempted annexations of the Ten-Foot Strip of the Francis Marion and of the Nebo Church Tract. On or about January 23, 2004, the Town sent the United States Forest Service a letter requesting that the Forest Service grant the Town use of the Ten-Foot Strip of the Francis Marion for annexation by the Town. The January 23, 2004 letter explained that the Town needed the Forest Service's assistance in this regard to establish the contiguity required to annex the Nebo Church Tract and for other future annexations of property. Upon information and belief, the Forest Service never agreed to

provide the assistance requested; it did not petition for annexation of its property, nor did it so much as return correspondence acquiescing to the Town's proposal to annex the National Forest land at issue without a petition. Nevertheless, the Town passed an annexation ordinance stating that a proper petition had been filed for annexation of the Ten-Foot Strip of the Francis Marion and purporting to accept an annexation petition.

10. Upon information and belief, this is not the first time that the Town has attempted to annex a strip of the Francis Marion National Forest without having received an annexation petition as required under S.C. Code Ann. § 5-3-140. Upon information and belief, as far back as 1994, the Town began annexing strips of National Forest land to reach other properties adjacent to the Francis Marion but separated from the Town's incorporated limits, allowing for pockets of development divided by expanses of undeveloped forest land.

11. The Town's annexation of the Ten-Foot Strip of the Francis Marion was void and of no effect because the Town never received a Petition of Annexation from the owner of the Ten-Foot Strip of the Francis Marion, the United States Forest Service. Because the annexation of the Ten-Foot Strip was *ultra vires* of the Town's authority, the subsequent annexations of the Nebo Church Tract and the Nebo Tract fail because these tracts lack contiguity with the Town. As such, Plaintiffs have this same day filed a Notice of Intention to Contest Extension of Town of Awendaw's Municipal Limits with the clerk of the Town of Awendaw and the clerk of this Court pursuant to S.C. Code Ann. § 5-3-270. Within thirty days of the filing of this Complaint, Plaintiffs will file an amended complaint to add claims challenging the annexations of the Nebo Tract, the Nebo Church Tract, and the Ten Foot Strip of Francis Marion National Forest.

12. Up until October 1, 2009, the Nebo Tract was subject to the zoning and other ordinances of the County of Charleston. The Nebo Tract was zoned Agricultural Preservation District (AG-10), which permitted no more than one house per every ten acres of land or one house per every five acres of land under a Planned Development. This Agricultural Preservation zoning designation helped to preserve the rural character of this property while allowing a limited amount of development.

13. On or about October 1, 2009, the Town of Awendaw adopted a series of ordinances pursuant to which the Town allegedly annexed the Nebo Tract, entered into the Development Agreement with EBC, amended the Town's comprehensive plan, and rezoned the property. Together these actions sought to authorize extensive residential and commercial development of the Nebo Tract (*e.g.*, the Development Agreement allows for up to 360 residential units and up to ninety thousand (90,000) square feet of gross floor area for commercial uses and eighty thousand (80,000) square feet of gross floor area for office uses).

14. As a direct result of the adoption of the ordinances just described, Plaintiffs are aggrieved and have suffered an injury in fact which is concrete and particularized, actual or imminent, and is directly traceable to the ordinances. Plaintiffs' injuries will be redressed by a decision in their favor in this matter.

15. Plaintiffs Lynne Vicary and Kent Prause reside and own property in Awendaw and use the Francis Marion National Forest for recreation and other outdoor pursuits, which are and will be adversely affected by the purported rezoning of the Nebo Tract, its purported exclusion from the zoning imposed by the County of Charleston, its purported

new zoning as established by the Development Agreement, and the purported amendment to the Town's Comprehensive Plan to include the rezoned development.

