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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Hon. Jocelyn Newman, Circuit Court Judge

Case No. 2024-000961

Ryan McAvoy.....Appellant,

v.

Town of Hilton Head Island.....Respondent.

INITIAL BRIEF OF RESPONDENT

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## STATEMENT OF QUESTION PRESENTED

Does the expenditure of public funds to contribute to the cost to dredge a publicly owned navigable waterway and the submerged lands in the navigable waterway violate S. C. Const. art X, § 5 or S. C. Const. art X § 11?

(a) The only evidence in the record is that waterways in question are publicly owned waters of the United States and the State of South Carolina.

(b) Private docks or marinas exist in navigable waterways by permit from the State of South Carolina, and the existence of such does not change the public nature and ownership of the navigable waterway or the submerged lands in it.

(c) The existence of private property abutting a public navigable waterway does not change the nature and ownership of navigable waterway.

(Appellant's Arguments I, II, III and IV).

## SCOPE OF REVIEW

This case was bench trial before the Hon. Jocelyn Newman. The appeal arises from an Order of Judge Newman granting the Town’s motion for involuntary non-suit under Rule 41(b), SCRPC. When considering a motion under Rule 41(b) SCRPC, the Court should review using the abuse of discretion standard.

A Motion for involuntary non-suit under Rule 41(b), SCRPC, “allows the judge as fact finder to weigh the evidence, determine the facts and render a judgment against the plaintiff at the close of his case if justified.”<sup>1</sup> Because this case is a law case, Ryan McAvoy’s appeal is from the trial court’s factual findings as a judge in a non-jury action at law.<sup>2</sup>

“In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law.”<sup>3</sup> An appellate court may not “disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings.”<sup>4</sup>

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<sup>1</sup> *Johnson v. J.P. Stevens & Co.*, 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992).

<sup>2</sup> *Waterpointe I Prop. Owner's Ass'n, Inc. v. Paragon, Inc.*, 342 S.C. 454, 459, 536 S.E.2d 878, 880 (Ct. App. 2000). In McAvoy’s Complaint and in the case he presented disputes the public ownership of the navigable waterways to be dredged. An action concerning the determination of ownership of tidelands pursuant to S. C. Code Ann. § 48-39-220 (Supp. 2024) is an action at law. See: *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006). McAvoy’s assertions questioning the use of public funds for dredging a public waterway implicate the ownership status of the waterways. South Carolina case law holds that “where the main purpose of the complaint concerns the determination of title to real property, it is an action at law.” *Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 101, 552 S.E.2d 778, 781 (Ct. App. 2001) (citing *Wigfall v. Fobbs*, 295 S.C. 59, 60, 367 S.E.2d 156, 157 (1988)). Because McAvoy challenges the public ownership of these waterways, this is an action at law.

<sup>3</sup> *Wilson v. Gandis*, 430 S.C. 282, 291, 844 S.E.2d 631, 636 (2020).

<sup>4</sup> *Waterpointe I Prop. Owner's Ass'n, Inc. v. Paragon, Inc.*, *supra*.

## STATEMENT OF THE CASE

Ryan McAvoy (hereafter, “McAvoy”) commenced this case on August 25, 2022, by the filing of a Summons and Complaint.<sup>5</sup> In his Complaint, McAvoy made the following material allegations of fact:

1. The Town of Hilton Head Island is a municipality located in Beaufort County, South Carolina.<sup>6</sup>
2. The Town of Hilton Head Island has spent public money for the dredging of the Harbour Town Yacht Basin and Braddock Cove Creek, which McAvoy alleged to be private waterways located in Sea Pines.<sup>7</sup>
4. In the year 2022, the Town of Hilton Head Island voted to spend \$600,000 in public money for dredging of the Harbor Town Yacht Basin and Braddock Cove Creek, which McAvoy alleges to be private waterways in Sea Pines.<sup>8</sup>
5. Using public funds for the dredging of Harbour Town Yacht Basin and Braddock Cove Creek is an expenditure of public money for private purposes

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<sup>5</sup> In the caption and in paragraph 1 of the Complaint (R. \_\_\_\_), McAvoy states that the case was brought on behalf of McAvoy and “all others similarly situated.” McAvoy never pursued an order establishing a class action status under Rule 23, SCRPC, and McAvoy’s counsel disclaimed that he sought class action status (Transcript, p. 122, l. 25 to p. 123, l. 1, R. \_\_\_\_).

<sup>6</sup> Complaint, para. 2, R. \_\_\_\_.

<sup>7</sup> Complaint, para. 12, R. \_\_\_\_.

