

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS**

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 12 2011

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. Supreme Court

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-26-7839

Kenneth Dippel &
Kimber Fowler,

Petitioners,

v.

Horry County Planning
Department,

Respondent.

APPENDIX

Kenneth Dippel
Kimber Fowler

Loris, SC 29569
(843) 716-0699

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kenneth Dippel & Kimber Fowler, Appellants,

v.

Horry County Planning Department, Respondent.

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Unpublished Opinion No. 2011-UP-108
Submitted March 1, 2011 – Filed March 16, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Kenneth Dippel and Kimber Fowler, both of Loris,
pro se.

John L. Weaver, of Conway, for Respondent.

PER CURIAM: Kenneth Dippel and Kimber Fowler (Appellants), pro se, appeal the circuit court's (1) denial of their motion for an order of reference and change of venue and (2) the grant of the Horry County Planning Department's (the Department) motion to strike and motion to dismiss. We affirm in part, reverse in part, and remand.^[1]

This appeal concerns the Department's refusal to approve Appellants' submitted plat. After the Department did not approve the plat, Appellants unsuccessfully appealed to the Horry County Planning Commission. Subsequently, Appellants appealed this determination to the circuit court. Appellants' appeal, manifested in a lengthy document styled as a "complaint," alleged three causes of action. Appellants asserted (1) a judicial taking, (2) the Department's failed to comply with a court order, and (3) an action that constituted an appeal of the Planning Commission's adverse determination. Upon motion by the Department, the circuit court struck all allegations and causes of action not related to a direct appeal of the Planning Commission's plat determination. Subsequently, the circuit court dismissed the appeal on procedural grounds because Appellants failed to file a pre-litigation request for mediation with the notice of appeal and failed to join necessary parties. Appellants appealed this decision, asserting the

circuit court erred in striking actions from their complaint and in dismissing their appeal. Appellants also contend error in the denial of their motion for an order of reference and change of venue.

"A property owner whose land is the subject of a decision of the planning commission may appeal by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with section 6-29-1155." S.C. Code Ann. § 6-29-1150(D)(2) (Supp. 2010). "If a property owner files a notice of appeal with a request for pre-litigation mediation, the request for mediation must be granted" S.C. Code Ann. § 6-29-1155(A) (Supp. 2010). When interpretation of a statute is required, "words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991).

We find the circuit court erred in basing the dismissal of Appellants' appeal on their failure to file a request for pre-litigation mediation. The Department contends sections 6-29-1150 and 6-29-1155 require the mandatory filing of a request for mediation along with a notice of appeal in order to properly appeal a decision by the Planning Commission. We believe a plain and ordinary reading of the statute reveals that it merely informs a potential appellant of the option and procedure for filing a request for mediation. Specifically, section 6-29-1150(D)(2) provides a property owner "may appeal by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with section 6-29-1155." Section 6-29-1155 in turn provides: "[i]f a property owner files a notice of appeal with a request for pre-litigation mediation" Reading these two sections together indicates the mediation request is an optional step in appealing the decision of a planning commission. Accordingly, we reverse the circuit court's grant of dismissal on this ground.

As a second ground for dismissal, the circuit court found Appellants failed to join necessary parties. We find the circuit court erred in failing to make findings of fact to support the dismissal of Appellants' appeal for failure to join necessary parties.

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Rule 19, SCRCP. "[A] development permittee is a necessary party to an appeal of its permit." Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. of Adjustment of Town of Hilton Head Island, 295 S.C. 67, 69, 367 S.E.2d 160, 161 (1988). "Designating the permittee a necessary party insures the most vitally interested party's participation in the appellate process." Id. at 68, 367 S.E.2d at 161. "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Rule 52, SCRCP.

We do not require a lower court to set out findings on all the myriad factual questions arising in a particular case. But the findings must be sufficient to allow this [c]ourt, sitting in its appellate capacity, to ensure the law is faithfully executed below. The absence of factual findings makes our task of reviewing the court order

impossible because "the reasons underlying the decision [are] left to speculation."

In re Treatment and Care of Luckabaugh, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002).

The circuit court's order relies on Spanish Wells to support the contention that Appellants failed to join necessary parties to the appeal of the Planning Commission decision.^[2] The order indicates unnamed parties were necessary because the determination of the Planning Commission directly affected their existing access to these parcels. The circuit court's order states, "These parties occupy an analogous position to an owner whose application approval is appealed, since appeal could result in reversal of the access rights recognized by the Planning Commission." Notwithstanding these analogies, the paucity of information concerning the purported necessary parties makes it difficult to determine if the circuit court's legal conclusions are correct. See Luckabaugh, 351 S.C. at 132-133, 568 S.E.2d at 343 (quoting Coble v. Coble, 268 S.E.2d 185, 189 (N.C.1980)) ("Trial courts, sitting without juries in an action at law, write their findings specially and separately: to allow a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system."). The circuit court's order neither provides the identities of the purported necessary parties nor fully describes how these parties are "directly affected" by the Planning Commission's determination beyond unspecified effects on their existing access. Accordingly, we remand for the circuit court to clarify the nature and identity of the purported necessary parties and if necessary to consider the appeal on its merits.

To the extent Appellants asserted original causes of action in their appeal from the Planning Commission, the circuit court's decision is affirmed.

Finally, we affirm the circuit court's denial of Appellants' motion for an order of reference and change of venue. Because the underlying action is an appeal from a planning commission decision, reference to a master-in-equity is not appropriate pursuant to Rule 53, SCRPC, and the circuit court did not err. Likewise, venue in Horry County is proper and we find no error in the circuit court's denial of this motion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FEW, C.J., KONDUROS, J., and CURETON, A.J., concur

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] The order does not reveal the identity of these parties.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2011-UP-108

Kenneth Dippel &
Kimber Fowler,

Appellants,

v.

Horry County Planning
Department,

Respondent.

MOTION FOR REHEARING

Kenneth Dippel
Kimber Fowler
2145 Oakdale Road
Loris, SC 29569
(843) 716-0699

TABLE OF AUTHORITIES

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Appellants, Kenneth Dippel & Kimber Fowler hereby pursuant to Rule 221(a), SCACR moves the Court for a rehearing with respect to its opinion issued on March 16, 2011. Appellants, Kenneth Dippel & Kimber Fowler respectfully must state the Court by holding the following: *"To the extent Appellants asserted original causes of action in their appeal from the Planning Commission, the circuit court's decision has affirmed"*, has failed to provide the parties with a final appellate order setting forth the facts or accompanying legal analysis sufficient to permit the parties to determine if the Court's legal conclusions and analysis are correct. See Rule 220(b), SCACR providing: *"In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with **the reason for the court's decision**, be preserved in the record of the case"*, see also *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E. 2d 338, 343 (2002), The lack of supportive reasons and bases also will make it very difficult if not impossible for Appellants to undertake any meaningful appellate review by the South Carolina Supreme Court. In addition, the Appellants respectfully must state the Court did not undertake any effort at all in trying to properly interpret the following:

1. RULE 8(a), SCRPC, RULE 12(b)(6), SCRPC, and S.C. Code Ann., Section 6-29-1150(A)

It is imperative for this Court to grant reconsideration of the decision in order to determine the interpretation and applicability of Rule (8)(a), SCRPC and Rule 12(b)(6). The order of the lower Court notes that Appellants did not comply with procedural rules for pleadings, particularly Rule 8(a), SCRPC (R. at 2). The lower Court order notes all parts of the Complaint are stricken as impertinent and immaterial matter pursuant to Rule 12(f), SCRPC (R. at 3). Appellants in their final brief raised the argument to this Court that S.C. Code Ann., Section 6-29-1150(A) required Respondents to include specific procedures for appealing planning commission decisions.

Appellants pointed out that Respondents in their Horry County Land Development Regulations have not published anything in their land development regulations specifically stating that a party aggrieved by planning commission decision must provide an appeal to the Circuit that complies with Rule 8(a), SCRPC or plead with specifics otherwise the appeal will be stricken pursuant to Rule 12(f), SCRPC. See Appellants' Brief pages 12 – 14.

Indeed, there is a problem with this Court's order in that it does not address what fundamental due process rights (right of written notification of decision, notice appeal rights, notice of what is required to appeal a planning commission decision) are owed to an aggrieved party who receives an adverse Planning Commission determination. For this Court to ignore this in

a case such as this where property owners across this State who are aggrieved by a planning commission determination such as this is unconscionable. Appellants' appeal and many other property owners who are aggrieved by planning commission determinations will all have their appeals dismissed on the grounds they did not comply with Rule 8(a), SCRPC. In addition, there are fundamental due process notification rights that are clearly owed to all property owners who are aggrieved by a Planning Commission decision, which the Court did not address in this Court's ruling.

This case is very important to the citizens of Horry County and to the citizens across the State because as it now stands a property owner who does not clearly pinpoint and plead with specifics in their appeal of a Planning Commission to the Circuit Court will ultimately always have their cases dismissed on procedural grounds for not complying with Rule 8(a), SCRPC and for failure to plead with specifics to constitute a cause of action when there is nothing in Horry County's regulations or statute that require an aggrieved party to do this.

This is particular troubling when considering that the order dismissing the Complaint notes that an appeal of a Planning Commission determination is controlled by statute (R. at 4). None of these statutes relied on in the order state that a pro se party aggrieved by a planning commission determination must comply with Rule 8(a), SCRPC and must plead that

appeal with specifics. Appellants pointed out that the holding in *Doe v. Greenville County School District*, 375 S.C. 63, 651 S.E. 2d 305 (2007) was factually distinguishable because Appellants' case involved an appeal of a Planning Commission determination unlike *Doe*.

One of those statutes that was failed to mention in the lower Court's order is S.C. Code Ann., Section 6-29-1150(A). Yet, the Court's order states appeals of planning commission determinations are controlled by statute. As previously stated herein, the statute required Respondents to publish in their Horry County Land Development Regulations specific requirements of what is required for an aggrieved party to appeal to the circuit court if they want to appeal a Planning Commission decision.

As stated before, **there are not adequate regulations published in Horry County's Land Regulations pertaining to appeals of a planning commission determination.** The Court should note that this was one of the first cases ever that the circuit court in Horry County or Respondents have had to deal with concerning an appeal of a Horry County Planning Determination. Therefore, it is important for this Court to grant reconsideration of this Court's order so that the Court can issue a final ruling providing final guidance to the parties on this issue, and also to all future parties who one day may also have to appeal a Horry Planning Commission or Horry Planning Department determination.

The order issued by this Court while affirming parts of the lower court's order is not clear on whether it was holding dismissal of Appellants' third cause of action in their complaint is proper for failing to plead with specificity. The Court should note that the order of the lower Court while acknowledging Appellants' third cause of action (error of law) in their complaint (failure to correctly apply the law in denying approval of Plaintiffs' plat), it dismissed the complaint on the grounds that Appellants did not request mediation and did not enjoin all affected property owners (R. at 4). This Court reversed that part of the order dismissing the complaint for failing to request mediation and remanded that part of the order holding that Appellants did not enjoin all effected property owners.

The Court should note that this Courts order reversing and remanding that part of the order dismissing Appellants' appeal is intertwined with Appellants' third cause of action in the Complaint. This Court should have issued a final order vacating and remanding Appellant's third cause of action in their complaint (error of laws).

It is unclear by this Court's order as to whether it was affirming the dismissal of the Appellants' third cause of action (errors of law which is a basis for an appeal of a planning commission determination) for failing to plead with specificity. It is necessary for this Court to grant reconsideration and issue a new final ruling which clearly addresses this. Without reconsideration and an opinion issued by this Court addressing the dismissal

of the third cause of action by the lower Court, there will be no finality on this issue. Appellants respectfully state Rule 220(b), SCACR compels this Court to grant reconsideration and to issue a new final opinion specifically addressing as to whether the lower Court's dismissal of Appellants' third cause of action in their complaint was proper.

2. S.C. Code Ann., Section 6-29-1150(D)(4)

The Appellants in their complaint noted that the Planning Commissions determination amounted to a judicial taking of private property for the sole benefit to benefit another private citizen. The order by the lower Court determined that an inverse condemnation claim was not ripe and cannot lie in an appeal of a planning commission determination (R. at 3). Appellants in their brief to this Court (AB 25 – 29) presented arguments to this Court pointing out a judicial taking could be a parcel to the subject matter jurisdiction in an appeal involving a Planning Commission determination.

Appellants relied upon the controlling statute and interpretation of S.C. Code Ann., Section 6-29-1150(D) (4) which provided: *"Nothing in this subsection prohibits a property owner from subsequently electing to assert a pre-existing right to a trial by jury of any issue beyond the subject matter jurisdiction of the planning commission, such as, but not limited to, a determination of the amount of damages due for an unconstitutional taking".*

Indeed, the statute above does not exclude an unconstitutional taking of private property from being excluded from a planning commission

determination appeal. The Courts in South Carolina have never before given a proper interpretation of S.C. Code Ann., Section 6-29-1150(D) (4). The holding in *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165, 656 S.E. 2d. 346 (2008) certainly did not address the interpretation and applicability of Section 6-29-1150(D) (4). Also, the ruling in *Kurschner* is factually distinguishable because in that case the ruling was based on the obvious fact the party did not exhaust their administrative remedies. Appellants in this case at bar on the other hand have exhausted their administrative remedies.

Appellants respectfully state that based on the foregoing, it is imperative for this Appellate Court to grant reconsideration and issue a new final opinion specifically giving a proper legal interpretation of S.C. Code Ann., Section 6-29-1150(D) (4). Subsequent litigation by the parties will be dramatically impacted without the Court granting reconsideration. Furthermore, thousands of property owners across this State could be affected by this Court giving a proper interpretation to the statute. This Court has exclusive jurisdiction and power to do so.

3. S.C. Code Ann., Section 6-29-1150(D) (1)(2) & Rule 74, SCRPC

Appellants in their brief presented arguments stating that an appeal of a planning commission determination only begins to run after receipt of written notice of the judgment, order or decision appealed from (Appellants Brief, pages 7-12). This is important because if indeed an aggrieved party

must enjoin all effected property owners and must plead with specifics in their appeal, the time limits to do this only begin to run when the Planning Commission mails out a written decision setting forth findings of fact, conclusions of law, reasons and bases, and a determination either granting or denying the Appeal. As stated in Appellants' brief (AB. 7 – 12), Respondents never mailed out a decision to them which set forth separately findings of fact, conclusions of law, reasons and bases, and a determination either granting or denying the Appeal.

This Court in a very general statement without any supportive analysis concluded the other parts of the order were affirmed. This ruling fails to comply with **Rule 220(b), SCACR** which mandates for this Court to issue an opinion setting forth the reasons for the decision. This Court did not attempt to give a proper interpretation of S.C. Code Ann. Code, 6-29-1150(D) (1), S.C. Code Ann. Code, 6-29-1150(D) (2) & Rule 74, SCRCPP and no reasons were provided in the order explaining why this was not done.

A proper interpretation and application of these statutes and **Rule 74, SCRCPP** should have been done because it will affect this case in future proceedings at the lower Court. As explained in Appellants' briefs the time limits to appeal, to enjoin all effected property owners if it is required, and to plead with specifics if it is required cannot begin to run when Appellants were never mailed out a copy of the decision by the Horry County Planning Commission.

4. Rule 75, SCRCP

Rule 75, SCRCP mandated for Respondents to provide the Circuit Court within 30 days upon the filing of the appeal by Appellants of the Planning Commission determination an original certified record that was before the Horry County Planning Commission. There was never a certified record provided by Respondents to the Circuit Court. Appellants pointed this out to this Court (Appellants' brief pages 14 & 15).

This Court in affirming the other parts of the lower Court ruling failed to interpret Rule 75, SCRCP as it relates to an appeal of a Planning Commission determination. This is important because to date there is no timely certified record that has ever been filed by the Respondents to the lower Court. It is therefore imperative for this Court to take judicial notice and to properly give a proper interpretation of Rule 75, SCRCP and for the Court to properly apply Rule 75, SCRCP as it relates to this case.

Without the Court granting reconsideration and without issuing a new opinion there is never going to be finality in this case. In addition, the parties will go back to the lower Court and commence litigation again without the benefit of having an original certified record that was before the Horry County Planning Commission. Furthermore, the Court should note a proper interpretation of Rule 75, SCRCP as it relates to appeals involving planning commission appeals will dramatically affect many other property owners who are aggrieved by local planning commission determination. The role and

of this Court is indeed to interpret rules. The order recently issued by this Court unfortunately does not do this.

CONCLUSION

Wherefore, based upon consideration of the foregoing, Appellants respectfully pray for this Honorable Court to grant reconsideration and to issue a new opinion addressing that part of the Court's order which affirmed the other parts of the lower court ruling.

Respectfully submitted,

Handwritten signatures of Kenneth Dippel and Kimber Fowler in cursive script, written over a horizontal line.

Date: 3/25/2011

Kenneth Dippel / Kimber Fowler
2145 Oakdale Road
Loris, SC 29569
(843) 716-0699

CERTIFICATE OF SERVICE (Proof of Service)

I, **Kenneth Dippel & Kimber Fowler**, hereby certify that a copy of the Appellant's reply to Respondent's pleadings was served and provided to the Respondent, Claudius Eugene Fowler on **March 25, 2011** by mailing a copy by first class US mail to the Respondents' last known physical mailing address addressed as follows:

John L. Weaver, Horry County Attorney
PO Box 1236
Conway, South Carolina 29528

3-25-11
(Date)

Kenneth Dippel / Kimber Fowler
(Signature)

Kenneth Dippel / Kimber Fowler
2145 Oakdale Road
Loris, SC 29569
(843) 716-0699



The South Carolina Court of Appeals

TANYA A. GEE
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April 22, 2011

Kenneth Dippel
P.O. Box 622
Loris, SC 29569

Re: Dippel, Kenneth v. Horry County

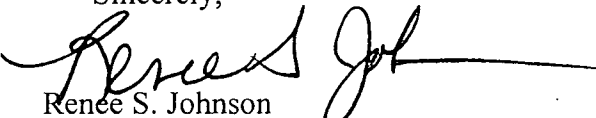
Dear Mr. Dippel:

Enclosed is a copy of an Order of the Court denying your Petition for Rehearing in the above case.

The Remittitur in this case will be held in this Court only so long as required by Appellate Court Rule 221 (b).

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining Records on Appeal and briefs we may have in this case. Also enclose a check payable to the S. C. Court of Appeals, in the amount of \$7.50, to cover mailing costs. If we have not heard from you within ten (10) days, the Record on Appeal and briefs will be disposed of.

Sincerely,


Renee S. Johnson
Administrative Specialist


TAG/rj

cc: John L. Weaver, Esquire

The South Carolina Court of Appeals

Kenneth Dippel and Kimber Fowler, Appellants,

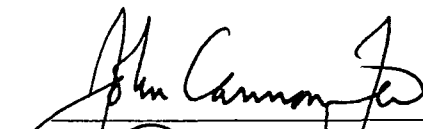
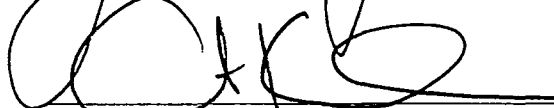
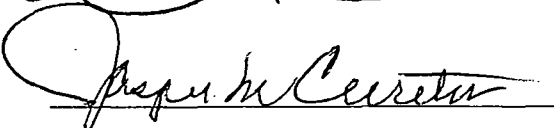
v.

Horry County Planning Department, Respondent.

The Honorable Benjamin H. Culbertson
Horry County
Trial Court Case No. 2009-CP-26-07839

ORDER

After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

 C.J.
 J.
 A.J.

Columbia, South Carolina

FILED

APR 22 2011

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM HORRY COUNTY
Court of Common Pleas**

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-26-7839

KENNETH DIPPEL &
KIMBER FOWLER,

APPELLANTS

v.

HORRY COUNTY PLANNING
DEPARTMENT,

RESPONDENTS.

RECORD ON APPEAL

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CERTIFICATE OF COMPLIANCE (RULE 210(g), SCACR)

I Kenneth Dippel & Kimber Fowler, Appellants hereby certify pursuant to **Rule 210 (g), SCACR** that the Record on Appeal contains all material proposed to be included by any of the parties and does not contain any other material.

Feb. 16, 2010

(Date)

Kenneth Dippel

(Signature)

(2-16-10)

(Date)

Kimber Fowler

(Signature)

Y900

COPY

CERTIFICATE OF SERVICE (PROOF OF SERVICE)

I **Kenneth Dippel** and **Kimber Fowler**, Appellants, hereby certify that on Feb. 16, 2010 we properly served a copy of the Record of Appeal on Respondents by mailing a copy by US first class mail in an envelope with sufficient postage affixed to Respondents' Attorney, addressed as follows:

John L. Weaver,
Horry County Attorney
PO Box 1236
Conway, SC 29526

Feb. 16, 2010
(Date)

Kenneth Dippel Kimber Fowler
(Signatures)

FORM 4

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

Kenneth Dippel and Kimber Fowler
PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-2039
Horry County Planning Department
DEFENDANT(S)

FILED
2009 OCT 26 AM 11:00
CLERK OF COURT
ALLANIE HUGGINS-WARD

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Defendant's Motion to Dismiss is granted.

Dated at Georgetown, South Carolina, this 22nd day of October, 2009.

Benjamin H. Culbertson

Benjamin H. Culbertson
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

R. Allen Beverly, Jr.
ATTORNEY(S) FOR THE PLAINTIFF(S)

Victoria V. Vaughn
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

KENNETH DIPPEL and)
KIMBER FOWLER,)

Plaintiffs,)
vs.)

HORRY COUNTY PLANNING)
DEPARTMENT,)

Defendant.)

FILED
HORRY COUNTY
IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A No. 2009-CP-26-7839
2009 OCT 28 AM 11:00

TELLANIE HUGGINS-WARD
CLERK OF COURT

ORDER GRANTING MOTION
TO STRIKE AND DISMISS

CC COPY

This matter came before me October 6, 2009 on motion of Defendant to dismiss and/or strike allegations from the Complaint pursuant to Rules 12(b) and (f), SCRPC. Present were counsel for Defendant, Victoria T. Vaught of Battle & Vaught, P.A. and John L. Weaver, Horry County Attorney, as well as counsel for Plaintiff, R. Allen Beverly, and his clients, Kenneth Dippel and Kimber Fowler. This action was commenced after Defendant denied approval of a plat submitted by Plaintiffs to remove a road previously platted of record on Plaintiff Kimber Fowler's property. After hearing argument, reviewing the file, and considering the matter, the motion is granted for the following reasons.

