

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

G. Wells Dickson, Jr., Special Referee

Case No.: 2005-CP-45-434

Town of Kingstree, a Body Corporate and Politic,.....Respondent

v.

Gary W. Chapman, Jr., Terilyn J. McClary, Waccamaw
Housing, Inc., Lydia F. Duke, Alice H. Kellahan and
South Carolina Department of Transportation.....Defendants

Of whom, Lydia F. Duke and Alice H. Kellahan are.....Appellants

**RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE
RECORD ON APPEAL**

The Respondent hereby designates the following items to be included
in the Record on Appeal:

1. Summons, Notice of Intention to File Petition for Abandonment and Closure of a Portion of Porter Street in the Town of Kingstree dated November 14, 2005
2. Order of Reference dated December 1, 2005
3. Department of Transportation Answer dated December 1, 2005
4. Waccamaw Housing Inc. Answer dated December 20, 2005
5. Order for Abandonment and Closure of Portion of Porter Street Dated October 22, 2010

6. Appellant's Answer and Counter Claim dated January 18, 2006
7. Reply of Petitioner Town of Kingstree dated February 7, 2006
8. Hearing Transcript Dated April 26, 2006 Pages 9-13, 14-16, 17, 18, 20, 21-22, 32-34, 40-54, 55-59, 61, 64-73, 75-80, 81-82, 85-86
9. Hearing Transcript Dated April 16, 2007 Pages 2-8
10. Appellant's Motion to Alter or Amend dated November 4, 2010
11. Order Denying Defendant's Motion for Reconsideration dated December 1, 2011
12. Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7
13. Defendant's Exhibits 2, 3, 4, 8, 9, 10, 11, 12, 16, 18
14. Affidavit of Eaton Living Trust
15. Affidavit of Pendergrass

The undersigned certifies that this Designation of Matter to be Included in the Record on Appeal contains no matter which is irrelevant to this appeal.

Respectfully submitted,



M. Amanda Shuler
JENKINSON, JARRETT & KELLAHAN, P.A.
Post Office Drawer 669
Kingstree, SC 29556
Ph. (843) 355-2000
Fax (843) 355-2010
ATTORNEY FOR THE RESPONDENT

Kingstree, South Carolina
April 27, 2012

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v.

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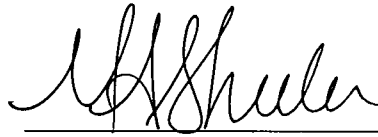
Of whom, Lydia F. Duke and Alice H. Kellahan are.....Appellants

PROOF OF SERVICE

I, M. Amanda Shuler, hereby certify that I have served the Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal by forwarding a copy of same by United States Mail, postage prepaid and addressed on April 27, 2012, as follows:

Larry G. Reddeck, Esquire
Nettles, Turbeville & Reddeck
Attorneys at Law
Post Office Box 699
Lake City, SC 29560

William M. O'Bryan, Jr.
O'Bryan & O'Bryan
Post Office Box 1105
Kingstree, SC 29556



M. Amanda Shuler
JENKINSON, JARRETT & KELLAHAN, P.A.
Post Office Drawer 669
Kingstree, SC 29556
Ph. (843) 355-2000
Fax (843) 355-2010
ATTORNEY FOR THE RESPONDENT

Kingstree, South Carolina
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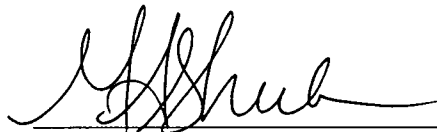
v.

Gary W. Chapman, Jr., Terilyn J. McClary, Waccamaw
Housing, Inc., Lydia F. Duke, Alice H. Kellahan and
South Carolina Department of Transportation.....Defendants

Of whom, Lydia F. Duke and Alice H. Kellahan are.....Appellants

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Designation of Matter to be Included in the Record on Appeal of the Respondents contains no matter which is irrelevant to the appeal.