<sup>8</sup> Complaint, para. 16, R. \_\_\_\_.

in violation of S. C. Const, Art. X, § 5 and 11.<sup>9</sup>

On these allegations McAvoy:

- (a) sought a declaration that the use public funds for the dredging of Harbour Town Yacht Basin and Braddock Cove Creek are expenditures of public money for private purposes in violation of S. C. Const, Art. X, § 5 and 11;
- (b) An injunction prohibiting the Town of Hilton Head Island from spending public money for the dredging of the Harbour Town Yacht Basin and Braddock Cove Creek; and,
- (c) An award of attorney's fees under S. C. Code Ann. § 15-77-300 (Supp. 2024).

The Town of Hilton Head Island (hereinafter, the "Town") filed its Answer on September 1, 2022. In its Answer, the Town denied the material allegations of the Complaint and asserted the following defenses:

1. Harbour Town Yacht Basin and Braddock Cove Creek are not private, but rather are publicly owned navigable waters of the State of South Carolina and of the United States.<sup>10</sup>

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<sup>9</sup> Complaint, paras. 14 and 18, R. \_\_\_\_\_. Paragraph 14 McAvoy's Complaint states a figure of two million dollars, not the six hundred thousand dollars stated in paragraph 16 of the Complaint. The higher figure arises from other allegations in the Complaint in which McAvoy also challenged the Town's expenditure of Stormwater Utility Fees on drainage infrastructure in gated communities over which the Town possessed permanent legal access and maintenance authority. The claim related to the Stormwater Utility Fees was withdrawn by McAvoy.

<sup>10</sup> Answer, para. 12, R. \_\_\_\_; para. 22, R. \_\_\_\_\_.

2. Harbour Town Yacht Basin and Braddock Cove Creek are tourism related recreational facilities as defined in S. C. Code Ann. § 6-1-730 (Supp. 2024), and by § 4-13-70, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983).<sup>11</sup>

3. The funding source for the Town's contribution to the cost of the dredging is the local hospitality tax authorized in S. C. Code Ann. § 6-1-730 (Supp. 2024). The expenditure of local hospitality taxes on tourism related

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<sup>11</sup> Answer, para. 12, R. \_\_\_\_; para. 14, R. \_\_\_\_; para. 16, R. \_\_\_\_; para. 20, R. \_\_\_\_; and, para. 21, R. \_\_\_\_ . § 4-13-70, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983), reads:

(a) The town council is hereby authorized to utilize the funds collected from the imposition and collection of the local accommodations tax and any other funds deposited into "The Town of Hilton Head Island, South Carolina, Local Accommodations Tax Account." The revenue generated by the local accommodations tax must be used exclusively for the following purposes:

- (1) Tourism-related buildings, including, but not limited to, civic centers, coliseums, and aquariums;
- (2) Tourism-related cultural, recreational, or historic facilities;(3)Beach access and renourishment;
- (4) Highways, roads, streets, and bridges providing access to tourist destinations;
- (5) Advertisements and promotions related to tourism development;
- (6) Water and sewer infrastructure to serve tourism-related demand; and,
- (7) The operation and maintenance of those items provided in (a)(1) through (a)(6) above, including police, fire protection, emergency medical services, and emergency-preparedness operations directly attendant to those facilities;
- (8)For those purposes set forth in section 4-10-100.

(b) The town shall set aside five (5) percent of the local accommodations tax collected hereunder, and shall deposit the same into an advertising account in the general fund as identified in the accounting and financial policies section of the annual budget as adopted by town council, with said funds to be utilized as provided therein.

(c) Authorization to utilize any funds from the "the town, Local Accommodations Tax Account," shall be by the annual budget ordinance duly adopted by the town council for the town.

recreational facilities is authorized by S. C. Code Ann. § 6-1-730 (Supp. 2024), and by § 4-13-80, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983).<sup>12</sup>

The Town and McAvoy filed motions for summary judgment. The Town filed its motion on October 11, 2022, and McAvoy filed his motion on November 1, 2022. The motions were heard by Judge Newman on February 6, 2024. On September 5, 2023, Judge Newman denied both motions for summary judgment.

A bench trial before Judge Newman commenced at the Beaufort County Courthouse on September 6, 2023. At the conclusion of McAvoy's case, the Town moved for involuntary dismissal under Rule 41(b), SCRCPP, because the only evidence in the record established that Harbour Town Yacht Basin, its entrance channel, and Braddock Cove Creek and the submerged lands in them are not private, but are public waterways.<sup>13</sup> Judge Newman granted the Town's motion.<sup>12</sup>

On May 10, 2024, Judge Newman filed her written Order, dated May 8, 2024, dismissing McAvoy's complaint under Rule 41(b), SCRCPP.<sup>13</sup>

McAvoy filed his Notice of Appeal on June 10, 2024.

