THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY

Court of Common Pleas

G. Wells Dickson, Jr., Special Referee

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SC Court of Appeals

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

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 3

Statement of Facts 5

Standard of Review 12

Arguments . . . .

I. BECAUSE THE PLAINTIFF ALLEGED IN ITS PETITION DATED OCTOBER 19, 2005 THAT DEFENDANTS KELLAHAN/DUKE HAD AN EASEMENT FOR THE USE OF PORTER STREET, THE PLAINTIFF IS BOUND BY THAT ALLEGATION. 14

II-A. BECAUSE DEFENDANTS KELLAHAN/DUKE HOLD AN EXPRESS WRITTEN EASEMENT WHICH HAS NOT BEEN ABANDONED THE PLAINTIFF IS NOT ENTITLED TO CLOSE THE AREA IN QUESTION TO DEFENDANTS KELLAHAN/DUKE 15

II-B. BECAUSE DEFENDANTS KELLAHAN/DUKE HOLD A VALID EASEMENT FROM MCINTOSH WHICH HAS PRIORITY OVER ANY RIGHTS OF THE TOWN OF KINGSTREE, THE DEFENDANTS KELLAHAN/DUKE ARE ENTITLED TO THE CONTINUED AND UNRESTRICTED USE OF THE AREA IN QUESTION FOR ACCESS 16

III. BECAUSE THERE WAS NEVER A DEDICATION OF PORTER STREET FOR THE AREA IN QUESTION, THE PLAINTIFF IS NOT ENTITLED TO CLOSE THE AREA IN QUESTION SO AS TO PREVENT DEFENDANTS KELLAHAN/DUKE FROM HAVING ACCESS AND USE OF THE AREA IN QUESTION. 20

IV. BECAUSE THE TOWN OF KINGSTREE DID NOT HAVE A RIGHT TO PETITION TO ABANDON OR CLOSE THE FIFTY (50') FOOT WIDE AREA BETWEEN LOTS 13 AND 14 AS SHOWN ON THE GOURDIN PLAT FOR NELSON IN 1903, THE DEFENDANTS KELLAHAN/DUKE SHOULD CONTINUE TO

HAVE FULL USE TO THE AREA IN QUESTION FOR ACCESS . . 22

V. BECAUSE THE PLAINTIFF HAS FAILED TO PLEAD OR PROVE THAT THE DEFENDANTS HAVE ABANDONED OR DEDICATED THEIR EASEMENT, DEFENDANTS KELLAHAN/DUKE ARE ENTITLED TO THE FULL USE OF THEIR EASEMENT FOR ACCESS OVER AND ACROSS THE AREA IN QUESTION 24

VI. BECAUSE THE PLAINTIFF FAILED TO PROVE THAT THE CLOSURE OF THE AREA IN QUESTION IS IN THE BEST INTEREST OF ALL CONCERNED, I.E. IN THE PUBLIC INTEREST, THE CLOSURE OF THE AREA SHOULD BE DENIED 25

VII. BECAUSE THE PLAINTIFF FAILED TO EITHER ALLEGE OR PROVE ANY AGENCY OR ESTOPPEL THAT WOULD BIND DEFENDANTS KELLAHAN/DUKE TO THE ACTION BY THE TOWN COUNCIL ON FEBRUARY 2, 2004, THE PLAINTIFF IS NOT ENTITLED TO ASSERT AGENCY OR ESTOPPEL IN THIS MATTER 28

VIII. BECAUSE THE WRITTEN EASEMENT FROM SAMUEL MCINTOSH TO KELLAHAN AND DUKE WAS NOT AN EXPRESS WRITTEN DEDICATION AND THE EVIDENCE DOES NOT SUPPORT THE ACT OF DEDICATION OF THE AREA AS A STREET, THE EASEMENT RIGHTS OF DEFENDANTS KELLAHAN/DUKE SHOULD NOT BE TERMINATED.. 34

IX. BECAUSE THE ORDER OF OCTOBER 22, 2010 PROVIDES FOR THE CLOSURE OF AN AREA AND FOR THE TAKING OF PROPERTY RIGHTS OF DEFENDANTS KELLAHAN/DUKE, THESE DEFENDANTS ARE ENTITLED TO COMPENSATION FOR THE TAKING. 36

Conclusion 39

TABLE OF AUTHORITIES

CASES

Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) . . . 12

Roberts v. Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997) 12

Jefferies v. Phillips, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994) 12

Friarsgate, Inc. v. First Federal Sav. & Loan Ass'n. of South Carolina, 317, S.C. 452, 454 S.E.2d 901 (Ct. App. 1995) 12

Harvey v. South Carolina Dep't of Corrections, 338 S.C. 500, 527 S.E.2d 765 (Ct. App. 2000) 13

Slear v. Hanna, 329 S.C. 407, 496 S.E.2d 633 (1998) 13

Eldridge v. City of Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998) 13

Poole v. Combined Util. Sys. of City of Easley, 269 S.C. 271, 237 S.E.2d 82 (1977) 13

Gaymon v. Richland Memorial Hosp., 327 S.C. 66, 488 S.E.2d 332 (1997) . . . 13

State v. Beach Co., 271 S.C. 425, 248 S.E.2d 115 (1978) 13, 21

American Fed. Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439 (1996) 13

Postal v. Mann, 418 S.E.2d 322 (Ct. App. 1992) 14

Elrod v. All, **134 S.E.2d 410, (1964)** 14

Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997) 20, 21

Blue Ridge Realty Co. vs Williamson, 247 S.C. 112, 145 S.E.2d 922 (1965) 17

Helsel v. City of North Myrtle Beach, 307 S.C. 24, 413 S.E.2d 821 (1992) 20

Mack v. Edens, 320 S.C. 236, 464 S.E.2d 124 (Ct. App.1995) 20

Baugus v. Wessinger, § 42 at 38 (1983) 21

Hodge v. Manning, 241 S.C. 142, 127 S.E.2d 341 (1962) 21

Chafee v. City of Aiken, 57 S.C. 507, 35 S.E. 800 (1900) 21

Vereen v. Liberty Life Ins. Co., 306 S.C. 423, 412, S.E.2d 425, (Ct. App. 1991) 29

McCall v. Finley, 294 S.C. 162, S.E.2d 26 (Ct. App. 1987) 29

Citing Paramount Fund, Inc. v. Cusaac, 282, S.C. 497, 319 S.E.2d, 354 (Ct. App. 1984) 29

City of Rockhill v. Cothran, 209 S.C. 357, 40 S.E.2d 239 (1946) 37

R&G Construction, Inc. v. Low Country Regional Transportation Authority, 343 S.C. 424, 540 S.E.2d 113 (2000) 29, 31

Collins Entertainment, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005) 32, 33

Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994) 32

E.g., Adams v. B & D, Inc., 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989) .. 33

South Carolina State Hwy. Dep't v. Allison, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965) 37

Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76, 80 (2005) 37

Gray v. South Carolina Dep't of Highways and Public Transp., 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1992) 37

Hardin v. South Carolina Dept. of Transp., 371 S.C. 598, 641 S.E.2d 437 (2007) 37, 38

South Carolina State Highway Dept. v. Carodale Associates, 268 S.C. 556, 235 S.E.2d 127(1977) 38

Hoogenboom v. City of Beaufort, 315 S.C. 306, 433 S.E.2d 875 (Ct. App., 1992) 15, 36

STATUTES

S.C. Code Ann. § 6-7-1070 (1976) 21

S.C. Code Ann. § 6-29-1170 (1976) 22, 35

S.C. Code Ann. § 57-9-10 (1976) 22

S.C. Code Ann. § 57-9-10, et sequi 25

S.C. Code Ann. § 57-9-20 (1976) 23, 24, 26, 28

S.C. Code Ann. § 57-3-120, (1976) 23

U.S.C.A. Const.Amend. 5 . . . . 25, 37, 38

Const. Art. 1, § 13 . . . . 25, 37, 38

OTHER AUTHORITIES

Rule 8, SCRCP 28, 32, 33

Rule 12, SCRCP 28

Ordinance 2004-01, Ordinance to Rezone a Portion of Tax Map
Property 11-39-11 10

American Jurisprudence 2ND Estoppel & Waiver Section 57 . . . . *29*

American Jurisprudence 2ND Estoppel & Waiver Section 78 . . . . *30*

American Jurisprudence 2nd Estoppel & Waiver 32

STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURT ERR BY FAILING TO FIND THAT THE PLAINTIFF WAS BOUND BY THE ALLEGATION IN THE PETITION DATED OCTOBER 19, 2005 THAT DEFENDANTS KELLAHAN/DUKE HAD AN EASEMENT FOR THE USE OF PORTER STREET, THE ERROR BEING THAT THE PLAINTIFF WAS BOUND BY THE ADMITTED FACTUAL ALLEGATIONS IN HIS PLEADINGS. (Argument I)

2. DID THE LOWER COURT ERR BY FAILING TO DENY THE CLOSURE OF A PORTION OF PORTER STREET, (WHICH HAS NEVER BEEN PAVED) ON THE GROUNDS THAT IT WAS NOT A ROADWAY UNDER S.C. CODE, § 57-9-10, ET SEQUI? (Argument IV)