Plaintiffs' Complaint, which was filed pro se, does not comply with procedural rules for pleading, particularly Rule 8(a), SCRPC, because the Complaint does not contain short, concise statements of fact and relief sought, but instead is a twenty page memorandum containing case citations, conclusions, and argument, with a few facts interspersed. Therefor, all portions of the Complaint specifically set forth and identified by page, paragraph and sentence in Defendant's motion are properly stricken as

impertinent and immaterial matter, pursuant to Rule 12(f), SCRCP, and will not be considered for purposes of ruling on Defendant's motion to dismiss.

In considering a motion to dismiss for failure to state a claim, the court must base its ruling solely upon the allegations set forth on the face of the Complaint, and the motion may not be sustained if the facts alleged in the Complaint and inferences reasonably deducible therefrom would entitle the Plaintiff to any relief under any theory.

Doe v. Greenville County School Dist., 375 S.C. 63, 651 S.E.2d 305 (2007).

The first cause of action asserts a claim for inverse condemnation. Such a claim is not ripe, and dismissal is warranted. Until an administrative determination by a planning department or commission is successfully appealed, an inverse condemnation claim is not ripe and will not lie. Kurshner v. City of Camden Planning Commission, 376 S.C. 165, 656 S.E.2d 346 (2008). The third cause of action in Plaintiffs' Complaint, addressed below, is an appeal from the determination of the Planning Commission to uphold disapproval of Plaintiffs' plat. Unless and until that claim is determined in Plaintiffs' favor, no claim for inverse condemnation may proceed.

The second cause of action asserts a claim for failure to comply with court orders. The orders are an unpublished opinion from the South Carolina Court of Appeals in an action brought by Plaintiff Kimber Fowler against a third party, and a judgment on remand in the same action, copies of both orders having been incorporated by reference in, and attached to, the Complaint. Defendant was, patently, not a party to the action in which the decision and judgment were rendered. Therefore, Defendant is not bound by the orders, and no claim is stated on which relief may be granted in the second cause of

action. Additionally, both orders preceded Defendant's denial of plat approval, and neither order addresses the plat for which Plaintiffs sought Defendant's approval.

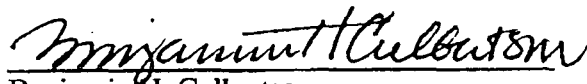
The third cause of action is nominated as a claim for failure to correctly apply the law in denying approval of Plaintiff's plat. This claim is an appeal of the Planning Commission's determination regarding plat approval, and error of law is a basis for appealing a local planning commission's determination. See, Kurschner, supra. However, an appeal from a local planning commission determination is governed by statute, specifically S.C. Code Ann. Section 6-29-310, et. seq., and in particular, S.C. Code Ann. Section 6-29-1110, et. seq., governing plat approval and appeal. The statutory provisions governing this appeal are controlling and jurisdictional, and failure to comply with statutory requirements may be raised at any time and result in dismissal. Friends of McLeod, Inc. v. City of Charleston, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2009)(vacated following settlement 682 S.E.2d 488 (2009)); see also, Rule 74, SCRCPP (recognizing statute governs appeals to circuit court from inferior tribunals). Pursuant to S.C. Code Ann. Section 6-9-1150(D), an aggrieved party may appeal a local planning commission determination by filing a notice of appeal accompanied by a request for pre-litigation mediation within 30 days of actual notice of the determination or mailing of the decision. Although filed within 30 days of the Planning Commission determination, Plaintiffs' action was not accompanied by a request for pre-litigation mediation. Additionally, Plaintiffs have not joined other persons in this action who were directly affected by the Planning Commission's determination, which recognized and maintained existing access to their properties. These parties occupy an analogous position to an owner whose application approval is appealed, since appeal could result in reversal of the

access rights recognized by the Planning Commission. See, id.; see also, Spanish Wells Property Owners Association v. Bd. of Adjustment of Town of Hilton Head, 295 S.C. 67, 367 S.E. 2d160 (1988)(holding permittee is necessary party to third party appeal of local zoning board determination). Therefore, Plaintiffs' third cause of action fails to meet jurisdictional and procedural requirements imposed by statute and recognized by law, and the third cause of action is properly dismissed.

Finally, the facts alleged and inferences reasonably deducible therefrom state no other claim, for injunction, quiet title, nuisance or other theory on which relief may be granted, since Plaintiffs have failed to properly effect and prevail in an appeal of the Planning Commission determination, and have not alleged any other facts besides the adverse determination of the Planning Commission and its inconsistency with determinations made by other courts in another action involving parties other than Defendant, and issues other than Defendant's disapproval of Plaintiffs' proposed plat.

The action is therefore dismissed.

IT IS SO ORDERED.


Benjamin H. Culbertson
Presiding Judge
Fifteenth Judicial Circuit
Court of Common Pleas for Horry County

October 22, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY FILED
HORRY COUNTY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

OCT -7 PM 12:30

MELANIE HUGGINS
CLERK OF COURT

CASE #: 2009-CP-26-7839

Kenneth Dippel,
etal

vs.

Planning Department
Horry County

PLAINTIFF(S)

DEFENDANT(S)

ORDER
DISPOSITION OF MOTIONS

Plaintiff's Motion for Order of Reference is
Denied.

Plaintiff's Motion for Change of Venue is Denied.

Defendant's Motion to Dismiss is Under Advisement.
Both Attorneys shall submit proposed Orders
within 15 days.
AND IT IS SO ORDERED.

Margaret T. Culbertson
PRESIDING CIRCUIT JUDGE

DATED AT CONWAY, SOUTH CAROLINA THIS 6th DAY OF OCTOBER, 2009.

Randy A. Beverly Jr.

PLAINTIFF'S ATTORNEY(S)

Victoria J. Vaught
John L. Weaver

DEFENDANT'S ATTORNEY(S)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

2009-CP-26-7839

Kenneth Dippel and)
Kimber Fowler,)

Plaintiffs,)

Transcript of Record

vs.)

Horry County Planning)
Department,)

October 6, 2009

Defendant.)

B E F O R E :

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Randy A. Beverly, Jr., Esquire
Attorney for Plaintiffs

Victoria Vaught, Esquire
Attorney for Defendant

Grace L. Hurley, CVR-CM
Circuit Court Reporter

1 (There were no exhibits marked during the hearing.)
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(On the record, October 6, 2009.)

THE COURT: All right, this is case number 2009-CP-26-7839, Kenneth Dippel and Kimber Fowler versus Horry County Planning Department. The matter is before the Court on a motion for an order of reference. Present at the call of the case, just, your name, sir?

MR. BEVERLY: My name is Alan Beverly. I'm the attorney representing Ken Dippel and Kimber Fowler, the Plaintiffs, Your Honor.

THE COURT: The Plaintiffs, all right, Victoria Vaught representing the Defendant.

MS. VAUGHT: Yes, Your Honor.

THE COURT: All right, this is the Plaintiffs' motion?

MR. BEVERLY: I think we've got two motions. They have a motion ---

MS. VAUGHT: There are actually three motions, Your Honor. The first motion ---

THE COURT: Wait a minute. I've just got one on my roster. Let me see what we've got here.

MS. VAUGHT: I think all three - I think there were three scheduled, but ---

THE COURT: Oh, is it over on the - I see it. Okay, I've got Plaintiffs' motion for order of reference,

1 Defendant's motion to dismiss and the Defendant's motion for
2 change of venue.

3 MS. VAUGHT: Actually that's the Plaintiff's motion
4 for a change of venue.

5 THE COURT: Okay. All right, okay, does it matter
6 which one we take first? Is any of them dispositive of the
7 others?

8 MS. VAUGHT: I don't know. I would assume that the
9 Court could defer, if the Court were going to refer the case,
10 the Court could defer the motion to dismiss, but I don't know
11 that - I would say the motion to dismiss would be dispositive
12 possibly.

13 THE COURT: All right, well, let's go, let's go ahead
14 then and hear the motion to dismiss.

15 MS. VAUGHT: Okay, Your Honor, this case basically is
16 an appeal of a planning commission determination with regard
17 to an application made by Kimber Fowler who is a property
18 owner in Horry County concerning a plat that she wanted
19 approved on her property that removed an easement which had
20 been shown on a prior plat of the property. That appeal, that
21 - the submission of the plat for approval and the appeal which
22 resulted from denial of approval by staff, the planning
23 commission then heard the, heard the appeal to the planning
24 commission and denied the request to approve the plat for
25 recording and the Plaintiff then filed this action naming the

1 planning department as a Defendant appealing the decision of
2 the planning commission.

3 As a way of background the property involved here was
4 originally all owned by a gentleman by the name of Mr.
5 Claudius Fowler, I believe. Ms. Kimber Fowler's property was
6 deeded out of the original tract back in 1999. Prior to that
7 time a plat had been approved and recorded which showed an
8 easement across the tract which was deeded out to Kimber
9 Fowler or, excuse me, to Kimber Fowler's former husband.
10 There was a divorce between Kimber Fowler and Mr. Claudius
11 Fowler's son and Kimber Fowler wound up with the property, and
12 then there were - there was a dispute about this easement
13 running across the property which actually provides access to
14 the rear property from a public road and from 1996 on the
15 county has treated that easement, has had that easement named
16 as a road called Dolly Road.

17 Before the request for the plat approval to the planning
18 commission or to the planning department there had been
19 litigation between Mr. Claudius Fowler and Kimber Fowler. Ms.
20 Fowler had filed an action for trespass and the county was not
21 a party to that lawsuit, in short, and but that lawsuit both
22 parties were pro se. It was apparently appealed to the master
23 here in Horry County, determined that there was an easement.
24 It was appealed to the Court of Appeals, an unpublished
25 opinion resulted that said there was no easement by dedication

1 created but did not address any other issues. The Court of
2 Appeals remanded to the Master-in-Equity here in Horry County
3 who at that time was Judge Howe, and Judge Howe then entered
4 an order basically saying that between the parties to that
5 action the easement, there was no easement across Kimber
6 Fowler's tract adjoining the road servicing Mr. Claudius
7 Fowler's property in the back. However, the county was not
8 made a party to that litigation, private litigation between
9 the property owners. There's no issue presented or anything
10 having to do with this road that has been shown on Horry
11 County records since 1996 and the planning commission and
12 planning department refused approval of the plat removing that
13 road from Kimber Fowler's property based on the fact that it
14 provides access to other property owners who were joined in
15 the appeal, the application proceeding and the appeal but have
16 not been joined in this action.

17 Your Honor, we filed a motion to dismiss and/or to strike
18 from the complaint and the complaint here is a very peculiar
19 complaint and really does not comply with Rule 8(A) of the
20 South Carolina Rules of Civil Procedure which require a
21 pleading stating a claim to set forth a short and concise
22 summary of the facts giving rise to the claim and then what
23 relief is requested as a result. Instead what we have here,
24 Your Honor, is a complaint that spans 20 pages and essentially
25 is written more like a brief than a complaint. The, the

1 initial portion of the complaint sets forth sort of a summary
2 which is inconsistent with the prayer at the end of the
3 complaint, not typical pleading and certainly not a short and
4 concise summary or statement of the facts and the relief
5 sought but it does state here on the first page of the
6 complaint that injunctive relief is requested; however, that,
7 you know, it talks about trespass. It talks about collateral
8 estoppel or res judicata which are not claims to my knowledge
9 and other things.

10 The next page, page two, statement of the facts, it is
11 more along the lines with Rule 8(A) but then on page four the
12 complaint goes into the first cause of action which is for
13 violation of property rights and judicial taking of private
14 property. If I could just step back to the summary at the
15 beginning of the complaint as well as to the prayer at the end
16 of the complaint both speak to or use the word injunction, but
17 what the Plaintiff has essentially put forth there is a
18 request for mandamus for this Court to substitute its judgment
19 for the planning commission's judgment and we would submit to
20 the Court that that's not a proper claim for relief, that an
21 appeal of a planning commission decision is limited to
22 determination of whether or not the decision of the planning
23 commission is arbitrary and capricious and complies with law,
24 applicable law and that that is the only issue framed or which
25 can be properly framed in an appeal of a planning commission

1 determination. So, we would state that the request for a
2 mandamus for this Court to substitute its judgment for the
3 planning commission is improper and should be dismissed.

4 With regard to the first cause of action, violation of
5 property rights and judicial taking of private property, the
6 Plaintiff is claiming essentially that the right protected is
7 - was created by a Court of Appeals' opinion which the county
8 was not a party to, and of course, we would submit that that
9 does not necessarily in and of itself create a property right
10 enforceable against the county sufficient to support a claim
11 for violation of property rights if in fact there is such a
12 claim cognizable. With regard to the judicial taking of
13 private property, Your Honor, it has been held in South
14 Carolina in the case of Kurschner versus City of Camden, Court
15 of Appeals decision, I have a copy, that it is a claim for
16 inverse condemnation or a taking is not ripe and cannot be
17 presented in an appeal of a planning commission's
18 determination. That case is reported at 656 S.E.2d 346, it's
19 a 2008 Supreme Court decision and it states that any issue
20 regarding whether the decision constituted a taking without
21 just compensation may not be considered at this time. This is
22 a direct appeal from a decision regarding whether to uphold
23 the commission's decision denying the Kurschners' application
24 to subdivide their property. Any resulting issue raised by
25 the operation of that decision would not be ripe for judicial

1 review at this stage and those issues should be litigated in a
2 separate action. So, we would submit that the first cause of
3 action to the extent that it states any sort of a claim for
4 inverse condemnation, violation of property rights, a judicial
5 taking of private property is not ripe and should be dismissed
6 in a direct appeal of the planning commission determination.
7 I'll be happy to hand that case up.

8 THE COURT: Thank you.

9 MS. VAUGHT: What I read from is on the final page of
10 the opinion.

11 THE COURT: All right.

12 MS. VAUGHT: The next claim, Your Honor, sorry.

13 THE COURT: All right, go ahead.

14 MS. VAUGHT: I have a little bit more. The second
15 cause of action, Your Honor, nominated in the complaint is a
16 failure to comply with court orders. Your Honor, to my
17 knowledge there is no court order mentioned anywhere in the
18 complaint that applies to Horry County or the Horry County
19 Planning Commission, the county was not a party to any prior
20 litigation or proceedings involving Ms. Fowler or Mr. Dippel
21 besides the plat application and review and planning
22 commission appeal and this appeal. Therefore, there's also no
23 private cause of action that I'm aware of for failure to
24 comply with a court order. Even if the planning commission
25 were a party that's something inherent in the power of the

1 court itself and we would submit that there is no claim stated
2 in the second cause of action for failure to comply with the
3 court order or claim in favor of the Plaintiff.

4 The third cause of action, Your Honor, is actually the
5 one for failure to correctly apply the law which I think the
6 Court can construe as a claim, as the direct appeal of the
7 planning commission determination and whether or not the
8 planning commission determination complied with law and was
9 arbitrary, capricious or was not arbitrary or capricious and
10 whether or not it was supported by the record or unsupported
11 by the record. That claim, Your Honor, would be the only
12 viable claim that would actually state a potential cause of
13 action in this case. However, but with regard to the
14 remaining claims nominated with regard to the very verbose
15 argument, legal conclusion set forth in the complaint, which
16 is fairly meticulously listed out in the motion to dismiss. I
17 believe I've put forward all of the clauses in the complaint
18 which should be dismissed or stricken as not complying with
19 Rule 8(A) because not containing a short and plain, concise
20 statement of the facts, the relief requested, the motion
21 itself and I won't belabor that as it's part of the record,
22 but the motion itself sets forth all of the allegations or
23 portions of this complaint that need to be redrafted or
24 stricken or just dismissed as improper pleading.

25 One additional matter raised by the motion to dismiss,

1 Your Honor, is that, is the joinder, both the joinder of Mr.
2 Kenneth Dippel as a party in the action, as well as the
3 failure to join the other individuals who were parties or who
4 were notified of the plat application and the planning
5 commission determination. Mr. Dippel according to the
6 allegations of the complaint owns a mobile home which is
7 located on Ms. Fowler's property and he and Ms. Fowler
8 apparently rent out that mobile home and that is the extent of
9 any interest alleged in this pleading. As a non-property
10 owner, as not - because Mr. Dippel is not the owner of the
11 property which, on which the re-platting was sought he is not
12 a real party in interest in this action, and does not have a
13 property right in the real estate.

14 THE COURT: So, regardless of the Court's decision
15 he's not going to be effected one way or the other?

16 MS. VAUGHT: Correct, Your Honor, he only owns a
17 mobile home which is titled in his name.

18 THE COURT: But I mean, he's not going to be claiming
19 the existence or nonexistence of an easement?

20 MS. VAUGHT: Your Honor, he certainly has in the
21 complaint joined as a party and alleged that there's no
22 easement but any interest that he has as the certificate of
23 title holder on a mobile home located on the real property is
24 represented by Ms. Fowler who is the actual property owner, he
25 only holds an interest in personalty, not in the real property

1 and we'd submit that this case, the subject of this case is
2 real property not a mobile home.

3 Finally, and then, of course, there are additional
4 parties who are - who were affected by the planning commission
5 determination with regard to access who are not joined in this
6 action and would be proper parties and certainly joinder is
7 feasible of those parties.

8 THE COURT: And who are they?

9 MS. VAUGHT: I'm sorry?

10 THE COURT: Who are the necessary parties that you
11 say should be joined in?

12 MS. VAUGHT: The parties who were joined in, who were
13 notified of the plat application, I believe that's Mr.
14 Claudius Fowler would be the party to the appeal, Claudus E.
15 Fowler.

16 THE COURT: He is - how is he a necessary party?

17 MS. VAUGHT: Well, Your Honor, he is one of the owners
18 of the property served by Dolly Lane according to the county
19 records and public records.

20 THE COURT: All right.

21 MS. VAUGHT: I have a Eugene Fowler. Let me see if I
22 have any other. I don't have any other names at this time,
23 Your Honor, but I would submit that those would be proper
24 parties who are not joined in the action.

25 THE COURT: All right.

1 MS. VAUGHT: And under Rule 12(B)(7) failure to join
2 them should result in dismissal or joinder. Finally, Your
3 Honor, we would submit that the action should be dismissed for
4 insufficient process. The right to bring an action appealing
5 a planning commission determination, jurisdiction for such an
6 action is established by statute. The statute, Title VI
7 Chapter 29 is the code provision that applies to appeals from
8 planning commissions.

9 In this case, Your Honor, the Plaintiff filed a summons
10 within 30 days of the planning commission determination or
11 mailing of the planning commission determination but along
12 with the summons the Plaintiff did not file a request for
13 mediation. That is required by South Carolina Code Annotated
14 Section 629-1150 and 1155. 629-1150 is the procedure for
15 submission of a plat and the record and the appeal of the
16 planning commission.

17 THE COURT: The mediation is required when you're
18 appealing a?

19 MS. VAUGHT: A request for mediation must be filed
20 along with the summons and complaint when you're appealing a
21 planning commission determination according to 629-1150.

22 THE COURT: So, the planning commission can mediate
23 it and change their decision? There can be an altered
24 agreement? I didn't think mediation was required for ---

25 MS. VAUGHT: Your Honor, what it says is pre-

1 litigation mediation, notice, settlement approval, effect on
2 real property, unsuccessful mediation, that's the title of the
3 section. It's 629-1155 says if a property owner files notice
4 of appeal with a request for pre-litigation mediation the
5 request for mediation must be granted. The property owner or
6 his representative, any other person claiming an ownership
7 interest in the property or his representative and any other
8 person who has been granted leave to intervene must be
9 notified and have opportunity to attend the mediation.
10 Governmental entity must be represented. Then depending on
11 what happens if there's a successful mediation, the mediator
12 must provide the parties with a signed copy of the written
13 mediation agreement.

14 THE COURT: That's appeals from a planning commission
15 decision?

16 MS. VAUGHT: That's correct, and that says the Circuit
17 Court Judge must approve settlement if the settlement has
18 rational basis in accordance with standards of this chapter.
19 We would submit that it's jurisdictional, that the Plaintiff
20 has to request the mediation along with filing ---

21 THE COURT: I mean, I knew they - in civil actions. I
22 didn't know they had to request mediation in appeals from
23 local boards.

24 MS. VAUGHT: That is, that is pre-litigation mediation,
25 Your Honor, and we would submit that that is a jurisdictional

1 flaw, the failure to request the pre-litigation mediation and
2 the case should be dismissed.

3 THE COURT: Now, it says if a property owner files a
4 notice of appeal with a request for pre-litigation the request
5 must be granted. The mediation must be conducted.

6 MS. VAUGHT: And, okay.

7 THE COURT: It doesn't - where are you saying that it
8 requires the filing?

9 MS. VAUGHT: In 629-1150 under subsection D(1), D(2) o
10 a notice of appeal and a request for pre-litigation mediation
11 must be filed within 30 days after the decision of the board.

12 THE COURT: And I don't have 1150.

13 MS. VAUGHT: I'll hand that up. That is 629-1150.

14 THE COURT: All right.

15 MS. VAUGHT: Subsection D.

16 THE COURT: All right.

17 MS. VAUGHT: Your Honor, just for the proposition that
18 the statute is, statute authorizing an appeal such as the one
19 brought in the third cause of action here before the Court
20 that that statute is jurisdictional and controls the procedure
21 and must be complied with. We would cite the case of Friends
22 of McLeod versus City of Charleston, which is a Court of
23 Appeals case from 2008 and I have a copy of that also to hand
24 up.

25 THE COURT: All right, thank you.

1 MS. VAUGHT: One last thing, Your Honor, just to
2 correct the, Claudius or Claudus Fowler and Eugene Fowler are
3 one in the same person. So, that would be the necessary party
4 as well as Joe Dale Fowler who owns property adjoining what is
5 known as Dolly Lane and has been known as Dolly Lane since
6 1996 according to county records.

7 THE COURT: All right, hold for one second.

8 All right, now, this Friends of McLeod versus City of
9 Charleston that just deals with the timeliness of filing an
10 appeal or does this deal with failure to file a request for
11 mediation?

12 MS. VAUGHT: No, Your Honor, it does not deal with the
13 mediation request. What it does state there though with
14 regard to the issue presented in that case which was the
15 timing is that the ability and the rules concerning filing of
16 an appeal are governed by statute not by the South Carolina
17 Rules of Civil Procedure and that they are jurisdictional and
18 that a Plaintiff appealing a planning commission decision must
19 comply with the statutory authority for the appeal which in
20 this case is 629-1150 and 1155.

21 THE COURT: But there is no case out there that deals
22 with failure to file a request for mediation?

23 MS. VAUGHT: Did not find any reported decisions in
24 South Carolina on that, on those provisions in 6-29-1150 or
25 1155.