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<sup>12</sup> Answer, para. 12, R. \_\_\_\_; para. 14, R. \_\_\_\_; para. 16, R. \_\_\_\_; para. 20, R. \_\_\_\_; and para. 21, R. \_\_\_\_.

<sup>13</sup> The Town's motion stated other grounds which were denied by Judge Newman. Transcript, p. 141. l. 9, to p. 142, l. 10, R. \_\_\_\_.

<sup>12</sup> Transcript, p. p. 142, l. 11, to p. 143. l. 9, R. \_\_\_\_.

<sup>13</sup> May 8, 2024, Order, pp. 1 - 8, R. \_\_\_\_.

## RESPONDENT'S STATEMENT OF FACTS

In the May 8, 2024, Order, Judge Newman found the following to be the matters of fact relevant to this case. Each is supported by the only evidence in the record.<sup>14</sup>

1. On May 3, 2022, the Town adopted Resolution 2022-11, which authorized the Town Manager to execute and deliver an Agreement between the Town and the South Island Dredging Association.<sup>15</sup>
2. The findings in Resolution 2022-11 state that the Town allocated the sum of \$600,000.00 for the purpose of dredging of the Harbour Town Yacht Basin and Braddock Cove Creek.<sup>16</sup>
3. The Town Manager executed the Agreement authorized by Resolution 2022-11.<sup>17</sup>
4. Under the terms of the Agreement, the Town authorized the expenditure of \$600,000.00 for the dredging of the Harbour Town Yacht Basin, the entrance channels to it and Braddock Cove Creek.<sup>18</sup>
5. The dredging of the Harbour Town Yacht Basin, the entrance channels to it and Braddock Cove Creek and the submerged lands in them are authorized by permits issued by the United States Army Corps of Engineers (hereinafter, "USACOE"), and the State of South Carolina Department of Health and Environmental Control (hereinafter, "SDCHEC"). The permits state that the purpose of the work is:

- (a) To maintain navigational access from certain Sea Pines waterways to the Calibogue Sound for recreational and commercial use;<sup>19</sup> and,
- (b) To remove sediments from the existing tidal waterways associated with Calibogue Sound in order to provide adequate depths for recreational and

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<sup>14</sup> May 8, Order, R. pp.\_\_\_\_.

<sup>15</sup> Exhibit A to Exhibit 1, R. \_\_\_\_.

<sup>16</sup> Exhibit A to Exhibit 1, R. \_\_\_\_.

<sup>17</sup> Exhibit B to Exhibit 1, R. \_\_\_\_.

<sup>18</sup> Exhibit B to Exhibit 1, R.\_\_\_\_.

<sup>19</sup> Exhibit 11, p. 2 of 33, R. \_\_\_\_.

commercial vessels utilizing the waterways.<sup>20</sup>

The witness John Brinkley testified that the purpose of the purpose of the dredging is to preserve navigation.<sup>21</sup>

6. The Harbour Town Yacht Basin, the entrance channels to it, Braddock Cove Creek and the submerged lands in them are publicly owned, navigable waterways of the United States and the State of South Carolina and are open to the public.<sup>22</sup> The Plaintiff's witness Mare Deckard testified that she was able to pilot a vessel into the Harbour Town Yacht Basin and the full length of Braddock Cove Creek without hindrance.<sup>23</sup>

7. Both the Harbour Town Yacht Basin, its entrance channel and Braddock Cove Creek are open to Calibogue Sound, the water in them is saline and is affected by the tides.<sup>24</sup>

8. The source of funding for the contribution to the dredging of the public waterways that are used for recreational purposes is local hospitality taxes authorized under S. C. Code Ann. § 6-1-730 (Supp. 2024) and § 4-13-80, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983).<sup>25</sup>

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<sup>20</sup> Exhibit 18, p. 13, R. \_\_\_\_.

<sup>21</sup> Transcript, p. 111, l. 17, R. \_\_\_\_.

<sup>22</sup> Exhibit 11, R. \_\_\_\_ and Exhibit 18, R. \_\_\_\_.

<sup>23</sup> Transcript, p. 31, l. 21 to p. 32, l. 13; p. 60., R. \_\_\_\_.

<sup>24</sup> Exhibit 18, p. 13, R. \_\_\_\_\_. See also: Appellants' Brief, p. 26. The Appellant admits that these waters are saline and tidal.