M. Amanda Shuler
JENKINSON, JARRETT & KELLAHAN, P.A.
Post Office Drawer 669
Kingstree, SC 29556
Ph. (843) 355-2000
Fax (843) 355-2010
ATTORNEY FOR THE RESPONDENT

Kingstree, South Carolina
April 27, 2012



Jenkinson, Jarrett & Kellahan, PA

ATTORNEYS AT LAW

120 WEST MAIN STREET • POST OFFICE DRAWER 669 • KINGSTREE, SOUTH CAROLINA 29556
TELEPHONE (843) 355-2000 • FACSIMILE (843) 355-2010 • TOLL FREE 1-888-354-7417
www.jenkinsonlaw.com

W. E. Jenkinson, III
Ernest J. Jarrett
Jennifer R. Kellahan

M. Amanda Harrelson Shuler

April 27, 2012

The Honorable Tanya A. Gee
Clerk, The South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Town of Kingstree v. Gary W. Chapman, Jr., Terilyn J. McClary,
Waccamaw Housing, Inc., Lydia F. Duke, Alice H. Kellahan and
South Carolina Department of Transportation, of whom, Lydia F.
Duke and Alice H. Kellahan are Appellants
2010-CP-45-434

Dear Ms. Gee:

Please find enclosed the following documents:

- 1) Original and one copy of the Initial Brief of the Respondent and Designation of Matter to be Included in the Record on Appeal in the above captioned case, along with the Certificate of Counsel; and
- 2) Original and one copy of Proof of Service on opposing counsel.

By copy of this letter to opposing counsel, I am serving them with a copy of these documents. I would appreciate your returning the clocked copies to me in the envelope provided.

We appreciate your continued cooperation.

With warm personal regards, I am

Very truly yours,

M. Amanda Shuler
mandv@jenkinsonlaw.com

MAS/dwm
Pc: Larry G. Reddeck, Esquire

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APR 30 2012

SC Court of Appeals

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APPEAL FROM WILLIAMSBURG COUNTY
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Housing, Inc., Lydia F. Duke, Alice H. Kellahan, and
South Carolina Department of Transportation.....Defendants

of whom, Lydia F. Duke and Alice H. Kellahan areAppellants

INITIAL BRIEF OF THE RESPONDENT

Ernest J. Jarrett
M. Amanda Shuler
Jenkinson, Jarrett & Kellahan, P.A.
Post Office Box 669
Kingstree, South Carolina 29556
(843) 355-2000 (phone)
(843) 355-2010 (fax)
Attorneys for the Respondent

RECEIVED
APR 30 2012

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. PORTER STREET IS A PUBLIC ROAD AND HAS BEEN DEDICATED FOR PUBLIC USE SINCE 1903 AND THEREFORE THE TOWN OF KINGSTREE HAS THE RIGHT TO PETITION TO CLOSE A PORTION OF PORTER STREET
- II. THE CLOSURE OF PORTER STREET IS IN THE BEST INTERESTS OF THE PUBLIC AND THE CLOSURE SHOULD BE UPHELD
- III. THE TOWN OF KINGSTREE HAS THE RIGHT TO ASSERT AGENCY AND ESTOPPEL IN THE MATTER AS THE DEFENSE WAS NOT AT ISSUE UNTIL TRIAL AND IT WAS RAISED AND RULED UPON AT TRIAL
- IV. SINCE PORTER STREET IS A ROAD AND THE APPELLANTS EASEMENT DOES NOT SURVIVE THE DEDICATION, THE APPELLANTS ARE NOT ENTITLED TO JUST COMPENSATION

STATEMENT OF THE CASE

This action was commenced by the Town of Kingstree filing its Summons, Notice of Intention to File Petition for Abandonment and Closure of a Portion of Porter Street in the Town of Kingstree, County of Williamsburg on November 14, 2005. (Petition) The matter was referred to the Honorable G. Wells Dickson, Jr., Special Referee by Order of Reference with Finality of the Honorable Clifton Newman dated December 1, 2005. (Order of Reference) The Defendant, South Carolina Department of Transportation, filed an Answer dated December 9, 2005, admitting the allegations of the Petition. (DOT Answer) The Defendant Waccamaw Housing, Inc. filed an Answer dated December 20, 2005, also admitting the allegations of the Petition. (Waccamaw Housing Answer) The Defendants, Gary W. Chapman, Jr. and Terilyn J. McClary did not file an Answer and were found in default. (Order for Abandonment and Closure of Portion of Porter Street) The Appellants, Alice H. Kellahan and Lydia F. Duke, were named as party Defendants based upon a fifty (50) foot easement granted from Samuel E. McIntosh to them found in the Office of the Clerk of Court for Williamsburg County in Deed Book A-311 at page 235, dated September 7, 1993. (Defendants Exhibit 11). The Appellants filed their Answer and Counterclaim on January 18, 2006. (Appellant's Answer). The Town of Kingstree filed its Reply on February 7, 2006. (Petitioner's Reply). A hearing was held on this matter on April 26, 2006 and April 16, 2007. The Court issued its Order on October 22, 2010, closing a portion of Porter Street. (Order for Abandonment and Closure of Portion of Porter Street). The Appellants