3. DID THE LOWER COURT ERR BY FAILING TO SPECIFICALLY FIND AND HOLD THAT ANY CLOSURE OF A PORTION OF PORTER STREET (WHICH HAS NEVER BEEN PAVED) SHOULD BE TOTALLY AND COMPLETELY SUBJECT TO THE PRIVATE EASEMENT OF DEFENDANTS KELLAHAN AND DUKE? (Argument II)

4. DID THE LOWER COURT ERR BY FAILING TO SPECIFICALLY FIND AND HOLD THAT DEFENDANTS KELLAHAN AND DUKE WERE ENTITLED TO THEIR PRIVATE EASEMENT? (Argument II)

5. DID THE LOWER COURT ERR BY FAILING TO SPECIFICALLY FIND AND HOLD THAT DEFENDANTS KELLAHAN AND DUKE RETAIN THEIR PRIVATE EASEMENT SINCE THERE WAS NEVER A DEDICATION OF THE PORTION OF PORTER STREET WHICH HAS NEVER BEEN PAVED? (Argument III)

6. DID THE LOWER COURT ERR BY FAILING TO FIND AND HOLD THAT DEFENDANTS KELLAHAN AND DUKE CONTINUE TO RETAIN THEIR PRIVATE EASEMENT SINCE THE PLAINTIFF FAILED TO ALLEGE IN ITS PLEADINGS THAT THERE HAD BEEN ANY DEDICATION AND/OR ABANDONMENT OF THE EASEMENT TO A PUBLIC USE BY DEFENDANTS, KELLAHAN AND DUKE, OR THAT THERE WAS ANY MERGER OF THE EASEMENT AND THE ROADWAY? (Argument III)

7. DID THE LOWER COURT ERR BY FAILING TO FIND AND HOLD THAT THE EVIDENCE BEFORE THE COURT FAILED TO ESTABLISH THAT THERE WAS ANY DEDICATION BY DEFENDANTS, KELLAHAN AND DUKE, OF THEIR EASEMENT OR OTHER PROPERTY RIGHT AND ALSO FAILED TO ESTABLISH THAT THERE WAS ANY MERGER OF

THE EASEMENT INTO THE ROADWAY SUFFICIENT TO MEET THE REQUIRED BURDEN OF PROOF? (Argument III)

8. DID THE LOWER COURT ERR BY FAILING TO DENY THE REQUEST FOR RELIEF OF THE PLAINTIFF AND DENY THE CLOSURE OF THE ROADWAY SINCE THE PROPERTY RIGHTS OF THE DEFENDANTS KELLAHAN AND DUKE, BEING PRIVATE EASEMENT RIGHTS, COULD NOT BE DIVESTED FROM THOSE DEFENDANTS AND VESTED IN A THIRD PARTY OR IN A PERSON OR ENTITY, NOT A PARTY TO THIS ACTION, BY THE CLOSING OF THE ROADWAY? (Argument IV)

9. DID THE LOWER COURT ERR BY FAILING TO FIND AND HOLD THAT THERE WAS NO AGENCY RELATIONSHIP BETWEEN YANCEY MCGILL AND WILLIAM N. KELLAHAN, JR. ON THE GROUND THAT THE EVIDENCE BEFORE THE COURT FAILED TO MEET THE REQUIRED BURDEN OF PROOF TO ESTABLISH AN AGENCY RELATIONSHIP BETWEEN YANCEY MCGILL AND WILLIAM N. KELLAHAN, JR.? (Argument VII)

10. DID THE LOWER COURT ERR BY FAILING TO FIND AND HOLD THAT THERE WAS NO AGENCY RELATIONSHIP BETWEEN YANCEY MCGILL AND DEFENDANTS KELLAHAN AND DUKE ON THE GROUND THAT THE EVIDENCE AND TESTIMONY BEFORE THE COURT FAILED TO MEET THE REQUIRED BURDEN OF PROOF TO ESTABLISH AN AGENCY RELATIONSHIP BETWEEN YANCEY MCGILL AND DEFENDANTS KELLAHAN AND DUKE? (Argument VII)

11. DID THE LOWER COURT ERR BY FAILING TO DENY THE CLOSURE OF THE ROADWAY ON THE GROUND THAT A DETERMINATION OF THE EQUITABLE RIGHTS OF THE PARTIES WAS NOT AN APPROPRIATE REMEDY BASED UPON THE FACT THAT SINCE NO ESTOPPEL OR EQUITABLE ESTOPPEL WAS PLED, AND, SINCE THE SAME HAD NOT BEEN PLED, THE ESTOPPEL WAS WAIVED? (Argument VII)

12. DID THE LOWER COURT ERR BY FAILING TO FIND AND HOLD THAT DEFENDANTS KELLAHAN AND DUKE RETAINED THEIR PRIVATE EASEMENT RIGHTS SINCE BASED UPON THE ORDER DATED OCTOBER 22, 2010 HELD THAT NO TAKING OCCURRED, AND THEREFORE, IF NO TAKING OCCURRED, THEN THE PRIVATE EASEMENT RIGHTS OF THE DEFENDANTS KELLAHAN AND DUKE COULD NOT BE EXTINGUISHED, REMOVED OR OTHERWISE AFFECTED? (Argument IX)

13. DID THE LOWER COURT ERR BY FAILING TO FIND AND HOLD THAT THE DEFENDANTS KELLAHAN AND DUKE SHOULD BE COMPENSATED IN THE AMOUNT OF ONE HUNDRED THOUSAND ($100,000.00) DOLLARS AS JUST COMPENSATION UNDER THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF SOUTH CAROLINA IF THEIR RETAINED PRIVATE EASEMENT RIGHTS ARE TERMINATED? (Argument IX)

14. DID THE LOWER COURT ERR BY FAILING TO FIND AND HOLD THAT THE DEFENDANTS KELLAHAN AND DUKE RETAINED THEIR PRIVATE EASEMENT RIGHTS SINCE NO TAKING HAD OCCURRED, AND, ACCORDINGLY, THOSE RIGHTS COULD NOT BE EXTINGUISHED OR TRANSFERRED TO A THIRD PARTY, OR TO A PERSON OR ENTITY, NOT A PARTY TO THIS ACTION, BASED UPON THE PLEADINGS, EVIDENCE AND TESTIMONY BEFORE THE COURT, AS WELL AS THE APPLICABLE LAWS OF THIS STATE? (Arguments I - IX)

STATEMENT OF CASE

On November 14, 2005, the Plaintiff filed a Petition for Abandonment and Closure of an area that is located in the Town of Kingstree and that it called a portion of Porter Street. The Petition only sought relief under **S.C. Code Ann** §**57-9-10, et seq.** which sets forth the procedure for the closure of a roadway. Defendant South Carolina Department of Transportation filed and Defendant Waccamaw Housing, Inc. filed Answers which both admitted the allegations of the Petition. Defendants Gary W. Chapman Jr. and Terilyn J. McClary did not respond and both are in default. Defendants Lydia F. Duke and Alice F. Kellahan filed an Answer and Counterclaim, that requested that the Petition be dismissed and also counterclaimed for payment of just compensation for termination of their rights under their written recorded easement for access to Ashston Ave. if the closure of the undeveloped portion of the Porter Street. The Plaintiff's reply to the Answer and Counterclaim of Defendants

Duke and Kellahan was a general denial.

This matter was referred to the Honorable G. Wells Dickson, Jr. by Order of Reference with Finality by the Honorable Clifton Newman dated December 1, 2005.

The Notice of Intention to File Petition for Abandonment and Closure of a portion of Porter Street of the Town of Kingstree, County of Williamsburg, was published in The News, a newspaper of general circulation in Williamsburg County on October 26, 2005, November 2, 2005, and November 8, 2005.

The Honorable G. Wells Dickson, Jr., Special Referee, received testimony and evidence, as well as the arguments of counsel, at hearings on April 26, 2006, and on April 16, 2007 and other evidence was received thereafter in the form of affidavits.

The Special Referee issued an Order on October 22, 2010 which granted the relief sought by the Plaintiff and terminated the easements rights of Defendants Kellahan/Duke without requiring the payment of just compensation. Defendants Kellahan/Duke timely filed and served their Motion for reconsideration on November 3, 2011. The Special Referee held a hearing concerning Defendants Kellahan and Duke's Motion for Reconsideration on March 29, 2011, receiving additional testimony and arguments at that hearing. The Lower Court issued its Order denying Defendants Kellahan and Duke's Motion for Reconsideration on December 1, 2011, which specifically stated that "the undersigned's order dated October 22, 2010, remains the order of this Special Referee." **(Order Denying Lydia F. Duke and Alice H. Kellahan's Motion for Reconsideration, dated December 1, 2011 R. p.**

1) On December 27, 2011, Defendants Kellahan and Duke filed their Notice of Appeal. This Appeal follows.