16. The League is an environmental organization dedicated to protecting the natural environment of the South Carolina coastal plain and to enhance the quality of life of South Carolina communities by working with individuals, businesses, and government to ensure balanced solutions. The League advocates sound growth management that is the product of environmentally aware regional planning that designates areas for rural preservation and other areas for suburban growth to prevent needless urban sprawl into rural areas. Among the many hazards and costs of needless and ill-considered suburban sprawl into remote areas are that (a) lands rural in character with their traditional communities and culture are irrevocably altered forever, (b) important and irreplaceable natural resources and habitat, such as the Francis Marion National Forest, are degraded or destroyed, (c) wildlife is displaced and wildlife populations diminished, (d) public wetland resources, such as oysterbeds and fisheries, are damaged, (e) the cost of providing public facilities, infrastructure, and services exceeds the public revenues derived from the developed areas, and (f) taxpayers' monies are used to subsidize private development. The members of the League, especially those in the Town and Charleston County, are taxpayers who participate in the observance of wildlife and enjoyment of the outdoors, including recreation in the Francis Marion, and believe in sound municipal fiscal and development policies. The League's members within the Town and the individual Plaintiffs will suffer an individualized injury from the conduct at issue in this action.

17. The Forest Service manages the Francis Marion National Forest according to a multiple-use plan to preserve the health of these public lands for the benefit of present and

future generations. As members of the public who use and enjoy the public land which is managed for their benefit and which largely surrounds the Nebo Tract, Plaintiffs are adjoining landowners and representatives under S.C. Code Ann. § 6-29-760(C).

18. The individual Plaintiffs and members of the League are taxpayers who will suffer a concrete and individualized injury from the conduct at issue in this action, which requires the Town to expend taxpayer funds to maintain and construct infrastructure and provide services necessary to support a development outside its bounds and without complying with applicable law.

19. Plaintiffs are acting within the public interest by challenging an unprecedented development in the heart of a National Forest, which is premised on illegal and *ultra vires* acts and stands to severely impact the Forest and the public's use and enjoyment thereof. The actions complained of impact public lands and a uniquely biodiverse area that is home to natural resources of state and national significance. In addition to authorizing development of and agreeing to provide services for land over which the Town has no jurisdiction, the Town's actions raise important issues regarding Comprehensive Planning, zoning, and development agreements that require resolution for future guidance. The Town is required by law to review and amend its Comprehensive Plan pursuant to a systematic process and in keeping with the strictures of S.C. Code Title 6, Chpt. 29, Art. 3. If permitted to bypass the statutory requirements for the Comprehensive Planning Process by suddenly and arbitrarily declaring its Plan inclusive of a development that will fundamentally alter the Town without following or establishing the procedures required by statute, without undertaking any planning concerning the effects the development at issue, and without considering any of the factors the statute mandates that a Comprehensive Plan

address, the Plan becomes a meaningless formality; the effort put into its development is therefore wasted. Worse, the purported amendment then becomes the vehicle for arbitrary and unreasonable rezoning. Similarly, a Town should not be permitted to evade the requirements of the Development Agreement Act by failing to provide required notice and purporting to establish agreement as to responsibilities for necessary infrastructure by designating an “either or” of the only available options that provides no more clarity or certainty for the Town and its residents and taxpayers than if no agreement had been entered into at all.

20. The Nebo Tract forms part of a larger in-holding, the “Fairlawn Plantation,” mostly surrounded by the Francis Marion National Forest. Upon information and belief, the Town plans to continue using the Ten-Foot Strip of the Francis Marion to establish contiguity needed for the Town to pass ordinances annexing and enabling development of additional tracts of the Fairlawn Plantation. Resolution of the issues raised in this action is especially warranted for future guidance concerning this anticipated development and impacts to public lands with unique ecological importance.

21. The purported amendment to the Comprehensive Plan of the Town of Awendaw and the purported rezoning of the Nebo Tract to permit the residential and commercial development specified in the adopted Development Agreement was in violation of state law and applicable ordinances in that it was contrary to the wise and efficient use of public funds, did not consider the impact on other property owners in the Town, and was in violation of the following purposes established by statute: the prevention of the overcrowding of land; the protection and preservation of scenic, historic, or ecologically sensitive areas; the facilitation of adequate provision or availability of transportation,

police and fire protection, water, sewage, schools, parks and other recreational facilities; and other public services and requirements.