filed its Motion to Alter or Amend Judgment on November 4, 2010. (**Appellants Motion to Alter or Amend**). A hearing was held on the Motion to Alter or Amend on March 29, 2011. The Court issued its Order Denying the Defendant's Motion to Alter or Amend Judgment on December 1, 2011. (**Order Denying Defendant's Motion for Reconsideration**). This appeal followed.

FACTS

The Town of Kingstree filed its petition for closure of an unpaved portion of Porter Street located in the Town of Kingstree, County of Williamsburg, State of South Carolina. The undeveloped portion of the Street leads from Ashton Avenue to the Town of Kingstree's Recreation Center. The remainder portion of Porter Street is paved and is currently in use. (Tr. P. 11 l. 24- P. 12 l. 8) (Tr. P. 16 ll. 12-15) (Tr. P. 21). The Town of Kingstree agreed to petition to close the undeveloped portion of Porter Street as a part of the rezoning of a portion of property adjacent to the road. (Tr. P. 14 – P. 16) (Pl. Ex. 3)(Pl. Ex. 4). The property adjacent to Porter Street was rezoned from Highway Commercial to Planned Unit Development at the request of Waccamaw Housing, Inc. to allow for the construction of a senior housing project. The land that was rezoned was owned by the Appellants Duke Kellahan and sold to Waccamaw Housing Inc. Appellants Duke Kellahan brokered a deal whereby the lot would be rezoned to allow for sale to Waccamaw Housing Inc. and subsequent development of the senior housing project. (Pl. Ex. 4)

The adjacent landowners to the undeveloped portion of Porter Street that the Town of Kingstree sought to close were Terilyn J. McClary, Gary W. Chapman Jr. and Waccamaw Housing, Inc. All of the adjacent landowners were named as defendants as well as the South Carolina Department of Transportation. The adjacent defendant landowners consented to the closure. (Tr. P. 40-54). The South Carolina Department of Transportation had no objection to the closure. (Ans. Of SCDOT). Appellants Duke Kellahan were added as defendants to the action due to

an easement that was recorded for the use of Porter Street. Said Easement indicates that “the parties have agreed that efforts should be made to have said street opened and used for their benefit and members of the public, who made need to use the same.” (App. Ex. 11). The parcel of property owned by Terilyn J. McClary is now owned by the Eaton Living Trust. The Trustees of the Eaton Living Trust are Sharon Eaton and Robert Eaton. They have indicated by affidavit that they are in favor of the closure of the property. (Aff. Of Eaton Living Trust). The property owned by Gary W Chapman Jr. is now owned by Hartwell and Hattie Pendergrass. They too have indicated that they are in favor of the closure by way of affidavit. (Aff. Of Pendergrass).

The Town of Kingstree had its first reading of Ordinance 2004-1 to rezone the property owned by the Appellants Duke Kellahan on January 26, 2004. (Pl. Ex. 3). The Appellant Kellahan’s husband, W. N. Kellahan, Jr. along with Senator John Yancey McGill attended the reading to voice the support for the rezoning as they felt that senior housing was needed in the area. Appellant Kellahan stated that the property was in her name but her husband handled the property for her and Ms. Duke. (Tr. P. 57, ll. 2-4). Although the ordinance passed Town Council at its first reading, Council decided that there should be a public hearing on the rezoning due to the citizens of Ashton Avenue’s concerns that there would be an increase in pedestrian and automobile traffic when the housing project was completed thus making their neighborhood unsafe. (Pl. Ex. 3)(Tr. P. 9-13).