STATEMENT OF FACTS

The area in question, which is the subject of this action, is called a portion of Porter Street by the Plaintiff. **(Petition, Page1, Paragraph 2, R. p. 46)** The larger tract of land which is between what is now Ashton Avenue and Nelson Blvd. in the Town of Kingstree was owned by a John T. Nelson and subsequently by his daughter, Marie L. Nelson. **(Defendants' Exhibit 5, R. p. 323)** The area in question was reserved by the Nelson family as shown on a plat prepared by P. G. Gourdin, Surveyor dated March 1903 and recorded in the office of the Office of the Clerk of Court for Williamsburg County in Plat Book B page 55 **(Defendants' Exhibit 2, R. p. 320)**

The area that the plaintiff seeks to abandon and close first appeared on a plat prepared for John T. Nelson by Peter G. Gourdin dated March, 1903, recorded in Plat Book "B" page 55 as access to a larger tract owned by Nelson. The survey also identified twenty (20) lots and several access areas that were located on the south side of what appeared to be a roadway, this area designated as a roadway, and in fact, no name or other designation was used to describe that area. **(Defendants' Exhibit 2, R. p. 320)** The two lots that border the area which is the subject of this action, Lots 13 and 14 as shown on the Gourdin plat, were subsequently sold by Nelson. At the time the Petition was filed Defendant Gary W. Chapman was the owner of Lot 14, having purchased it in 1996 and Defendant Terilyn J. McClary was

the owner of Lot 13, having purchased it in 1997. **(Plaintiff's Exhibit 1, R. p. 235, and Defendants' Exhibits 13, R. p. 367, 14, R. p. 371 & 15, R. p. 374)**

There is a fifty (50') foot wide area in between lots 13 and 14 on the March 1903 Gourdin plat, which is not designated in any manner. **(Defendants' Exhibit 2, R. p. 320)** The area was obviously reserved for access to the remainder of the Nelson property. It was not designated as a part of any lot or as a roadway. **(Defendants' Exhibit 2, R. p. 320)**

Defendants Alice H. Kellahan and Lydia F. Duke (Defendants Kellahan/Duke) purchased a 20.97 acre tract of land from Samuel E. McIntosh adjoining Porter Street by deed dated September 7, 1993 recorded on September 8, 1993 in the Office of the Clerk of Court for Williamsburg County in Deed Book"A- 311" at page 231. **(Defendants' Exhibit 10, R. p. 358)** As part of the acquisition, in order to have access for the development of the 20.97 acres, Defendants Kellahan/Duke, also acquired a fifty (50) foot easement from Ashton Avenue to Nelson Blvd. along a proposed roadway– Porter Street and the extension of the same to Ashton Ave. from Samuel E. McIntosh, Individually and Executor and Trustee under the Last Will and Testament of Marie L. Nelson. This easement was also dated September 7, 1993 and recorded on September 8, 1993. **(Defendants' Exhibit 11, R. p. 362)** A review of this easement and the plat, as referenced in the easement, finds that, although Defendants Kellahan/Duke received the easement with a width of 50 feet for the entire distance from Nelson Blvd. to Ashton Ave., the last 208 feet are not part of the area designated as "PROPOSED 50' ROAD PORTER STREET." **(Defendants' Exhibit**

11, R. p. 362) No party, including the PLAINTIFF, has contested the fact that Defendants Kellahan/Duke have an easement which completely covers the area in question and also extends from Ashton Ave. to Nelson Blvd. The PLAINTIFF admitted the easement in its pleadings. **(Petition, Page 1, Paragraph 2, R. p. 46)**

The PLAINTIFF hired J.B. Ellis, Jr., Surveyor, to prepare a plat for this litigation. The survey dated October 4, 2005, shows Porter Street coming to, but stopping at, the property which is the subject of this action on the Ellis survey. **(Plaintiff's Exhibit 1, R. p. 235)** The survey does not designate the area, which is the subject of this action, as a "portion of Porter(undeveloped street)".

Although Defendants Kellahan/Duke never acquired the fee simple ownership to the area in question, they specifically acquired an easement for access to Ashton Ave across the area. **(Defendants' Exhibit 2 R. p. 320 and Tr. 4/26/2006 R. p. 126, line 15 - R. p. 127, line 7)**

At the hearing on April 16, 2007, the Plaintiff introduced deeds to the Town of Kingstree concerning the property in question as one exhibit which verifies that the Plaintiff did not acquire title to the area in question until 1998. **(Plaintiff's Exhibit 7, R. p. 250-317)** These deeds were subsequent to, and accordingly, subject to the easement acquired by Defendants Kellahan/Duke in September of 1993. Those conveyances did not remove or defeat the property rights of Defendants Kellahan/Duke.

The Plaintiff did not introduce any document by Defendants Kellahan/Duke or any of their predecessors in title of the fee simple title dedicating the area in

question to the Town of Kingstree or any other public entity for a road or street. The Plaintiff produced no evidence that the Town of Kingstree or any other public entity ever took control of or maintained the area in question as a roadway prior to the institution of this litigation. The Plaintiff does seek to reserve an easement for a sewer line over the area in question. **(Tr. 4/26/2006, R. p.83, lines 1-11)**

Michael Kirby, Community Planning and Development Director for the Plaintiff, confirmed that the area in question has never been opened or developed as a road, never been paved, and had no documentation of a written dedication of the area in question as a roadway. **(Tr.-4/26/2006-R. p. 87, lines 2 – R. p. 88, l. 24)** Mr. Kirby testified on direct examination that he did not believe that the closure of the area in question would diminish the value of the property owned by Defendants Kellahan/Duke. **(Tr. 4/26/2006 - R. p. 94, lines 5-9)** However, on cross examination, Mr. Kirby admitted it would be reasonable that closure of the area in question would diminish the value of Defendants Kellahan/Duke's property due to the fact that one of the means of access(the area in question) would be eliminated. **(Tr. 4/26/2006 R. p. 94, lines 10-19)**

W. N. Kellahan, Jr. testified that the closure of the area in question would diminish the value of the remainder of the tract of land by $100,000.00. **(Tr. 4/26/2006, R. p. 134, lines 5-12)**

The adjoining landowners, owners of lots 13 and 14, stand to gain property if the closure of the area is granted. Defendants Terilyn McClary and Gary W. Chapman testimony centered around the benefit that both would receive from the

closure. **(Tr. 4/26/2006, R. p. 110, lines 20-24 & R. p. 118, lines 10-12)** The only other testimony to the effect tat the closure of the area in the best interest of the public limited to the benefit for the residents on Ashton Ave. **(Tr. 4/26/2006, R. p. 118, lines 13-15)** Defendant Waccamaw Housing, Inc., the purchaser of the property that was re-zoned as a Planned Unit Development, consented to the relief sought by the Plaintiff by its answer.

In 2003, Defendant Waccamaw Housing, Inc. agreed to purchase approximately 2.15 acres of Defendants Kellahan/Duke property for a senior citizens housing project contingent upon the 4 acres zoning being changed from Highway Commercial to Planned Unit Development (PUD). Although the Highway Commercial classification is less restrictive than a PUD, the Town Council received some concerns about the senior citizens housing project. **(Tr. 4/26/2006, R. p. 110, lines 20-24 & R. p. 77, lines 4-22 & Plaintiff's Exhibit 5, R. p. 245)**

Defendant Waccamaw Housing, Inc. completed the purchase of the 2.15 acres from Defendants Kellahan/Duke in 2004 and also completed the senior citizens housing project prior to the institution of this litigation.

The funds for the paving of an area called Porter Street from Nelson Blvd. so as to provide access to the senior citizens housing project were obtained and the paving to the facility was completed by prior to the institution of the litigation.

Although the paving did not extend to the area in question, but stopped approximately 75 feet short of the area that the Plaintiff seeks to close. **(Tr. 3/29/2011, R. p. 219, lines 2-13 & Tr. 3/29/2011, R. p. 187, line 24 - R. p. 188,**

lines 1-13) This paved area, called Porter Street, has not been taken into the state road system. **(Tr. 4/26/2006, R. p. 110, lines 20-24)** There is no evidence that it is in any public road system.

The Kingstree Town Council gave the first reading of an ordinance to re-zone the 2.15 acres from Highway Commercial to Planned Unit Development (PUD) on January 26, 2004. **(Tr. 4/26/2006 R. p. 130, lines 22 - R. p. 131, 1- 2)** Senator John Yancey McGill and other community leaders also attended the meeting to also emphasize the need for senior housing in Kingstree. **(Tr. 4/16/2007, R. p. 162, lines 6-15)** When the ordinance received a first reading, the Kingstree Town Council scheduled a public hearing to allow comment on the re-zoning based upon the request of a member of the Council. **(Plaintiff's Exhibit 3, R. p. 236)**

The Town Council of Kingstree held a public hearing on February 2, 2004 concerning the re-zoning of a portion of the 20.97 acre tract purchased by Defendants Kellahan/Duke from Highway Commercial to Planned Unit Development and immediately thereafter gave second reading to approve the Ordinance for re-zoning. **(Plaintiff's Exhibit 5, R. p. 245)**

Immediately following the public hearing, Kingstree Town Council held a meeting for the second reading of **Ordinance 2004-01, Ordinance to Rezone a Portion of Tax Map Property11-39-11. (Plaintiff's Exhibit 4, R. p. 243 & Plaintiff's Exhibit 5, R. p. 245)** The Ordinance passed the second reading with the following in the minutes: "Porter Street would be blocked on the Ashton Avenue side with a fence to be erected on the Kingstree Recreation Department property line up

to the paved portion of Porter Street, that the Developer would fence its property line as well, and Mrs. Kellahan would fence her property line within fifty (50) feet of Highway 377". **(Plaintiff's Exhibit 5, R. p. 245)**