1 THE COURT: Okay, all right, thank you.

2 All right, Mr. Beverly.

3 MR. BEVERLY: Thank you, Your Honor. May it please
4 the Court?

5 THE COURT: Yes, sir.

6 MR. BEVERLY: I don't know where to start, Your Honor.
7 Her list is kind of extensive. I don't know if you have some
8 questions for me or you just want to - me to ---

9 THE COURT: Well, let me ask you first, what about
10 his failure to file a request for mediation as mandated by the
11 statute?

12 MR. BEVERLY: Our argument to that, Your Honor, is -
13 you got the statute there?

14 THE COURT: Yeah, 16-629-1150.

15 MR. BEVERLY: 629-1150, look at two, or excuse me,
16 D(2), Your Honor, a notice of appeal and request for pre-
17 litigation mediation must be filed within 30 days after the
18 decision of the board is mailed. My client never received a
19 written board order. No decision from the board was ever
20 mailed.

21 THE COURT: So, what is he appealing?

22 MR. BEVERLY: Well, I mean he went to the meeting and
23 they voted, but they never signed an order. They never
24 provided him with a specific signed order, a signed decision.

25 THE COURT: Okay, all right, go ahead.

1 MR. BEVERLY: So, that's our argument there. The
2 statute says clearly within 30 days after the decision of the
3 board is mailed, no decision, no, there was no written order,
4 and minutes of a planning commission does not constitute a
5 written decision. You want case law on that?

6 THE COURT: Yeah, because I was thinking that you
7 could use minutes of board meetings to support a decision.

8 MR. BEVERLY: Do you have our - we have a summary
9 judgment motion, Your Honor. I don't know if it's in the
10 file. It's actually in there.

11 THE COURT: I don't know. This is kind of a
12 voluminous file.

13 MR. BEVERLY: Yeah.

14 THE COURT: Well, go ahead, let me just hear your
15 argument.

16 MR. BEVERLY: Okay.

17 THE COURT: Go ahead and make your argument.

18 MR. BEVERLY: That's our argument there on the
19 pre-litigation, Your Honor. What's the next on her - oh, she
20 was talking about we couldn't - the inverse condemnation
21 claim, Judge. If you look at that statute again, 629-11 -
22 Your Honor, if you look at 629-1150, D(4) this addresses our
23 inverse condemnation claim. It states in pertinent part
24 nothing in this subsection prohibits a property owner from
25 subsequently electing to assert a pre-existing right to a

1 trial by a jury on any issue beyond the subject matter
2 jurisdiction of the planning commission such as, but not
3 limited to, a determination of amount of damages due for an
4 unconstitutional taking. So, we think it's pertinent to file
5 the inverse condemnation action with the notice of appeal.
6 The statute clearly allows us to do that.

7 THE COURT: All right, that it?

8 MR. BEVERLY: What else we got? What else do you want
9 me to address, Your Honor?

10 THE COURT: Whatever you want to address.

11 MR. BEVERLY: As far as standing for Mr. Dippel he owns
12 a mobile home on the property that's rented out, plus his
13 sister has deeded him a half interest in the property, Your
14 Honor. So, if the mobile home is sufficient to have standing
15 he has a half interest.

16 THE COURT: All right.

17 MR. BEVERLY: I'll be happy to address any other
18 questions the Court may have.

19 THE COURT: All right, that's fine. Anything else in
20 reply?

21 MS. VAUGHT: Your Honor, I would just point out that in
22 paragraph 15 of the complaint it is alleged that the Plaintiff
23 appeared at the planning commission meeting on July the 30th of
24 2009 and that there was a vote taken. The Plaintiff filed
25 this action within 30 days of that meeting; and therefore, we

1 would submit that the Plaintiff in filing this action was
2 required to file a request for pre-litigation mediation
3 pursuant to the statute. Secondly with regard to the language
4 in 629-1150 or 1155, I'm not sure which one Mr. Beverly was
5 reading from, concerning inverse condemnation and the
6 authorization found in that statute for an inverse
7 condemnation action if the Court would refer to that, that
8 language says subsequently the property owner may file such a
9 claim, not in the action, not in the appeal of the planning
10 commission decision, and the Kurschner case is directly on
11 point there and holds that the inverse condemnation claim must
12 be brought separately and after the appeal process is
13 completed, after the appeal to the circuit court is completed
14 and with regard to the deed, Your Honor, that was recorded
15 September the 22nd well after this action was filed and after
16 our motion was filed.

17 THE COURT: All right, all right, let's hear the -
18 all right, let me hear the Plaintiff's motion for change of
19 venue.

20 MR. BEVERLY: Yes, Your Honor, we have a motion for
21 change of venue to refer to the Master-in-Equity in Georgetown
22 County. We feel justice would be best served if this is
23 transferred out of this county into another county since we
24 are appealing the Horry County Planning Commission's decision
25 and we have an inverse condemnation claim. John Weaver is co-

1 counsel on the other side. He is the interim county
2 administrator and the county attorney. We just think to get
3 more of a fair and impartial hearing that transfer it to the
4 Georgetown County.

5 THE COURT: That's if it is referred.

6 MR. BEVERLY: If it, yes, sir, if it.

7 THE COURT: Okay, well, let me go ahead then, let's
8 go ahead and hear you on your motion for order of reference
9 then.

10 MR. BEVERLY: For order of reference we think that this
11 is a - obviously deals with real property, plats, planning
12 commission, that the Master-in-Equity is most qualified to
13 render a decision on property, knows more about property laws
14 and is more qualified to render a decision in an appeal in an
15 inverse condemnation case.

16 THE COURT: All right, all right, Ms. Vaught.

17 MS. VAUGHT: Your Honor, because the complaint and as
18 long as the complaint continues to contain allegations of
19 inverse condemnation, nuisance, quiet title, those are legal
20 issues. They may be questions of law for a court to decide,
21 but they are not equitable claims; and therefore, the county
22 has demanded a jury trial and maintains that they do have a
23 right to a jury trial on the those issues and on the claims
24 made by the Plaintiff in this case such that reference of the
25 case to the Master-in-Equity would not be appropriate on any

1 legal claims at this time at least and the other thing I would
2 like to point out, Your Honor, is that the motion to refer
3 this to the Master-in-Equity was a motion to refer it to Judge
4 Howe. That motion, the basis stated in that motion for the
5 reference was that there were claims for res judicata,
6 collateral estoppel and laches. To my knowledge those are
7 more in the nature of defenses than claims and but the
8 Plaintiff has stated that those are claims made in the case
9 and I'm unaware of how they are alleged as claims in the case
10 or how there are such claims that could be allowed to go
11 forward and result in any kind of relief but that was the
12 basis for the motion to refer, and of course, to the extent,
13 Your Honor, and I'm sure that Your Honor is well familiar with
14 the C&S, Massengale case and line of cases that if there were
15 equitable claims and legal claims it is appropriate to try the
16 legal claims first and just because there is joinder of legal
17 and equitable claims does not deprive a party of the right to
18 trial by jury. So, we would contest that. With regard to the
19 motion to change venue, Your Honor, this is the Horry County
20 Planning, it is an appeal of the Horry County Planning
21 Commission. The proper venue is in the circuit court in Horry
22 County in the Court of Common Pleas for Horry County, not in
23 Georgetown County, and we would oppose any change of venue in
24 the case. The Plaintiff filed the action in the Court of
25 Common Pleas for Horry County; and therefore, that was the

1 Plaintiff's choice. The issue with regard to a change of
2 venue only came up when we made an appearance, my law firm
3 made an appearance. Judge Howe was a former partner in our
4 law firm before becoming the Master-in-Equity. The Plaintiff
5 seems to believe that that creates some kind of conflict.
6 However, this action was filed well after Judge Howe became
7 the Master-in-Equity and after she left our law practice and
8 was not an active case pending. Furthermore, Your Honor, with
9 regard to whether or not there would be any conflict or
10 whether or not Judge Howe would have any difficulty being fair
11 or impartial that is a matter which would be addressed to
12 Judge Howe through a motion to recuse and would be subject to
13 her determination if the case were referred to her. Thank
14 you.

15 THE COURT: All right, all right, I'm going to at this
16 time deny the motion for an order of reference. I'm going to
17 deny the motion for change of venue. Motion to dismiss I'm
18 going to take under advisement. I want each attorney to
19 submit a proposed order within 15 days setting forth your
20 position. Mr. Beverly, you're to submit one on behalf of the
21 Plaintiffs. Ms. Vaught, you're to submit one on behalf of the
22 Defendants, a proposed order in this case. Okay, all right.

23 MR. DIPPEL: Your Honor, may I speak?

24 THE COURT: No, Mr. Beverly is representing you.
25 Thank you very much. All right.

1 MR. BEVERLY: And that order is to address which
2 specific issue, Your Honor?

3 THE COURT: The Defendant's order, the Defendant's
4 motion to dismiss.

5 MR. BEVERLY: Okay.

6 THE COURT: All right.

7 MS. VAUGHT: Thank you, Your Honor.

8 THE COURT: Thank you.

9 (Adjourned.)

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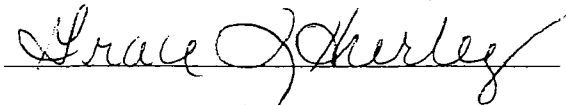
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25

C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Kenneth Dippel, et al. v. Horry County Planning Department, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on October 6, 2009.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Grace L. Hurley, CVR-CM

Official Reporter

December 23, 2009.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

KENNETH DIPPLE AND KIMBER FOWLER

☒ Plaintiff

v.

Horry County Planning Department

☒ Defendant.

 ORIGINAL

IN THE COURT OF COMMON PLEAS

CASE NO.
2009-CP-26-7839

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
R. Allen Beverly, Jr., Bar No. 72528
Address:
900 C Main St. Suite C
Conway, SC 29526
phone: 843-248-2089 fax: 843-248-9653
e-mail: beverlya@sccoast.net other:

Defendant's Attorney:
Victoria Vaught, Bar No.
Address:
PO Box 530
Conway, SC 29528
phone: 843-248-4321 fax: 843-248-4512
e-mail: Vvaught@sccoast.net other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Stay

Estimated Time Needed: 15 minutes Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

- ☐ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed

Signature of Attorney for ☐ Plaintiff / ☐ Defendant

Date submitted

SECTION III: Motion Fee

- ☒ PAID – AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

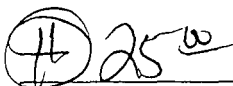
JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by:



Date Filed:

10/21/09

- ☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

CIVIL CASE NO.: 2009-CP-26-7839

KENNETH DIPPEL &
KIMBER FOWLER,

Plaintiffs,

Vs.

HORRY COUNTY PLANNING
DEPARTMENT,

Defendant.

**MOTION TO STAY DEFENDANT'S
MOTION TO DISMISS UNTIL
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT CAN BE
HEARD**

TO: THE DEFENDANT

PLEASE TAKE NOTICE that the Plaintiffs by and through their undersigned counsel, moves and will move at 10:00 AM on the tenth day following service hereof, for an Order staying a decision on Defendant's Motion to Dismiss and Strike until Plaintiffs Motion for Summary Judgment can be heard. This motion is based upon the fact that Plaintiff's motion for Summary Judgment is related to and in defense of Defendant's Motion to Dismiss and should be heard in conjunction with Defendant's motion. Both Plaintiffs' Motion and Defendant's Motion could be dispositive of the case and both address the same issue and should be heard together.

The Plaintiffs' hereby respectfully make a motion for a court order to stay any final decisions until Plaintiffs' motion for summary judgment can heard and any other further relief as this court may deem necessary, just and proper.

FILED
HORRY COUNTY
2009 OCT 21 PM 12:48
MELANIE HUGGINS-BAIRD
CLERK OF COURT

This motion is based upon Rule 7 (b) (1) and in the interest of justice.

R. ALLEN BEVERLY, JR., LLC

R. Allen Beverly Jr.
R. Allen Beverly, Jr., Esq.
Attorney for Plaintiffs
900 C Main St. Suite C
Conway, SC 29526
(843)248-2089; (843)248-9653
beverlya@sccoast.net

October 20, 2009
Conway, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

KENNETH DIPPEL & KIMBER FOWLER

CASE NO.

☒ Plaintiff

2009-CP-26-7839

v.

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Horry County Planning Department

☐ Defendant.

Plaintiff's Attorney:

R. Allen Beverly, Jr., Bar No. 72528

Address:

900 C Main Street Conway, SC 29526

phone: 248-2089 fax:

e-mail: beverlya@sccoast.net other:

Defendant's Attorney:

Victoria Vaught, Bar No.

Address:

PO Box 530 Conway, SC 29528

phone: 248-4321 fax: 248-4512

e-mail: vvaught@sccoast.net other:

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTION II and III)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion For Summary Judgement, Rule 56, SCRCP

Estimated Time Needed: 1 hour Court Reporter Needed: ☒ YES / ☐ NO**SECTION II: Motion/Order Type**☒ Written motion attached☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

R. Allen Beverly Jr.Signature of Attorney for ☒ Plaintiff / ☐ Defendant10-2-09

Date submitted

SECTION III: Motion Fee☒ PAID - AMOUNT: \$25.00☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support(check reason) ☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☐ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:**JUDGE'S SECTION**☐ Motion Fee to be paid upon filing of the attached order.☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON
PLEAS

CIVIL CASE NO: 2009-CP-26-7839

KENNETH DIPPEL &
KIMBER FOWLER,

vs.

HORRY COUNTY PLANNING
DEPARTMENT
Defendant,

PLAINTIFFS' MOTION FOR
SUMMARY JUDGEMENT

HORRY COUNTY
09 OCT -2 PM 12:32
MELANIE HUGGINS
CLERK OF COURT

Plaintiffs in the above entitled case will respectfully request for a hearing to be scheduled in the above entitled case 10 days after service of this motion on Defendants and will move the Court for a grant of summary judgment pursuant to **Rule 56 (a), SCRCF**. Plaintiffs respectfully hereby move this Honorable Court for a grant of summary judgment as set forth below in the following paragraphs:

"A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action move for a summary judgment in his favor upon all or any part thereof". Rule 56(a), SCRCF. "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Toomer v. Norfolk So. Ry. Co., 344 S.C. 486, 489, 544 S.E.2d 634, 635 (Ct. App. 2001); see also Rule 56(c) SCRCF. Plaintiffs in this

instant case at bar are informed and believe they are entitled to summary judgment as a matter of law.

On June 16, 2009 the Horry County Planning Department denied approval of a Plat submitted by Plaintiffs (herein known as the Crescent Moon Plat). **Note: A copy of the denial sheet and Crescent Moon Plat was attached to Plaintiffs original complaint pursuant to Rule 10(c), SCRCF.** Plaintiffs timely appealed this decision to the Planning Commission.

On July 30, 2009 Plaintiffs appeared before the Planning Commission. Planning Commission members voted to sustain the decision by the Horry County Planning Department. Plaintiffs subsequently filed a timely appeal to this Court. However, the Court should note no written decision was ever issued by the Planning Commission and no written decision was mailed out to the Plaintiffs within seven business days which was required by law to be provided to Plaintiffs. This was also required by law in order for the Court to review any written decision by the Planning Commission. The Court without any kind of written decision issued by the Horry County Planning Commission cannot effectively conduct judicial review of that decision.

Title 6, Chapter 29; 6-29-1150 required Defendants' Planning Commission to take action within 60 days by issuing a written decision and also required mailing out a copy of a written decision (emphasis added). **Title 6, Chapter 29; 6-29-1150(A)** specifically states that if no action is taken within 60 days the Plat shall constitute an approval and the developer must be issued a letter of approval and authorization based on the Plat submitted (emphasis added).

Section 6-29-1150 provides as follows:

SECTION 6-29-1150. Submission of plan or plat to planning commission; record; appeal.

(A) The land development regulations adopted by the governing authority must include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff. These procedures may include requirements for submission of sketch plans, preliminary plans, and final plans for review and approval or disapproval. Time limits, not to exceed sixty days, must be set forth for action on plans or plats, or both, submitted for approval or disapproval. Failure of the designated authority to act within sixty days of the receipt of development plans or subdivision plats with all documentation required by the land development regulations is considered to constitute approval, and the developer must be issued a letter of approval and authorization to proceed based on the plans or plats and supporting documentation presented. The sixty-day time limit may be extended by mutual agreement.

(B) A record of all actions on all land development plans and subdivision plats with the grounds for approval or disapproval and any conditions attached to the action must be maintained as a public record. In addition, the developer must be notified in writing of the actions taken.

(C) Staff action, if authorized, to approve or disapprove a land development plan may be appealed to the planning commission by any party in interest. The planning commission must act on the appeal within sixty days, and the action of the planning commission is final.

(D)(1) An appeal from the decision of the planning commission must be taken to the circuit court within thirty days after actual notice of the decision.

(2) A property owner whose land is the subject of a decision of the planning commission may appeal by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-1155.

A notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is mailed.

The Horry County Land Development regulations also required for Defendants' Planning Commission to take action on an appeal by issuing a written decision and by mailing out a copy of a written decision within seven business days. Defendants are bound by these land development regulations pursuant to **Article 1**

(Applicability); Section 2: Authority; page 1 and also Article 1 (Applicability); Section 3: Jurisdiction; page 1. Please see also Morton v. Ruiz, 415 U.S. 199, 234 (1974) ("where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures").

Article 1, Section 11 (Appeals): page 10 of the Horry County Land Development Regulations provide:

SECTION 11: APPEALS

Questions arising from the enforcement of these regulations by the Planning Department may be appealed to the Planning Commission for consideration. The Planning Commission will render a decision on the appeal within 60 days and the applicant will be notified, in writing, of such decision within seven business days. Any party aggrieved by a decision of the Planning Commission regarding the standards enumerated in these regulations or a ruling on a requested variance may appeal the decision to the Circuit Court of Horry County. The aggrieved party shall file a petition with the clerk of court within 30 days after a Planning Commission decision is rendered.

Article 2 (Procedures) 2.2 (C) on page 15 provides as follows:

C. Planning Commission Action on Design Modifications and Appeals

The Planning Commission will act upon any requests for a design modification or appeal of staff decision within 45 days of the date of its submission. If no action is taken by the Planning Commission within this time, the modification or appeal will be deemed approved. The applicant may waive this requirement and consent to an extension of the 45-day period. All applications for Design Modifications must be submitted the second Wednesday of each month in order to be presented to the next Planning Commission meeting.

The Planning Commission's decision regarding the design modification or appeal shall be either:

1. Approval;
2. Conditional approval;
3. Disapproval; or

4. Deferral for additional information upon agreement of the applicant.

The applicant will be notified in writing within seven business days of the actions taken by the Planning Commission. In cases of conditional approval, the Planning Commission may require the applicant to submit a revised preliminary plan prior to the submittal of a final plat.

The provisions found within (Title 6, Chapter 29, 6-29-1150); **Article 1, Section 11 (Appeals): page 10 and Article 2 (Procedures) 2.2 (C) on page 15** of the Horry County Land Development Regulations when viewed together clearly mandated for the Horry County Planning Commission to issue a **written decision within 60 days, and within those 60 days to mail out a copy of their written decision to Plaintiffs within seven business days.** Plaintiffs' Plat must be deemed approved according to **Title 6, Chapter 29, 6-29-1150(A)** and by the Land Development Regulations of Horry County because the Planning Commission did not take the appropriate action within 60 days which included within that time span mailing out a copy of their **written decision** within seven business days. **Note: Article 2 (Procedures) 2.2 (C) on page 15 states 45 days of the date of submission. But, see Article 1 – Applicability; Section 13: Conflict With Other Laws, Ordinances, and Regulations; page 11 of the Horry County Land Development Regulations.**

It is undisputed that Defendants' Planning Commission did not comply with the provisions found in **Title 6, Chapter 29, 6-29-1150** as well as **Article 1, Section 11 (Appeals): page 10 and Article 2 (Procedures) 2.2 (C) on page 15** which **Defendants stated they craved upon in their Answer to Plaintiffs' Complaint.** There is no genuine issue of material fact concerning whether Defendants' Planning Commission **mailed out a written decision to Plaintiffs.** Defendants to date have still not been mailed out a copy of a **written decision issued by the Planning**

Commission setting forth separately the evidence they considered, findings of fact, and conclusions of law.

Plaintiffs are informed and believe the transcript of the minutes from the July 29, 2009 Horry County Planning Commission Workshop does not constitute a written decision. Please *Massey v. City of Greenville Bd. of Zoning Adjustments*, 341 S.C. 193, 201, 532 S.E.2d 885, 889 (Ct. App. 2000). A copy of this decision is attached to this Pleading for the Court's review.

In Massey the Court of Appeals held a letter written and sent out by the zoning administrator **after Plaintiffs appealed to the Circuit Court did not constitute a written decision.** The Court held the Zoning Board was required by law to issue a final written decision setting forth separately "findings of fact and conclusions of law" and was required to mail that out to Plaintiffs. The mere act of voting by the Zoning Board the Court of Appeals noted did not constitute a written decision.

The same similar set of circumstances exist in this instant case at bar because Defendants' Planning Commission **has not issued a final written decision setting forth separately "findings of fact and conclusions of law" and have not mailed out a written decision to Plaintiffs within the mandatory statutory or mandatory regulatory time limit.** The statutes found at Title 6, Chapter 29 (6-29-1150(A)) as well as the Land Development Regulations found at **Article 1, Section 11 (Appeals): page 10 and Article 2 (Procedures) 2.2 (C) on page 15** dictate that Plaintiffs prevail with respect to the approval of their Crescent Moon Survey Plat that was subject to Planning Commission action within a specific time limit (60 days which includes within that time

span mailing out a copy of a Planning Commission written decision within seven business days).

The Constitution of the United States of America and the Constitution of the State of South Carolina guarantee due process rights to all parties. See U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 & § 22. The State Constitution provides:

*“The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or **property without due process of law, nor shall any person be denied the equal protection of the laws**”. S.C. Const. art. I, § 3.*

The State Constitution additionally assures:

“No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review”.

Due process requires (1) **adequate notice**; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses. Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235,

642 S.E.2d 565, 567 (2007) (citing In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)); accord Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 353, 354 (2008) (“The procedural component of the state and federal due process clauses requires **the individual whose property or liberty interests are affected to have received adequate notice of the proceeding**, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review”).)

With respect to this instant case at bar, it is undisputed that Plaintiffs were not mailed a copy of a **written decision** within the statutory time limits or regulatory time limits set forth in the Horry County Land Development Regulations. There is *no genuine issue of material fact*. Plaintiffs are informed and believe as the moving party they are entitled to judgment as a matter of law.

CONCLUSION

Wherefore, based upon consideration of the foregoing, Plaintiffs respectfully move this Honorable Court to grant summary judgment.