The public hearing was held on February 2, 2004, and due to a scheduling conflict, W. N. Kellahan, Jr. was unable to attend. On April 26, 2006, Mr. Kellahan testified that he sent Senator McGill to represent his interests at the proceedings because he assisted Mr. Kellahan with his property. (Tr. P. 64) (Tr. P. 72). Senator McGill testified on April 16, 2007, that he was encouraging the senior housing project for the benefit of his constituents because he knew of a need for senior housing in the Town of Kingstree. (April 16, 2007, Tr. P. 2 ll. 7-15). At the public hearing on February 2, 2004, Senator McGill and other Town Citizens expressed concerns about the increase in noise and traffic as well as other problems associated with the Senior Housing Project and the paving of the majority of Porter Street which would be necessary for the new Senior Housing Project. Senator McGill suggested that a portion of Porter Street connecting it to Ashton Avenue be closed to alleviate the concerns of the Town citizens. The minutes from the public hearing reflect an “understanding that Porter Street will be closed off permanently from Ashton Avenue side, a barricade will be put here and put up a fence.” Senator McGill was the facilitator that allowed town council to broker an agreement that was in the best interests of all parties. (Pl. Ex. 4) (Tr. P. 9-11).

The second and final reading of Ordinance 2004-01 passed with the requirement that Porter Street would be blocked on the Ashton Avenue side with a fence to be erected on the Kingstree Recreation Property line to the paved portion of Porter Street. (Pl. Ex.4). The developer of the Senior Housing project was to fence the property line as well as Appellants Duke Kellahan being required to fence their

remaining property within fifty feet of Highway 377. The property was therefore rezoned to allow for the development of the senior center.

Porter Street was paved from Nelson Boulevard to the land purchased by the proposed Senior Housing Project. Appellants Duke and Kellahan erected the fence from the undeveloped portion of Porter Street to within fifty (50) feet of Highway 377 as agreed. As a result of the rezoning and paving of a portion of Porter Street, Appellants Duke Kellahan were able to consummate a sale of property to Waccamaw Housing Inc. for Sixty Thousand Dollars as evidenced by the deed dated May 3, 2004 and recorded in the Office of the Clerk of Court for Williamsburg County in Deed Book A-522 at page 242. (Tr. P. 9-13). Without the approved rezoning by Town Council and the negotiated agreement by Senator McGill, the sale to Waccamaw Housing Inc. would not have occurred.

The portion of the subject street to be closed is an undeveloped street that is no longer needed for public purposes, and the access, ingress, and egress can be found by the public through using Nelson Boulevard. Additionally, there are plats recorded by the Appellants Kellahan and Duke, subdividing their property indicating a proposed fifty (50) foot road from Porter Street to S. C. Highway 377, although Mr. Kellahan testified that the plans for this road may change in the future. (Tr. P. 75) The Appellants have numerous access points to its property, from Highway 377, to Nelson Boulevard and Porter Street. (Def. Ex. 8, 9, 12, 16, 18).

Without the approved rezoning by the Town of Kingstree Council based upon the negotiated agreement with Senator Yancey McGill, the agent of the Appellants, Alice Kellahan and Lydia Duke, the sale to Waccamaw Housing Inc. would not have been consummated because the housing project would not have been allowed on the property as originally zoned. Thereafter, the Appellants, Lydia Duke and Alice H. Kellahan, erected a fence erected from the closed portion of Porter Street to within fifty (50) feet of Highway 377 as required under the agreement brokered by Senator Yancey McGill on their behalf and complied with the terms of the agreement with the Town with the exception of consenting to the closure of Porter Street.

STANDARD OF REVIEW

This matter involves both legal and equitable issues. When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." Kiriakides v. Atlas Food Systems & Services, Inc., 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct. App. 2000).

The determination of the existence of an easement is a question of fact in an action at law, and on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. Townes Associates, Ltd. v. Greenville, 266 S.C. 81, 86 (S.C. 1976). While the determination of the existence of an easement is a question of fact in a law action, the question as to the extent of an easement is an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997).

In an action in equity referred to a special referee for final judgment, this Court may find facts in accordance with its own view of the preponderance of the evidence. Van Blarcum v. North Myrtle Beach, 337 S.C. 446, 450, 523 S.E.2d 486, 488 (Ct. App. 1999); see also Tupper, 326 S.C. at 323, 441 S.E.2d at 190 (finding since it is an action in equity, the Court may take its own view of the evidence); Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58, 67, 558 S.E.2d 902, 907 (Ct. App. 2001) ("The scope of an easement is an equitable matter in which a reviewing court may take its own view of a preponderance of the evidence.").

However, the court should not disregard the special referee's findings as he was in a better position to access the credibility of witnesses. Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750 (2005). "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." Temple v. Tec-Fab, Inc., 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009).