<sup>25</sup> Exhibit 1, R. \_\_\_\_\_. McAvoy does not challenge the source of the funding, or whether the dredging is an appropriate use of hospitality taxes under S. C. Code Ann. § 6-1-730 (Supp. 2024) and § 4-13-80, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983). Rather, Judge Newman found that the sole argument advanced by McAvoy is that the waterways are privately owned, and the use of any public funds to dredge them violated S. C. const. art. X, § 5. May 8, 2024, Order, p. 6, R. \_\_\_\_.

INTRODUCTION  
(Appellant's Arguments I, II, III & IV)

Throughout McAvoy's Brief, he attempts to make a case that the Town improperly allocated local hospitality taxes to defray a part of the cost of dredging public waterways that serve recreational and tourism needs.<sup>26</sup> As was the case at trial, McAvoy fails to point to any evidence to show that the navigable waterways and submerged lands being dredged are not public waterways and submerged lands and that the purpose of the dredge is to maintain navigability of public waterways.<sup>27</sup>

Each of McAvoy's arguments is premised on the claim that public funds were spent on private property or for private purposes in violation of S. C. Const, Art. X, § 5 and 11. As a matter of fact, this is wrong. The public funds are to aid in the dredging of publicly owned navigable waterways. There is no evidence in the record to show otherwise.

The purpose of the dredge permit issued by SCDHEC is stated to be: "To maintain navigational access from certain Sea Pines waterways to the Calibogue Sound for recreational and commercial use."<sup>28</sup> The purpose of the dredge permit issued by the USACOE is stated to be: "To remove sediments from the existing tidal waterways associated with Calibogue Sound in order to provide adequate depths for recreational and commercial

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<sup>26</sup> May 8, 2024, Order, p. 5, n. 8. McAvoy does not challenge the finding that the navigable waterways serve recreational and tourism needs.

<sup>27</sup> At trial, McAvoy's misunderstanding of the critical fact in this case was shown by McAvoy's counsel when he stated: "And all that dredging is taking place on land, which we will proffer is privately owned. The land under the docks is privately owned and is being dredged using public monies in part, and that's the constitutional violation." Transcript, p. 37, l. 4-8. The submerged lands in the navigable waterway belong to the State, see Argument 1. McAvoy did not proffer any evidence to show otherwise.

<sup>28</sup> Ex. 11, p. 2 of 33, R. \_\_\_\_.

vessels utilizing the waterways.”<sup>29</sup>

McAvoy argues that the existence of docks and marinas in the public waterways somehow changes the submerged lands in the public waterway into something else.<sup>30</sup> McAvoy offers no authority for this proposition, and the permits for the dredge show the opposite. The permit issued by SCDHEC states: “This permit is granted subject to the rights of the State of South Carolina in the navigable waters and shall be subject, further, to all rights held by the State of South Carolina under the public trust doctrine as well as any other right the State may have in the waters and submerged lands of the coast.”<sup>31</sup> The SCDHEC permit shows that the areas to be dredged include the submerged lands under any of the marinas or docks.<sup>32</sup> The permit issued by the USACOE states the dredge is “. . . to remove sediments from existing tidal waterways associated with Calibogue Sound . . . in order to provide adequate depths for recreational and commercial depths for recreational and commercial vessels utilizing the waterways . . . .”<sup>33</sup>

As noted above, McAvoy frames his argument around the proposition that dredging

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<sup>29</sup> Exhibit 18, p. 13, R. \_\_\_\_.

<sup>30</sup> McAvoy states “The Town of Hilton Head admits that the boat slips and marinas are privately owned (Answer of Town of Hilton Head, par. 13). Paragraph 13 of the Town’s answer reads, in full: “On information and belief, the Town admits only that boat slips in the Harbour Town Yacht basin are privately owned, and that the waters in the Harbour Town Yacht Basin are waters of the State of South Carolina. Any other or further allegation of Paragraph 13 of the Complaint is denied.” McAvoy’s attempt to conflate the ownership of a dock or marina into ownership of the waterway and submerged lands in the waterway has no basis in law or in fact.

<sup>31</sup> Exhibit 11, p. 6 of 33, R. \_\_\_\_.

<sup>32</sup> Exhibit 11, pp. 8 - 20 of 33, R. \_\_\_\_; pp. 27 - 29 of 33, R. \_\_\_\_.