Mr. Kellahan was in attendance at the Town Council meeting on January 26, 2004, but did not attend the public meeting or the council meeting on February 2, 2004. **(Plaintiff's Exhibit 5, R. p. 245)** Senator McGill attended both the public hearing and the subsequent Kingstree Town Council meeting as did representatives of Defendant Waccamaw Housing, Inc. **(Tr. 4/16/2007, R. p. 161, lines 22- R. p. 162, lines 5)** Senator McGill appeared on February 2, 2004 because he believed that there was a need for senior housing in Kingstree. **(Tr. 4/16/2007, R. p. 162, lines 6-15)** Also, Senator McGill was there to provide support for the use of CTC funds for the paving of Porter Street. **(Tr. 4/16/2007, R. p. 168, lines 11-24)** Thereafter, CTC provided appropriate funds for the paving of Porter Street from Nelson Boulevard. **(Tr. 4/16/2007, R. p. 168, lines 11-24)** The paved area is known as Porter, Street, but is not a state road system and the South Carolina Department of Transportation does not consider it a public road. **(Tr. 4/26/2006, R. p. 102, lines 5-10)**

At the hearing on April 16, 2007, Senator McGill testified that he did not represent W. N. Kellahan, Jr. or Defendants, Alice H. Kellahan and Lydia F. Duke. **(Tr. 4/16/2007, R. p. 162, lines 16-21 & R. p.166, lines 23-p.7, lines 1-14)** Neither the record of the public meeting nor the minutes of the Town Council meeting, which were both held on February 2, 2004 have any implication or inference

that Senator McGill appeared on behalf of W.N. Kellahan, Jr. or Defendants Kellahan/Duke. Additionally, there is no evidence that any person at the public hearing or council meeting relied on apparent authority of Senator McGill as an agent of W. N. Kellahan, Jr. or Defendants Kellahan/Duke.

There is no evidence in the record that the unpaved area, which includes the area in question and an area between the paved area and the area in question, has been dedicated or accepted by written instrument.

STANDARD OF REVIEW

This matter involves both legal and equitable issues and, accordingly, presents a divided scope of review with each issue retaining its own identity of either a legal and equitable issue for the purposes of the applicable standard of review of the issues. ***Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003).**

Since this matter was referred to a Special Referee for final judgment, the Appellate Court is to affirm the Special Referee's factual findings unless there is no evidence that reasonable supports those findings, but will correct any error of law. ***Roberts v. Gaskins*, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997) *Jefferies v. Phillips*, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994).**

Although an Appellant Court is not required to disregard the findings of a Special Referee, in an action in equity decided by a Special Referee direct appeal to the Court of Appeals, the Appellate Court is entitled to review the evidence to determine facts in accordance with its own view of the preponderance. ***Friarsgate,***

***Inc. v. First Federal Sav. & Loan Ass'n. of South Carolina,* 317, S.C. 452, 454 S.E.2d 901 (Ct. App. 1995)**

Generally, where right is purely statutory the action is one at law. ***Harvey v. South Carolina Dep't of Corrections,* 338 S.C. 500, 527 S.E.2d 765 (Ct. App. 2000)** A determination of whether or not an easement exist is an action at law. ***Slear v. Hanna,* 329 S.C. 407, 496 S.E.2d 633 (1998)** ***Eldridge v. City of Greenwood,* 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998)**

An action by a property owner against a municipality for taking property without just compensation is an action at law. ***Poole v. Combined Util. Sys. of City of Easley,* 269 S.C. 271, 237 S.E.2d 82 (1977).**

The defense of estoppel is equitable in nature. ***Gaymon v. Richland Memorial Hosp.,* 327 S.C. 66, 488 S.E.2d 332 (1997)** In Gaymon the Court held that a defense of equitable estoppel interposed in a law case should be tried by the court as an equitable issue.

It is an action in equity when the court is required to make a determination of whether the property has been dedicated to the public. ***State v. Beach Co.,* 271 S.C. 425, 248 S.E.2d 115 (1978)**

The issuance of agency, whether or not an agency relationship exists 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)**

The review of the decision of the Special Referee's Order of October 22, 2010 will necessarily involve both equitable and legal matters.

ARGUMENT I

BECAUSE THE PLAINTIFF ALLEGED IN ITS PETITION DATED OCTOBER 19, 2005 THAT DEFENDANTS KELLAHAN/DUKE HAD AN EASEMENT FOR THE USE OF PORTER STREET, THE PLAINTIFF IS BOUND BY THAT ALLEGATION.

The allegations, statements or admissions contained in the pleadings are conclusive as against the pleader and a party cannot subsequent take a position contrary of or, inconsistent with, his pleadings. ***Postal v. Mann*, 418 S.E.2d 322 (Ct. App. 1992)**

Consistent with the ***Postal v. Mann* case,** and its ruling that a party cannot subsequently take a position contrary of, or inconsistent with his pleadings, is the holding that facts which are admitted by the pleadings are to be taken as true against the pleader for purpose of the action. ***Elrod v. All,* 134 S.E.2d 410, (1964)**

In paragraph 2 of its Petition, the Plaintiff stated "the Defendants Lydia F. Duke and Alice H. Kellahan, have an easement for the use of Porter Street". **(Petition, p. 1, paragraph 2, R. p. 46)** Defendants Kellahan/Duke admitted that factual allegation in their answer and counterclaim. **(Answer and Counterclaim of Defendants Lydia F. Duke and Alice H. Kellahan, p. 1, paragraph 2, R. p. 62)** The Petitioner admitted the existence and the validity of Defendants Duke and Kellahan easement **(Defendants Duke and Kellahan's Exhibit 11, R. p. 362)** in its Petition. **(Petition, p. 1, Paragraph 2, R. p. 46)** The statement is clear, unequivocal and without qualification.

The Plaintiff has never sought to amend its pleadings and never presented any proof or testimony to contradict the allegation that the Defendants had an easement

for the use of the area as of the date of the Petition was filed on October 19, 2005. The Plaintiff never alleged that Defendants Kellahan/Duke had dedicated the area in question as a public road.

For this reason and for this reason alone, the Defendants Kellahan/Duke are entitled to maintain their easement rights for full and complete access, as granted to them in the written easement filed September 7, 1993, over and across the area in question. Even when a roadway is properly closed, valid easement rights remain in effect. ***Hoogenboom v. City of Beaufort,* 315 S.C. 306, 433 S.E.2d 875 (Ct. App., 1992)**

The Plaintiff has sought and retained an easement for a sewer line across the area in question and maintains that its rights are still valid. Based upon the foregoing, the Lower Court's order should be reversed and the Defendants Kellahan/Duke easement rights should be fully protected and preserved property rights which are undiminished in any manner.

The case should be reversed, and respectively submitted because the decision is not supported by the pleadings or evidence and by the pleadings in that the Plaintiffs Petition admitted the validity of Defendants Kellehan and Dukes easement. The decision of the Special Referee was controlled by an error of law.

ARGUMENT II -A

BECAUSE DEFENDANTS KELLAHAN/DUKE HOLD AN EXPRESS WRITTEN EASEMENT WHICH HAS NOT BEEN ABANDONED THE PLAINTIFF IS NOT ENTITLED TO CLOSE THE AREA IN QUESTION TO DEFENDANTS KELLAHAN/DUKE.

<u>ARGUMENT II -B</u>

BECAUSE DEFENDANTS KELLAHAN/DUKE HOLD A VALID EASEMENT FROM MCINTOSH WHICH HAS PRIORITY OVER ANY RIGHTS OF THE TOWN OF KINGSTREE, THE DEFENDANTS KELLAHAN/DUKE ARE ENTITLED TO THE CONTINUED AND UNRESTRICTED USE OF THE AREA IN QUESTION FOR ACCESS.

Neither the Plaintiff, nor any other party, has challenged the fact that Defendants Kellahan/Duke have an easement with a width of 50 feet for the entire distance from Nelson Blvd. to Ashton Ave., the last 208 feet are not part of the area designated as "PROPOSED 50' ROAD PORTER STREET." Additionally, for the purpose of this action, the Plaintiff alleged that the Defendants Kellahan/Duke have an easement for the use of the access. Defendants Kellahan/Duke acquired the express written easement to secure access to the 20.97 acres. **(Defendant's Exhibit 11, R. p. 362)** The 1993 plat that depicted the 20.97 acres that Defendants Kellahan/Duke purchased and delineated the extent and location of the easement. No plat had used the word "street" or "road" or any similar term to describe any portion of the 50 foot easement from Nelson Blvd. to Ashton Ave. No plat that is part of the record in this matter has described the area in question-the area between Lots 13 and 14 as a "street" or "roadway". This is why Defendants Kellahan/Duke obtained the easement.

The easement constitutes a private property right held by Defendants Kellahan/Duke.

Further, the grant of this easement to Kellahan and Duke was in witting and any abandonment or release of that easement by Kellahan and Duke or of any successor in title would have to be also in writing to satisfy the statute of frauds. The

Plaintiff has failed to prove any release or abandonment of this express written easement. In ***Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 145 S.E.2d922 (1965)**, the Court held that where lots in a subdivision are sold by reference to a map or plat upon which roads are shown which are or become public highways, the private easement which arises upon such a sale survives the vacation, abandonment, or closing of the road or highway by the public.