Wherefore, based upon consideration of the foregoing, Plaintiffs respectfully move this Honorable Court to order Defendants to approve the new Plat that was originally submitted to the Horry County Planning, and which was before the Horry County Planning Commission.

Wherefore, based upon consideration of the foregoing, Plaintiffs respectfully move this Honorable Court to order Defendants to issue a written letter of approval

regarding the new Plat (Crescent Moon Survey Plat) that was submitted to the Horry County Planning Department and which was before the Horry County Planning Commission. **See Title 6, Chapter 29 (6-29-1150(A)) which require a written letter to be sent out by Defendants to Plaintiffs indicating the Plat is deemed approved.**

Respectfully submitted,

R. Allen Beverly Jr.

R. Allen Beverly, Jr., LLC (SC Bar #72528)
Attorney at Law
900 C Main Street
Conway, SC 29526 (843) 248-2089

October 2nd, 2009
Conway, South Carolina

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Millicent Massey, Respondent,

v.

The City of Greenville Board of Zoning
Adjustments and The City of Greenville,
Appellant.

Appeal From Greenville County
Charles B. Simmons, Jr., Special Circuit Court Judge

Opinion No. 3184
Heard May 9, 2000 - Filed June 12, 2000

REVERSED & REMANDED

Assistant City Attorney Debra J. Gammons, of
Greenville, for appellant.

Susan B. Covington, of Greenville, for
respondent.

PER CURIAM: The City of Greenville Board of Zoning Adjustments and the City of Greenville appeal the circuit court's grant of Millicent Massey's applications for uses permitted upon review. We reverse and remand.

FACTS

Massey owns four contiguous lots on Augusta Street, across from the intersection with Grove Road. One of the lots Massey owns is vacant. The other three have houses on them. The lots are in an area zoned RM-2, for multi-family residential use. The City's zoning ordinance permits the Board to authorize professional offices in a RM-2 area after public notice and hearing, and subject to appropriate conditions and safeguards. This exception is termed a "use permitted upon review" or "use on review."

On June 30, 1998, Massey applied for a use on review of her property at 1401 Augusta Street. In the application, she stated the proposed use was a law office. A public hearing was held on the application on July 23, 1998. The Board tabled the matter until August 27, 1998. Massey subsequently filed an application for a use on review for 1311 Augusta Street, which adjoins

1401 Augusta Street. She stated the proposed use for the adjoining lot was a professional office. The Board considered the two applications at the August hearing.

At the end of the August hearing, the Board voted to deny Massey's applications. On September 2, 1998, Bryan Wood, the zoning administrator, sent Massey a letter notifying her of the Board's denial of her applications. Massey appealed the Board's decision to the circuit court. In its return to the circuit court, the Board included a document entitled "Findings of Fact and Conclusions by the Greenville Board of Zoning Adjustments." The document was dated October 9, 1998 and signed by the Board's chairperson.

At the hearing, the trial court allowed Massey, over the City's objection, to present the additional testimony of several witnesses who had not testified before the Board. In response, the City called its zoning administrator as a witness.

Although the circuit court considered the October document, it relied on the conclusions set forth in the September 2, 1998 letter, finding the October document did not constitute the decision of the Board. The circuit court held the Board acted arbitrarily and unreasonably in denying Massey's applications. Accordingly, it reversed the Board's denial of the applications. This appeal followed.

LAW/ANALYSIS

A reviewing court should not disturb the findings of a zoning board of adjustment unless the board has acted arbitrarily or in an obvious abuse of discretion, or unless the board has acted illegally or in excess of its lawfully delegated authority. Bannum v. City of Columbia, 335 S.C. 202, 516 S.E.2d 439 (1999); Hartman v. City of Columbia, 268 S.C. 44, 232 S.E.2d 15 (1977).

Admission of Additional Testimony Before Circuit Court

The City argues the circuit court erred in allowing Massey to present testimony on appeal that was not presented at the Board's hearings. We agree.

The transcript of the Board hearing is clearly inadequate for review. The transcriber noted many portions of the hearing were inaudible. In many places, the transcript does not identify who is speaking, using "Man" and "Woman" to designate the speakers. However, the City argues, "The correct response under Section 6-29-840 is a remand to the Board for a rehearing." Instead of reversing and remanding, the circuit court allowed Massey to supplement the record with additional testimony pursuant to S.C. Code Ann. § 5-23-160 (1976).

The propriety of the court's allowing additional testimony hinges upon whether Title 5 or Title 6 is applicable to this case. Section 5-23-160 provides, "If, upon the hearing, it shall appear to the [reviewing] court that testimony is necessary for the proper disposition of the matter, it may take evidence . . . which shall constitute a part of the proceedings upon which the determination of the court shall be made." In 1994, the General Assembly greatly revised the zoning statutes for local governments with the South Carolina Local Government Comprehensive Planning Enabling Act. 1994 Act No. 355, as amended by 1999 Act No. 15, effective April 1, 1999. "Municipal governments could follow either set of the former provisions until their repeal . . . and they could implement the 1994 Act at any time." I'on, L.L.C. v. Town of Mt. Pleasant, ___ S.C. ___, 526 S.E.2d 716 at n.3 (2000). The replacement statute, section

6-29-840 (Supp. 1999), states, "The findings of fact by the board of appeals shall be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence."

Although Massey contends the circuit court properly heard additional testimony pursuant to S.C. Code Ann. § 5-23-160, Massey elected to proceed under Title 6. In Massey's petition on appeal to the circuit court, she stated that the applicable standard of review was found in S.C. Code Ann. §§ 6-7-780 & 6-29-840 (Supp. 1999). The City stated in its return that Title 6 governed the appeal. In Massey's Memorandum in Opposition to the City's Return of Appeal, she "agree[d] . . . that *the statute governing this appeal* and the standard of review to be applied is set forth in S.C. Code Ann. Section 6-29-840 . . ." (emphasis added). In the circuit court's order, it found "the parties agree that this appeal is governed by S.C. Code Ann. § 6-29-840 . . ." Because Massey elected to proceed under section 6-29-840, the circuit court's consideration of additional testimony under section 5-23-160 was error.⁽¹⁾

Furthermore, even if Massey had elected to proceed under Title 5, the evidence before the circuit court exceeded the scope allowed by the statute. Section 5-23-160 "does not authorize a trial de novo; rather, it gives the reviewing court the authority to supplement the record to make an intelligent review of the actions of the board." *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565,566 (1987).

The circuit court allowed Massey to present testimony by a licensed real estate broker and real estate appraiser, a police officer, and Massey's estate planning attorney. None of these witnesses testified at the Board hearings. Although the police officer submitted a written memorandum, which was considered by the Board and contained the substance of his testimony before the circuit court, the other two witnesses presented evidence which was not before the Board when it reached its decision.

The testimony of Frank Dietz, the licensed real estate broker and appraiser who did not testify at the Board's hearing, is especially troublesome. Dietz's testimony included his extensive educational and experiential background. He opined that there was no reason to distinguish Massey's property from other properties which had been granted uses on review. He also testified that neither residential property values nor traffic would be affected if the requested use on review was granted. Furthermore, Dietz testified that Massey's property would be better used and more desirable as a business than a residence. None of this information was presented by anyone with Dietz's qualifications at the Board hearings. Dietz's testimony did not provide the circuit court with the information necessary for an intelligent review of the Board's actions. The testimony offered new information which was not considered by the Board, but was used as the basis for reversing the Board.

Because the circuit court impermissibly supplemented the record and the transcript of the Board hearing is insufficient for review, we reverse and remand the matter to the Board for rehearing.

Board's Final Order

The City also argues the circuit court erred in rejecting the October document's "Findings of Fact and Conclusions." As an initial matter, we note the circuit court did not reject the Findings of Fact and Conclusions. The circuit court considered the October document, but held it did not constitute the Board's final decision. We agree with the circuit court's determination that the

October document was not the Board's final decision.

The Board denied Massey's application for a use permitted upon review at its August 27, 1998 Board Hearing. Bryan Wood, the zoning administrator, mailed Massey a letter explaining the Board's decision. Relying upon this letter, Massey filed her notice of appeal on September 25, 1998. After Wood mailed Massey the letter, Wood listened to the audio tapes of the hearing and prepared a document entitled, "Findings of Fact and Conclusions." This document was signed by the Board's chairperson after being reviewed by the chairperson and another Board member. The remaining Board members never reviewed the document. The "Findings of Fact and Conclusions" document is dated October 9, 1998.

The trial court refused to use the "Findings of Fact and Conclusions" as the Board's decision because (1) "there [was] no evidence or other indication that the members of the Board who voted against Massey's application considered or assented to the October document," and (2) the document, "drafted one and a half months after the August hearing, is materially different from the decision set forth in the July and August transcripts." Instead, it considered the letter Wood mailed Massey as the Board's final decision.

~~"All final decisions . . . of the board [of zoning appeals] shall be in writing and be permanently filed in the office of the board as a proper record." S.C. Code Ann. § 6-7-740 (Supp. 1999). The final decision must contain separately stated "findings of fact and conclusions of law . . ."~~
Id.

Although the conclusions set forth in the letter which was mailed to Massey are similar to the conclusions in the October document, the letter to Massey did not contain separately stated findings of fact and conclusions of law. Because the letter to Massey did not satisfy the statutory requirements, the trial court erred in holding the letter constituted the Board's final decision. See S.C. Code Ann. §6-7-740.⁽²⁾

Although the letter to Massey did not meet the statute's requirement for a final decision, the October "Findings of Facts and Conclusions" also cannot constitute the Board's final action, having been shown to only two of the five Board members.

Generally, an administrative agency, board, or commission should act as a body, and, in the absence of a statutory exception, can act officially only in or at a lawfully convened session, if the act is one requiring deliberation or the exercise of discretion or judgment. Except where authorized by statute, the powers and duties of an administrative body may not be exercised by the individual members separately.

73 C.J.S. Public Administrative Law and Practice §16 at 384-385 (1983). "In order to be the action of the board, the action must be that of the board as such and not merely the action of the individual members thereof . . ." 101A C.J.S. Zoning & Land Planning § 189 at 560 (1979). See also 73A C.J.S. Public Administrative Law and Practice §138 at 83 (1983) ("Where the legislature gives quasi-judicial powers to an administrative agency or officer, only the agency or person granted the authority may exercise it, and it has been held that a . . . decision by a person not authorized, notwithstanding approval by an administrative agency or officer, is without legal force and effect."); 56 Am. Jur. 2d §155 Municipal Corporations § 155 (1971) ("[T]he powers of a municipal council or body must be exercised at a meeting which is legally called. Action of all the members of the council separately is not the action of the council, and an agreement entered into separately by the members of the council outside a

regular meeting is not binding.").

Additionally, it would be fundamentally unfair to allow a document promulgated by the Board, after Massey appealed to serve as the final decision. Because the "Findings of Fact and Conclusions" document was not the Board's action and was promulgated after Massey filed her notice of appeal, the circuit court correctly held the document did not constitute the Board's final decision.

The only record of the Board's action is the transcript of the July and August hearings. The City argues that the vote on the record was the Board's final decision. However, the Board's decision recorded in the transcript cannot satisfy the legal requirements for a final decision. Section 6-7-740 requires that the Board's final decision be "in writing" with separate findings of fact and conclusions of law. Even if the transcript is considered a "writing," it is virtually indecipherable and does not contain separate findings of fact and legal conclusions. Therefore, the transcript does not meet the statutory requirements of a final decision.

Because there has been no final Board decision in accordance with section 6-29-840, as is mandated for further judicial review, we remand the case to the Board. Written findings of fact and conclusions of law should be promulgated and either signed by the Board or ratified on the record by the Board before written notice of the Board's decision is given to the applicant. Such a procedure will avoid confusion as to when the thirty days to file an appeal commence, and provide an adequate record of the Board's action for judicial review.

Review on Remand

Section 6-29-840 provides, "In the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing." (Emphasis added). Because of the lapse of time between this opinion and the Board hearing, the continual commercialization of the affected area,⁽³⁾ and the illegibility of the Board hearing transcript, a de novo hearing before the Board is necessary on remand. See Parker v. South Carolina Pub. Serv. Comm'n, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986). ("Unless this Court provides for the taking of additional evidence, no party may afford itself two bites at the apple."); Georgetown County Dep't of Social Servs. v. Phipps, 278 S.C. 64, 292 S.E.2d 184 (1982) (where our supreme court remanded a custody case for a trial de novo because considerable time had passed since the decision awarding custody had been made and the record had become stale); Dorn v. Criddle, 306 S.C. 189, 410 S.E.2d 590 (Ct. App. 1991) (termination of parental rights case remanded for trial de novo where three years had passed since the appealed order was issued).

CONCLUSION

Because the circuit court erroneously received additional testimony and there is no adequate final Board decision, we reverse and remand the case to the Board for de novo proceedings and decision in accordance with section 6-29-840.

REVERSED AND REMANDED.

CURETON, GOOLSBY, J., and MOREHEAD, A.J., concur.

1. Inasmuch as § 6-29-840 and § 5-23-160 conflict, Massey cannot elect to proceed in a hybrid fashion

under both titles.

2. Moreover, because of the insufficient transcript of the Board hearing, we are unable to verify that the Board reached the conclusions set forth in Wood's letter.

3. See Rushing v. City of Greenville, 265 S.C. 285, 217 S.E.2d 797 (1975). In Rushing, our supreme court affirmed a circuit court decision which reversed the City's denial of requests to rezone property on Augusta Street to allow commercial use of the property. The property at issue in Rushing is located diagonally across the street from Massey's. In deciding Rushing, over two decades before Massey's petition, the court stated, "The area is heavily developed for commercial uses. . . . The increased traffic, noise and encroaching commercial development have all been sanctioned by the City by zoning changes. These conditions have effectively destroyed any value of the lots for residential purposes." Id. at 288, 217 S.E.2d at 798-799.

CERTIFICATE OF SERVICE

Plaintiffs hereby certify that a copy of the Plaintiffs' foregoing motion for summary judgment was provided to the Defendants by mailing a copy to the Defendants by first class US mail addressed as follows:

Attention: Attorney Victoria T. Vaught
Battle & Vaught
PO Box 530
Conway, SC 29528

Attention: Attorney John L. Weaver
PO Box 1236
Conway, SC 29528

10-2-09

(Date)

R. Allen Beverly Jr.

(Signature)

R. Allen Beverly, Jr., LLC (SC Bar #72528)
Attorney at Law
900 C Main Street
Conway, SC 29526 (843) 248-2089

HORRY COUNTY
09 OCT -2 PM 12:32
MELANIE HUGGINS
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

KENNETH DIPPEL & KIMBER FOWLER

☒ Plaintiff

v.

Horry County Planning Department

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2009-CP-26-7839

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:

R. Allen Beverly, Jr., Bar No. 72528

Address:

900 C Main Street Conway, SC 29526

phone: 248-2089 fax:

e-mail: beverlya@sccoast.net other:

Defendant's Attorney:

Victoria Vaught, Bar No.

Address:

PO Box 530 Conway, SC 29528

phone: 248-4321 fax: 248-4512

e-mail: vvaught@sccoast.net other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion To Change Venue

Estimated Time Needed: 1 hour Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

R. Allen Beverly Jr.
Signature of Attorney for ☒ Plaintiff, ☐ Defendant

9-24-09

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: [Signature]

Date Filed:

☐ MOTION FEE COLLECTED: 25.00

☐ CONTESTED - AMOUNT DUE:

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON
PLEAS

CIVIL CASE NO: 2009-CP-26-7839

KENNETH DIPPEL &
KIMBER FOWLER,

vs.

HORRY COUNTY PLANNING
DEPARTMENT
Defendant,

PLAINTIFFS' MOTION FOR CHANGE
OF VENUE

HORRY COUNTY
09 SEP 24 AM 11:08
MELANIE HUGGINS
CLERK OF COURT

Plaintiffs named above hereby respectfully move the Court to transfer the above named case in its entirety to the **Honorable Joe M. Crosby, Master in Equity in Georgetown, South Carolina** located at 401 Dozier Street, Georgetown, SC.

On August 31, 2009 Plaintiffs filed a motion to transfer this case to the Honorable Cynthia Howe, Master in Equity. Defendants subsequently appointed Victoria Vaught, Attorney at Law at the Law Firm of Battle and Vaught. Defendants also filed an answer to the Plaintiffs' Complaint and a motion to dismiss on September 14, 2009. A hearing on this matter and also on Plaintiffs' motion to transfer this case to the Horry County Master in Equity, the Honorable Judge Cynthia Howe is scheduled at the Court of Common Pleas on October 6, 2009 at 9:30 Courtroom 2B, Conway, SC.

Plaintiffs are informed and believe it will be impossible for them to get a fair and impartial trial here in Horry County. The Honorable Cynthia Howe,

Horry County Master in Equity is a former partner at the Law Firm of Battle and Vaught which is the exact same law firm that is involved in this case for Defendants.

Plaintiffs are informed and believe several Horry County employees and public officials are heavily involved in this case and will attempt to influence the outcome of this case. Plaintiffs are informed and believe the interest of fairness and justice will be better served by transferring this entire case to the **Honorable Joe M. Crosby, Master in Equity in Georgetown, South Carolina.**

CONCLUSION

Wherefore, based upon consideration of the foregoing, the Plaintiffs respectfully request and move this Honorable Court to transfer this case to the **Honorable Joe M. Crosby, Master in Equity in Georgetown, South Carolina.**

Respectfully submitted,

R. Allen Beverly Jr.

R. Allen Beverly, Jr., LLC (SC Bar # 72528)
Attorney at Law
900 C Main Street
Conway, SC 29526 (843) 248-2089

CERTIFICATE OF SERVICE

Plaintiffs hereby certify that a copy of the Plaintiffs' foregoing motion to change venue was provided to the Defendants by mailing a copy to the Defendants by first class US mail addressed as follows:

Attention: Attorney Victoria T. Vaught
Battle & Vaught
PO Box 530
Conway, SC 29528

Attention: Attorney John L. Weaver
PO Box 1236
Conway, SC 29528

ADAMS COUNTY
09 SEP 24 AM 11:08
MICHAEL HUGGINS
CLERK OF COURT

9-24-09

(Date)

R. Allen Beverly Jr.

(Signature)

R. Allen Beverly, Jr., LLC (SC Bar # 72528)
Attorney at Law
900 C Main Street
Conway, SC 29526 (843) 248-2089

**NOTICE OF APPEAL FROM AN ORDER OR JUDGMENT
IMPOSED BY THE COURT OF COMMON PLEAS**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-26-7839

Kenneth Dippel & Kimber
Fowler,

Appellants,

v.

Horry County Planning
Department,

Respondents.

NOTICE OF APPEAL

Kenneth Dippel & Kimber Fowler, Appellants hereby appeals a dismissal order issued in the above entitled case. The order or judgment was imposed by the Honorable Benjamin H. Culbertson on Appellants on October 26, 2009. This appeal is taken from the order of the Honorable Benjamin H. Culbertson, dated October 26, 2009, which dismissed Appellants' case against Respondents, the Horry County Planning Department.

Kenneth Dippel & Kimber Fowler, Appellants also hereby appeals a handwritten signed order issued in the above entitled case. The order was imposed by the Honorable Benjamin H. Culbertson on Appellants on October 6, 2009. This appeal is also taken

from the order of the Honorable Benjamin H. Culbertson, dated October 6, 2009, which denied the Appellants' motion to transfer the case to the Master in Equity and which also denied the Appellants' motion for change of venue.

October 29, 2009

s/ Kenneth Dippel / Kimber Fowler
Kenneth Dippel / Kimber Fowler
PO Box 622
Loris, SC 29569
(843) 716-0699

Pro Se for Appellants

Other Counsel of Record:

Victoria Vaught, Attorney for Respondent
PO Box 530
Conway, SC 29528
(843) 248-4321

CERTIFICATE OF SERVICE

Kenneth Dippel & Kimber Fowler, Appellants hereby certify that a copy of the Appellants' foregoing Notice of Appeal was served and provided to the Respondent, Horry County Planning Department on **October 29, 2009** by mailing a copy by first class US mail to the Respondents' Counsel of Record addressed as follows:

Attention: Attorney Victoria T. Vaught
Battle & Vaught
PO Box 530
Conway, SC 29528

10-29-2009
(Date)

Kenneth Dippel Kimber Fowler
(Signature)

Kenneth Dippel / Kimber Fowler
PO Box 622
Loris, SC 29569
(843) 716-0699 Pro Se for Appellants



FILED
HORRY COUNTY

2009 OCT 26 AM 11:00

MELANIE HUGGINS-WARD
CLERK OF COURT

State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

P. O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Telephone: (843) 545-3030
Facsimile: (843) 545-3282
Email: bculbertsonj@sccourts.org

October 22, 2009

The Honorable Melanie Huggins-Ward
Horry County Clerk of Court
P.O. Box 677
Conway, SC 29528

COPY

RE: *Dippel, et al. v. Horry County Planning Dept.*
Case Number: 2009-CP-26-7839

Dear Ms. Huggins-Ward:

Please find enclosed for filing with your office the original Order dated October 22, 2009, in the above referenced case.

By copy of this letter and enclosure to the attorneys in this case, I am providing them with a copy of the order and notice of its filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc

Enclosure (a/s)

pc: R. Allen Beverly, Jr., Esquire
Victoria T. Vaught

FORM 4

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

Kenneth Dippel and Kimber Fowler
PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-2839

Horry County Planning Department
DEFENDANT(S)

FILED
Horry County
2009 OCT 22 AM 11:00
CLERK OF COURT

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came before the court for trial or hearing before the court. The issues have been ~~tried or~~ heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Defendant's Motion to Dismiss is granted.

Dated at Georgetown, South Carolina, this 22nd day of October, 2009.

Benjamin H. Culbertson

Benjamin H. Culbertson
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

R. Allen Beverly, Jr.
ATTORNEY(S) FOR THE PLAINTIFF(S)

Victoria V. Vaught
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
KENNETH DIPPEL and)
KIMBER FOWLER,)
Plaintiffs,)
vs.)
HORRY COUNTY PLANNING)
DEPARTMENT,)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A No. 2009-CP-26-7839

FILED
HORRY COUNTY
2009 OCT 28 AM 11:00
TILLANIE HUGGINS-WARD
CLERK OF COURT

ORDER GRANTING MOTION
TO STRIKE AND DISMISS

COPY

This matter came before me October 6, 2009 on motion of Defendant to dismiss and/or strike allegations from the Complaint pursuant to Rules 12(b) and (f), SCRCPP. Present were counsel for Defendant, Victoria T. Vaught of Battle & Vaught, P.A. and John L. Weaver, Horry County Attorney, as well as counsel for Plaintiff, R. Allen Beverly, and his clients, Kenneth Dippel and Kimber Fowler. This action was commenced after Defendant denied approval of a plat submitted by Plaintiffs to remove a road previously platted of record on Plaintiff Kimber Fowler's property. After hearing argument, reviewing the file, and considering the matter, the motion is granted for the following reasons.