<sup>33</sup> Exhibit 18, R. \_\_\_\_\_. The drawings in the USACOE Permit include the drawings from the SCDHEC Permit which is Exhibit 11. R. \_\_\_\_\_.

of a public waterway in which the State has permitted a dock or marina is a dredge of the dock or marina changes the nature of the both the waterway and the project.<sup>34</sup> Both the Harbourtown Yacht Basin and Braddock Cove Creek and the submerged lands under them are public, tidal waterways of the United States and State of South Carolina.<sup>35</sup> The fact that the State has permitted marinas and docks to exist in the public waterway does not change the waterway from one that is public to one that is private, and does not change the nature of the project from the dredging of a public waterway in aid of navigation to something else. McAvoy offers no authority to support his proposition because none exists.

McAvoy's reliance on *South Carolina Public Interest Foundation v. S. C. Department of Transportation*, 421 S. C. 110 804 S. E.2d 854 (2017), and *Eidson v. S. C. Department of Education*, Op. No. 28235 (S.C. Supreme Court, filed September 10, 2024), is misplaced because, unlike this case, those cases concerned the expenditure of public funds on private property. *South Carolina Public Interest Foundation v. S. C. Department of Transportation*, *supra.*, concerned three privately owned bridges, and *Eidson v. S. C. Department of Education*, *supra.*, concerned private educational institutions. Here, the properties in question are not privately owned, but are publicly owned navigable waterways.

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<sup>34</sup> In his four arguments, McAvoy repeats variations of text stating that “private marinas, private docks and individually owned private boat slips” were dredged. This is untrue and unsupported by the law and evidence in the record. With respect to any marina, dock or boat slip, what was dredged are the submerged lands under them. The submerged lands are public, and McAvoy offers no authority to show otherwise. Exhibit 11, R. \_\_\_\_ and Exhibit 18, R. \_\_\_\_.

<sup>35</sup> Exhibit 11, R. \_\_\_\_ and Exhibit 18, R. \_\_\_\_.

## ARGUMENT 1

NO PUBLIC FUNDS WERE ALLOCATED TO PRIVATE PROPERTY OR PRIVATE INTERESTS. THE FUNDS WERE ALLOCATED TO MAINTAINING PUBLIC NAVIGABLE WATERWAYS AND THE SUBMERGED LANDS IN THEM. (Question Presented 1, Appellant's Argument I)

In his first argument, McAvoy's claim is founded on the false premise that because a boat dock or a marina exists in a public navigable waterway, that the "primary purpose" of the dredging is to benefit the owners of the docks or marinas. This argument is contrary to the law of South Carolina regarding ownership of navigable waterways and submerged lands, and the only evidence in the record. The State of South Carolina holds presumptive title to all land below the high watermark, which includes the submerged lands in them, in trust for the benefit of its citizens.<sup>36</sup> There is no evidence in the record for this case that any public money will be spent to improve any marina, dock or boat slip. McAvoy conflates ownership of a marina, dock or boat slip with ownership of the submerged lands beneath them. The law of South Carolina is that the submerged land beneath any such facility is not private property but is property of the State.

The dredging of the Harbour Town Yacht Basin, the entrance channels to it, Braddock Cove Creek and the submerged lands in them, including the submerged lands

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<sup>36</sup> *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E. 2d 116, 119 (2003); *State v. Pac. Guano Co.*, 22 S.C. 50, 84 (1884); *Port Royal Min. Co. v. Hagood*, 30 S.C. 519, 9 S.E. 686 (1889); *State v. Hardee*, 259 S.C. 535, 193 S.E.2d 497 (1972). See also: S.C. Code Ann. § 48-39-10(X)(Supp. 2024), which reads: "Maintenance dredging" means excavation to restore the depth of underwater lands or restore channels, basins, canals, or similar waterway accesses to depths and dimensions that support and maintain prior or existing levels of use that previously have been dredged pursuant to a license issued by the department or an exemption as provided in Section 48-39-130(D)(10) as added by Act 41 of 2011. (emphasis added). South Carolina law expressly authorizes the work described in Exhibit's 11 and 18, and expressly authorizes restoring the depth of underwater lands.

under the marinas, docks and boat slips are authorized by permits issued by the United States Army Corps of Engineers (hereinafter, “USACOE”), and the State of South Carolina Department of Health and Environmental Control (hereinafter, “SDCHEC”).<sup>37</sup> The permits state that the purpose of the work is:

- (a) To maintain navigational access from certain Sea Pines waterways to the Calibogue Sound for recreational and commercial use;<sup>38</sup> and,
- (b) To remove sediments from the existing tidal waterways associated with Calibogue Sound in order to provide adequate depths for recreational and commercial vessels utilizing the waterways.<sup>39</sup>

The witness John Brinkley testified that the purpose of the purpose of the dredging is to preserve navigation.<sup>40</sup> Judge Newman found that the waterways being dredged are public waterways. This finding is supported by the law of this state and by the facts of this case.<sup>41</sup>

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<sup>37</sup> See S. C. Code Ann. §48-39-10 (Supp. 2024), S. C. Code Ann. § 43-39-150 (Supp. 2024), and S. C. Code Ann. Regs. 30-10, which define SDCHCEC’s permitting authority over the waters of the State of South Carolina. See also 33 USC 403 and 33 USC 1344, which are the stated statutory authority for the USACOE permit.