The Lower Court ordered that the easement from McIntosh to Duke and Kellahan was terminated because the road was dedicated to public use. **(Order dated October 22, 2010, R. p. 11)** The Plaintiff, in its Petition, specifically states that Defendants Duke and Kellahan have an easement. **(Petition, R. p. 46 Paragraph 2)** The statement is clear, uneqivacable and without any qualification. There is no testimony, no other pleading, no Motion to Amend, or any other action by the Plaintiff to retract this admission in any manner. Additionally, the Plaintiff did not allege any abandonment or dedication by Defendants Duke and Kellahan.

When the Town of Kingstree obtained deeds for a portion of the Nelson property which included, the road bed for Porter Street as a separate tract, the Defendant Kellahan/Duke's easement from McIntosh for the area in question was recorded and was legally binding notice that there was an easement on record to the Defendant. **(Plaintiff's Exhibit 7, R. p. 250-317), (Defendants' Exhibit 11, R. p. 362)**

The language of the McIntosh easement does not mandate or create a dedication, but only suggests cooperation in making the area a public road. The

easement in and of itself is strong evidence that no dedication had occurred. **(Defendants' Exhibit 11, R. p. 362)**

The language of the easement from Samuel McIntosh makes reference to the area in question as a "proposed road or street" throughout the entire document. **(Defendants' Exhibit 11, R. p. 362)** to the use at the time the easement was granted in 1993, the grantor and grantees agreed:

> "It is deemed to the mutual benefit and interest of the said Alice H. Kellahan and Lydia F. Duke and Samuel E. McIntosh as Personal Representative and Trustee under the Last Will and Testament of Marie L. Nelson, deceased, that said proposed fifty (50) foot road or street should be opened and remain open for the mutual use and benefit of the owners of the lands of the Estate of Marie L. Nelson now held in trust and the owners of the twenty and ninety-seven hundredths (20.97) acres this day conveyed to the Alice H. Kellahan and Lydia F. Duke." (Defendants Duke and Kellahan, Ex. No. 11)

As to the <u>future</u> use the McIntosh easement stated:

> "Whereas 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 may need to use the same (Defendants Duke and Kellahan, Ex. No. 11).

The easement also stated:

> The grantor does agree that the grantee, their heirs or assigns may take such steps to make such improvements as may be necessary to have said street or road opened and maintained as a public street or road and that grantor will assist in such endeavor and that said street or road when opened shall be for the mutual use and benefit of the owners of property lying on either side of the same." **(Defendants Duke and Kellahan, Ex. No. 11, R. p. 362).**

The testimony of Michael Kirby, Community Planning and Development Director for Plaintiff indicates that neither the Town of Kingstree or any other entity

had taken any action to accept that property is a roadway or to actually maintain it. **(Tr. 4/26/2006, R. p. 86, lines 22 - R. p. 87, lines 21)** Mr. Kirby the Plaintiff's Community Planning Director answered the questions of dedication, acceptance and use of the area on cross-examination:

Mr. O'Bryan: During the time as Development Director and as a police officer, you would patrol Kingstree from time to time?

Mr. Kirby: Yes, sir?

Mr. O'Bryan: And has there ever been vehicular traffic on that road?

Mr. Kirby: It has never really been a road until now.

Mr. O'Bryan: When you say now.

Mr. Kirby: Until this project was done, it was never developed as a road.

Mr. O'Bryan: So although it has been shown on the maps, it has never been opened as a road?

Mr. Kirby: That's correct.

Mr. O'Bryan: And the portion that has been paved does not extend all the way through, does it?

Mr. Kirby: That's correct, it stops at the back of the other property off of Ashton.

Tr. 4/26/2006, R. p. 86, lines 22 - R. p. 87, lines 21

W.N. Kellahan, Jr. testified that he could not find that there was any indication that any governmental entity had taken the paved roadway called Porter Street in its system, especially the South Carolina Department of Transportation. **(Tr.**

4/26/2006, R. p. 145, lines 4-8) Again, the area of Porter Street which concerns this action has not been paved and was only reserved as access to the remainder of the Nelson property. **(Tr.4/26/2006, R. p. 87, lines 17-21)**

This case should be reversed, it is respectfully submitted because the decision of the Court that there was a dedication of the unpaved area of the area in question is wholly unsupported by the evidence and the pleadings. The decision of the Trial Court was controlled by an error at law and factual findings were not reasonable based upon the evidence, and accordingly, those findings were an abuse of discretion.

ARGUMENT III

BECAUSE THERE WAS NEVER A DEDICATION OF PORTER STREET FOR THE AREA IN QUESTION, THE PLAINTIFF IS NOT ENTITLED TO CLOSE THE AREA IN QUESTION SO AS TO PREVENT DEFENDANTS KELLAHAN/DUKE FROM HAVING ACCESS AND USE OF THE AREA IN QUESTION.

As set forth in Argument I, it is the position of the Defendants Kellahan/Duke that the Plaintiff has admitted to the existence and validity of the easement over the area in question in its pleadings dated October 19, 2005. That is the law of ths case.

Without waiving the foregoing Defendants Kellahan/Duke submit that there was never any dedication of the area in question.

The case of ***Tupper v. Dorchester County,* 326 S.C. 318, 487 S.E.2d 187 (1997)** sets forth the requirements for dedication.

> "Two elements are required to perfect dedication. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use. Second, there must be acceptance of such property by the public. ***Helsel v. City of North Myrtle Beach,* 307 S.C. 24, 413 S.E.2d 821 (1992).** Dedication is an exceptional manner of passing an interest in land and proof thereof must be strict, cogent, and convincing. ***Mack v. Edens,* 320 S.C. 236, 464 S.E.2d**

> **124 (Ct. App.1995).** To have a completed dedication, there must be some form of acceptance of the offer to dedicate. ***Baugus v. Wessinger, supra;*** **23 Am.Jur.2d Dedication § 42 at 38 (1983);** ***Hodge v. Manning,*** **241 S.C. 142, 127 S.E.2d 341 (1962).** The use, repair, and working of the streets by public authorities is a mode of acceptance. ***Chafee v. City of Aiken,*** **57 S.C. 507, 35 S.E. 800 (1900).** The mere fact the County approved the plat does not constitute an acceptance of the proposed public dedication. **S.C. Code Ann. § 6-7-1070 (1976).**" ***Tupper v. Dorchester County,*** **326 S.C. 318, 487 S.E.2d 187 (1997)**

The evidence in the record clearly shows that the area in question has never been dedicated for a public roadway or street. A careful examination of the 1993 Kellahan plat together with the written easement, reveals that the 50 feet easement extends the entire distance from Nelson Blvd. to Ashton Ave., the last 208 feet are not part of the area which is designated as "PROPOSED 50' ROAD PORTER STREET." **(Defendants' Exhibit 10, R. p. 358 & Defendants' Exhibit 11, R. p. 362)**

The plat prepared for John T. Nelson by Peter G. Gourdin dated March, 1903 recorded in Plat Book "B" page 55 reserved for access at four different places, it is significant that none of the four access areas was designated as a street or roadway. **(Plaintiff's Exhibit 2)** (too large for reproduction)

Our courts have recognized dedication as an exceptional mode of passing an interest in land where proof for the standard of dedication must be strict, cogent and convincing. The act to prove dedication must not be inconsistent with any other construction other than that of a dedication. ***State v. Beach Co.,*** **271 S.C. 425, 248 S.E.2d 115 (1978)** The Plaintiff has not proved any dedication by written dedication or implied dedication which requires strict, cogent and convincing evidence. The

Plaintiff has failed to prove either of two required elements for dedication of a roadway.

The approval of the land development plan or subdivision plat may not be deemed to automatically constitute or affect an acceptance by the municipality or the county or the public of the dedication of any street, easement, or other ground shown upon the plat. Public acceptance of the lands must be by action of the governing body customary to these transactions. **S.C. Code Ann. § 6-29-1170 (1976).**

ARGUMENT IV

BECAUSE THE TOWN OF KINGSTREE DID NOT HAVE A RIGHT TO PETITION TO ABANDON OR CLOSE THE FIFTY (50') FOOT WIDE AREA BETWEEN LOTS 13 AND 14 AS SHOWN ON THE GOURDIN PLAT FOR NELSON IN 1903, THE DEFENDANTS KELLAHAN/DUKE SHOULD CONTINUE TO HAVE FULL USE TO THE AREA IN QUESTION FOR ACCESS.

Any right to close the area which the Plaintiff has called Porter Street between lots 13 and 14 or anyone else for that matter, must be derived from a statutory authority. This authority is **S.C. Code Ann. § 57-9-10 (1976)** which states in part "any interested person, the state or any of its political subdivisions or agencies may petition the Court of competent jurisdiction to abandon or close any street, road or highway, whether opened or not . . . **S.C. Code Ann. § 57-9-10 (1976).** The operative words in the statute are "street", "road" or "highway".

The Plaintiff's own Community Planning and Development Director testified on April 26, 2006 that the area in question had "never really been a road until now". **(Tr. 4/26/2006, R. p. 88, lines 1-3)** The Plaintiff has failed to prove that the area in question was, at the time of the filing of the Petition, or at any later time, ever a

roadway, street or highway. The area in question and a small portion of property adjacent to the area sough to be closed has never been paved and the Plaintiff has failed to meet the burden of proof of strict cogent and convincing evidence of the dedication as to the unpaved area. The Plaintiff's own plat, which was obtained for the purpose of this litigation, does not designate the area as a street. **(Plaintiff's Exhibit 1, R. p. 235)**

S.C. Code Ann. § 57-9-20 (1976), states that the street, road or highway can be abandoned or closed if the Court determines that it is in the best interest of all concerned. Again, the words street, road or highway are used. The area that is in question has never been used or maintained as a street, road or highway, there has been no dedication and no acceptance by the Town of Kingstree, and accordingly, neither does the Town of Kingstree nor any other party has the right to use this statute to close the roadway.

