

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

APPEAL FROM Horry County
Court of Common Pleas

APR 25 2012

William H. Seals, Jr., Circuit Court Judge **S.C. Supreme Court**

CASE NO. 2009-CP-26-5782

City of North Myrtle Beach Respondent

vs.

East Cherry Grove Realty Co., LLC,
The State of South Carolina and John Doe..... Defendants

Of whom
East Cherry Grove Realty Co., LLC is Appellant

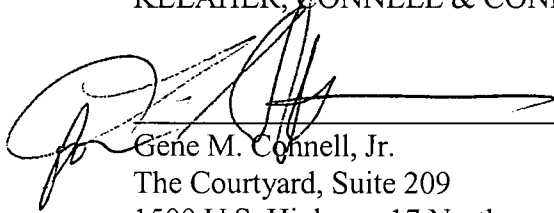
and
The State of South Carolina is Respondent

PETITION FOR REHEARING

The Appellant, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court for a rehearing of its decision filed April 11, 2012 and received by Appellant's attorney on April 12, 2012. The basis of this Petition for Rehearing is the attached Memorandum of Law.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
Attorney for Appellant

April 24, 2012

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

CASE NO. 2009-CP-26-5782

City of North Myrtle Beach Respondent

vs.

East Cherry Grove Realty Co., LLC,
The State of South Carolina and John Doe..... Defendants

Of whom

East Cherry Grove Realty Co., LLC is Appellant

and

The State of South Carolina is Respondent

MEMORANDUM OF LAW IN SUPPORT
OF PETITION FOR REHEARING

On April 11, 2012, this Court issued its Opinion No. 27113. In its Opinion, this Court affirmed the jury verdict finding that the State of South Carolina holds the title to disputed canals in North Myrtle Beach. Thereafter, on April 13, 2012, counsel for East Cherry Grove Realty received a letter from J. Emory Smith, Assistant Deputy Attorney General for the State of South Carolina (attached hereto as Exhibit "A").

In the aforementioned letter of April 13, 2012, the State of South Carolina, for the first time, revealed to East Cherry Grove Realty that there were additional files relating to

the East Cherry Grove Realty litigation that had not previously been produced in discovery or under the Freedom of Information Act. In his letter of April 13, 2012, the Assistant Attorney General noted:

Recently, while looking in a file cabinet, I noticed a file that had slipped under other files. It was a file formerly of Ken Woodington on North Myrtle Beach matters and it included some file material from the 1960's East Cherry Grove litigation. I do not believe that I had located it and reviewed it for the purpose of responding to your letter of December 10, 2009.

Counsel for East Cherry Grove Realty believes that the documents listed in the April 13, 2012 letter of Assistant Deputy Attorney General Emory Smith, along with any and all documents in his files, should have been produced prior to the trial of this case. Counsel had previously sent a Freedom of Information Act request on December 10, 2009 (Exhibit "B") and a Request for Production of Documents (Exhibit "C").

Further, the Attorney General had advised counsel in a letter of December 22, 2009: "That file appears to have been destroyed by the State Records Center..." (See letter of Emory Smith to Gene M. Connell, Jr. dated December 22, 2009 (Exhibit "D")). Appellant's counsel, without reviewing such documents, cannot have intelligently decided whether or not those documents were necessary to try this case to a jury.

Significantly, Assistant Deputy Attorney J. Emory Smith, in his letter of April 13, 2012 further noted: "I am not describing post December 17, 1969 documents because my earlier document response to you was so limited based upon your representations. See my letter of December 22, 2009."

Based on Exhibit "A", counsel for East Cherry Grove Realty requests the Court stay its Opinion and require the Attorney General's Office to produce all documents discussed in its April 13, 2012 letter. Counsel for East Cherry Grove Realty Company can make no

decision on how the case should have been tried to a jury without knowing what documents the South Carolina Attorney General's Office has in its possession. Counsel for East Cherry Grove Realty requests the Court hold a hearing to discuss the contents of the April 13, 2012 letter from the Attorney General's Office and to afford counsel for East Cherry Grove Realty to review the records with a view towards rearguing this case based on these after-discovered documents.

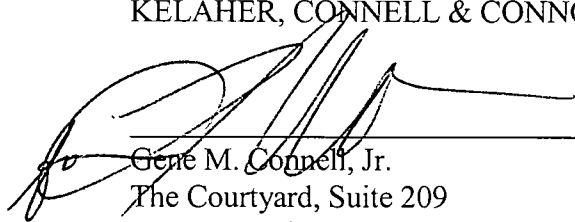
Counsel for East Cherry Grove Realty believes the ends of justice are served in reviewing the documents mentioned in the Attorney General's April 13, 2012 prior to any final Opinion being released in this matter. Counsel has not seen such documents that are described in the April 13, 2012 letter, but raises the issue of whether or not those documents would have been relevant to the issue of whether the deeds were ambiguous and also as to the matter of intent when the deeds were prepared.