Plaintiffs' Complaint, which was filed pro se, does not comply with procedural rules for pleading, particularly Rule 8(a), SCRCPP, because the Complaint does not contain short, concise statements of fact and relief sought, but instead is a twenty page memorandum containing case citations, conclusions, and argument, with a few facts interspersed. Therefore, all portions of the Complaint specifically set forth and identified by page, paragraph and sentence in Defendant's motion are properly stricken as

impertinent and immaterial matter, pursuant to Rule 12(f), SCRCPP, and will not be considered for purposes of ruling on Defendant's motion to dismiss.

In considering a motion to dismiss for failure to state a claim, the court must base its ruling solely upon the allegations set forth on the face of the Complaint, and the motion may not be sustained if the facts alleged in the Complaint and inferences reasonably deducible therefrom would entitle the Plaintiff to any relief under any theory. Doe v. Greenville County School Dist., 375 S.C. 63, 651 S.E.2d 305 (2007).

The first cause of action asserts a claim for inverse condemnation. Such a claim is not ripe, and dismissal is warranted. Until an administrative determination by a planning department or commission is successfully appealed, an inverse condemnation claim is not ripe and will not lie. Kurshner v. City of Camden Planning Commission, 376 S.C. 165, 656 S.E.2d 346 (2008). The third cause of action in Plaintiffs' Complaint, addressed below, is an appeal from the determination of the Planning Commission to uphold disapproval of Plaintiffs' plat. Unless and until that claim is determined in Plaintiffs' favor, no claim for inverse condemnation may proceed.

The second cause of action asserts a claim for failure to comply with court orders. The orders are an unpublished opinion from the South Carolina Court of Appeals in an action brought by Plaintiff Kimber Fowler against a third party, and a judgment on remand in the same action, copies of both orders having been incorporated by reference in, and attached to, the Complaint. Defendant was, patently, not a party to the action in which the decision and judgment were rendered. Therefore, Defendant is not bound by the orders, and no claim is stated on which relief may be granted in the second cause of

action. Additionally, both orders preceded Defendant's denial of plat approval, and neither order addresses the plat for which Plaintiffs sought Defendant's approval.

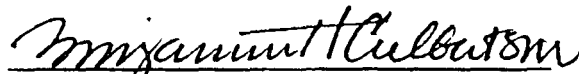
The third cause of action is nominated as a claim for failure to correctly apply the law in denying approval of Plaintiff's plat. This claim is an appeal of the Planning Commission's determination regarding plat approval, and error of law is a basis for appealing a local planning commission's determination. See, Kurschner, supra. However, an appeal from a local planning commission determination is governed by statute, specifically S.C. Code Ann. Section 6-29-310, et. seq., and in particular, S.C. Code Ann. Section 6-29-1110, et. seq., governing plat approval and appeal. The statutory provisions governing this appeal are controlling and jurisdictional, and failure to comply with statutory requirements may be raised at any time and result in dismissal. Friends of McLeod, Inc. v. City of Charleston, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2009)(vacated following settlement 682 S.E.2d 488 (2009)); see also, Rule 74, SCRCPP (recognizing statute governs appeals to circuit court from inferior tribunals). Pursuant to S.C. Code Ann. Section 6-9-1150(D), an aggrieved party may appeal a local planning commission determination by filing a notice of appeal accompanied by a request for pre-litigation mediation within 30 days of actual notice of the determination or mailing of the decision. Although filed within 30 days of the Planning Commission determination, Plaintiffs' action was not accompanied by a request for pre-litigation mediation. Additionally, Plaintiffs have not joined other persons in this action who were directly affected by the Planning Commission's determination, which recognized and maintained existing access to their properties. These parties occupy an analogous position to an owner whose application approval is appealed, since appeal could result in reversal of the

access rights recognized by the Planning Commission. See, id.; see also, Spanish Wells Property Owners Association v. Bd. of Adjustment of Town of Hilton Head, 295 S.C. 67, 367 S.E. 2d160 (1988)(holding permittee is necessary party to third party appeal of local zoning board determination). Therefore, Plaintiffs' third cause of action fails to meet jurisdictional and procedural requirements imposed by statute and recognized by law, and the third cause of action is properly dismissed.

Finally, the facts alleged and inferences reasonably deducible therefrom state no other claim, for injunction, quiet title, nuisance or other theory on which relief may be granted, since Plaintiffs have failed to properly effect and prevail in an appeal of the Planning Commission determination, and have not alleged any other facts besides the adverse determination of the Planning Commission and its inconsistency with determinations made by other courts in another action involving parties other than Defendant, and issues other than Defendant's disapproval of Plaintiffs' proposed plat.

The action is therefore dismissed.

IT IS SO ORDERED.



Benjamin H. Culbertson
Presiding Judge
Fifteenth Judicial Circuit
Court of Common Pleas for Horry County

October 22, 2009

2009 OCT -7 PM 12:30

MELANIE HUGGINS
CLERK OF COURT

CASE #: 2009-CP-26-7839

Kenneth Dippel,
etal

PLAINTIFF(S)

VS.

Planning Department,
Horry County

DEFENDANT(S)

ORDER
DISPOSITION OF MOTIONS

Plaintiff's Motion for Order of Reference is
Denied.

Plaintiff's Motion for Change of Venue is Denied.

Defendant's Motion to Dismiss is Under Advisement.
Both Attorneys shall submit proposed Orders
within 15 days.

AND IT IS SO ORDERED.

Margaret T. Culbertson
PRESIDING CIRCUIT JUDGE

DATED AT CONWAY, SOUTH CAROLINA THIS 6th DAY OF OCTOBER, 2009.

Randy A. Beverly Jr.

PLAINTIFF'S ATTORNEY(S)

Victoria J. Vaught
John L. Weaver

DEFENDANT'S ATTORNEY(S)

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON
PLEAS

CIVIL CASE NO: 2009-CP-26-7839

KENNETH DIPPEL &
KIMBER FOWLER,

vs.

HORRY COUNTY PLANNING
DEPARTMENT
Defendant,

PLAINTIFFS' NOTICE OF APPEAL

FILED
HORRY COUNTY
2009 OCT 29 PM 12:22
MELANIE HUGGINS-WARD
CLERK OF COURT

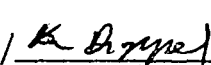
Plaintiffs in the above entitled case pursuant to SCRCP, Rule 201, SCRCP, Rule 203 (b) (1) and SCRCP, Rule 203 (d) (1) (B) hereby are filing and providing notice to this Court that Plaintiffs have filed an appeal to the South Carolina Court of Appeals in response to a proposed dismissal order issued by the Respondents in the above entitled case which was subsequently signed by the Honorable Benjamin H. Culbertson. The signed order by Judge Culbertson is dated October 26, 2009. **A copy of the Notice of Appeal to the South Carolina Court of Appeals is attached to this pleading along with a copy of the October 26, 2009 order signed by Judge Benjamin H. Culbertson.**

Plaintiffs in the above entitled case pursuant to SCRCP, Rule 201, SCRCP, Rule 203 (b) (1) and SCRCP, Rule 203 (d) (1) (B) hereby are filing and providing notice to this Court that Plaintiffs have filed an appeal to the South Carolina

Court of Appeals in response to a handwritten order issued in the above entitled case and which was subsequently signed by the Honorable Benjamin H. Culbertson. The date of the order is dated October 6, 2009. **A copy of the Notice of Appeal to the South Carolina Court of Appeals is attached to this pleading along with a copy of the October 6, 2009 order signed by Judge Benjamin H. Culbertson.**

Pursuant to SCRCF, Rule 241 the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court.

October 29, 2009

s/  
Kenneth Dippel Kimber Fowler

Loris, SC 29569
(843) 716-0699

Pro Se for Appellants

Other Counsel of Record:

Victoria Vaught, Attorney for Respondent
PO Box 530
Conway, SC 29528
(843) 248-4321

CERTIFICATE OF SERVICE

Kenneth Dippel & Kimber Fowler, Appellants hereby certify that a copy of the Appellants' foregoing Notice of Appeal was served and provided to the Respondent, Horry County Planning Department on **October 29, 2009** by mailing a copy by first class US mail to the Respondents' Counsel of Record addressed as follows:

Attention: Attorney Victoria T. Vaught
Battle & Vaught
PO Box 530
Conway, SC 29528

FILED
HORRY COUNTY
2009 OCT 29 PM 12:23
MELANIE HUGGINS-WARD
CLERK OF COURT

10-29-2009
(Date)

Kenneth Dippel
(Signature)

Kenneth Dippel / Kimber Fowler

Loris, SC 29569
(843) 716-0699 Pro Se for Appellants

**NOTICE OF APPEAL FROM AN ORDER OR JUDGMENT
IMPOSED BY THE COURT OF COMMON PLEAS**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-26-7839

FILED
HORRY COUNTY
OCT 29 PM 12:22
NE-ANNE HUGGINS-WARD
CLERK OF COURT

Kenneth Dippel & Kimber
Fowler,

Appellants,

v.

Horry County Planning
Department,

Respondents.

NOTICE OF APPEAL

Kenneth Dippel & Kimber Fowler, Appellants hereby appeals a dismissal order issued in the above entitled case. The order or judgment was imposed by the Honorable Benjamin H. Culbertson on Appellants on October 26, 2009. This appeal is taken from the order of the Honorable Benjamin H. Culbertson, dated October 26, 2009, which dismissed Appellants' case against Respondents, the Horry County Planning Department.

Kenneth Dippel & Kimber Fowler, Appellants also hereby appeals a handwritten signed order issued in the above entitled case. The order was imposed by the Honorable Benjamin H. Culbertson on Appellants on October 6, 2009. This appeal is also taken

from the order of the Honorable Benjamin H. Culbertson, dated October 6, 2009, which denied the Appellants' motion to transfer the case to the Master in Equity and which also denied the Appellants' motion for change of venue.

October 29, 2009

s/ *Kimber Fowler*
Kenneth Dippel / Kimber Fowler
PO Box 622
Loris, SC 29569
(843) 716-0699

Pro Se for Appellants

Other Counsel of Record:

Victoria Vaught, Attorney for Respondent
PO Box 530
Conway, SC 29528
(843) 248-4321

CERTIFICATE OF SERVICE

Kenneth Dippel & Kimber Fowler, Appellants hereby certify that a copy of the Appellants' foregoing Notice of Appeal was served and provided to the Respondent, Horry County Planning Department on **October 29, 2009** by mailing a copy by first class US mail to the Respondents' Counsel of Record addressed as follows:

Attention: Attorney Victoria T. Vaught
Battle & Vaught
PO Box 530
Conway, SC 29528

FILED
HORRY COUNTY
2009 OCT 29 PM 12:22
MELANIE HUGGINS-MAYRO
CLERK OF COURT

10-29-2009
(Date)

Kenneth Dippel & Kimber Fowler
(Signature)

Kenneth Dippel / Kimber Fowler
PO Box 622
Loris, SC 29569
(843) 716-0699 Pro Se for Appellants



FILED
HORRY COUNTY

2009 OCT 26 AM 11:00

MELANIE HUGGINS-WARD
CLERK OF COURT

State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

P. O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Telephone: (843) 545-3030
Facsimile: (843) 545-3282
Email: bculbertson@sccourts.org

October 22, 2009

The Honorable Melanie Huggins-Ward
Horry County Clerk of Court
P.O. Box 677
Conway, SC 29528

COPY

RE: *Dippel, et al. v. Horry County Planning Dept.*
Case Number: 2009-CP-26-7839

Dear Ms. Huggins-Ward:

Please find enclosed for filing with your office the original Order dated October 22, 2009, in the above referenced case.

By copy of this letter and enclosure to the attorneys in this case, I am providing them with a copy of the order and notice of its filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc

Enclosure (a/s)

pc: R. Allen Beverly, Jr., Esquire
Victoria T. Vaught

FORM 4

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

Kenneth Dippel and Kimber Fowler
PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-22839
Horry County Planning Department
DEFENDANT(S)

FILED
Horry County
2009-10-22 AM 11:00
CLERK OF COURT

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Defendant's Motion to Dismiss is granted.

Dated at Georgetown, South Carolina, this 22nd day of October, 2009.

Benjamin H. Culbertson

Benjamin H. Culbertson
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

R. Allen Beverly, Jr.
ATTORNEY(S) FOR THE PLAINTIFF(S)

Victoria V. Vaught
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
KENNETH DIPPEL and)
KIMBER FOWLER,)
Plaintiffs,)
vs.)
HORRY COUNTY PLANNING)
DEPARTMENT,)
Defendant.)

FILED
HORRY COUNTY
IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A No. 2009-CP-26-7839
2009 OCT 28 AM 11:00

CLERK OF COURT
TILLANIE HUGGINS-WARD

ORDER GRANTING MOTION
TO STRIKE AND DISMISS

 COPY

This matter came before me October 6, 2009 on motion of Defendant to dismiss and/or strike allegations from the Complaint pursuant to Rules 12(b) and (f), SCRPC. Present were counsel for Defendant, Victoria T. Vaught of Battle & Vaught, P.A. and John L. Weaver, Horry County Attorney, as well as counsel for Plaintiff, R. Allen Beverly, and his clients, Kenneth Dippel and Kimber Fowler. This action was commenced after Defendant denied approval of a plat submitted by Plaintiffs to remove a road previously platted of record on Plaintiff Kimber Fowler's property. After hearing argument, reviewing the file, and considering the matter, the motion is granted for the following reasons.

Plaintiffs' Complaint, which was filed pro se, does not comply with procedural rules for pleading, particularly Rule 8(a), SCRPC, because the Complaint does not contain short, concise statements of fact and relief sought, but instead is a twenty page memorandum containing case citations, conclusions, and argument, with a few facts interspersed. Therefor, all portions of the Complaint specifically set forth and identified by page, paragraph and sentence in Defendant's motion are properly stricken as

impertinent and immaterial matter, pursuant to Rule 12(f), SCRCP, and will not be considered for purposes of ruling on Defendant's motion to dismiss.

In considering a motion to dismiss for failure to state a claim, the court must base its ruling solely upon the allegations set forth on the face of the Complaint, and the motion may not be sustained if the facts alleged in the Complaint and inferences reasonably deducible therefrom would entitle the Plaintiff to any relief under any theory. Doe v. Greenville County School Dist., 375 S.C. 63, 651 S.E.2d 305 (2007).

The first cause of action asserts a claim for inverse condemnation. Such a claim is not ripe, and dismissal is warranted. Until an administrative determination by a planning department or commission is successfully appealed, an inverse condemnation claim is not ripe and will not lie. Kurshner v. City of Camden Planning Commission, 376 S.C. 165, 656 S.E.2d 346 (2008). The third cause of action in Plaintiffs' Complaint, addressed below, is an appeal from the determination of the Planning Commission to uphold disapproval of Plaintiffs' plat. Unless and until that claim is determined in Plaintiffs' favor, no claim for inverse condemnation may proceed.

The second cause of action asserts a claim for failure to comply with court orders. The orders are an unpublished opinion from the South Carolina Court of Appeals in an action brought by Plaintiff Kimber Fowler against a third party, and a judgment on remand in the same action, copies of both orders having been incorporated by reference in, and attached to, the Complaint. Defendant was, patently, not a party to the action in which the decision and judgment were rendered. Therefore, Defendant is not bound by the orders, and no claim is stated on which relief may be granted in the second cause of

action. Additionally, both orders preceded Defendant's denial of plat approval, and neither order addresses the plat for which Plaintiffs sought Defendant's approval.

The third cause of action is nominated as a claim for failure to correctly apply the law in denying approval of Plaintiff's plat. This claim is an appeal of the Planning Commission's determination regarding plat approval, and error of law is a basis for appealing a local planning commission's determination. See, Kurschner, supra. However, an appeal from a local planning commission determination is governed by statute, specifically S.C. Code Ann. Section 6-29-310, et. seq., and in particular, S.C. Code Ann. Section 6-29-1110, et. seq., governing plat approval and appeal. The statutory provisions governing this appeal are controlling and jurisdictional, and failure to comply with statutory requirements may be raised at any time and result in dismissal. Friends of McLeod, Inc. v. City of Charleston, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2009)(vacated following settlement 682 S.E.2d 488 (2009)); see also, Rule 74, SCRCP (recognizing statute governs appeals to circuit court from inferior tribunals). Pursuant to S.C. Code Ann. Section 6-9-1150(D), an aggrieved party may appeal a local planning commission determination by filing a notice of appeal accompanied by a request for pre-litigation mediation within 30 days of actual notice of the determination or mailing of the decision. Although filed within 30 days of the Planning Commission determination, Plaintiffs' action was not accompanied by a request for pre-litigation mediation. Additionally, Plaintiffs have not joined other persons in this action who were directly affected by the Planning Commission's determination, which recognized and maintained existing access to their properties. These parties occupy an analogous position to an owner whose application approval is appealed, since appeal could result in reversal of the

access rights recognized by the Planning Commission. See, id.; see also, Spanish Wells Property Owners Association v. Bd. of Adjustment of Town of Hilton Head, 295 S.C. 67, 367 S.E. 2d160 (1988)(holding permittee is necessary party to third party appeal of local zoning board determination). Therefore, Plaintiffs' third cause of action fails to meet jurisdictional and procedural requirements imposed by statute and recognized by law, and the third cause of action is properly dismissed.

Finally, the facts alleged and inferences reasonably deducible therefrom state no other claim, for injunction, quiet title, nuisance or other theory on which relief may be granted, since Plaintiffs have failed to properly effect and prevail in an appeal of the Planning Commission determination, and have not alleged any other facts besides the adverse determination of the Planning Commission and its inconsistency with determinations made by other courts in another action involving parties other than Defendant, and issues other than Defendant's disapproval of Plaintiffs' proposed plat.

The action is therefore dismissed.

IT IS SO ORDERED.



Benjamin H. Culbertson
Presiding Judge
Fifteenth Judicial Circuit
Court of Common Pleas for Horry County

October 22, 2009

OCT -7 PM 12:30

MELANIE HUGGINS
CLERK OF COURT

CASE #: 2009-CP-26-7839

Kenneth Dippel,
etal

VS.

Planning Department,
Horry County

PLAINTIFF(S)

DEFENDANT(S)

ORDER
DISPOSITION OF MOTIONS

Plaintiff's Motion for Order of Reference is
Denied.

Plaintiff's Motion for Change of Venue is Denied.

Defendant's Motion to Dismiss is Under Advisement.
Both Attorneys shall submit proposed Orders
within 15 days.

AND IT IS SO ORDERED.

Margaret T. Culbertson
PRESIDING CIRCUIT JUDGE

DATED AT CONWAY, SOUTH CAROLINA THIS 6th DAY OF OCTOBER, 2009.

Randy A. Beverly Jr.

Victoria J. Vaught
John L. Weaver

PLAINTIFF'S ATTORNEY(S)

DEFENDANT'S ATTORNEY(S)

COUNTY OF HORRY

KENNETH DIPPEL & KIMBER FOWLER

Plaintiff(s)

vs.

HORRY COUNTY PLANNING DEPARTMENT

Defendant(s)

CIVIL ACTION COVERSHEET

2009-CP-26-7839

(Please Print)

Submitted By: KENNETH DIPPEL & KIMBER FOWLER

Address: PO BOX 622 LORIS, SC 29569

SC Bar #:

Telephone #: (843) 716-0699

Fax #:

Other:

E-mail: krf28472@yahoo.com

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

DOCKETING INFORMATION (Check all that apply)

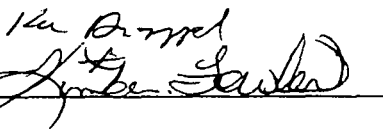
*If Action is Judgment/Settlement do not complete

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

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|---|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Previous Notice of Intent Case #
20 _____ -CP- _____
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Other (799) | Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture—Consent Order (850)
☐ Other (899) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☒ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Sexual Predator (510) | | |

Submitting Party Signature:



Date: 8-11-2009

**Horry County Planning
Commission**

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

STATE OF SOUTH CAROLINA,)
)
COUNTY OF HORRY)
)
KENNETH DIPPEL & KIMBER FOWLER)
Plaintiff,)
)
vs.)
)
HORRY COUNTY PLANNING DEPT.)
Defendant.)

IN THE COURT OF COMMON PLEAS

SUMMONS

FILE NO.

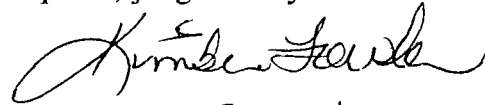
2009-CP-
26-7839

FILED
HORRY COUNTY
2009 AUG 11 AM 10:40
MELANIE HUGGINS
CLERK OF COURT

TO THE DEFENDANT ABOVE-NAMED:

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

HORRY COUNTY, South Carolina



Kim Dippele
Plaintiff/Attorney for Plaintiff

Dated:

Address: KENNETH DIPPEL,
LORIS, SC 29569
KIMBER FOWLER,
2145 OAKDALE ROAD, LORIS, SC 29569

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
CIVIL CASE NO: _____

KENNETH DIPPEL &)
KIMBER FOWLER)

Plaintiffs,)

vs.)

HORRY COUNTY PLANNING)
DEPARTMENT)
Defendant.)

COMPLAINT
(Non-jury)

FILED
HORRY COUNTY
2009 AUG 11 AM 10:45
HELANIE HUGGINS
CLERK OF COURT

Plaintiffs bring this action in response to the Horry County Planning Department and the Horry County Planning Commission decision not to approve a new plat of Kimber Fowler which was submitted by the Plaintiffs to the Horry County Planning Department to remove a private easement. Plaintiffs are seeking the following:

1. An injunction ordering the Horry County Planning Department to approve the new resurvey Plat (the Crescent Moon Plat) for recording purposes.
2. An injunction ordering the Horry County Planning Department to fully comply with the South Carolina Court of Appeals Decision and the Master in Equity Rulings which both held there was no private easement for Mr. Claudius E Fowler.
3. An injunction ordering the Horry County Planning Department to stop claiming a private easement right for the benefit of Mr. Claudius E. Fowler.
4. An injunction ordering the Horry County Planning Department to remove the street known as Dolly Lane off the Plaintiff, Kimber Fowler's property.
5. An injunction ordering all Horry County Citizens including Mr. Claudius E. Fowler's assignees, heirs, and successors from continually trespassing on the Plaintiff, Kimber Fowler's property.