PROCEDURAL BACKGROUND

22. On August 13, 2009, the Town provided public notice of a planning commission meeting on August 24, 2009. The notice stated that the agenda for the meeting would include a public hearing on the Nebo Tract Development Agreement and rezoning of the Nebo Tract, which was described as encompassing only parcels -004 & -006. The public notice failed to state if or where documents related to the Development Agreement or the rezoning could be reviewed by the public, as required by statute. S.C. Code Ann. § 6-31-50.
23. On August 24, 2009, the planning commission held a public hearing on the Development Agreement, and a motion to approve the development agreement passed.
24. On August 29, 2009, the Town provided notice of a September 8, 2009 public hearing on rezoning the Nebo Tract (still described as only -004 and -006) and on the Development Agreement for the same area.
25. On August 29, 2009, the Town also published a notice of an October 1, 2009 hearing on an ordinance to amend the Town's Comprehensive Plan to include the Nebo Tract Planned Development. The Town published this notice although no such amendment had yet been proposed to the Town Council by the Town's Planning Commission. The notice did not give any description of the Tract or the Planned Development.
26. On September 8, 2009, first readings of ordinances for the Development Agreement, rezoning, annexation, and comprehensive plan amendment occurred and motions in favor of each were approved. There had been no notice provided that the amendment to the

Comprehensive Plan, which still had not been recommended to the Town Council by the Town's Planning Commission, would be discussed at the Sept. 8, 2009 meeting in which the Town Council conducted the first reading of the ordinance to pass the amendment and allowed comments on the amendment.

27. On September 13, 2009, the Town provided a public notice of a Planning Commission meeting that would include a resolution to amend the Comprehensive Plan to include the Nebo Tract. The same notice also listed as a separate matter the discussion of recommendations made as part of the Town's ongoing review of its Comprehensive Plan, last revised in 2004.

28. On September 15, 2009, the Town provided public notice regarding an October 1, 2009 Town Council Meeting at which time public hearings on rezoning and the Development Agreement for Nebo Tract (which now included part of -041) would occur. The notice did not describe which part of -041 was now included, nor did it indicate what use would be made of the property or why it had been added to the Tract.

29. On September 28, 2009, the Town's Planning Commission passed a resolution to amend the Town's Comprehensive Plan to include the Nebo Tract. The resolution did not indicate that the Planning Commission considered whether the Tract was appropriate for intensive development or the impact of such development on the planning elements that must be considered under S.C. Code Ann. § 6-29-510. Instead, it simply noted that because the Planning Commission approved of the "Development Standards" laying out the design of the planned development, the Tract should be added to the Comprehensive Plan.

30. On October 1, 2009, the Town Council held a hearing on the rezoning and Development Agreement, conducted second readings of the ordinances approving the

rezoning and Development Agreement, and approved both ordinances. Despite the August 29, 2009 notice of an October 1, 2009 public hearing on the Comprehensive Plan amendment, no public hearing was held on that amendment. The Town Council did, however, conduct a second reading of the ordinance to amend the Comprehensive Plan and approved that ordinance. Although it had noticed the never-held hearing on the amendment and conducted a first reading of the ordinance to approve it ahead of the Planning Commission resolution recommending that amendment to the Town, the ordinance to amend the Comprehensive Plan purported to act on the Planning Commission's recommendation.