Under Title 57, the title under which the Plaintiff seeks to close the area in question, our statutory law defines street, roadway or highway as follows:

> **§ 57-3-120.** Definitions.
>
> For the purposes of this title, the following words, phrases, and terms are defined as follows:
> (1) "Highway", "street", or "road" are general terms denoting a public way for the purpose of vehicular travel, including the entire area within the right-of-way, and the terms shall include roadways, pedestrian facilities, bridges, tunnels, viaducts, drainage structures, and all other facilities commonly considered component parts of highways, streets, or roads. **S.C. Code Ann. § 57-3-120 (1976)**

It was error of law for the Special Referee to grant the relief to close the area because the area was not a roadway. This case should be reversed, it is respectfully submitted, because the decision of the Court that there was a dedication of the area in question is wholly unsupported by the evidence and the pleadings. The decision of the Lower Court was controlled by the error at law and the factual findings were not reasonable.

ARGUMENT V

BECAUSE THE PLAINTIFF HAS FAILED TO PLEAD OR PROVE THAT THE DEFENDANTS HAVE ABANDONED THEIR EASEMENT, DEFENDANTS KELLAHAN/DUKE ARE ENTITLED TO THE FULL USE OF THEIR EASEMENT FOR ACCESS OVER AND ACROSS THE AREA IN QUESTION.

The Plaintiff has failed to plead or prove that the area in question is not subject to the easement of Defendants Kellahan/Duke. If the Town of Kingstree filed deeds for the area in question for lots 13 and 14 in 1998, after the grant of the easement to the Plaintiff. **(Plaintiff's Exhibit 7, R. p. 250-317)** This conveyance had to be subject to the easement rights of Defendants Kellahan and Duke.

Under the court's decision in ***Hoganboon v. The City of Beaufort,*** **315 S.C. 306, 433 S.E.2d 875,** the South Carolina Court of Appeals states that under **S.C. Code Ann. § 57-9-20 (1976),** the court cannot divest a property owner of legal title under **S.C. Code Ann. § 57-9-20 (1976)** and vest it in another, but merely declare who owns title according to the law. The court also recognized that while a municipality can acquire a fee simple title to the property in the case of the dedication the municipality acquires merely a right of passage and title remains in with the landowner who initially dedicated the property to public use. If the municipality

abandons the right of passage then the fee simple interest becomes unencumbered in the original land owner.

Defendants, Duke and Kellahan are entitled to their easement rights. If the Town of Kingstree is entitled to the closure of the area in question under **S. C. Code Ann. § 57-9-10, et sequi,** then the private easement rights of Defendants Duke and Kellahan have been taken and these Defendants are entitled to compensation. **(S.C. Const. art.1, § 13 and U.S. Const. amend. 5)**

This case should be reversed, it is respectfully submitted because the Plaintiff failed to plead or prove any abandonment by the Defendants of their easement. The decision of the Special Referee was controlled by an error at law and any factual findings by the Special Referee are not reasonably supported by the evidence, and accordingly, the decision of the Special Referee amounts to abuse of discretion.

ARGUMENT VI

BECAUSE THE PLAINTIFF FAILED TO PROVE THAT THE CLOSURE OF THE AREA IN QUESTION IS IN THE BEST INTEREST OF ALL CONCERNED, I.E. IN THE PUBLIC INTEREST, THE CLOSURE OF THE AREA SHOULD BE DENIED.

The Plaintiff has failed to prove that it is in the best interest of all concerned that the area in question be closed. The 20.97 acre tract was acquired by defendants, Kellahan and Duke for commercial development and the acquisition and development was predicated on access to said property along Porter Street with ingress and egress being available on both Ashton Avenue and Nelson Boulevard. **(Defendants' Exhibit 11, R. p. 362; Tr. 4/26/2006, R. p. 129, lines 5-R. p. 130, lines 11)**

S.C. Code Ann. § 57-9-20 (1976), requires that the court determine " that it is in the best interest of all concerned" that the street, road or highway be abandoned. Since the property was acquired by Kellahan and Duke for investment purposes, any closure of the area will negatively impact the subdivision of the property, the access to various parcels, and will also negatively impact the value of the property. It is clearly not in the best interest of all parties that the roadway be closed.

The purpose of this litigation by the Plaintiff was only to benefit the adjacent property owners on Ashton Ave and to enforce some a promise by the Town Council when it approved a zoning change. The closure could and most likely will create situations where emergency vehicles could not get through including EMS vehicles in route to the Williamsburg County Hospital, if there is an event like the Pig Picking festival, baseball tournament or other functions at the Recreation center, **(Tr. 4/26/2006, R. p. 90, line 19 - R. p. 91, line 14)**

The evidence provided by the Plaintiff to comply with **S.C. Code Ann. § 57-9-20 (1976)** to support the premise that it would be in the best interest of all concerned is primarily and almost exclusively from the individuals who would benefit by receiving title to a portion of the area that was to closed as adjoining property owners. **(Tr. 4/26/2006, R. p. 110, lines 20-24 - R. p. 118, lines 10-15)** Defendant Waccamaw Housing, Inc. consented to the relief, but it must be noted that Defendant was present at the public meeting on February 2, 2004 and the Town Council meeting on the same date. **(Plaintiff's Exhibits R. p. 243 & R. p. 245)** It benefitted directly from the closure and re-zoning.

Clearly, the closing of the area in question is not in the best interest of Defendants Duke and Kellahan. The only people that really benefit from the closing are the owners of the property on Ashton Avenue that will receive an additional twenty-five (25') feet of property. **(Order dated October 22, 2010, R. p. 11)** The only citizens of Town of Kingstree who testified were Defendants Gary W. Chapman, Jr. (Lot 14) and Terilyn J. McClary, (Lot 13) and both have sold their lots **(Affidavits filed by Plaintiff after close of evidence, R. p. 416-421 - Order of October 22, 2010, R. p. 16, lines 1-11)** The need for emergency vehicles to have an alternate route to exit the recreational center other than on to Nelson Boulevard is a real concern and no alternative was considered. All members of the public, from Kingstree and surrounding areas, will be in a real danger if the access to Ashton Ave. is eliminated by having the access to the Williamsburg Hospital. The public as a whole will benefit by having that area open. Closing that access would be to the detriment of many more people than those who could claim an injury. The close proximity of the hospital and other medical providers on Hwy. 377 and Nelson Blvd. makes the closure detrimental to the citizens of the town and the public in general. **(Tr. 4/26/2006, R. p. 133, lines 12 -24; R. p. 1347, line 13 - R. p. 135, line 10)** The considerations of a few(adjacent landowners) have overshadowed the very people who are members of the general public who will need ready access to hospital and other medical providers–the residents of the senior citizens housing project. Would it be in the best interest of a resident of the senior citizens housing facility, who needs emergency medical treatment, to be able to travel about 300 feet away from the

crowds at the recreation center to Ashton Ave., then on to the hospital or in that senior citizens' best interest to have to travel at least 900 feet through crowds at the recreation center to get to Nelson Blvd. with heavy traffic to get to hospital?

This case should be reversed, it is respectfully submitted, because the decision is unsupported by the evidence and the pleadings. The error of the special referee being **S.C. Code Ann. § 57-9-20** was not properly applied and the finding that the closure of the area in question is in the public's best interest was not reasonably supported by the evidence and amounts to abuse of discretion.

ARGUMENT VII

BECAUSE THE PLAINTIFF FAILED TO EITHER ALLEGE OR PROVE ANY AGENCY OR ESTOPPEL THAT WOULD BIND DEFENDANTS KELLAHAN/DUKE TO THE ACTION BY THE TOWN COUNCIL ON FEBRUARY 2, 2004, THE PLAINTIFF IS NOT ENTITLED TO ASSERT AGENCY OR ESTOPPEL IN THIS MATTER.

It appears that the Order of October 22, 2010 has, as a part of its basis, the premise that Defendants Kellahan/Duke are be estopped to object to the closing of the area in question based upon an alleged agreement with Town Council of Kingstree. Also, the Order of October 22, 2010 has, as its basis in part, that there was an agency relationship between Senator McGill and Defendants Kellahan/Duke. **(Order dated October 22, 2010, R. p. 11)**

Neither the agency nor the estoppel was pled or proven. Estoppel is in the nature of an affirmative defense and must be pled or it is waived. **Rule 8 (c) and Rule 12, SCRCP.** Plaintiff has failed to allege equitable estoppel in its pleadings. **(Petition)** Further, the Plaintiff failed to move to amend its pleadings.