The defense of estoppel is equitable in nature and should be determined by a trial judge. Gaymon v. Richland Mem. Hosp., 327 S.C. 66, 488 S.E.2d 332 (1997). In addition, the issue as to agency is a question of fact. American Fed. Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439 (1996). Therefore, the court may correct only errors of law.

ARGUMENT

I. PORTER STREET IS A PUBLIC ROAD AND HAS BEEN DEDICATED FOR PUBLIC USE SINCE 1903 AND THEREFORE THE TOWN OF KINGSTREE HAS THE RIGHT TO PETITION TO CLOSE A PORTION OF PORTER STREET

In March of 1903, Peter Gourdin surveyed the lands of John T. Nelson into lots. Porter Street, although unnamed at the time, appears on the subdivision plat. John T. Nelson divided his property into lots and delineated roads on the subdivision plat. (Tr. P. 17, 20)(Pl. Exhibit 2). The deed from John T. Nelson to H.O. Britton describes a lot according to the plat and describes the lot as being situated next to “a new Street.” (Def. Exhibit 3). The deed from John T. Nelson to C.C. Brinkley also describes a lot according to the plat as drawn by Peter Gourdin and states that the street is “a new Side Street.” (Def. Exhibit 4). The 1903 Plat dedicated the “new streets” to the public.

On August 19, 1993, W. N. Kellahan, Jr., husband of Appellant Alice H. Kellahan, surveyed the Appellant’s property. The plat indicates the existence of the beginning portion of Porter Street on the northern portion of the plat. (Def. Exhibit 9). Again, on November 14, 1996, W. N. Kellahan, Jr., surveyed a parcel of property located immediately East of Porter Street. Mr. Kellahan’s own plat shows Porter Street as a road on the plat. (Def. Exhibit 12). Finally, in May of 1999, W.N. Kellahan, Jr. again surveyed the land of Appellants Kellahan and Duke for a subdivision project. Again the plat shows Porter Street as an unimproved street on the plat that was recorded with the office of the Clerk of Court for Williamsburg

County. (Tr. P. 18). The deed from Samuel McIntosh to Appellants Kellahan and Duke describe the western boundary as Porter Street. (Def. Exhibit. 10)

Porter Street is a public road as it was dedicated to the public in 1903. In order for a road to be dedicated to the public, the owner must express in a positive and unmistakable manner the intention to dedicate the property for public use. Secondly, there must be acceptance of the property by the public. Dedication need not be formal. It may be implied from long use by the public of the land claimed to be dedicated. In addition, formal acceptance is not necessary. It may also be implied by continued use. Boyd v. Hyatt, 294 S.C. 360, 364 S.E.2d 478 (Ct. App. 1988). Porter Street was dedicated to the public in 1903 when the first subdivision plat was recorded. With this plat, the property was expressly dedicated for use by the public. The public later accepted that dedication by use, albeit light use by the public.

The Community Planning and Development Director for the Town of Kingstree, Michael Kirby, testified that it was the Town's responsibility to maintain the road. (Tr. P. 15). Terrilyn McClary, defendant and adjacent landowner, testified that Porter Street was a dirt road and people would drive and walk through often. (Tr. 42-43) Gary Chapman, adjoining landowner and defendant also testified that vehicle and foot traffic went through Porter Street and that it was dangerous for the neighborhood and his children. He stated that it was used as a road for foot and vehicular traffic since at least 1995 when he moved to the area. (Tr. P. 50-51). The Appellants' own expert and agent, W.N. Kellahan, Jr. also admitted that Porter

Street was a public road. He stated "it has been open to the public since 1903." (Tr. P. 80). He stated that the road had been used since 1975 or 1976 when it was actually cut. (Tr. P. 81). The Appellant Kellahan also testified that the road was a public road. (Tr. P. 56, ll 10-20).

Appellants Kellahan and Duke argue that they have an express written easement that has not been abandoned. They suggest that since the easement was granted in writing then any abandonment or release would have to be in writing. This argument is simply absurd and contrary to the above stated law. A dedication by writing is not required by South Carolina law. In addition, the parties did make such a dedication by writing in the easement granted to Appellants Kellahan and Duke by Mr. McIntosh.