Accordingly, counsel requests the Court to stay its Opinion, to order the documents recently discovered by the Attorney General's Office to be produced to Appellant's counsel, to ascertain from the Attorney General's Office as to why the documents were not produced in the course of this litigation, and to consider whether or not these documents require reconsideration of the Court's Opinion once produced.

(Signature on following page)

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.

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(843) 238-5648 (phone)

(843) 238-5050 (facsimile)

gconnell@classactlaw.net

Attorney for Appellant

April 24, 2012

EXHIBIT "A"



ALAN WILSON
ATTORNEY GENERAL

April 13, 2012

Gene M. Connell, Esquire
Kelaher, Connell & Connor, P.C.
Attorneys at Law
P.O. Drawer 14547
Surfside Beach, SC 29587

Re: City of North Myrtle Beach v. E. Cherry Grove Realty, et al

Dear Mr. Connell:

Recently, while looking in a file cabinet, I noticed a file that had slipped under other files. It was a file formerly of Ken Woodington on North Myrtle Beach matters and it included some file material from the 1960's East Cherry Grove litigation. I do not believe that I had located it and reviewed it for the purpose of responding to your letter of December 10, 2009, despite a great effort to find pertinent files. Almost all of the 1960's material in that file is already in the Record. I did find a few documents that are referenced in other documents in the record, but may not be in the Record. They do not appear to be of consequence, but in an abundance of caution and without waiving claims or defenses, I am notifying you of these documents although this case has already been tried and appealed. The documents are as follows:

1. Order, April 7, 1969, adding Channel Development as a party-defendant. This Order is the result of a Petition in the Record at p. 957 which is attached to the Order. Duplicates of other Orders regarding Channel Development of the same April 7 date are in the Record at pp. 62 and 959.

2. A summons and complaint in Horry case 32351, State v. East Cherry Grove, Nixon and Nye, dated September 1, 1966. This Complaint relates to a jetty at Hog Inlet and appears to have resulted in the Order in the Record at p. 1353.

3. A letter to the Horry County Clerk of Court dated December 2, 1966, filing the above Complaint, affidavit of service and an order of Judge Morrison dated November 25, 1966. I do not see the November 25 Order in the file or Record.

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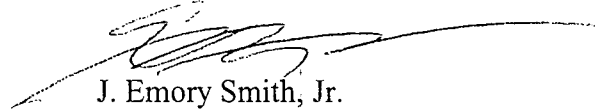
Gene M. Connell, Esquire
April 13, 2012
Page 2

4. Portions of a plat attached to a Petition dated May 17, 1965 and referenced in the Petition in the Record at p. 1339.

I am not describing post December 17, 1969 documents because my earlier document response to you was so limited based upon your representations. *See* my letter of December 22, 2009.

Should you want to see any of these documents, let me know, and I will be glad to send them to you. In providing you this notice or the documents, I do not waive any claims or defenses as to the litigation that has concluded or any use by you of the documents. As I have said, they do not appear to be of significance.

Sincerely,



J. Emory Smith, Jr.
Assistant Deputy Attorney General

cc: Michael W. Battle, Esquire

EXHIBIT "B"

KELAHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW
SUITE 209
THE COURTYARD
1500 U.S. HIGHWAY 17 NORTH
P.O. DRAWER 14547
SURFSIDE BEACH, SOUTH CAROLINA 29587

EDWARD T. KELAHER*
GENE M. CONNELL, JR.
L. SIDNEY CONNOR, IV
LISA POE DAVIS

* OF COUNSEL

AREA CODE 843
238-5648
FAX: 238-5050

December 10, 2009

J. Emory Smith, Jr.
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Re: *City of North Myrtle Beach v. Ray Nixon, LLC, et al.*
Civil Action No. 2009-CP-26- 5782
East Cherry Grove Realty Co., LLC v. The City of North Myrtle Beach, et al.
Civil Action No. 2009-CP-26-5929
Our File No. 2009-0133C

Dear Emory:

I am requesting under the **Freedom of Information Act** a copy of any and all records, letters, documents, deeds, settlement agreements between the State of South Carolina and East Cherry Grove Realty, prior to the Quit Claim Deed filed December 22, 1969 found in Deed Book 420 at Page 586 to include any and all records regarding the Quit Claim Deed found in Deed Book 420 at Page 595. This Freedom of Information Act Request includes a complete copy of the file in regards to the proposed settlement between the parties which resulted in the Quit Claim Deed in exchange between East Cherry Grove Realty Company and the State of South Carolina. Please advise when I may receive those documents.