Defendants Kellahan/Duke maintain that the failure to plead estoppel constitutes a waiver, but, without waiving their rights, also that the Plaintiff failed to make an adequate showing that Senator McGill was acting as an authorized agent of the Defendant's, Kellahan and Duke in attending the meeting to close the street and that McGill had the authority to bind them. **American Jurisprudence 2nd Estoppel & Waiver Section 57**

While Defendants Kellahan/Duke acknowledge that a purported principal maybe estopped to deny an "apparent agency" relied upon by a third person, the elements which must be alleged and proven to establish apparent agency the elements are: (1) purported principal consciously or impliedly represented another to be his agent; (2) third party reasonably relied on the representation; and (3) third party detrimentally changed his or her position in reliance on the representation." ***R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 540 S.E.2d 113, 118 (2000).**

As to the burden of proof, the party asserting the agency as a basis of liability has the burden of proving the existence of the agency. ***Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991)** Additionally, agency must be clearly established by the facts. ***McCall v. Finley*, 294 S.C. 162, S.E.2d 26 (Ct. App. 1987) *(Citing Paramount Fund, Inc. v. Cusaac*, 282 S.C. 497, 319 S.E.2d, 354 (Ct. App. 1984).**

The failure to either pled or prove the equitable estoppel or any agency relationship between Senator McGill and Defendants Kellahan/Duke prevents the

Plaintiff from binding Defendants Kellahan/Duke to any action taken by the Kingstree Town Council on February 2, 2004. Furthermore, the Plaintiff has never moved to amend its pleadings to include any allegation of agency or estoppel.

An essential element of estoppel is that any injury claimed must be actual, material and substantial. "Broadly speaking injury, detriment, or prejudice to the party claiming the estoppel is one of the essential elements of an equitable estoppel or estoppel in pais. Since the function and purpose of the doctrine of estoppel are the prevention of fraud and injustice, there can be no estoppel when there is no loss, injury, damage, judgment, prejudice to the party claiming it moreover, the injury or prejudice involved must be actual and material or substantial and not merely technical or formal", **American Jurisprudence 2nd Estoppel & Waiver Section 78**

In the present case, it was clearly established by testimony that the property, owned by the Defendants Kellahan and Duke, was previously zoned Highway Commercial, which is the least restrictive use of the property and can be used for almost any legal purpose. **(Tr. 4/26/2006, R. p. 91, line 15 - R. p. 92, line 19)** The re-zoning reclassified the property as a Planed Unit Development (PUD) classification, which is far more restrictive as to use. The testimony was that the residents of Ashton Avenue were concerned with traffic through the neighborhood and the reclassification to a PUD classification would serve to limit the traffic in the area that might otherwise exist under a Highway Commercial use and, as such, the Plaintiff has failed to prove any actual or material injury that would justify applying equitable estoppel. **(Tr. 4/26/2006, R. p. 91, line 15 - R. p. 94, line 4)**

W.N. Kellahan, Jr. testified that Senator McGill was not authorized to take any action for him. **(Tr. 4/26/2006, R. p. 131 lines 7-13)** Senator McGill's testimony clearly states that he did not represent Defendants Duke and Kellahan or W.N. Kellahan, Jr. **(Tr. 4/16/2007, R. p. 176, lines 16-21)**

There is no evidence in the record to show that anyone at the public hearing on February 2, 2004 or the Town Council Meeting on the same date thought that Senator McGill was acting as agent for Defendants Duke or Kellahan or W.N. Kellahan, Jr. at those meetings. **(Plaintiff's Exhibit 4, R. p. 243 & Plaintiff's Exhibit 5, R. p. 245)** W.N. Kellahan, Jr. testified on cross-examination **(Tr. 4/26/2006, R. p. 139 lines 4)** that Senator McGill attended Town meeting to represent "his interest", not that of Alice H. Kellahan or Lydia F. Duke. Additionally, in order to allow such an amendment, there must be proof to which the pleadings can be conformed. There has been no showing of any action by Defendants Duke or Kellahan or W.N. Kellahan, Jr. on their behalf to the Plaintiff, the Kingstree Town Council or any third other person at the public hearing or council meeting on February 2, 2004, that Senator Yancey McGill was acting on their behalf as their agent. This is an essential and required element of apparent authority. **(*R&G Construction, Inc. v. Low Country Regional Transportation Authority,* 343 S.C. 424, 540 S.E.2d 113 (2000*)*.** The burden of proof is upon the Plaintiff to show this agency and the Plaintiff has failed to have any evidence of representation by Defendants Duke or Kellahan or W.N. Kellahan, Jr. that Senator Yancey McGill was their agent at the hearing and public meeting. **(Emphasis Added)**

An essential element of estoppel is that any injury claimed must be actual, material and substantial. "Broadly speaking injury, detriment, or prejudice to the party claiming the estoppel in pais. Since the function and purpose of the doctrine of estoppel are the prevention of fraud and injustice, there can be no estoppel when there is no loss, injury, damage, judgment, prejudice to the party claiming it moreover, the injury or prejudice involved must be actual and material or substantial and not merely technical or formal." **"American Jurisprudence 2nd Estoppel & Waiver".**

The Plaintiff has made no showing of injury in order to invoke the application of estoppel.

Senator McGill also confirmed the fact that he did not have any authority to act on the behalf W.N. Kellahan, Jr. or Defendants Duke or Kellahan. **(Tr. 4/16/2007, R. p. 176, lines 16-21)**

The Plaintiff is trying to "Bootstrap" agency, and apparent authority to its petition and to those claims, it is trying to "Bootstrap" estoppel. This is prohibited.

> In the case of ***Collins Entertainment, Inc. v. White,*** **363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005)** the Court stated:
>
> Appellants assert the issue of estoppel was raised in the pleadings under the arguments for breach of contract accompanied by a fraudulent act. We disagree and find that estoppel must be affirmatively pled as a defense and cannot be bootstrapped onto another claim. See ***Rule 8,*** *SCRCP*; ***Provident Life & Accident Ins. Co. v. Driver,*** **317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct.App.1994)** (finding estoppel is an affirmative defense). ***Collins Entertainment, Inc. v. White,*** **363 S.C. 546, 611 S.E.2d 262 (S.C. App. 2005)**

Additionally the *Collins* Court held:

> As we found above, Appellants failed to plead estoppel as an affirmative defense and the court properly denied their motion to include it as a defense. Additionally, laches is an affirmative defense which must be specifically pled. ***Rule 8(c), SCRCP***. The failure to plead an affirmative defense is deemed a waiver of the right to assert it. ***E.g., Adams v. B & D, Inc.,* 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989)**. Accordingly, we find the trial court properly refused to dismiss Collins' claims under either theory. ***Collins Entertainment, Inc. v. White,* 363 S.C. 546, 611 S.E.2d 262(S.C.App.,2005)**

At the time that Defendants Duke and Kellahan purchased the 20.97 acres, some research was conducted and there was no evidence that Porter Street was ever a public road or that it was maintained by City. It was primarily grown up in broom straw. **(Tr. 4/26/2006, R. p. 127 & R. p. 128)**

The Plaintiff's argument concerning apparent authority and estoppel should be rejected. As an affirmative defense, estoppel must be pled or it is waived. There has been no motion to conform the pleadings to the proof. **(Petition R. p. 46, paragraph 2)** Based upon the forgoing, the Order of October 22, 2011 should be reversed.

This case should be reversed, and respectfully submitted, and on the grounds that the Special Referee relied on an agency estoppel and as a basis of the decision to terminate the continued easement rights of Defendants Kellahan/Duke of the area in question. The decision of the Special Referee was in the first incidence controlled by an error of law in applying agency and estoppel when the relief sought by the Plaintiff was a statutory relief. Additionally, the factual findings of the Special Referee, concerning agency and estoppel were not reasonable based upon the evidence, as well as the pleadings, and the same amounts to an error based on abuse of discretion.

ARGUMENT VIII

BECAUSE THE WRITTEN EASEMENT FROM SAMUEL MCINTOSH TO KELLAHAN AND DUKE WAS NOT AN EXPRESS WRITTEN DEDICATION AND THE EVIDENCE DOES NOT SUPPORT THE ACT OF DEDICATION OF THE AREA AS A STREET, THE EASEMENT RIGHTS OF DEFENDANTS KELLAHAN/DUKE SHOULD NOT BE TERMINATED.

The Special Referee's finding that the easement from Samuel McIntosh to Defendants Duke and Kellahan was purchased to make Porter Street a public road not supported by the evidence. The language of the easement cited in the supplemental facts above clearly states that the road is proposed and Defendants Duke and Kellahan can take such action to have it made a public road and that the Grantor would cooperate. It is elemental that an entire document must be read to obtain its full meaning. The three areas for the use of the area in question in the easement clearly reflect two things:

First: The easement is for the benefit of the both the Grantor and the Grantees of Samuel McIntosh, as well as, Defendants Duke and Kellahan and their heirs and assigns for them to have access to their respective parcels of property.

Second: The easement deals with the future use. Additionally, the argument that the paving of the area up to the senior citizens facility certainly indicates where the paving has occurred, dedication has occurred, but only as to the portion of the property that was paved. The fact the area in question and a small portion of property adjacent thereto has not been paved is strong evidence of the fact that the unpaved area has not been dedicated.

If the dedication had already occurred in 1993 (which is most strongly denied by the Defendants Duke and Kellahan), then the Town of Kingstree would not have needed to purchase the area in question in 1998. Those deeds would also be of no effect **(Plaintiff's Exhibit 7, R. p. 250-317).** That is just not the case. The Town of Kingstree purchased the property subject to the Duke and Kellahan easement.