Although the road appears on maps as early as 1903 and has been a road since that time, the Appellants Kellahan and Duke further dedicated the easement to the public and it, therefore, became a public road. Defendants' Exhibit 11 submitted at trial is the document whereby Appellants Kellahan and Duke obtained the easement. Contained within that grant is language that indicates a dedication by writing. The language in the Easement states "the parties have agreed that efforts should be made to have [Porter] street opened and used for their benefit and members of the public who may need to use the same." (Defendants' Exhibit 11) . Porter Street even appears on Defendant's Exhibit #9, a plat surveyed at the request of Mrs. Kellahan and Mrs. Duke on August 19, 1993, by her agent and husband W.N. Kellahan, Jr.. Mr. Kirby, Community Planning and Development

Director for the Town of Kingstree, testified that the Town of Kingstree has been responsible for maintaining Porter Street. Without question, the Defendants have dedicated Porter Street for public use and it has been accepted by the public.

Porter Street is definitely a public road. The street was owned by the Town of Kingstree as evidenced by their deeds in purchasing the recreation complex. Although there is no formal written dedication of the road for public use, the Court may look to the actions of the parties as to whether a dedication has occurred. "In situations where title to real estate is claimed by dedication rather than actual conveyance, the action of the parties must be unequivocal and positive as to leave little doubt that it was the intention of the owner to dedicate the same to the public use." Vick v. S.C. Dep't of Transportation, 347 S.C. 470, 556 S.E.2d 693 (Ct. App. 2001). The Town of Kingstree as well as the Appellants Kellahan and Duke have equivocally indicated that Porter Street would be used as a public road. Public funds were used for the paving of Porter Street and the original easement conveyance to the Appellants, Alice H. Kellahan and Lydia H. Duke, indicates a strong desire to have the street opened and used for their benefit and members of the public. Additionally, the portion of Porter Street which is to be closed was "cut in" in the 1970's although the plat showing its existence was recorded in 1903. (Tr. P. 61).

Although there was never an express public written dedication of Porter Street, Porter Street has been used by the public and has been paved using public CTC funds and is therefore a public street. The road was dedicated and accepted

well before the paving. The road was never paved until the deal was brokered with Appellants Kellahan and Duke which provided for the paving of the majority of the road and the other portion to be closed permanently. Once the road is deemed “dedicated” for public use by the parties’ actions, a landowner may no longer retain discretion to alter or control future uses of the property once it has been accepted by the public. Timberlake Plantation Company vs. County of Lexington, 314 S.C. 556, 431 S.E.2d 573 (1993). At the time, Mr. McIntosh granted an easement to Appellants Kellahan and Duke, the road was a public road at that time and he did not have the ability to make such a conveyance. The conveyance would then be void.

Further, as evidenced by the Deed of the Appellants, Alice H. Kellahan and Lydia H. Duke, to Waccamaw Housing dated May 3, 2004, and recorded in the Office of the Clerk of Court for Williamsburg County in Deed Book A-552 at page 242, there was no easement contained in the deed for access to the property evidencing the Appellants’ belief that Porter Street was indeed a public street. As a public street, such recitation of an easement would no longer be necessary. In fact, if Porter Street is deemed private as maintained by the Defendants, Alice H. Kellahan and Lydia F. Duke, Waccamaw Housing would have claims against the Defendants, Alice H. Kellahan and Lydia F. Duke, due to having no public access to their property. (Tr. 34) Porter Street is a public road from Ashton Avenue to Nelson Boulevard and has been since 1903. Therefore, the Town of Kingstree may petition

to close the a portion of road if it is in the best interests of the citizens of the Town of Kingstree.

II. THE CLOSURE OF PORTER STREET IS IN THE BEST INTERESTS OF THE PUBLIC AND THE CLOSURE SHOULD BE UPHELD

Porter Street is without a doubt a public road. As such, the Town may petition to close a portion of the road according to South Carolina Code Section 57-9-10 et. seq. if it is in the best interests of all. This public road is not subject to the easement of Appellants Kellahan and Duke as there was no easement to grant. Alternatively, if there was an easement to grant, that easement was dedicated to and accepted by the public. The public, including the Appellants Kellahan and Duke, through their agent, Senator McGill, then spoke and decided to close a portion of the road for the safety of the Town of Kingstree's citizens.