Out of an abundance of caution, I have sent to you a Request for Production since I am not sure whether or not the State of South Carolina is a named party in order to receive those documents.

Sincerely yours,


Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosure

cc w/enc.: Michael W. Battle, Esquire

EXHIBIT "C"

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2009-CP-26-5782

City of North Myrtle Beach,)
)
Plaintiff,)
)
vs.)
)
Ray Nixon, LLC, Windle Skipper,)
individually and as the personal)
representative of the Estate of C.D.)
Nixon, N.F. Nixon, Jr., John W. Ray,)
State of South Carolina and John Doe,)
)
Defendants.)

**REQUEST FOR PRODUCTION OF
DOCUMENTS TO DEFENDANT
STATE OF SOUTH CAROLINA**

TO: EMORY SMITH, ATTORNEY FOR DEFENDANT STATE OF SOUTH CAROLINA:

Pursuant to Rule 34 of *South Carolina Rules of Civil Procedure*, the Defendants requests that **Defendant State of South Carolina** produce and permit the inspection and reproduction of the following documents and/or tangible items. Unless otherwise noted or agreed to between counsel, the production, inspection, copying and all other acts necessarily related thereto, shall take place at the offices of the Defendants' counsel, Kelaher, Connell & Connor, P.C., Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Post Office Drawer 14547, Surfside Beach, South Carolina 29587 within thirty (30) days of the service hereof, such inspection to continue from day to day thereafter until said inspection and related acts are completed.

NOTE: These requests shall be deemed continuing so as to require supplemental production pursuant to Rule 26(e) of the *South Carolina Rules of Civil Procedure*.

REQUESTS

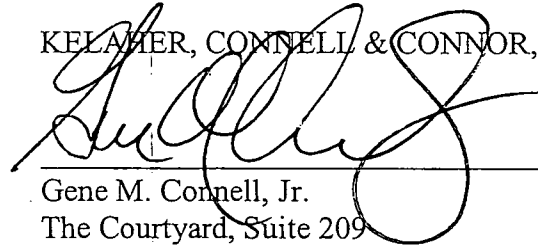
1. A complete copy of any and all settlement documents between the State of South Carolina and East Cherry Grove Realty Company to include any letters, correspondence, notes and settlement agreements signed by the State of South Carolina and C.D. Nixon regarding two Quit

Claim Deeds filed December 22, 1969 and found in Deed Book 420 at Page 586 and Deed Book 420 at Page 595.

2. Copies of any and all plats or proposed plats approved by the South Carolina Attorney General's Office in regard to the aforementioned Quit Claim Deeds.

3. A copy of any and all settlement documents showing that the appeal of the Order of The Honorable James B. Morrison dated August 1, 1968 (attached hereto) was resolved.

KELAMER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net

**Attorney for Defendants Ray Nixon, LLC,
N.F. Nixon, Jr., John W. Ray, and Windle
Skipper Individually and as PR of the
Estate of C.D. Nixon**

December 10, 2009
Surfside Beach, South Carolina.

In conclusion, I hold that defendant, East Cherry Grove Realty Company, and its grantees, have a good and valid title to the property in question upon the following grounds:

1. That the grants called for and intended to include the beds of streams or creeks that were nonnavigable.

2. That according to the maps accompanying the grants, intention and interpretation of the parties and custom and usage at the time of these grants, they called for and intended to include the areas or marsh

lands lying between the high water (mean tide) and the low water mark on navigable streams.

3. That the sovereign governments, at the time of these grants, had the authority and right to and did convey and give good title to such lands in the ordinary and customary manner of grants.

4. That the defendant, and its predecessors in title, have been in possession and exercised such control of said property since these grants to entitle it to a presumption of a grant to the center of the creeks on non-navigable creeks and to the low water mark on navigable creeks if any.