The public may acquire a prescriptive easement from the use of property for a roadway or a street but for dedication to occur, there must be some action by a public entity **(SC Code Ann. §6-29-1170).**

This case should be reversed, it is respectfully submitted, because the decision is not supported by the ruling by the Special Referee that Defendants Kellahan/Duke "purchased the easement for the express purpose of making Porter Street a public road in effect was a determination that the easement never existed and that the document creating it was in effect a public dedication of the area.

The Plaintiff failed to meet the burden of proof required to establish dedication. The following outlines the burden of proof necessary for dedication:

> "Only the owner of a fee simple interest can make a dedication. Safety Building & Loan Co. v. Lyles, 131 S.C. 542, 128 S.E. 724 (1925). To prove a dedication of land to the public, the party claiming dedication must show that a person who owned the land intended to dedicate it to a public *317 use and that the dedication was accepted by the public. Anderson v. Town of Hemingway, 269 S.C. 351, 237 S.E.2d 489 (1977). The owner's intention to dedicate must be manifested in a positive and unmistakable manner. Id. A dedication need not be made by deed or other writing, but may be effectually made by acts or declarations. Id. Intent to dedicate may also be implied from long public use of the land to which the owner acquiesces. Id. Nevertheless, dedication is an exceptional mode of passing an interest in land, and the proof of dedication must be strict, cogent, and convincing. Shia v.

Pendergrass, 222 S.C. 342, 72 S.E.2d 699 (1952). The acts proved must not be consistent with any construction other than that of a dedication. Id. **Hoogenboom v. City of Beaufort 315 S.C. 306, 433 S.E.2d 875 (Ct. App., 1992)**"

The case should be reversed, it is respectfully submitted, based upon the error of law of the Special Referee that determined that the easement was a dedication. Additionally, the case should be reversed, it is respectfully submitted, because the decision is wholly unsupported by the evidence and the pleadings and was an abuse of discretion due to the lack of evidence to support the same.

ARGUMENT IX

BECAUSE THE ORDER OF OCTOBER 22, 2010 PROVIDES FOR THE CLOSURE OF AN AREA AND FOR THE TAKING OF PROPERTY RIGHTS OF DEFENDANTS KELLAHAN/DUKE, THESE DEFENDANTS ARE ENTITLED TO COMPENSATION FOR THE TAKING.

Duke and Kellahan counterclaimed for taking of a property right stated a claim inverse condemnation, the property right being access to Ashton Avenue. **(Answer and Counterclaim of Defendants Kellahan/Duke, R. p. 62-66)** The property right sought to be taken was a fifty (50) easement granted to Defendants Duke and Kellahan by a written easement dated September 7, 1993 from Samuel E. McIntosh recorded in Deed Book A-311 at Page 235. **(Defendants' Exhibit11, R. p. 362)**

The property has not been paved and has not been dedicated to public use. Defendants Duke and Kellahan had a valid easement that the Plaintiff admitted was valid in its pleadings. **(Petition, R. p. 46, paragraph 2)** The Plaintiff cannot now disavow that admission in this case.

Under the laws and the Constitution of our state and the Constitution of The United States, no private property may be taken without just compensation. **(S.C. Const. art.1, § 13 and U.S. Const. amend. 5)**

In the case of ***Hardin v. South Carolina Dept. of Transp.*, 371 S.C. 598, 641 S.E.2d 437 (2007)** addressed what constitutes the taking of easement rights. The Supreme Court stated:

> "In South Carolina, however, a property owner has more rights. As we have held, a property owner in South Carolina has an easement for access to and from any public road that abuts his property, regardless of whether he has access to and from an additional public road. ***South Carolina State Hwy. Dep't v. Allison*, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965)**."
>
> "[A]a plaintiff's right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking. ***Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 80 (2005)**."
>
> In determining whether a road re-configuration amounts to a taking of property, the focus is on how the reconfiguration affects property owner's easements to access public road system, not on whether property owner has suffered special injury that is different in kind and not merely in degree from that suffered by public at large; overruling ***City of Rockhill v. Cothran*, 209 S.C. 357, 40 S.E.2d 239, and *Gray v. South Carolina Dep't of Highways and Public Transp.*, 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1992). U.S.C.A. Const.Amend. 5; Const. Art. 1, § 13.**
>
> The right of a landowner to recover damages because of the vacation of a street depends on the location of his land with reference to the street vacated, or the part of the street vacated, and the effect of such vacation on his rights as an abutting owner. It is well settled that an owner is not entitled to recover damages unless he has sustained an injury different in kind and not merely in degree from that suffered by the public at large. If it appears that there is a special injury, the owner may recover damages notwithstanding his property does not abut, as

> in this case, on the part of the street vacated, because this amounts to a 'taking.'
>
> Determining whether government action effects a taking requires a court to examine the character of the government's action and the extent to which this action interferes with the owner's rights in the property as a whole. **U.S.C.A. Const.Amend. 5; Const. Art. 1, § 13.**
>
> Physical occupation of private property by the government generally results in a taking regardless of the public interest the government's action serves. **U.S.C.A. Const.Amend. 5; Const. Art. 1, § 13.**

***Hardin v. South Carolina Dept. of Transp.*, 371 S.C. 598, 641 S.E.2d 437 (2007)**

The Court in Hardin, citing ***South Carolina State Highway Dept. v. Carodale Associates*, 268 S.C. 556, 235 S.E.2d 127(1977)**, Stated:

> Though it does not expressly provide so, Carodale implicitly recognizes that road closings and re-alignments are actions of a far different character than government conduct which affects an owner's rights in his or her property in a constitutionally significant sense. Stated in doctrinal terms, modern takings principles instruct that road closings and realignments which do not "take" land or an easement from a property owner do not give rise to compensable takings because these actions do not directly interfere with an owner's rights in the property as a whole. ***Hardin v. South Carolina Dept. of Transp.*, 371 S.C. 598, 641 S.E.2d 437 (2007)**

The property was acquired by Defendants Duke and Kellahan for commercial development and the acquisition and development was predicated on access to said property along Porter Street with ingress and egress being available on both Ashton Avenue and Nelson Boulevard. **(Defendants' Exhibit11, R. p. 362 and Tr. 4/26/2006, R. p. 129, lines 5 - R. p. 130, line 11)** The Defendants Duke and Kellahan have established by uncontroverted testimony that special injury will occur to their property if their access to Ashton Avenue is terminated and they are entitled

to recover damages for such injury in the amount of One Hundred Thousand and No/100 ($100,000.00) Dollars. **(Tr. 4/26/2006, R. p. 134, lines 5-12)**

Defendants Kellahan/Duke easement rights cannot be taken without just compensation.

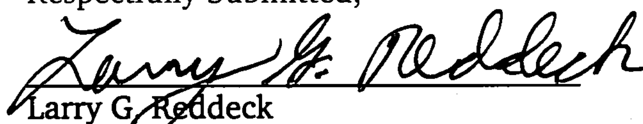
The decision of the Special Referee to deny compensation if the easement rights of the Defendants Kellahan/Duke are terminated is an error at law.

The case should be reversed, it is respectfully submitted, because the decision as to the taking of the Defendant's easement rights is unsupported by the evidence and the pleadings and, accordingly, the same is an abuse of discretion. Additionally, the decision was controlled by an error of law in that the Special Referee failed to properly apply the law concerning the taking of property rights of Defendants Kellahan/Duke.

CONCLUSION

For the reasons stated, the judgment of the Special Referee should be reversed.

Respectfully Submitted,



July 5, 2012
Lake City, SC

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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM WILLIAMSBURG COUNTY

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SC Court of Appeals

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.

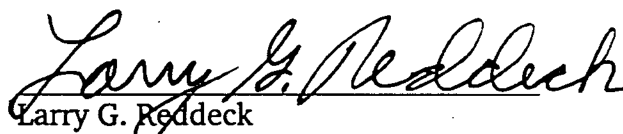
Gary W. Chapman, Jr., Terilyn J. McClary, Waccamaw Housing, Inc., Lydia F. Duke, Alice H. Kellahan and South Carolina Department of Transportation .... Defendants

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief of Appellants complies with Rule 211(b), SCACR.

July 12, 2012



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July 12, 2012

HAND DELIVERED

The Honorable Tanya Gee
Clerk, Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RECEIVED
JUL 12 2012
SC Court of Appeals

RE: Town of Kingstree vs. Gary W. Chapman, Jr., et al.
Case No. 2005-CP-45-434

Dear Ms. Gee:

Enclosed herein please find fifteen (15) copies of each (one unbound) of the following for filing in this matter:

A. Brief of Appellants;
B. Reply Brief of Appellants; and
C. Record on Appeal.

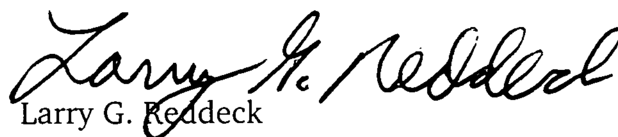
I have also enclosed one extra copy of each of the above-referenced documents on which I would appreciate your clocking for my file.

By separate letter, I have served bound copies of Brief of the Appellants, Reply Brief of Appellants and Record on Appeal upon opposing counsel on July 9, 2012. The Proof of Service is enclosed for filing. Please clock the enclosed copies of the Proof for my file.

With my best regards, I am

Yours very truly,

NETTLES, TURBEVILLE & REDDECK



Larry G. Reddeck

LGR/jpa
Enclosures

CC: Ernest J. Jarrett, Esquire
M. Amanda Shuler, Esquire