31. In November 2009, members of the League reviewed public records requested by the Southern Environmental Law Center under the S.C. Freedom of Information Act. Although the requested materials encompassed the most recent edition of the Town's Comprehensive Plan, the Town was unable to provide an amended Plan that reflected the addition of the Nebo Tract; instead, the Town continues to use and to supply to the public the 2004 version of the Plan that it is currently updating. According to the 2004 Plan, the most recent survey of housing units indicated 464 to 466 units within the Town; the 360 planned for the Nebo Tract would represent a 77 percent increase in this number of residences. The 2004 Plan also cautions that a town the size of Awendaw does not need an overabundance of commercial development and calls for such development to be channeled into a pedestrian-friendly Town Center near the intersection of Hwy 17, Doar Road, and Sewee Road.

FIRST CLAIM FOR RELIEF
**(Failure to Comply with Procedural Requirements of the South Carolina Local
Development Agreement Act)**

32. Plaintiff incorporates the allegations of the preceding paragraphs as if set forth in full.

33. S.C. Code Ann § 6-31-50(A) provides that prior to entering into a development agreement, a local government shall conduct at least two public hearings. One of these two meetings can be held by the planning commission.

34. Section 6-31-50(B)(1) provides that notice of intent to enter into a development agreement must be advertised in a newspaper of general circulation. If more than one hearing is to be held, the day, time, and place of the second hearing must be announced at the first.

35. Section 6-31-50(B)(2) provides that notice must specify the location of the property subject to the development agreement, the uses proposed, and must specify a place where a copy of the proposed development agreement can be obtained.

36. The Town failed to follow required procedures regulating adoption of development agreements in several respects. First, the August 13, 2009 notice does not contain information required by Section 6-31-50(B)(2) because (a) it did not state the uses proposed for the property and (b) it did not state where a copy of the development agreement could be viewed. The notice provided only that there would be a public hearing on the development agreement, which fails to provide sufficient information or notice for the public to meaningfully participate. The August 13 notice also failed to correctly identify the entire property subject to the development agreement since it did not include the portion of the Nebo Tract that is located in Charleston County Parcel Identification Number -041.

37. Upon information and belief, the first of the two required public hearings (conducted by the Planning Commission on August 24) did not announce the date, time, and place of the second meeting, as required by Section 6-31-50(B)(1).

38. The September 15 notice of the October 1 Town Council meeting listed all three parcel numbers, but it failed to state what uses are proposed for the additional acreage or where a copy of the modified agreement could be obtained. The notice just lists the Development Agreement for Nebo Tract as up for a hearing and gives the acreage, parcel numbers, and name of the applicant.

SECOND CLAIM FOR RELIEF
(Failure to Comply with Procedural Requirements for Amending Comprehensive Plan)

39. Plaintiff incorporates the allegations of the preceding paragraphs as if set forth in full.

40. Under S.C. Code Ann. § 6-29-530, before adopting the Comprehensive Plan or any element thereof, the Town must hold a public hearing after not less than thirty day's notice of the time and place of the hearing.

41. The Town failed to comply with S.C. Code Ann. § 6-29-530 in amending its Comprehensive Plan to include the Nebo Tract. It provided no notice whatsoever that it would conduct the first reading of the ordinance to approve the amendment and spontaneously allow comments on the amendment at the September 8, 2009 Town Council meeting. Although the August 29, 2009 purported to provide notice of an October 1, 2009 public hearing on the amendment, no such hearing was conducted.

42. S.C. Code Ann. § 6-29-520 provides that any amendment to the Plan must be made by recommendation of the Planning Commission. S.C. Code Ann. § 6-29-520 further provides that this recommendation must take the form of a resolution referring expressly to maps and other descriptive matter, as well as that a copy of the recommended plan or element(s) be transmitted to the Town's governing authority.