The Town has provided safe access to the Recreation Center. The closing of the portion of Porter Street is for the safety of landowners surrounding the area, the public, and Town of Kingstree's property. Mr. Chapman, adjacent landowner, testified that the increase in traffic made it dangerous for his children to play inside. He feared that any further development would increase that traffic further. (Tr. P. 50). Porter Street travels into the rear of the Recreation center. It is for the safety of the users of the Recreation Center that the public use the access from the front of the Recreation Center. The closing of a portion of Porter Street also decreases foot and automobile traffic to the rear of the Recreation Center. It decreases the traffic to the residential neighborhood is behind the Recreation

Center making the citizens safer. (Tr. P. 41-43). The Town has provided sufficient proof that the closing of a portion of Porter Street is in the best interests of the residents of the Town of Kingstree. (Tr. P. 32).

III. THE TOWN OF KINGSTREE HAS THE RIGHT TO ASSERT AGENCY AND ESTOPPEL IN THE MATTER AS THE DEFENSE WAS NOT AT ISSUE UNTIL TRIAL AND IT WAS RAISED AND RULED UPON AT TRIAL

Generally, any affirmative defense that a party seeks to assert must be plead. However, if the affirmative defense is raised before the trial court, it is properly preserved for appeal. Here, the issue as to estoppel was properly raised and ruled upon by the trial court. Simply because the defense of estoppel was not entered as a defense in the reply to the counter-claim does not prohibit the Court from considering the equitable defense. See Adams v. B & D, Inc., 297 S.C. 416, 377 S.E.2d 315 (1989). The issue as to estoppel was properly before the court. The rule as to the pleading requirement exists so the defending party may have the opportunity to refute the claim. Here, Appellants Kellahan and Duke were on notice as to the claim of estoppel and had the opportunity to defend the claim. The Special Referee even kept the record open and held a hearing a year after the initial hearing to allow the Appellants to present additional evidence. The issue of estoppel was tried by the consent of all parties involved as the appellants made estoppel an issue in the case. Therefore, it is proper for the Court to consider the argument of estoppel. See Collins Entm't, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

The elements of equitable estoppel are split between the estopped party and the party claiming estoppel.

The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped.

Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007). During the February 2, 2004 Public Hearing, Senator Yancey McGill, agent of Appellants Kellahan and Duke, made the recommendation to Council for a second reading for an ordinance to rezone property from Highway Commercial to Planned Unit Development for the purpose of building senior citizen housing. As a part of the reading, Senator McGill brokered a deal where a portion of Porter Street would be closed permanently from Ashton Avenue and a barricade and fence to block the area. The Town would put up a fence on the Town's side; the developer would put the fence on the development side. Senator McGill also requested that a letter be sent from the Town to CTC requesting funds to pave the remaining unclosed portion of Porter Street. Due to Senator McGill's actions, the rezoning was consummated and the development for senior housing was allowed. The funds for the paving of Porter Street were then appropriated.

It is clear from the record that an agency relationship was established between Senator Yancey McGill and the Appellants Kellahan and Duke. W. N. Kellahan, Jr. testified that he handled the property for Appellants Kellahan and Duke. During trial, W.N. Kellahan, Jr. testified that he had a scheduling conflict and could not attend the meeting; therefore, he sent Senator Yancey McGill to “represent them.” When asked, “On February 2, and you sent Senator McGill I guess to represent your interest, is that correct?” Mr. Kellahan responded “Yes.” (Tr. P. 72 ll. 4-6).

“An agency relationship may be established by evidence of actual or apparent authority.” Fochtman v. Clanton’s Auto Auction Sales, 233 S. C. 581, 583, 106 S.E.2d 272, 274-75 (1958). While actual authority is that which is expressly conferred upon the agent by the principal, apparent authority is that which though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing.” Clearly, Senator Yancey McGill was an agent of these ladies. It is not relevant that Senator McGill testified at the second hearing that he did not represent the Appellants Kellahan and Duke because W. N. Kellahan, Jr., testified himself that he sent Senator McGill to represent Appellants Kellahan and Duke. It is the intent of the principal that is key in any agency relationship, not the intent of the agent. Mr. Kellahan testified that he handled all of the business concerning these properties for the Appellants Kellahan and Duke and that he sent Senator Yancey McGill to represent them due

to his scheduling conflict. It is always the intent of the principal that the Court must look to in determining whether an agency relationship exists.