STATEMENT OF FACTS

1. The Plaintiff, Kimber Fowler resides at 2145 Oakdale Road, Loris, SC and is a citizen of Horry County, South Carolina. The Plaintiff, Kenneth Dippel resides at 4931 Forest Drive, Loris, SC 29569 and owns a mobile home on Kimber Fowler's property. Both Plaintiffs rent this mobile home out to tenants.
2. The Defendant is a local government entity whose mailing address is Planning & Zoning, Government & Justice Center, 1301 Second Avenue, Conway, SC 29526. The Horry County Planning Department makes decisions concerning the approval of Plats for recording purposes. Decisions regarding Plats by the Horry County Planning Department may be appealed to the Horry County Planning Commission. Decisions by the Planning Commission can be appealed to the Circuit Court.
3. The Plaintiff, Kimber Fowler owns .99 acres of land, Lot 1 of Tract D of P.F. Fowler Estate, TMS #0400001122, Deed Book 2897 at Page 463. **See Attached Deed and Plat.** The Plaintiff, Kenneth Dippel owns a mobile home on Kimber Fowler's property. **See Attached Deed.** Both Plaintiffs jointly rent this mobile home out to tenants.
4. On September 29, 1981 Mr. Claudius E Fowler acquired land by civil suit (Tract D of PF Fowler Estate). **See Attached Deed – Book 740, Page 312, and Plat - Book 73, Page 27.** **The 1982 plat did not show any kind of soiled driveway or road between tract C and D. No easement is depicted on this Plat and no easement is noted in the deed or release papers. No Dolly Lane is noted on this Plat.**
5. On August 6, 1999 Mr. Claudius E. Fowler surveyed his property. The Inman Survey Plat was recorded at the Horry County Register of Deeds. No dedication or transfer of property occurred. Mr. Claudius E. Fowler reserved unto himself and his wife a lifetime right. **See Attached Deed – Book 2175, Page 001 and Plat Book 163 at Page 228.** **Mr. Claudius E Fowler at the time of the creation of the Inman Survey Plat created a private easement for himself when he owned the dominant and servitude estate on Tract D of the PF Fowler Estate.** The deed nor release papers did not contain any reference to a private easement or any public access easement known as "Dolly Lane". **The Inman Survey Plat did not depict "Dolly Lane" running through the Plaintiff, Kimber Fowler's property** (emphasis added). The western end of Mr. Claudius E. Fowler's property and the public road G & B Lane were not depicted on the Inman Survey Plat.
6. On June 28, 2000 Mr. Claudius E Fowler removed his lifetime right and conveyed the entire .99 acres of Lot 1 to Timothy E. Fowler (Claudius E Fowler's son) and to the Plaintiff, Kimber Fowler who at that time was married to Claudius E Fowler's son. **See Attached Deed – Book 2278, Page 0358 and Plat Book 164 at Page 228.** This deed did not contain any reference to a private or public access easement known as "Dolly Lane". **The Inman Survey Plat did not depict "Dolly Lane" running through the Plaintiff, Kimber Fowler's property** (emphasis added).

7. On or about August 1, 2000 the Plaintiff planted a total of eight Bradford Pear Trees at the boundary line of her property within the private easement as depicted on the Inman Plat.
8. On January 19, 2005 the Plaintiff, Kimber Fowler was granted a divorce from Claudius E Fowler's son, Timothy Fowler. As a result of the divorce Timothy Fowler conveyed the entire .99 acres of Lot 1 and the home to the Plaintiff, Kimber Fowler. **TMS #0400001122, Deed Book 2897 at Page 463, Plat- Book 164 at Page 228. No public or private easement, or Dolly Lane is noted in the deed or release papers.**
9. On or about May 16, 2006 Mr. Claudius E Fowler re-surveyed the remainder what was previously known as Tract D of the PF Fowler Estate. Mr. Claudius E. Fowler subdivided his property into three tracts of land (Tract A, Tract B, and the Remainder of the PF Fowler Estate). A lot reconfiguration occurred as well. **See Attached Affiliated Surveyors Plat, Plat Book 214, Page 12.** The Plat depicted a 50 foot private easement and a private shared driveway running through Tract A and Tract B of Mr. Claudius E. Fowler's property and also depicted "Dolly Lane" running through the Plaintiff, Kimber Fowler's property. According to the Plat, Dolly Lane ended at the northern boundaries of Kimber Fowler's property. Dolly Lane according to this Plat did not run through any of Mr. Claudius E Fowler's property. **This marked the first time that Dolly Lane was officially recognized and approved by the Horry County Planning Department for recording plat purposes concerning the PF Fowler Estate.** Mr. Fowler did not convey any property out.
10. On March 21, 2007 Kimber Fowler brought an action for trespass and damage to personal property to the Court of Common Pleas in Horry County against Claudius E. Fowler. On April 24, 2007 the case was transferred to the Master-In-Equity. On August 15, 2007 Judge J. Stanton Cross Jr., the Master-In-Equity ruled the Respondent had an individual private dedicated easement. On August 20, 2007 the Plaintiff, Kimber Fowler appealed to the SC Court of Appeals.
11. On February 23, 2009 the SC Court of Appeals in a unanimous unpublished opinion reversed Judge Stanton J. Cross's decision. Please see the attached opinion. The SC Court of Appeals determined Mr. Claudius E. Fowler did not have an easement by dedication. **They held an easement in this case could only benefit a buyer.** A remitter was subsequently issued by the SC Court of Appeals.
12. On May 26, 2009 a hearing was conducted by the new Master in Equity, Judge Cynthia Graham Howe. The Master in Equity at this hearing repeatedly told all parties there was no easement. Judge Cynthia Graham Howe issued an order as follows:

"IT FURTHER IS ORDERED that Plaintiff be granted an injunction, enjoining Defendant, his successors, and heirs, from trespassing on Plaintiff's property, more

specifically shown on Exhibit "A" attached to this "Order", including a twenty-five foot soil driveway known as Dolly Lane across the north side of Plaintiff's property". Please see Master in Equity Ruling attached.

13. As a result of the decision by the Master in Equity, the Plaintiffs resurveyed the property of Kimber Fowler on or about June 6, 2009. The purpose of this Plat was to remove the private easement off the property belonging to Kimber Fowler. See **Crescent Moon Survey Plat attached**. The Plat was submitted to the Horry County Planning Department for recording by the Plaintiffs.
14. On June 16, 2009 the Horry County Planning Department denied the approval of the Crescent Moon Survey Plat. The Horry County Planning Department held in part that Kimber Fowler had to get the signature of Claudius E. Fowler to remove the private easement off her property and also held in part she had to continually provide an alternative access to all of Claudius E. Fowler's land. **Please see the attached decision**. The Plaintiffs appealed to the Planning Commission.
15. On July 30, 2009 the Plaintiffs appeared before the Planning Commission. The Planning Commission voted to continue the denial of the Crescent Moon Survey Plat of Kimber Fowler's property. They voted to leave the private easement on Kimber Fowler's property. **The Plaintiffs are now appealing this matter to the Court of Common Pleas and are requesting this matter be transferred to the Master in Equity for disposition.** See Article 1, Section 11 (Appeals), page 10 of the Horry County Land Development Regulations. The Master in Equity has jurisdiction to review this case and also has the authority to render a decision on this matter.

FIRST CAUSE OF ACTION

(Violations of property rights & Judicial taking of private property)

Each and every Statement of Facts is incorporated herein. The Plaintiffs contend the Horry County Planning Department and the Horry County Planning Commission have violated their constitutional rights as property owners. Owning property is a protected right under the 5th Amendment and 14th Amendment of the US Constitution. *"The Fifth Amendment of the U.S. Constitution states that no person shall be deprived of life, liberty, or property without due process of law. The Fourteenth Amendment also provides for equal protection of law". Article I, Section 13(A) of the South Carolina Constitution also provides as follows:*

"Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, or for public use without just compensation being first made for the property".

The Planning Department and the Planning Commission by not approving Kimber Fowler's new Plat, and by disregarding the SC Court of Appeals decision and latest Master in Equity Ruling have blatantly violated the Plaintiffs' constitutional rights as property owners. The Defendants have endorsed a judicial taking of private property

without providing just compensation. Our US Constitution and our State's Constitution specifically prohibit depriving a property owner **full use and enjoyment of their property**. By the Horry County Planning Department and the Horry County Planning Commission continually imposing an illegal private access easement in favor of Mr. Fowler it has striped the Plaintiffs **the right to exclude others from continually trespassing** on Kimber Fowler's property.

In *Gasque*, our SC Supreme Court held:

The Constitution of this State (Art. 1, Sec. 17) provides that 'private property shall not be taken . . . for public use without just compensation being first made therefore.' In construing this provision of the Constitution, we have held, along with many other courts, that an actual physical taking of property is not necessary to entitle its owner to compensation. A man's property may be taken, within the meaning of this provision, although his title and possession remain undisturbed. **To deprive him of the ordinary beneficial use and enjoyment of his property is, in law, equivalent to the taking of it, and is as much a 'taking' as though the property itself were actually appropriated**". *Gasque v. Town of Conway*, 194 S.C. 15, 8 S.E. 2d 871, 873 (1940).

"Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys one or more of these elements of property to that extent destroys the property itself. It must be conceded that the substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated, and ownership is rendered a barren right".

"The constitutional prohibition against taking private property for public use without just compensation must have been intended to protect all the essential elements of ownership which make property valuable, including, of course, the right of user, and the right of enjoyment". 194 S.C. at 21, 8 S.E.2d at 873 (citations omitted).

Justice Scalia writing for the majority opinion in *Nollan v California Coastal Comm*, 483 US 825; 107 S Ct 3141; 97 L Ed 2d 677 (1987) stated the following:

"Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property."

An important takings decision, *Nollan* involved a challenge to an effort by California to enhance the public's enjoyment of state beaches. California required the Nollans, owners of a small beachfront bungalow, to dedicate to the state a beach access easement as a condition for obtaining a state permit to replace and expand their bungalow. The easement would have given the public a permanent right to walk along a

narrow strip of the Nollan's beach. The Supreme Court invalidated the state's effort on the ground that California's demand would amount to a taking of private property without just compensation being provided. *Nollan* is significant because, in weighing the validity of California's action, the Court required a showing that the easement condition would substantially advance the state's interest in alleviating the congestion caused by beachfront construction. The principal effect of the Nollan's new home was to reduce the public's ability to see and enjoy the beach from the street. The easement that California demanded, however, **would only have benefited persons already on the beach and would not have enhanced visual access from a distance.**

With respect to this instant case at bar, the Plaintiffs respectfully must assert a judicial taking has occurred. The right to exclude has been stripped from the Plaintiff, Kimber Fowler. Also, the Plaintiffs are being deprived of the right to full use and enjoyment of their property. **Please see *Gasque* (noting actual physical taking not required in order for a judicial taking of private property to occur).** The Horry County Planning Department's actions in this case have essentially allowed a total circumvention of the Master In Equity Ruling issued by Judge Cynthia Howe, and this circumvention now allows Mr. Fowler, his heirs, successors, and assignees to continually transgress and illegally trespass on the Plaintiff, Kimber Fowler's property with impunity.

In fact, Mr. Fowler, his heirs, and renter now have started again passing through the private driveway belonging to Kimber Fowler (the so called "Dolly Lane"). The Plaintiffs are having now to relive the five year nightmare that they have endured in Court dealing with Mr. Fowler. The ruling issued by Judge Cynthia Howe was intended to grant the Plaintiff, Kimber Fowler relief and **to permanently stop all of the Fowlers including Mr. Fowler, and his successors from continually trespassing. No legally enforceable easement exists for Mr. Fowler as a result of that decision.** The Plaintiffs as a result of the Horry County Planning Department's and Horry County Planning Commission's decisions cannot even put a fence around their property to keep others from continually transgressing. Kenneth Dippel, the other Plaintiff cannot maintain the driveway leading up to the rental trailer because the illegal private easement known as "Dolly Lane" was not removed. **The soiled driveway specifically known as "Dolly Lane" was never intended for public use and is the private property belonging to Kimber Fowler.** This driveway has been damaged by the continued unlawful passage of traffic. The passage of all this traffic is a nuisance to the tenants of Kenneth Dippel. Further, at some point in time as a result of the Horry County Planning Department's actions Mr. Dippel could be forced to move his mobile home.

The Court should note there is no public benefit to the citizens of Horry County to continually impose an illegal **private easement** across Kimber Fowler's property. The only citizen who benefits from this is Mr. Claudius E. Fowler, his heirs, and successors. 911 do not need an access easement across Kimber Fowler's property. **If that were the case the so called Dolly Lane would extend across Mr. Claudius E. Fowler's property.** The Affiliated Surveyor's Plat plainly shows that Dolly Lane does not run through any of Mr. Fowler's property. That Plat shows a private shared driveway which

according to **Article 4 – Design Standards, Section 7-3(A) (Uniform Naming Streets)**, page 93 shall not be assigned an official street name. Please see attached **Article 4, 7-3(a) ordinance. Article 4 – Design Standards, Section 7-3(A) (Uniform Naming Streets)** page 93 of the Horry County Land Development Regulations provide as follows:

7-3 Uniform Naming System

The uniform naming system uses the following as guidelines for the naming of all streets and easements that meet the following:

A. A street is defined as any right-of-way or access where:

1. Three (3) or more residences or businesses are located along the street;
2. The street is a thoroughfare to another street; or
3. The street is publicly maintained

Note: Shared driveways, as defined in the Horry County Land Development Regulations, shall not be assigned an official street name.

A review of the Affiliated Survey Plat which was approved for recording purposes in May of 2006 by the Horry County Planning Department shows that **the so called households or residents on Dolly Lane do not even live along Dolly Lane. They all live on a private shared driveway belonging to Mr. Claudius E. Fowler.** None of these residences are land locked in. Please see attached Air Photos. Mr. Fowler owns all of Tract A, Tract B, and the Remainder of Tract D. The current so called residence on Dolly Lane should not at this time have a Dolly Lane 911 address. The only household that lives on the so called illegal Dolly Lane is the tenants of Mr. Kenneth Dippel and that address is currently 2153 Oakdale Road. The so called Dolly Lane at its present state does not even meet the criteria for a naming of a street according to **Article 4, Section 7-3(a) page 93 (three residence required for a street name to occur).**

If the County let Mr. Claudius E. Fowler have his own shared private driveway why should not Kimber Fowler, the Plaintiff be able to have her own private driveway? This is one of the reasons why the 911 emergency access and 911 addressing theory that will be poised by the County does not make any sense. To continually impose the illegal private easement known as Dolly Lane solely on Kimber Fowler but not on Mr. Fowler's property is a violation of the equal protection clause of the 14th Amendment of the US Constitution.

The Horry County Planning Department lets Mr. Fowler have full use and enjoyment of his property and lets him continually have the right to exclude. But, it does not let Kimber Fowler have this. Why? The Horry County Planning Department endorses a judicial taking of private property for the benefit of Mr. Claudius E. Fowler without providing just compensation. **None of the Plats in this case or deeds note any sort of public easement for the benefit of the County.** None of the deeds or release documents

in any of the deeds makes reference to the property being subject to any kind of public or private easement or to Dolly Lane (emphasis added). Our State has enacted and embraced the Statute of Fraud. **Chapter 3, SECTION 32-3-10** requires all real estate transactions including easement claims to be in writing and signed. The Statute of Frauds provides as follows:

No action shall be brought whereby:

- (1) To charge any executor or administrator upon any special promise to answer damages out of his own estate;
- (2) To charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person;
- (3) To charge any person upon any agreement made upon consideration of marriage;
- (4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; or**
- (5) To charge any person upon any agreement that is not to be performed within the space of one year from the making thereof;**

Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

Any kind of easement claim private or public asserted by the Horry County Planning Department should be barred by the South Carolina Statute of Frauds. The Horry County Planning Department to date has not cited to anything in writing signed by the Plaintiff, Kimber Fowler giving them, Mr. Fowler, or any other citizen an easement of any kind through her property. In fact, the Court should note the South Carolina Court of Appeals in their decision noted there was nothing in any of the deeds noting the property conveyed to Plaintiff; Kimber Fowler was subject to an easement. **Please see SC Court of Appeals decision; see also SECTION 32-3-10(4) and SECTION 32-3-10 (5). The Court should note The Horry County Planning Department prior to the decisions rendered in Mr. Fowler's case never asserted any kind of public or private easement right even when they were made aware of the Court proceedings involving Mr. Claudius E. Fowler.** The Plaintiffs were told by the Horry County Planning Department repeatedly at the very onset of the litigation involving Mr. Fowler that they do not get involved with private matters. **A letter dated March 23, 2009 from Deputy County Attorney Gorski noted that the County would not take any action. Please see attached letter dated March 23, 2009.**

The Horry County Planning Department denied the Plaintiffs new plat in part on the grounds there was no alternative route to all of Mr. Fowler's property. **Please see letter dated July 14, 2009 from Janet Carter, Planning Director.** In summary, the HC Planning Department claims the property of Mr. Fowler (Tract A, Tract B, and the remainder of Mr. Claudius E. Fowler) are land locked parcels. A party claiming to be benefited by an easement by necessity must demonstrate the existence of the following

three elements: 1) unity of title; 2) severance of the title; and 3) necessity of the easement. Morrow v. Dyches, 328 S.C. 522, 529, 492 S.E.2d 420, 424 (Ct. App. 1997).

The third element that of necessity requires a showing of more than convenience. Morrow, 328 S.C. at 529, 492 S.E.2d at 424. The doctrine of easement by necessity is based upon the presumption that the grantor intended the grantee of a landlocked parcel to have access to his property, a right recognized as essential to the enjoyment of the land. Id. Thus, “[this] doctrine only provides reasonable access to the dominant estate when there is none. It does not provide a means for ensuring a preferred method of access to a particular portion of a tract when access to the tract is otherwise available.” Id. The decision in Morrow makes it clear an easement out of necessity cannot arise out of an easement claim on the grounds of an alternative route even if the Court were to assume the parcels of land owned by Mr. Fowler are land locked in.

The Air Photos plainly show Mr. Fowler, his son, and his renter living along his private shared driveways, and 911 have reasonable access to G & B Lane (a public road) utilizing Mr. Fowler’s own private shared driveways and driveway that hooks up to G & B Lane. Please see attached air photos. Mr. Fowler’s son and his renter do not own any of the land. It is Mr. Fowler who owns all the tracts of land. Mr. Fowler’s current mailing address is 2042 G & B Lane. The driveway Mr. Fowler has is the same width of Plaintiff, Kimber Fowler’s private soiled driveway known as “Dolly Lane”. The ultimate responsibility rests with Mr. Fowler to provide access to his renter on Tract B and to his son on Tract A utilizing his own property and not Kimber Fowler’s property. The County cannot deprive the Plaintiff, Kimber Fowler of her property by imposing an illegal private easement on her property for the purpose of providing an alternative route to any of Mr. Fowler’s property. This constitutes a judicial taking. The County does not currently maintain the so called Dolly Lane. Please see letter dated April 9, 2009 from the Horry County Engineering Department from Mr. David Helms. Mr. Claudius E. Fowler currently does not maintain the so called Dolly Lane running across Kimber Fowler’s property. The property is currently maintained by Kenneth Dippel and Kimber Fowler. It is the Plaintiff, Kimber Fowler who owns the soiled driveway known as “Dolly Lane”. Dolly Lane is not even the length of a football field.

The Horry County Planning Commission on July 23, 1996 assigned the name “Dolly Lane”. The first 911 address appearing on it occurred sometime in 1997. The Plaintiff, Kimber Fowler did not at that time own Tract 1 of the PF Fowler Estate. It was not until April 21, 2005 was Tract 1 deeded out to Kimber Fowler exclusively. When the Affiliated Surveyor’s Plat was submitted by Mr. Claudius E. Fowler and was approved by the Horry County Planning Department in May 2006 the Plaintiff, Kimber Fowler was never told about it. The Affiliated Surveyor’s Plat was the first time that the so called Dolly Lane was shown on any kind of official plat for recording purposes, and when it was done the Horry County Planning Department allowed Mr. Fowler to remove Dolly Lane off his property in favor of a private shared driveway. If it is as they say there is a necessity for 911 purposes to have a “Dolly Lane” running through Kimber Fowler’s property and an estoppel easement applies, why did

they let Mr. Fowler have a private shared driveway? Why should not Kimber Fowler have the same rights as Mr. Claudius E. Fowler? If the Horry County Planning Department gave Mr. Fowler the blessing to remove Dolly Lane off his property then certainly it should have done the same for the joint Plaintiff, Kimber Fowler. This is especially true when examining the SC Court of Appeals' decision which held there was no dedicated easement for Mr. Fowler. Dedication according to Article 8 – Definitions page 135 of the HC LDR's is defined as an act of transmitting property or interest thereto. **See attached Article 8 – Definitions page 135 of the HC LDR's.**

SECOND CAUSE OF ACTION **(Failure to comply with Court Orders)**

Each and every allegation of the Statement of Facts is incorporated herein. The Planning Department and the Planning Commission feels they are not bound by the decisions rendered by the South Carolina Court of Appeals and the latest Master in Equity Ruling, Judge Cynthia Howe in this case concerning a private easement across Kimber Fowler's property. The bottom line in this case the County Planning Department contrary to what they believe is bound by these decisions concerning the question as to whether a legal enforceable *private easement exists in favor of Mr. Claudius E. Fowler.* It cannot step in the place of Mr. Claudius E. Fowler and now make a case for any other type *private easements existing for Mr. Fowler.* It would be a different story if the Planning Department were making a case for a public easement. But, that is not what they are trying to do in this case. The Horry County Planning Department has totally disregarded the South Carolina Court of Appeals' decision and Master in Equity Ruling for the sole purpose to give back Mr. Fowler an easement across Kimber Fowler's property. The Horry County Planning Department by not approving the Plat of the Plaintiffs has circumvented the Court rulings concerning the existence of a private easement existing for Mr. Claudius E. Fowler. The Planning Department has essentially given Mr. Fowler's easement back while ignoring the Court decisions. The Fowlers now are trespassing on the property of Kimber Fowler with little regard to the Court orders.

The Horry County Planning Department in denying the Plat of Kimber Fowler committed legal error by requiring Kimber Fowler to obtain the signature of Claudius E. Fowler when no private legally enforceable easement existed for Mr. Claudius E. Fowler. The actions of the Horry County Planning Department and Horry County Planning Commission now have opened up the flood gates allowing Mr. Fowler, his successors, and heirs to now circumvent the decision by the Master in Equity. A continued unlawful transgression of private property has been officially publicly endorsed by the Horry County Planning Department and the Planning Commission. Judge Cynthia Howe's order was issued to specifically keep all of the Fowler's including Mr. Claudius E. Fowler off the property of Kimber Fowler including the soiled driveway known as "Dolly Lane". No legally enforceable easement exists for Mr. Claudius E. Fowler and the old Plats the HC Planning Department relied on to make their decisions are void ab initio.