43. The amendment to the Comprehensive Plan failed to comply with S.C. Code Ann. § 6-29-520 in multiple respects. First, the Town Council did not await the recommendation

of the Planning Commission before conducting its fundamentally flawed notice and hearing procedure, indicating that the Town Council was acting on its own initiative, not on the yet-to-be-made recommendation of the Planning Commission, which was not made until three days before the Town approved the amendment and was not subjected to the required notice-and-hearing procedures by the Town Council before being approved. Second, the Planning Commission's recommendation does not refer to any map that would delineate the portion of TMS No. 625-00-00-041 to be included in the amendment and does not include a copy of the recommended element to be included in the Plan. Third, a copy of the recommended Plan, as amended by the addition of the large-scale planned development, which would dramatically increase the size of the Town, does not appear to have accompanied the recommendation or to have ever been produced. Rather, the recommendation was simply to declare the Plan amended to include the planned development agreed upon by the Town and EBC. Finally, S.C. Code Ann. § 6-29-520 provides for periodic and systematic revision and updating of the Plan; it does not provide a means of short-circuiting an on-going revision and updating of the Town's Comprehensive Plan through the sudden interjection of an amendment not made pursuant to any established amendment procedure.

44. Pursuant to S.C. Code Ann. § 6-29-510, local planning commissions must develop and maintain a systematic process for updating and amending their Comprehensive Plans. The Town's Planning Commission is authorized to adopt rules of procedure by the Town of Awendaw Zoning Ordinance § 1.3.2.3. Upon information and belief, the Town's Planning Commission has not established any generally applicable or systematic process for proposing, reviewing, and considering amendments to the Town's Comprehensive Plan.

Due to this procedural void, the Planning Commission and the Town Council haphazardly created an individualized process for the amendment at issue that failed to satisfy even the minimum requirements of S.C. Code Ann. § 6-29-510 & -530.

45. In sum, the purported amendment of the Comprehensive Plan violates applicable procedural requirements and amounts to nothing more than an arbitrary declaration that the Town's Comprehensive Plan will include the Nebo Tract Planned Development approved on October 1, 2009 so that the Development Agreement and Rezoning approved on that same date can be reciprocally declared consistent with the simultaneously-amended Plan.

THIRD CLAIM FOR RELIEF
(Failure to Comply with the South Carolina Local Development Agreement Act)

46. Plaintiff incorporates the allegations of the preceding paragraphs as if set forth in full.

47. The Development Agreement is invalid in that it does not satisfy the requirements of the South Carolina Local Development Agreement Act, S.C. Code Ann. § 6-31-10, *et seq.* Specifically, the Agreement fails to include the information required by Section 6-31-60, including but not limited to, "a description of public facilities that will service the development, including who provides the facilities, the date any new public facilities, if needed, will be constructed, and a schedule to assure public facilities are available concurrent with the impacts of the development."

48. The Agreement fails to satisfy S.C. Code Ann. § 6-31-70, which requires that a development agreement and authorized development must be consistent with the local government's comprehensive plan and land development regulations. The number of housing units and commercial facilities that are authorized by this Development Agreement is patently inconsistent with the Comprehensive Plan of the Town of Awendaw,

which seeks to preserve the small town, pedestrian scale of the existing municipality and the rural, undeveloped areas surrounding it.

49. The rezoning of the Nebo Tract through the Development Agreement and purported annexation is simply a contrivance intended to circumvent the more protective, existing zoning of the County, which has zoned this area, "Agricultural Preservation." Notwithstanding the purported amendments to the Comprehensive Plan, passed simultaneously with the annexation and adoption of the Development Agreement, the Town's Comprehensive Plan as a whole does not contemplate this kind of annexation to allow for such massive residential development far from the Town's historic business district. As such, this rezoning through the Development Agreement is invalid.

50. The Town of Awendaw's purported rezoning of the Nebo Tract from the zoning of the County to the zoning specified in the Development Agreement is arbitrary, capricious, and in violation of state law and the applicable ordinances. In so acting, the Town Council exceeded their authority as established under the laws of South Carolina.