<sup>38</sup> Exhibit 11, p. 2 of 33, R. \_\_\_\_.

<sup>39</sup> Exhibit 18, p. 13, R. \_\_\_\_.

<sup>40</sup> Transcript, p. 111, l. 17, R. \_\_\_\_\_. McAvoy argues that the testimony of John Brinkley supports his case because Mr. Brinkley described what would result from an unnavigable waterway. Mr. Brinkley’s testimony does not support McAvoy’s case, though, because Mr. Brinkley’s testimony, taken as a whole is that the preservation of navigation in the public waterways is the purpose of the dredging. The permits that authorize the dredging state that the purpose of the dredging is to improve the navigability of the public waterways. (Exhibit 11 and Exhibit 18 R. \_\_\_\_). While the ability to navigate in the waterway facilitates navigation to and from the marinas, docks and boat slips is a collateral benefit of improving navigability of the waterway, the stated purpose of the dredging project is the maintenance of the navigability of the waterways (Exhibit 11 and Exhibit 18 R. \_\_\_\_).

<sup>41</sup> See cases and statutes collected in note 36 above, Exhibit 11 and Exhibit 18. The witness Mare Deckard was able to pilot a vessel into the Harbour Town Yacht Basin and

Because the purpose of the dredging is to improve and maintain navigability of publicly owned waterways which are used for recreational purposes, the allocation of Local Hospitality Taxes to fund the dredging is consistent with the requirements of S. C. const. art. X, §§ 5 and 11, S. C. Code Ann. § 6-1-730 (Supp. 2024), and § 4-13-80, *Municipal Code of The Town of Hilton Head Island, South Carolina* (1983).

As Judge Newman found, the fact that all properties along a public road benefit from an improvement to the road does not make the primary purpose of improving the road to benefit the abutting landowners, the primary benefit of the improved road is to the public.<sup>42</sup> In this case, the analogy is exact. The primary benefit of maintaining navigability of the publicly owned navigable waterways is to the public. McAvoy's argument mirrors that made by Greenville County in *Burns, et al. v. Greenville County Council, et al.*, 433 S.C. 583, 861 S.E.2d 31 (2021). Greenville County argued that its road maintenance fee was a valid user fee because those paying the fee received the most benefit from the maintained roads. The Supreme Court dismissed this argument, stating:

At oral argument, Greenville County made the additional argument Ordinance 4906 satisfies subsection 6-1-300(6) because the property owners who pay the charge are the drivers who "most use the roads" maintained by the funds collected. We do not agree this satisfies subsection 6-1-300(6). While Greenville County residents who use the roads every day may derive more benefit from having the roads maintained in good condition, it is still the same benefit every driver gets, no matter where their car is registered.

McAvoy has shown no basis to reverse the May 8, 2024 Order of Judge Newman.

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the full length of Braddock Cove Creek without hindrance. Transcript, p. 31, l. 21 to p. 32, l. 13; p. 60., R. \_\_\_\_\_. The witness John Brinkley testified the dredging project is to improve navigation. Transcript, p. 111, l. 17, R. \_\_\_\_\_.

<sup>42</sup> May 8, 2024, Order, p. 8, n. 12, R. \_\_\_\_\_.

## ARGUMENT II

THE EXISTENCE OF PRIVATE MARINAS, DOCKS OR BOAT SLIPS IN A PUBLIC NAVIGABLE WATERWAY DOES NOT MAKE THE NAVIGABLE WATERWAY OR THE SUBMERGED LANDS IN THE NAVIGABLE WATER PRIVATE PROPERTY. TITLE TO SUCH IS PRESUMPTIVELY IN THE STATE OF SOUTH CAROLINA. THERE IS NOT CONSTITUTIONAL PROHIBITION AGAINST SPENDING PUBLIC MONEY TO MAINTAIN PUBLIC PROPERTY. (Question Presented 1, Appellant’s Argument II)

In his second argument, McAvoy restates his position that the existence of marinas, docks and boat slips in a navigable waterway makes the act of maintaining navigability in the waterway a private benefit. This argument is not founded on any law of South Carolina related to navigable waterways, nor any evidence at trial.