5. That the State is barred by virtue of Code Sections 10-121 and 10-129 of the 1962 Code of South Carolina.

JAMES B. MORRISON,
*Judge of the Fifteenth
Judicial Circuit.*

Georgetown, South Carolina,
August 1st, 1968.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2009-CP-26-5782

City of North Myrtle Beach,)
)
Plaintiff,)
)
vs.)
)
Ray Nixon, LLC, Windle Skipper,)
individually and as the personal)
representative of the Estate of C.D.)
Nixon, N.F. Nixon, Jr., John W. Ray,)
State of South Carolina and John Doe,)
)
Defendants.)
)

**AFFIDAVIT OF SERVICE
BY MAIL**


PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P. C., Attorneys at Law, and that she has mailed, on the date set forth below, a copy of the document described below, in the above entitled action to the following with proper postage affixed thereto:

J. Emory Smith, Jr.
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Michael W. Battle, Esquire
Battle & Vaught, PA
P.O. Box 530
Conway, SC 29528

DOCUMENT: Request for Production of Documents to Defendant State of South Carolina

DATE OF MAILING: December 14, 2009


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 14th day of December, 2009.

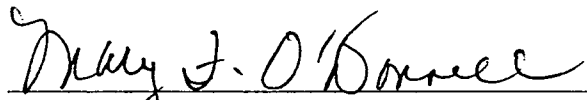

Notary Public for South Carolina
My Commission Expires: 6/1/16

EXHIBIT "D"



HENRY McMASTER
ATTORNEY GENERAL

December 22, 2009
(to be mailed in absence December 23, 2009)

Gene M. Connell, Esquire
Kelaher, Connell & Connor, P.C.
Attorneys at Law
P.O. Drawer 14547
Surfside Beach, SC 29587

Re: City of North Myrtle Beach v. Nixon, et al

Dear Mr. Connell:

Utilizing the guidelines set forth in the South Carolina Freedom of Information Act (FOIA), Section 30-4-10 et seq, Code of Laws of South Carolina, and pursuant to your request, our records were searched for documents referenced in your letter of December 10, 2009.

The documents that you are seeking would most probably be contained in a file for the related 1960's litigation. That file appears to have been destroyed by the State Records Center due to the passage of time under the State's records retention schedule. We have made several efforts to determine if the file is still available, but it no longer appears to exist; however, I have located the following documents from the file *Perrone v. State of SC et al*, (03-CP-26-1416) which are captioned *State of SC v. East Cherry Grove Realty, et al* except as noted:

Order, April 7, 1969
Petition re Ex Parte Channel Development Corp., March, 1969
Order, January 22, 1969
C.B. Berry plat, March 17, 1969

I have not included the quitclaim deeds because I believe you already have copies. I am not including the Supplemental Order, December 23, 1969, and the Order of Dismissal, June 3, 1970, because your letter indicates that you do not need documents generated after the quitclaim deeds.

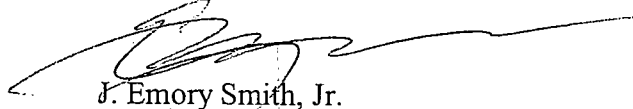
12/28/09

Gene M. Connell, Esquire
December 22, 2009
Page 2

If you need me to make a response to your Request for Production, please let me know. Unless I hear otherwise from you in writing, I will assume that a response to that Request is not necessary due to this letter response to your FOIA request.

Should you have questions, please let me know.

Yours very truly,



J. Emory Smith, Jr.
Assistant Deputy Attorney General

cc: Michael W. Battle, Esquire
Sara P. Bazemore, Esquire
Davis Whitfield-Cargile, Esquire

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

CASE NO. 2009-CP-26-5782

RECEIVED

APR 25 2012

S.C. Supreme Court

City of North Myrtle Beach Respondent

vs.

East Cherry Grove Realty Co., LLC,
The State of South Carolina and John Doe..... Defendants

Of whom

East Cherry Grove Realty Co., LLC is Appellant

and

The State of South Carolina is Respondent

PROOF OF SERVICE


PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served the **Petition for Rehearing and Memorandum of Law in Support of Petition for Rehearing** on the Respondents, through their attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Michael W. Battle, Esquire
Battle & Vaught, PA
P.O. Box 530
Conway, SC 29528
Attorney for Respondent City of North Myrtle Beach

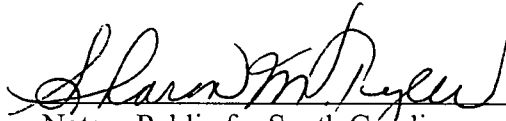
and

Alan Wilson
J. Emory Smith, Jr.
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Attorney for Respondent State of South Carolina

DATE OF MAILING: April 24, 2012


Shelia Y. McCumber

SWORN AND SUBSCRIBED before me,
this 24th day of April, 2012.


Notary Public for South Carolina
My Commission Expires: 2-25-19