**FOURTH CLAIM FOR RELIEF
(Illegal Amendment to Comprehensive Plan)**

51. Plaintiff incorporates the allegations of the preceding paragraphs as if set forth in full.

52. S.C. Code Ann. § 6-29-510 requires that the planning process consider nine required elements and must also consider potential conflicts with adjacent jurisdictions and regional plans or issues. Upon information and belief, the Planning Commission did not consider the impact of the Nebo Tract Planned Development on any of the nine planning elements, nor did it consider conflicts with Charleston County, the Town of Mount Pleasant, or the Forest Plan for the Francis Marion in making its recommendation. Upon information and belief, rather than addressing the necessary elements and engaging in the required

coordination, the Town declined to engage in any of the substantive planning required by the statute and simply declared the Nebo Tract Planned Development with densities and uses agreed to in an addendum to the Development Agreement to be part of the Comprehensive Plan. The Town thereby evaded any meaningful review of the development's consistency with the Plan it had developed through a more systematic process, as well as its impacts on the elements addressed in the Plan. In so doing, the Town rendered the lengthy and ongoing planning and revision process called for by Chapter Six, Title 29 of the South Carolina Code a nullity. The statutory requirements become a meaningless formality if the Town can bypass the required planning process and arbitrarily declare its Plan amended to include a development that fundamentally changes the planned-for character of the Town without analyzing or even addressing the required planning elements.

53. The amendment was not the product of any actual planning on the part of the Town, and it has not altered or affected the Plan in any meaningful way. After October 1, 2009, the Town continues to rely on and to provide to the public the same 2004 Comprehensive Plan that it did before October 1, 2009.

54. In sum, the purported amendment of the Comprehensive Plan violates the applicable substantive requirements and amounts to nothing more than an arbitrary declaration that the Town's Comprehensive Plan will include the Nebo Tract Planned Development approved on October 1, 2009 so that the Development Agreement and Rezoning approved on that same date can be reciprocally declared consistent with the simultaneously-amended Plan.

FIFTH CLAIM FOR RELIEF
(Arbitrary and Unreasonable Rezoning)

55. Plaintiff incorporates the allegations of the preceding paragraphs as if set forth in full.

56. On October 1, 2009, the Town enacted an ordinance to rezone the Nebo Tract as a planned development. The rezoning is fundamentally inconsistent with the Town's Comprehensive Plan, which contemplates a rural community with commercial development located in a Town Center far from the dense mixed-use development approved for the Nebo Tract, and also requires that any rezoning of a planned development not have a detrimental impact on surrounding areas. The rezoning of the Nebo Tract Planned Development would fundamentally alter the Town and shift its center from that identified in the Plan, while also degrading unique and valuable habitat in the surrounding areas. As discussed in the Fourth Claim, *supra*, the Town cannot lawfully resolve the inconsistency by simply declaring its Comprehensive Plan to include, and thus be consistent with, the planned development. Because the unlawful amendment to the Comprehensive Plan is of no effect and the rezoning of the Nebo Tract is inconsistent with the 2004 Comprehensive Plan for the Town of Awendaw, the rezoning is arbitrary and unreasonable.

57. The rezoning is further unlawful because the Town has no jurisdiction over the Nebo Tract, which as discussed in ¶¶ 8-11, *supra*, is not contiguous with the Town limits and could therefore not be annexed into the Town. The Town lacks authority to rezone the property, which is governed by the zoning laws of Charleston County, not the Town.

58. The Plaintiffs are entitled to (a) an adjudication by this Court that the ordinances so adopted as well as the Development Agreement are invalid and the purported rezoning is of no effect; and (b) an injunction prohibiting the development of the Nebo Tract pursuant to the purported zoning set forth in the Development Agreement, and prohibiting the

development of the Nebo Tract except in accordance with the zoning of the County of Charleston.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment as follows:

A. Declare that the ordinances adopted by the Town of Awendaw on October 1, 2009 relating to the Nebo Tract as well as the Development Agreement are invalid and that the purported rezoning is of no effect;

B. Issue an injunction prohibiting the development of the Nebo Tract pursuant to the purported zoning set forth in the Development Agreement;

C. Issue an injunction prohibiting the development of Nebo Tract except in accordance with the zoning of the County of Charleston and other applicable state and federal law; and

D. Award Plaintiffs' such other and further relief as the Court may deem just and proper.

Respectfully submitted this the 25th day of November, 2009.