Like the cases of *South Carolina Public Interest Foundation v. S. C. Department of Transportation, supra.*, and *Eidson v. S. C. Department of Education, supra.*, mentioned above, *Anderson v. Baehr*, 265 S.C. 153, 157, 217 S.E.2d 43, 45 (1975), has no application to this case.

In *Anderson v. Baehr, supra.*, the Supreme Court struck down a bond statute alleged to “. . . provides for the use of public funds for a private purpose, to wit: the acquisition of real estate to be leased or conveyed to a private person, firm or corporation, in violation of the provisions of the South Carolina Constitution, . . . .” In this case, the purpose of the expenditure of funds is to improve navigability of publicly owned navigable waterways. There is no evidence in this case that any public funds will be spent on privately owned property.<sup>43</sup>

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<sup>43</sup> As is shown in Argument 1 above, the submerged lands in the navigable waterways, including those under any marina, dock or boat slip, are the property of the state and part of the navigable waterway. McAvoy points to no authority to show otherwise, because none exists.

As was stated in the Introduction, McAvoy's reliance on *South Carolina Public Interest Foundation v. S. C. Department of Transportation*, 421 S. C. 110 804 S. E.2d 854 (2017), and *Eidson v. S. C. Department of Education*, Op. No. 28235 (S.C. Supreme Court, filed September 10, 2024), is misplaced because, unlike this case, those cases concerned the expenditure of public funds on private property. *South Carolina Public Interest Foundation v. S. C. Department of Transportation*, *supra.*, concerned three privately owned bridges, and *Eidson v. S. C. Department of Education*, *supra.*, concerned private educational institutions. Here, the properties in question are not privately owned, but are publicly owned navigable waterways.

McAvoy again points to testimony of the witness John Brinkley describing the benefits of maintaining a navigable waterway.<sup>44</sup> Mr. Brinkley's testimony speaks to the benefits of preservation of navigation of the waterways.<sup>45</sup>

What McAvoy fails to appreciate is that the ability to use boats is a benefit of maintaining navigation, and it benefits all users of the navigable waterway in the same fashion. It is not evidence that the primary benefit of a maintenance dredging project of a public navigable waterway is to private interests.<sup>46</sup>

McAvoy has shown no basis to reverse the May 8, 2024 Order of Judge Newman.

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<sup>44</sup> Appellant's Brief, p. 17.

<sup>45</sup> Transcript, p. 111, l. 13 - 22. The same benefits described by Mr. Brinkley are received by any other person who navigates the waterways. For example, McAvoy's witness Mare Deckard, who testified she was able to navigate through both the Harbourtown Yacht Basin and Braddock Cove Creek without any hindrance. Transcript, p. 31, l. 21 to p. 32, l. 13; p. 60., R. \_\_\_\_.

<sup>46</sup> See Argument 1 above, and reference to *Burns, et al. v. Greenville County Council, et al.*, *supra.*

### ARGUMENT III

MCAVOY FAILED TO OFFER ANY EVIDENCE THAT PUBLIC MONEY WAS SPENT ON PRIVATE PROPERTY OR FOR PRIVATE INTERESTS. THE ONLY EVIDENCE IN THE RECORD IS THAT PUBLIC FUNDS WERE ALLOCATED FOR THE MAINTENANCE OF PUBLICALLY OWNED NAVIGABLE WATERWAYS AND THE SUBMERGED LANDS IN THEM. (Question Presented 1, Appellant’s Arguments III and IV).

In his third argument, McAvoy argues that the dredging “touches” public property, but that the primary beneficiaries are private individuals. This is a misstatement of both the evidence in the record and Judge Newman’s Order.

There is no evidence in the record that any public funds are being spent to repair or maintain any marina, dock or boat slip. The only evidence in the record is that the public funds contribute to a dredge of navigable waterways, and that those navigable waterways include the submerged lands in the waterways, which is expressly authorized by South Carolina law and the permits issued for the dredging.<sup>47</sup>

McAvoy sums up his argument by complaining: “the circuit court made a legal error in ruling that Appellant must prove, in essence, that none of the areas touched by the dredge were public.”<sup>48</sup>

Judge Newman made no such ruling, rather, she ruled that waterways to be dredged

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<sup>47</sup> S. C. Code Ann. § 48-39-10(X)(Supp. 2024), Exhibit 11, Exhibit 18.