The SC Court of Appeals unanimously determined in this matter that Mr. Fowler did not have an easement by dedication. If there were any other type easement

(prescription, easement out of necessity on the grounds of land locked parcels, implication, or estoppel easement) the South Carolina Court of Appeals and even Judge Cynthia Howe, Master in Equity would have issued an order in favor of Mr. Claudius E. Fowler. Prior to these decisions Mr. Fowler raised all sorts of claims to different types of easements including easement out of necessity, implication, and prescription. In fact, both parties extensively briefed the existence of various type easements in the appeal to the South Carolina Court of Appeals.

Mr. Fowler all throughout the pendency of the case was given every opportunity to obtain an Attorney. He was also given a full and fair opportunity to raise any type of private easement he thought he may have. He could have appealed the South Carolina Appeals' decision and also could have appealed the decision by Judge Cynthia Howe, Master in Equity. Mr. Fowler did not appeal any of these decisions. The decision by the SC Court of Appeals and the latest Master-in-Equity ruling are now final. It does not matter whether the parties did nor did not have attorneys representing themselves nor does it matter as to whether Mr. Fowler did or did not make other easement claims. The question as to whether there exists a legally enforceable private easement of any kind is now binding on Mr. Claudius E. Fowler and also to parties by privy including the Horry County Planning Department. The Federal Third Circuit Court has noted: "*A decision by this court, not overruled by the United States Supreme Court, is a decision of the court of last resorts. Thus, our judgments are binding on all inferior courts and litigants in the Third Circuit, and also on administrative agencies when they deal with matters pertaining thereto*". Allegheny Gen. Hosp. v. NLRB, 608 F. 2d. 965, 970 (3rd Cir. 1979).

The Horry County Planning Department should not be allowed to circumvent the decisions rendered by the SC Court of Appeals and the latest Master in Equity on the grounds it was not a part of the case against Mr. Fowler. If this were allowed any party bringing any kind of dispute or action to Court would be able to circumvent final decisions issued by our Courts with impunity on the simple excuse that they were never a party to a previous dispute even though the exact same issue is being attempted to be re-litigated in a previous final Court order. This practice attempted by the HC Planning Department is a blatant attempt to flush issue preclusion down the toilet and also an attempt to throw the previous final decisions in this case in the waste basket including Judge Cynthia Howe's order which was specifically issued to give Kimber Fowler relief in the form of an injunction keeping Mr. Fowler, his heirs, successors, and assignees from trespassing on her property. It is never expected that all parties will rejoice with Court decisions. The bottom line is there is no private easement legally existing for Mr. Fowler in light of the Court orders. Mr. Fowler had a full and fair opportunity to litigate his position fully and he did not appeal.

Further, the HC Planning Department for many years knew about the case against Claudius E. Fowler for well over three years or more. The Plaintiffs made repeated contacts with the HC Planning Department for a period of over three years in which they asked for the HC Planning Department to get involved. The HC Planning Department when contacted at the very onset dating back even prior to Judge Stanton J. Cross, Jr.

August 16, 2007 decision declined to get involved on the grounds they did not get involved in private matters. The Plaintiff, Kenneth Dippel met with Janet Carter Planning Department Director on two or more occasions long before the issuance of the SC Court of Appeals decision, and on at least two or more occasions before the latest Master in Equity ruling. The Plaintiff, Kenneth Dippel was again told by the Planning Department Director and Carol Coleman, Deputy Director that the HC Planning Department did not get involved with private matters. The HC Planning Department could have filed a motion to intervene prior to any decisions in this case. They did not! They could have filed an amicus brief supporting Mr. Claudius E. Fowler's private easement claim to the SC Court of Appeals. They did not. Why didn't they get involved prior to these decisions? **For the Planning Department to come out now and say they were never given a full and fair opportunity to get involved in the Claudius E. Fowler case is a bunch of hog wash.** Repeatedly the Plaintiffs were told the HC Planning Department did not have any interest in the case because it was a private matter. The mere fact the Planning Department is not satisfied with the final decisions issued in this case does not give them any legal right to dispute these decisions and to second guess them. The Court should not allow Defendants to conjure up new novel theories of private easements still existing for Mr. Fowler. To allow them to do so would deny the Plaintiff, Kimber Fowler the protections that were afforded to her in Judge Cynthia Howe's ruling.

If the Court embraces the HC Planning Department's theory that the final Court decisions are not binding the flood gates will be open for all litigants to repeatedly re-litigate any kind of issue with impunity over and over again even when there is a final decision on a previous relevant issue decided in a final decision. If the Court accepts the HC Planning Department's unlawful theory the Plaintiffs in this case will have to end up re-litigating over and over again a lawsuit against Mr. Fowler even when the Master in Equity, Judge Cynthia Howe repeatedly told all parties in a hearing there was no easement. **A copy of the transcript of this hearing will be submitted at a later date. To simply ignore this and throw it in the waste basket would violate the Plaintiffs' due process rights and the separation of powers.** It is the Courts of Equity who have the exclusive authority to make determinations on whether legal private easements exist. Neither the Horry County Planning Department nor the Horry County Planning Commission has been given any legal authority or power to override the Court decisions concerning the existence of a private easement for Mr. Fowler. If the Court allows the HC Planning Department's decision not to approve the Plat of the Plaintiffs to stand as is it will mark the first time ever in American jurisprudence where a lower tribunal or lower administrative body overturns a decision by a higher Court.

The Plaintiffs respectfully requests for the Court to estop the HC Planning Department **arguing a private easement of any kind still exists** for Mr. Claudius E. Fowler, his heirs, successors, or (assignee(s) (party to whom property is transferred to)). Collateral estoppel and issue preclusion regarding the question on the existence of a **private easement for Mr. Fowler should apply to the Planning Department in this case.** Collateral estoppel in practice "simply means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties or **parties in privity in any future lawsuit.**" Judicial estoppel is

a common-law rule that a party will not be allowed to maintain inconsistent positions in judicial actions and proceedings. **It applies not only in the course of the same proceeding, but also in supplemental proceedings and separate actions.** In the words of the United States Court of Appeals for the Sixth Circuit, the doctrine of judicial estoppel serves the purpose of protecting the integrity of the courts by preventing the system from being manipulated by "chameleonic litigants." **Blanton v. Inco Alloys International, Inc.**, 108 F. 3d 104, 108 (6th Cir. 1997).

"Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." **Hayne Fed. Credit Union v. Bailey**, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). The doctrine exists to protect the integrity of the judicial process and courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. *Id.* The supreme court has stated the following elements are necessary for the doctrine of judicial estoppel to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. **Cothran v. Brown**, 357 S.C. 210, 215-216, 592 S.E.2d 629, 632 (2004).

The Plaintiffs respectfully must state each and every element of judicial estoppel is present in this case. The HC County Planning should be considered a party in privy to Mr. Claudius E. Fowler and it should also be noted the County in reality is going to be arguing for the same party (that Mr. Fowler somehow still has a private easement which was decided by the Courts by a final decision). First, the Horry County Planning Department has taken an inconsistent position regarding the existence of a private easement for Mr. Fowler which was previously fully litigated by the South Carolina Court of Appeals and the Master in Equity. The South Carolina Court of Appeals determined no legal enforceable easement existed for Mr. Claudius E. Fowler and Judge Cynthia Howe; Master In Equity issued an injunction precluding Mr. Claudius E. Fowler, his heirs, and successors from trespassing on the property of Kimber Fowler to include the soiled driveway known as "Dolly Lane". Second, the position which the Horry County Planning Department has taken is the same or related issue that was the subject of a final decision (the existence of a private easement for Mr. Fowler and involves a same party or party in privy). Third, the Plaintiff Kimber Fowler was successful in maintaining that no private easement existed and did receive a final order from the Master in Equity which effectively closed off access to Mr. Claudius E. Fowler, his heirs, and successors. Fourth, the inconsistency taken by the Horry County Planning, the Defendants is a blatant attempt to intentionally mislead the court. The Horry County Planning Department wants to have it both ways and that is arguing for a private easement existing for Mr. Fowler and at the same time a public easement. The fact is they have no legitimate public interest other than using deception to either preserve a private easement for Mr. Fowler or to give back Mr. Claudius E. Fowler's unenforceable illegal private easement back. This deception is intentional deception being utilized to provide Mr. Claudius E. Fowler a means to escape the finality of two final Court decisions which have determined no

easement existed for Mr. Fowler. Fifth, without a shadow of doubt the position taken by the Horry County Planning is totally different from the Plaintiffs and is also totally inconsistent with the ruling issued by the Courts in this case.

The Court should note when the Plaintiffs including Mr. Fowler were at the Master in Equity hearing they were repeatedly told there was no easement. The hearing transcript that will be provided at a later date will bear that out. To make the Plaintiffs again plow back over old ground in this case concerning the existence of a private easement would turn the appellate judicial system upside down. It would abate the finality of the previous Court decisions in this case. The Planning Department would be given the authority to second guess decisions rendered by our Courts concerning the existence of private easements. It would amount to basically throwing the prior decisions rendered by our Courts in the trash can. The Plaintiffs respectfully request for the Court to be bound by the prior Court decisions concerning the existence of a private easement and also respectfully request for the Court to hold the Horry County Planning Department should also be bound by those decisions or should be precluded from re-litigating the issue as to whether Mr. Fowler still has some sort of private easement.

The Horry County Planning Department like any other local government entity must follow rulings by the Courts. An agency's decision to refuse to follow a ruling by an Appellate Court can hardly be characterized as an exercise of discretion. **BPS Guard Services, Inc. v. NLRB, 942 F. 2d, 519, 523 (8th Cir. 1991)**. When the Horry County Planning Department and Planning Commission made a decision as to whether to approve the new Plat of Kimber Fowler they should have been bound by the SC Court of Appeals and latest Master in Equity ruling. These Courts essentially determined no private easement existed for Mr. Fowler. The HC Planning Commission did not comply with the SC Court of Appeals' decision or Master in Equity ruling when they made their decision to not approve the new Plat of the Plaintiffs. They threw both decisions in the trash can by voting to leave the private easement on Kimber Fowler's property. What is interesting in this case is the Horry County Planning Department has never at any time made any kind of claim or case for a public easement for the benefit of the County. What exactly are they arguing for? Is it that a private easement still exists for Mr. Fowler? Is it a public access easement? This Court and the Horry County Planning Department and Planning Commission should be bound by the US Supreme Court decision in **Nollan**.

Our US Supreme Court in in **Nollan v California Coastal Comm, 483 US 825; 107 S Ct 3141; 97 L Ed 2d 677 (1987)** requires a municipality to demonstrate a substantial public benefit so that a judicial taking does not occur. **Private property cannot be imposed with an easement for the benefit of another private citizen under the Supreme Court's decision in Nollan.** The HC Planning Department and Planning Commission have not and cannot make any kind of case proving a substantial public benefit exists. The HC Planning Department should not be allowed to deprive full use and enjoyment of private property from another individual like they have done in this case for another private citizen or other private citizens. Plaintiffs respectfully remind the Court an actual physical taking of private property is not necessary in order for a judicial taking to occur. When the right to exclude is taken away from a property owner and

individuals are allowed to remain stationary on that property a judicial taking occurs. See US Supreme Court decision in Nolan and our State Supreme Court decision in Gasque. This is exactly what has happened here in this case.

THIRD CAUSE OF ACTION (FAILURE TO CORRECTLY APPLY THE LAW)

Each and every allegation of the Statement of Facts is incorporated herein. The Plaintiffs have never denied the obvious fact a 25 foot easement has been depicted on the Inman Survey Plat. However, at the very onset the Plaintiffs have stated the sole depiction on this Plat of the 25 foot easement **does not make it valid and legally enforceable**. First, the Court should note at no time in any of the deeds or release documents is there any reference to a private easement, public access easement, or any Dolly Lane. The SC Court of Appeals noted this in their decision concerning the question as to whether Mr. Fowler had a private easement. Please see the Facts Section of the South Carolina Court of Appeals decision. Second, the Horry County Planning Department continually refuses to acknowledge that **the Common Law strictly prohibits individuals from creating easements for themselves when the dominant and servitude estates are lodged to the same person**. Mr. Fowler when he generated the Inman Survey Plat owned the entire PF Fowler estate, both the dominant and servitude estates. He did not convey any land out when the Plat was approved for recording. He essentially did what all Courts across our Country have struck down and that is illegally attempt to create an easement for himself when both the dominant and servitude estate was lodged to the same person. Our Courts have declared these type easements are void ab initio (they are not legally enforceable). See Hidalgo County Water Control & Improvement Dist. v. Hippchen, 233 F.2d 712, 714 (5th Cir. 1956):

As the Fifth Circuit Court of Appeals explained in Hidalgo:

“It is elementary that the dominant and servient estates must be held by different owners, for no person can have an easement in his [or her] own property . . . ;

“A person cannot have an easement in his [or her] own land since all the uses of an easement are fully comprehended in his [or her] general right of ownership. It follows that no easement exists so long as there is a unity of ownership of the property involved. Hidalgo, 233 F.2d at 714 (citations and internal quotation marks omitted)”.

See also One Harbor Financial Limited Corporation v. Hynes Property LLC, 884 So. 2d 1039 (October 15, 2004) (easement depicted on Plat was declared void ab initio because at the time of the creation of the easement the dominant and servitude estate was lodged to the same person; Haselden v. Schein, 167 S.C. 534, 539, 166 S.E. 643, 635 (1932) (no legally enforceable easement exists when the dominant and servitude estate are lodged to the same person). It is common sense when one owns the entire estate no legally enforceable easement exists; Windham v. Riddle, South Carolina Supreme Court Opinion No. 26586 (January 20, 2009) recently holding **there was no**

appurtenant easement for access and irrigation purposes because at the time of creation of the easement the dominant and servitude estate was lodged to the same person.

With respect to this instant case at bar, the Court likewise should declare just like any other Court, that the private easement shown on the Inman Survey Plat is void ab initio. The Plaintiffs respectfully must state this Court should be bound by the Federal Court ruling in Hidalgo and our Supreme Court decision in Windham v. Riddle. Further, the SC Court of Appeals in Kimber Fowler v. Claudius Eugene Fowler, No. 2009-UP-096 (Feb. 2009) (SC Court of Appeals) held no dedicated easement for Mr. Fowler existed. The easements shown on the Inman Plat (June 1999) and the Affiliated Surveyor's Plat (May 2006) are no longer valid. As such, the Court should declare them invalid and not legally binding. The Horry County Planning Department in making a determination not to approve the new plat of the Plaintiffs refused to acknowledge this. Their actions are arbitrary, capricious, an abuse of discretion, or otherwise are not in accordance with the law.

On about May 2006 Mr. Fowler submitted for recording the Affiliated Surveyor's Plat. The Horry County Planning Department refuses to accept the obvious fact this plat should have never been given the stamp of approval by their office for recording. Our US Supreme Court has held "where the rights of individuals are affected, it is incumbent upon an agency to follow their own rules and regulations". Morton v. Ruiz, 415 U.S. 199, 235 (1974). The Horry County Planning Department is bound by its own Land Development Regulations which every year are published on line for the public. **Article 4 - Design Standards, Section 2Q (Shared Driveways) page 71** which was in effect when the May 2006 Affiliated Plat was submitted stated as follows:

Q. Shared driveways.

Single-family developments containing three or fewer residential lots may utilize a shared private driveway as access to the lots. Shared private driveways shall be designed as shown in Figure 4-F, Appendix F. Lots having frontage on an existing County or State roadway and can obtain an encroachment permit from Horry County or SCDOT shall not be counted as part of the maximum 3 lots that access the shared private driveway. If an encroachment permit cannot be obtained such lot(s) shall be counted toward the maximum 3 lots permitted to access the shared driveway.

Residential developments containing four or more lots as well as non-residential developments shall not be permitted to utilize a shared private driveway for access. Such development's shall access their sites by public rights-of-way, private rights-of-way/easements, or utilize joint/cross access easements.

A shared private driveway is not required to be improved with asphalt or concrete paving rather the developer may utilize a base course of their choosing for the traveled way. Such base course shall consist of an all-weather surface capable of supporting emergency

apparatus. The traveled portion of a shared private driveway shall be no less than 20 feet in width and shall have no obstructions within 5 feet of the edge of such traveled way. The shared private driveway shall be shown on the plat presented for recording and shall be located within a non-exclusive and appurtenant easement that is either **30 feet wide (when on-site septic will service the lots)** or 50 feet wide (when the lots will be served by public water/sewer). Larger easements may be provided to accommodate future development needs.

The notation below shall be shown on the plat presented for recording:

“Access is provided to lots (lot numbers) through the use of a (insert easement size)-foot nonexclusive and appurtenant easement. The access easement and driveway shall be owned and maintained collectively by the property owner(s) of the adjacent lots. Horry County shall not be responsible for the maintenance of or the improvement to the easement.”

Shared private driveways 150ft or greater in length are required to show a cul-de-sac on at the terminus of the easement. No shared private driveway may be longer than 1800ft in length without receiving a design modification from the Planning Commission. No shared private driveway shall originate from another shared private driveway. **They may access off an existing or proposed improved access easement.** A shared private driveway may not be used as access for a commercial lot. Except as provided for in Article 7, Section 1-9, a shared private driveway shall serve a maximum of three lots. Further subdivision of the parcels fronting along the shared private driveway, beyond three lots, shall require that driveway be upgraded to the right-of-way requirements shown in Table 4-D. Shared private driveways are not eligible for dedication to Horry County.

(Ord. 155-02, § 2-6(Q), 12-17-02, Ord. 28-05, § 2-6(Q), 04-05-05)

Mr. Fowler when he submitted the Affiliated Surveyor's Plat created a private shared driveway. Dolly Lane was removed. According to **Article 4 - Design Standards, Section 2Q (Shared Driveways) page 71 which was in effect at the time of the recording (last change to this LDR was 04-05-05 – see attached LDR), Mr. Fowler was required to have on his Plat the required notification.** The word shall according to Article 8 – Definitions page 133 means it is “always mandatory”. A review of the Affiliated Plat dated May 2006 clearly shows there is no such notation on this Plat. Please see Affiliated Surveyor's Plat.

Section 2, Article 4-9, page 31 of the HC LDR's mandated for Mr. Fowler to get the signature of all effected property owners to include the joint Plaintiff, Kimber Fowler when Mr. Fowler created his 50 foot private easement to hook up to Kimber Fowler's property. It required him to include on the Plat a mandatory statement in order to create this easement pursuant **Section 2, 4-9(2).** This was not done on the Affiliated Surveyor's Plat and the Court should note this is not on the Plat. **Section 2, 4-9(5)** clearly states that

on the Plat the type easement has to be noted. See Attached Section 2, Article 4-9, page 31 of the HC LDR's attached providing as follows:

1. Easements (existing or proposed) shall be clearly delineated with dashed lines marking the boundaries;
2. The statement, "This is not a subdivision. This _____ foot easement is being (created, relocated, altered) for the purpose of _____ and will be owned by _____."; or, "This is not a subdivision. This _____ foot easement is being (abandoned, conveyed) to _____";
3. When multiple easements are being created/abandoned each easement may be numbered instead of providing the statements required in item 2, above. If numbered, a table shall be created that references each number which includes the dimensions, purpose and ownership of the easement; and
4. All affected property owners must sign the plat.
5. Easements shall be labeled appropriately as to indicate the type of easement, easement width, and whether the easement is public or private.

This very same LDR was in existence at the time of the recording of Mr. Fowler's Affiliated Surveyor's Plat in May 2006. The last change in this LDR occurred April 5, 2005. The May 2006 Affiliated Surveyor's Plat did not comply with Section 2, 4-9(2), 4-9(4), and 4-9(5) (plat did not indicate the type easement).

Regarding the so called Dolly Lane depicted on Mr. Fowler's Affiliated Surveyor's Plat, the HC Planning Department failed to comply with Article 4, Section 7, 7-3(A) Uniform Naming System page 93 of the HC LDR which was in effect then. The last change in this LDR was February 17, 2004. Please see attached LDR page 93 and page 97. The date of the Affiliated Plat for recording was May 2006. Section 7, 7-3(A) Uniform Naming System page 93 provided as follows:

7-3 Uniform Naming System

The uniform naming system uses the following as guidelines for the naming of all streets and easements that meet the following:

A. A street is defined as any right-of-way or access where:

1. **Three (3) or more residences or businesses are located along the street;**
2. The street is a thoroughfare to another street; or
3. The street is publicly maintained

Note: Shared driveways, as defined in the Horry County Land Development Regulations, shall not be assigned an official street name.

(Ord. 08-04, § 2-12, 2-17-04)

A review of the May 2006 Affiliated Surveyor's Plat shows that the so called "Dolly Lane" which is the legal property of Kimber Fowler ends at the northern end of the Plaintiff, Kimber Fowler's property. It is approximately 70 yards long and it is not even the length of a football field. **There was only one household that lived along the Dolly Lane according to the Affiliated Surveyor's Plat.** This particular household belongs to Mr. Kenneth Dippel. The other three households shown on this Plat did not live along side Dolly Lane and to date do not live along Dolly Lane. **They live along Mr. Fowler's private shared driveway.** "Private shared driveways shall not be named a street" according to **Article 4, 7-3(A).** The so called Dolly Lane residence should not even have a Dolly Lane address. Dolly Lane did not at the time of the recording of the Affiliated Surveyor's Plat meet the definition of a street pursuant to **Article 4, 7-3(A)(1) page 93.** Three household residences are required. **Dolly Lane currently cannot even exist as a named street because it does not have three residences living along side it and it has never been maintained by the County.** Please see attached letter noting the County does not maintain Dolly Lane. Therefore, the so called "Dolly Lane" noted on this Plat should have never been even recognized as a street in May 2006 when the Affiliated Plat was approved for recording.

Based on the consideration of the foregoing, the Plaintiffs respectfully must state the Affiliated Surveyor's Plat is not legally enforceable. The HC Planning Department did not follow its own rules and regulations. The HC Planning Department and the HC Planning Commission also did not comply with the SC Court of Appeals' decision or latest Master in Equity Ruling which both held no **private easement existed for Mr. Claudius E. Fowler.** The Court should based on the foregoing, issue an order specifically holding the Affiliated Surveyor's Plat (May 2006) is not legally enforceable.