Since Senator McGill was the agent of these ladies, “the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption.” WDI Meredith & Co. v. American Telesis, Inc., 359 S.C. 474, 597 S.E.2d 885 (Ct. App. 2004). According to R & G Construction, Inc. v. Lowcountry Regional Transportation Authority,

A true agency relationship may be established by evidence of actual or apparent authority. See Fochtman v. Clanton's Auto Auction Sales, 233 S.C. 581, 106 S.E.2d 272 (1958). See also Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982) (agency relationship may be proven by evidence of apparent or implied authority, even where parties have entered agreement to contrary). The doctrine of apparent authority focuses on the principal's manifestation to a third party that the agent has certain authority. Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996). Concomitantly, the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption.

...

Thus, the concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal. Beasley v. Kerr-McGee Chem. Corp., 273 S.C. 523, 257 S.E.2d 726 (1979); Visual Graphics Leasing Corp. v. Lucia, 311 S.C. 484, 429 S.E.2d 839 (Ct. App. 1993).

343 S.C. 424, 432, 540 S.E.2d 113, 117 (2000). The Town of Kingstree had a reasonable belief that Senator Yancey McGill was acting on behalf of the

Appellants. W. N. Kellahan Jr. testified at the April 26, 2006 hearing that he sent Senator McGill to represent his interests. (Tr. P. 72, ll. 4-6). He also testified that he handled all the aspects of the property. (Tr. P. 59, ll. 5-6). The appellant testified that her husband was her agent that handles the acquisition, development and sale of her property. (Tr. P. 54, ll. 18-24). She testified that her “husband handles off of this, and honestly the property is in mine and Lydia’s name.” (Tr. P. 57, ll. 3-4). W.N. Kellahan Jr. handled the appellant’s property and sent Senator McGill to represent him at the public hearing. Senator McGill was W.N. Kellahan, Jr.’s agent by way of apparent authority.

As such, the Appellants Kellahan and Duke are bound by the deal brokered by their agent, Senator Yancey McGill. After all, the deal was brokered in order to allow them to sell a two acre lot for \$60,000.00 for development. Since Senator McGill agreed to the closing of a portion of the road in order to have the property rezoned that would provide for the sale of the property at such an inflated rate, Appellants Kellahan and Duke are estopped from now arguing that they do not want the portion of the road closed.

Senator McGill stated that he understood that Porter Street would be closed permanently to allow for the rezoning. (April 16, 2007 Tr. P. 4). This is the conduct that conveyed that the Appellants would agree to the closing of Porter Street. Currently, Appellants Kellahan and Duke are opposed to the closing of Porter Street. The representation that this portion of Porter Street would be permanently closed was made so that Town Council would agree to the rezoning. This

representation by Appellants Kellahan and Duke would be reasonably calculated to induce the other party, The Town of Kingstree, to act. Appellants Kellahan and Duke had the actual or constructive knowledge that they would later oppose the closing of a portion of Porter Street.

IV. SINCE PORTER STREET IS A ROAD AND THE APPELLANTS EASEMENT DOES NOT SURVIVE THE DEDICATION, THE APPELLANTS ARE NOT ENTITLED TO JUST COMPENSATION

The land was dedicated to the public. Since the land was dedicated to the public, Appellants Kellahan and Duke are not entitled to compensation. Mr. McIntosh did not have an easement to grant the Appellants despite the grant otherwise. In the alternative, if he did have the ability to make such a grant, the grant was dedicated to the public for the use by the public. Therefore, any claim for just compensation is lost. Furthermore, the Appellants Kellahan and Duke specifically agreed to the closing of this portion of Porter Street based on the deal brokered by their agent, Senator McGill.

In Timberlake Plantation Co. v. County of Lexington, 314 S.C. 556, 431 S.E.2d 573 (1993), the Court found that there was no difference between an express dedication and a grant. The Court further stated “that while a landowner may dedicate land for a specific, limited, and defined purpose, he cannot retain discretion to alter or control future use of the property once it has been accepted by the public.” Id at 561, 576. Appellants Kellahan and Duke cannot dedicate land for a road then claim that they are entitled to compensation for the closing of the road

after the Town has deemed it in the best interests of the Town. Any control over that land was lost after the road was dedicated.

CONCLUSION

For the reasons stated herein, this Court should affirm the judgment of the Special Referee.

Respectfully submitted,

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Ernest J. Jarrett
M. Amanda Shuler
Jenkinson, Jarrett & Kellahan, P.A.
PO Drawer 669
Kingstree, South Carolina 29556
(843)355-2000
Attorneys for the Respondent