<sup>48</sup> Brief of Appellant, p. 23. This is the basis of McAvoy’s argument on the fungibility of the funds, and it is again based on the flawed premise that the submerged lands under a marina, dock or boat slip are not public. But the submerged lands are public. See authorities in note 36 above. The existence of a marina, dock or boat slip in the public waterway does not change the waterway or the submerged lands from public to private. What McAvoy failed to prove, or offer evidence of, is that any of the funds touched any private property.

are public, and that McAvoy failed to prove the waterways are private.<sup>49</sup> Judge Newman's order is consistent with the law of South Carolina, and the only evidence in this case.<sup>50</sup>

McAvoy's reliance on the case of *Brumby v. City of Clearwater*, 108 Fla. 633, 634, 149 So. 203, 204 (1933), is flawed. *Brumby v. City of Clearwater, supra.*, presents a statement of facts showing that the work proposed by the City of Clearwater was solely for the purpose of creating a facility for a private individual's business operation. The text of the case does not make any mention of maintenance of any public property, and in fact says the opposite. Relevant text from *Brumby v. City of Clearwater, supra.*, reads:

... the city of Clearwater was without authority to undertake the expenditure of public funds for the purpose of dredging a channel and basin for the use of an individual with which to carry on and maintain his private business, but the contract is also void because by its terms the city attempted to finance a private business enterprise for the use and benefit of an individual by undertaking to provide and furnish the major portion of the facilities for conducting such enterprise under the terms and conditions that the cost of such facilities should be reimbursed to the city by the individual for whose benefit the same was proposed to be furnished in monthly installments extending over a period of years.

*Brumby v. City of Clearwater, supra.*, has no application all to this case, which involves the maintenance dredging of a navigable public waterway.

The same applies to *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, Civil Action Number 2013-CP-07-3677 (referred to in Appellant's Brief as the "Driveway Case"), which is an unreported circuit court decision

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<sup>49</sup> May 8, 2024, Order, pp. 6 - 8.

<sup>50</sup> McAvoy frames his argument by stating that the "primary purpose of the dredging is to "allow them to use their boats." Appellant's Brief, p. 23. This demonstrates again the faulty premise of McAvoy's claim. The primary purpose of the dredging is to improve navigation of a public waterway. This "allows them to use their boats" in precisely the same way that maintaining a public road allows the public to use their automobiles.

discussed by McAvoy.<sup>51</sup> The issue in that case was that the Department of Transportation performed work on privately owned driveways. In his brief, McAvoy quotes the circuit court’s order which reads: “[T]his action is factually similar to the *Bridge Inspection* case. *Id.*, at p. 10.<sup>52</sup> The court concluded, “the South Carolina Department of transportation violated Article X, §§ 5 and 11 of the South Carolina Constitution when it did construction work and improvements on a privately owned driveway at public expense.” In the “Driveway Case” the work on the public roadway to which the driveway connected was not challenged. The issue was work performed by the SCDOT on a private driveway. Here, the dredging is only of the public navigable waterways and the submerged lands beneath them, which is exactly analogous to the public road in the “Driveway Case” about which there was no complaint. The “Driveway Case” is similar to this case only because there was no issue with spending public funds on the public road, which is the same as spending public funds to dredge publicly owned navigable waterways.<sup>53</sup>

McAvoy has shown no basis to reverse the May 8, 2024 Order of Judge Newman.

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<sup>51</sup> Appellant’s Brief, pp. 23 - 26.

<sup>52</sup> The “Bridge Inspection” case is *South Carolina Public Interest Foundation v. S. C. Department of Transportation*, *supra*.

<sup>53</sup> At trial, and in his Brief, McAvoy contends that the fact that Sea Pines Resort, which is a private community, abuts the public navigable waterways is relevant to this case. It is not. There is no evidence in the record showing that any public funds were or will be spend in the boundaries of Sea Pines, because Sea Pines does not extend beyond mean high water in the navigable waterways to be dredged. The public funds contribute to the dredge of the public navigable waterway only. McAvoy’s counsel admitted this at trial:

The Court: I’m asking about this \$600,000 that your about.

Mr. Carpenter: It’s being used for the dredging.

The Court: Only dredging?

Mr. Carpenter: Yes.

Transcript, p. 48, l. 5-10.

CONCLUSION

Because:

1. each of the findings of fact stated Judge Newman's May 8, 2024, Order, are supported by evidence in the record; and,
2. there is no error of law in Judge Newman's conclusion that the use of Local Hospitality Taxes to fund the dredging of public navigable waterways that serve recreational and tourism needs,

McAvoy has not shown any violation of either S. C. Const. art X, § 5 or S. C. Const. art X § 11, and there is no basis to reverse her May 10 2024, Order.

We urge the Court to affirm the May 8, 2024, Order of the Hon. Jocelyn Newman.

Respectfully Submitted:

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This 12<sup>th</sup> Day of November, 2024.