 *(by ed w/ express
return)*

W. Jefferson Leath
South Carolina Bar No. 003244
Leath, Bouch & Crawford, L.L.P.
P.O. Box 59
Charleston, SC 29402-0059
(843) 513-1071
jl@leathbouchlaw.com



Christopher K. DeScherer
South Carolina Bar No. 77753
Southern Environmental Law Center
P.O. Box 609
Charleston, SC 29402
(843) 720-5270
cdescherer@selcsc.org

Attorneys for Plaintiffs

November 25, 2009
Charleston, South Carolina

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

LYNNE VICARY, KENT PRAUSE, and)
SOUTH CAROLINA COASTAL)
CONSERVATION LEAGUE,)
)
Plaintiffs,)
)
v.)
)
TOWN OF AWENDAW, and EBC, LLC,)
)
Defendants.)
)

CASE NO. 09-CP-10-7399

**NOTICE OF INTENTION TO CONTEST
EXTENSION OF TOWN OF
AWENDAW'S MUNICIPAL LIMITS**

**NOTICE OF INTENTION TO CONTEST EXTENSION OF
TOWN OF AWENDAW'S MUNICIPAL LIMITS**


PLEASE TAKE NOTICE that the Plaintiffs, through their undersigned attorneys, pursuant to S.C. Code Ann. § 5-3-270, intend to contest the annexation by the Town of Awendaw of property bearing Charleston County Parcel Identification Numbers 625-00-00-004, -006, & a portion of -041, known as the Nebo Tract, which was purportedly annexed by ordinance of the Awendaw Town Council on October 1, 2009. Plaintiffs are also hereby providing notice of their intent to challenge previous annexations by the Town of Awendaw that purportedly establish contiguity between the Town and the Nebo Tract. These annexations include those involving the following properties: Nebo Church (Charleston County Parcel Identification Number 625-00-00-005) and a Ten-Foot Wide Strip of the Francis Marion National Forest (extending along the frontage properties bearing Charleston County Parcel Identification Numbers 629-00-00-224, -303, & -305 and continuing to Number 625-00-00-005).

FILED
2009 NOV 25 AM 10:04
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Respectfully submitted this the 25th day of November, 2009.

 (by ed w/express permission)

W. Jefferson Leath
South Carolina Bar No. 003244
Leath, Bouch & Crawford, L.L.P.
P.O. Box 59
Charleston, SC 29402-0059
(843) 513-1071
jl@leathbouchlaw.com



Christopher K. DeScherer
South Carolina Bar No. 77753
Southern Environmental Law Center
P.O. Box 609
Charleston, SC 29402
(843) 720-5270
cdescherer@selcsc.org

Attorneys for Plaintiffs

November 25, 2009
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that I served the foregoing Notice of Intention to Contest Extension of Town of Awendaw's Municipal Limits on the following parties by hand delivery as indicated below:

Julie J. Armstrong
Clerk of Court for Charleston County
100 Broad Street, Suite 106
Charleston, South Carolina 29401-2258

Sam Brown
Town Clerk
Town of Awendaw
P.O. Box 520
Awendaw, SC 29429

FILED
2009 NOV 25 AM 10:04
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

I certify that I served the foregoing Notice of Intention to Contest Extension of Town of Awendaw's Municipal Limits on the following parties by certified mail, return receipt requested as indicated below:

Dwayne Marvin Green, Esq.
Green & Ford, LLC
602 Rutledge Ave.
Charleston, South Carolina 29403

Roy E. Belser
EBC, LLC D/B/A/ EBCSC, LLC
407 N. Pike East
Sumter, SC 29153

Thomas S. Tisdale, Esq.
M. Jeffrey Vinzani, Esq.
Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC 29401



Christopher K. DeScherer