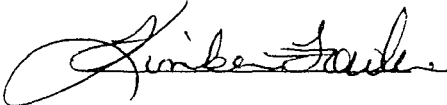
CONCLUSION

WHEREFORE, having fully set forth their Complaint, the Plaintiffs pray for the following relief from this Honorable Court:

1. The Plaintiffs be granted an injunction ordering the Horry County Planning Department to approve the new Plat (Crescent Moon Plat) for recording.
2. That an injunction be granted ordering the Defendants, the Horry County Planning Department or Horry County Planning Commission to remove "Dolly Lane" off Kimber Fowler's property the same manner they did for Mr. Claudius E. Fowler.
3. That an injunction be granted to stop the continued unlawful trespassing and transgression on the Plaintiff, Kimber Fowler's property.

4. That this Honorable Court awards such other and further relief as it may deem just, necessary, equitable, and proper to include but not limited to a quiet title to quash all easement claims against the property of Kimber Fowler, joint Plaintiff.

Respectfully submitted,

 Kimber Fowler, Plaintiff

 Kenneth Dippel, Plaintiff

8-11-2009

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Summons and Complaint in this action, dated 8-11-2009 on the **Horry County Planning Department** by mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope via certified mail, restricted delivery with sufficient postage affixed, addressed as follows:

JANET CARTER, HORRY COUNTY PLANNING DEPARTMENT
Planning & Zoning
Government & Justice Center
1301 Second Avenue
Conway, SC 29526

8-11-2009
(Date)

Mr. Appel
(Signature)

(8-11-09)
(Date)

Kimberly Faulkner
(Signature)

FILED
HORRY COUNTY
AUG 11 AM 10:45
MELANIE HUGHES
CLERK OF COURT

STATE OF SOUTH CAROLINA
CERTIFICATE OF TITLE
OF A VEHICLE

VEHICLE ID NUMBER
VAFLK19A25173SP

YEAR
1990

MAKE
FLET

MODEL
VAFLK1

NEW/USED
USED

BODY STYLE
MBH

DATE
06/06/2005

ODOMETER
0

WEIGHT
0

TITLE NUMBER
770260143951945

VEHICLE BRAND(S)
EXEMPT

FULL NAME OF OWNER(S)
DIPPEL, KENNETH D
2153 DOLLY LN
LORIS SC 295695484

CUSTOMER NUMBER: 30914308

THE SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES HEREBY CERTIFIES THAT THE
PERSON HEREIN IS REGISTERED BY THIS DEPARTMENT AS THE LAWFUL OWNER OF THE
VEHICLE DESCRIBED SUBJECT TO THE LIENS, IF ANY, HEREIN SET FORTH.

MARCIA S. ADAMS
EXECUTIVE DIRECTOR

MARK SANFORD
GOVERNOR

KEEP IN A SAFE PLACE ANY ALTERATION OR ERASURE VOIDS THIS TITLE

36370458

STATE OF SOUTH CAROLINA,

MASTER'S DEED

COUNTY OF Horry

WHEREAS, Nicky Gene Fowler, et al., on or about the 29th day of December in the year of our Lord one thousand, nine hundred Eighty did file Complaint in the Court of Common Pleas for the County of Horry State of South Carolina, against Jennie Bell Fowler, et al.

AND WHEREAS, the action being at issue, was heard by the Honorable the said Court on the 29th day of September in the year of our Lord one thousand, nine hundred Eighty-One whereupon the Judge of said Court, after full hearing thereof and mature deliberation in the premises, did ORDER, ADJUDGE, AND DECREE that the premises particularly set forth and described hereinafter, should be sold by John L. Breeden, Jr.,

as Master, hereinafter called party of the first part, on the terms and for the purposes mentioned in said Decretal Final Order, all of which will more fully appear by reference to the registry of the said Court, Judgement Roll No. 52515, and the terms of the said order, and the said parties of the first part, did then sell the premises for sale at public outcry on the 29th day of September, 1982, at the year of our Lord one thousand, nine hundred Eighty-Two, at the place and in the manner of auction, after the said premises for sale, and John L. Breeden, Jr., as Master, as provided by law, did then sell the same unto Eugene Fowler, Route 2, Loris, South Carolina 29569, BOY 36

of the County of Horry, State aforesaid, hereinafter called parties of the second part, whether one or more, for a sum of Five (\$5.00) Dollars, Partition of Porter F. Fowler Estate (\$5.00 Dollars), to be paid to the highest bidder for the same.

NOW KNOW ALL MEN BY THESE PRESENTS That the said party of the first part, in consideration of the premises and the sum of Five (\$5.00) Dollars paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell, and release, unto the said parties of the second part

Eugene Fowler, his heirs and assigns:

ALL AND SINGULAR, all that certain piece, parcel or lot of land situate, lying and being in Simpson Creek Township, Horry County, South Carolina and being shown and designated at Tract D on a plat prepared for the estate of P. F. Fowler by S. D. Cox Surveyors, Inc., dated November 9, 1981, and recorded in Plat Book 73 at Page 26, Office of the Clerk of Court for Horry County.

This being a portion of the property conveyed to P. F. Fowler by deed of Minnie Ward Hewett recorded in Deed Book 14 at Page 48, Office of the Clerk of Court for Horry County.

FILED
HORRY COUNTY
1982 APR 16 PM 4 34
CLERK OF COURT

Together with all and singular the hereditaments, rights, members and appurtenances whatsoever to the said premises belonging, or in any wise appertaining, and the reversions and remainders, rents, issues, and profits thereof; and also the estate, right, title, interest, dower, possession, property, benefit, claim and demand whatsoever of all the parties to the said suit, as well as of all other persons rightfully claiming or to claim the same or any part thereof by, from, or under them or through either of them.

TO HAVE AND TO HOLD the said premises, with its hereditaments, privileges, and appurtenances, unto the said parties of the second part, his heirs and assigns, forever.

IN WITNESS WHEREOF, I, the said John L. Breeden, Jr. as Master, under and by virtue of the said Decretal Final Order, have hereunto set my Hand and Seal, this the 15th day of March in the year of our Lord one thousand nine hundred Eighty-Two, and in the two hundred and Fifth year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered in the Presence of

Kathy G. Ward
Mary Alice Cox

John L. Breeden, Jr.
Master for Horry

(L. S.)
Corry

THE STATE OF SOUTH CAROLINA

by John L. Breeden, Jr. Master,

TO

Eugene Fowler

Rt 2 Box 36

L.C.S. SC. 29569

TITLE TO REAL ESTATE

STATE OF SOUTH CAROLINA,

County of

I hereby certify that the within Deed was

filed for record in my office at

o'clock on the 15th day of March,

1982, and immediately entered on the prop-

er indexes and duly recorded in Deed Book

740 at Page 313

William G. Calhoun

Clerk of Court of Common Pleas and General

Sessions, Register of Mease County

Recorded this day of

1982, in Book Page

Fee \$

Auditor

County.

NO. 34

Timesaver Publishing Co.

Conway, S. C.

THE SAYER
PUBLISHING

THE STATE OF SOUTH CAROLINA,

County of Horry

PROBATE

PERSONALLY appeared Kathy G. Ward
deponent saw John L. Breeden, Jr. as Master, sign, seal and as his act deliver the within deed;
and that deponent, together with Mary Alice Cox
thereof and signed their names as witnesses thereto.

and made oath that the de-
witnessed the due execution

SWORN to before me, this 15th

day of March, 1982

Mary Alice Cox (L. S.)

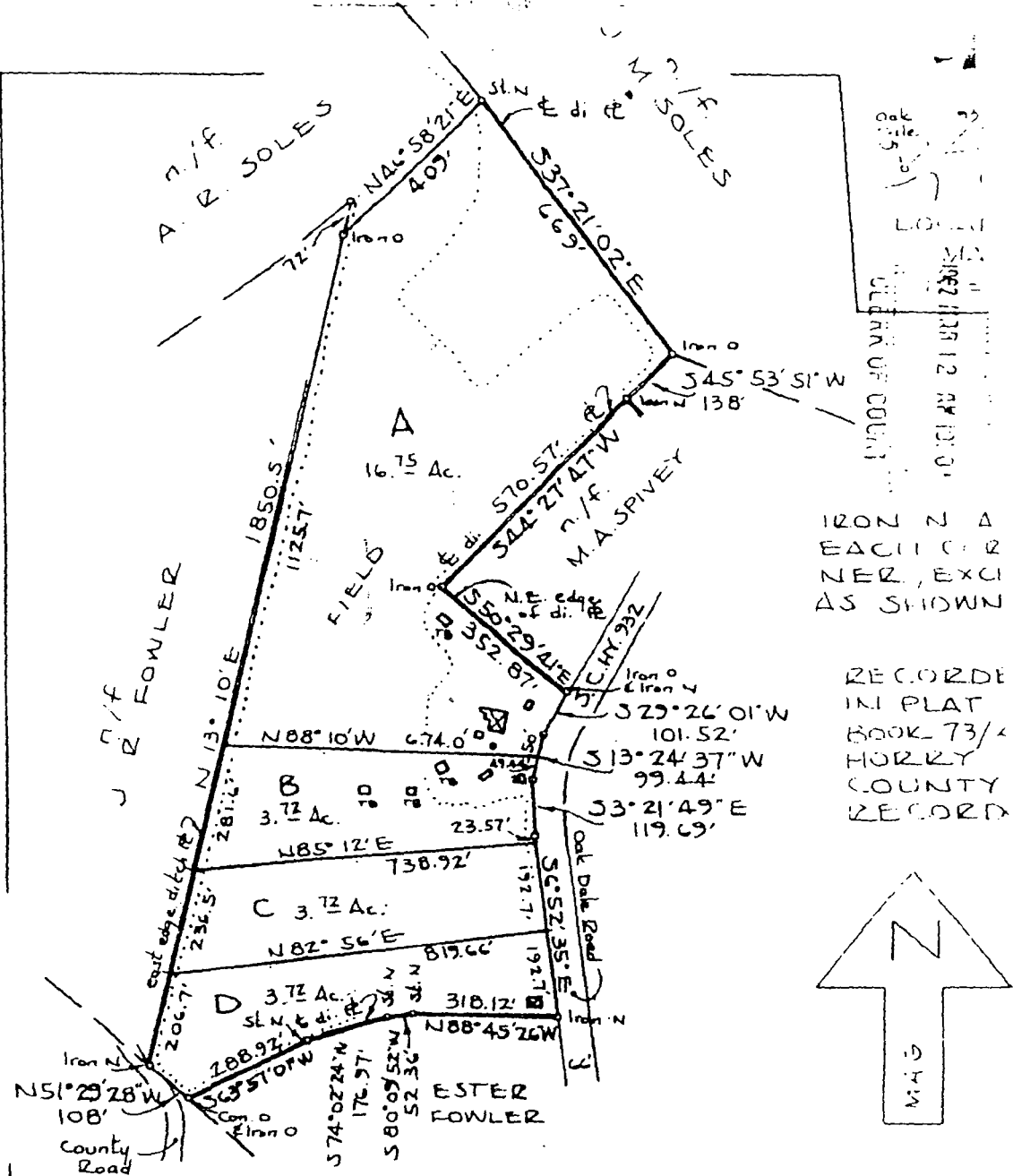
Notary Public for South Carolina

11-15-89

My commission expires

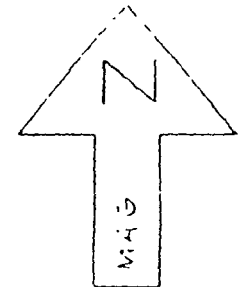
740 PAGE 313

Kathy G. Ward



IRON N A
EACH COR
NER, EXC
AS SHOWN

RECORDED
IN PLAT
BOOK 73/
HORRY
COUNTY
RECORD



- MAP -

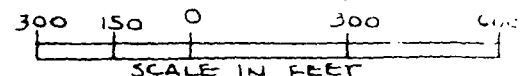
OF 27.92 ACRES OF LAND IN SIMPSON CREEK
TOWNSHIP, HORRY COUNTY, S.C. OWNED BY

EST. of P. F. FOWLER

RE: MAP BY S. D. COX, JR. DATED FEBRUARY 2, 1942
FOR P. F. FOWLER (E-242).

RE: DEED FROM MINNIE WARD HEWETT TO P. F.
FOWLER RECORDED IN BOOK 14/48, HORRY COUNTY
RECORDS.

NOVEMBER 9, 1981



S. D. COX SURVEYORS, INC.
700 4th Ave. Conway, S.C. 29526
"Ratio 1: 2500+, D.M.D. Calculation"

BY *[Signature]*

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

688552
FILED
HORRY COUNTY, S.C.
99 AUG -9 PM 3:51
REGISTER OF DEEDS

HORRY COUNTY ASSESSOR

040-00-01-122

Map

Blk

Parcel 8-10-99

PRESENTS,

KNOW ALL MEN BY THESE

That I, Eugene Fowler A/K/A Claudus E. Fowler in the state aforesaid for and in consideration of the sum of One and No/100 (\$1.00) DOLLAR LOVE AND AFFECTION

to me paid by Timothy E. Fowler and Kimberly R. Fowler

2145 Oak Dale Road
Loris, SC 29569

446-8544
(n) 716-0699

in the State aforesaid, (Receipt whereof is hereby acknowledged) I

have granted, bargained, sold and released; and by these presents do grant, bargain, sell and release unto the said Timothy E. Fowler and Kimberly R. Fowler, their heirs and assigns forever, reserving unto myself and my wife, Terry H. Fowler, a life time right:

All and Singular, all that certain piece, parcel lot of land lying, situate and being in Simpson Creek Township, County and State aforesaid shown and designated as Lot Number One containing 0.99 acres, more or less on that certain map of survey by Inman Surveying and Mapping dated June 17, 1999 and recorded in the ROD Office for Horry County in Plat Book 163 at Page 228, which is incorporated herein by reference and becomes part and parcel hereof.

Said lot is bounded on the North by lands of Mearl Dean Fowler; on the South by lands now or formally Ester Fowler; on the East by South Carolina Highway Number 932; and on the West by Lot Two as shown on said plat.

DERIVATION: DEED BOOK 740 AT PAGE 312.

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the

BOOK 2175 PAGE 001

EXEMPT

THIS INSTRUMENT PREPARED BY
WILLIAM V. JOSEPH, JR., ATTY.
WITH NO CERTIFICATE OF TITLE

said Timothy E. Fowler and Kimberly R. Fowler, their heirs and assigns forever,
reserving unto myself and my wife, Terry H. Fowler, a life time right.

And I do hereby bind myself and my Heirs and Executors and Administrators, to
warrant and forever defend all and singular the said premises unto the said: Timothy E.
Fowler and Kimberly R. Fowler, their heirs and assigns forever, reserving unto myself
and my wife, Terry H. Fowler, a life time right, Heirs and Assigns, against me and my
Heirs, and all persons whomsoever lawfully claiming, or to claim the same or any part
thereof.

Witness the execution hereof by grantor this 10th day of August

in the year of our Lord one thousand nine hundred and NINETY NINE

and in the TWO HUNDREDTH AND TWENTY THIRD year of the Sovereignty
and Independence of the United States of America.

Eugene Fowler
EUGENE FOWLER A/K/A

CLAUDUS E. FOWLER

Claude E. Fowler

Signed, Sealed and Delivered
in the Presence of

Ann J. Wade
Grace Lynn Wade

THIS INSTRUMENT PREPARED BY
WILLIAM V. JOSEPHS, JR., ABOOK 2175 PAGE 002
WITH NO CERTIFICATE OF TITLE

STATE OF SOUTH CAROLINA,
COUNTY OF HORRY

PERSONALLY appeared before me, Tracy Lynn Wade and made oath that she saw the within named Eugene Fowler A/K/A Claudus E. Fowler Sign, Seal and as his Act and Deed deliver the within written Deed; and that she with William V. Josephs, Jr. witnessed the execution thereof.

Sworn to before me this 10th

day of August A.D. 1999

WVJ
Notary Public for South Carolina

My Commission Expires: 9-29-2008

Tracy Lynn Wade

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF HORRY)

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. Property located at **Simpson Creek Township**, bearing **Horry County Tax Map Number** _____, was transferred by **Eugene Fowler A/K/A Claudus E. Fowler** to **Timothy E. Fowler and Kimberly R. Fowler** on August 4, 1999.

The transaction was (Check One):

_____ an arm's length real property transaction and the sales price paid or to be paid in money or money's worth was \$

_____ XXXXXX not an arm's length real property transaction and the fair market value of the property is \$ 75,000.00

The above transaction is exempt, or partially exempt, from the recording fee as set forth in S.C. Code Ann. Section 12-24-10 et seq. because the deed is transferring to a family member

As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: _____.

I further understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Eugene Fowler Claudus E. Fowler
Purchaser, Legal Representative of the Purchaser, or
other Responsible Person Connected with the Transaction

SWORN to before me this 6th

day of August, 1999

Tracy Lynn Wade
Notary Public for South Carolina

My Commission Expires: 10/10/2001

109

BOOK 2175 PAGE 004

THIS INSTRUMENT PREPARED BY
WILLIAM V. JOSEPHS, JR., ATTY.
WITH NO CERTIFICATE OF TITLE

4

343684

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

FILED
HORRY COUNTY, S.C.
TITLE TO REAL ESTATE
(No Title Examination Performed)
JUL 8 AM 1999

REGISTER OF DEEDS

WHEREAS, by that certain Deed dated August 6, 1999, and recorded on the 9th day of August, 1999, in Deed Book 2175, at Page 1, in the Office of the Horry County R.O.D., I, Eugene Fowler, a/k/a Claudus E. Fowler, conveyed the below-described property unto Timothy E. Fowler and Kimberly R. Fowler, reserving unto myself and my wife, Terry H. Fowler, a lifetime right thereto; and

WHEREAS, the purpose of the within deed is to convey the above mentioned lifetime right unto Timothy E. Fowler and Kimberly R. Fowler, NOW, THEREFORE

KNOW ALL MEN BY THESE PRESENTS, that Eugene Fowler, a/k/a Claudus E. Fowler and Terry H. Fowler, of the County of Horry, in the State aforesaid for and in consideration of the sum of FIVE AND NO/100 (\$5.00) DOLLARS, to us paid by Timothy E. Fowler and Kimberly R. Fowler in the State aforesaid, receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presents does grant, bargain, sell and release all of our right, title and interest, the same being a life estate, unto the said Timothy E. Fowler and Kimberly R. Fowler, their heirs and assigns forever, in and to the following described property:

SEE ATTACHED EXHIBIT "A" FOR LEGAL DESCRIPTION.

Together with all and singular, the Rights, Members, Hereditament and Appurtenances to the said premises belonging, or in anywise incident or appertaining.

EXEMPT

DEED
2278 0358

358

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Timothy E. Fowler and Kimberly R. Fowler, their Heirs, Successors and Assigns forever.

And the Grantors herein hereby bind themselves and their heirs and/or assigns to warrant and forever defend all and singular the said premises unto the said Timothy E. Fowler and Kimberly R. Fowler, their Heirs and Assigns against themselves, and their heirs and/or assigns, and all persons whomsoever lawfully claiming, or claim the same or any part thereof.

WITNESS the execution hereof by grantors this 28 day of June, in the year of our Lord Two Thousand and in the two hundred and twenty-third year of independence of the Sovereignty and Independence of the United States of America.

WITNESSES:

Lorina R Cagle

Hazel Dew

Eugene Fowler

Eugene Fowler, a/k/a Claudus
E. Fowler

Terry H. Fowler
Terry H Fowler

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

P R O B A T E

PERSONALLY appeared before me, the undersigned witness and made oath that (s)he saw the within named Eugene Fowler, a/k/a Claudus E. Fowler and Terry H. Fowler, sign, seal and as their act and deed, deliver the within written deed and that (s)he with the other witness whose name is subscribed above witnessed the execution thereof.

SWORN to me this 28
day of June, 2000.

Regina D. Cagle
Notary Public for South Carolina
My Commission Expires: 8/12/04

Hazel Dew

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

A life estate in the property described as Lot Number One containing 0.99 acres was transferred from Eugene Fowler, a/k/a Claudus E. Fowler and Terry H. Fowler to Timothy E. Fowler and Kimberly R. Fowler.

The transaction was (check one):

_____ An arm's length real property transaction and the sale price paid or to be paid in monies worth _____

_____ Not an arm's length real property transaction and the fair market value of the property is \$_____.

XXXX The above transaction is exempt, or partially exempt, from the recording fee as set forth in S.C. Code Ann., §12-24-10 et. seq. because the deed is: Exception 1 - consideration is less than \$100.00

As required by §12-24-70, I state that I am a responsible person who was connected with the transaction as Purchaser.

I further understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than One Thousand and NO/100 (\$1,000.00) Dollars, or imprisoned more than one (1) year, or both.

Timothy E. Fowler
Timothy E. Fowler

SWORN to before me this 28
day of June, 2000.

[Signature]
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 12-15-05

EXHIBIT "A"

ALL AND SINGULAR, all that certain piece, parcel and lot of land situate, lying and being in Simpson Creek Township, County and State aforesaid, shown and designated as Lot Number One, containing 0.99 acres, more or less on that certain survey prepared by Inman Surveying and Mapping, dated June 17, 1999, and recorded in the Office of the Horry County R.O.D. in Plat Book 163 at Page 228, which is incorporated herein by reference as a part and parcel hereof.

BOUNDED on the North by lands of Mearl Dean Fowler; on the South by lands now or formerly of Ester Fowler; on the East by South Carolina Highway Number 932; and on the West by Lot Two as shown on said plat.

BEING the identical property conveyed to Timothy E. Fowler and Kimberly H. Fowler by Eugene Fowler, a/k/a Claudus E. Fowler by Deed recorded in Deed Book 2175 at Page 1, Office of the Horry County R.O.D. on August 9, 1999, wherein Eugene Fowler, a/k/a Claudus E. Fowler reserved a life estate unto himself and his wife, Terry H. Fowler.

TMS NUMBER: 040-00-01-056

HORRY COUNTY ASSESSOR

040-00-01-122

Map

Blk

Parcel

7-7-0075

2145 Galadale Rd

319198

163.22

I hereby state to the best of my knowledge, information and belief, the survey shown hereon was made in accordance with the Minimum Standards Manual for the Practice of Land Surveying in South Carolina, and meets or exceeds the requirements for a Class B survey as specified therein.

Robert D. Inman
Robert D. Inman, RLS 6675

NOTE: These lots are for conveyance to immediate family members.
Eugene Fowler - Father
Timothy Fowler and Kimberly R. Fowler - Son and wife
Angela Fowler - Daughter
Amanda D. Fowler - Granddaughter

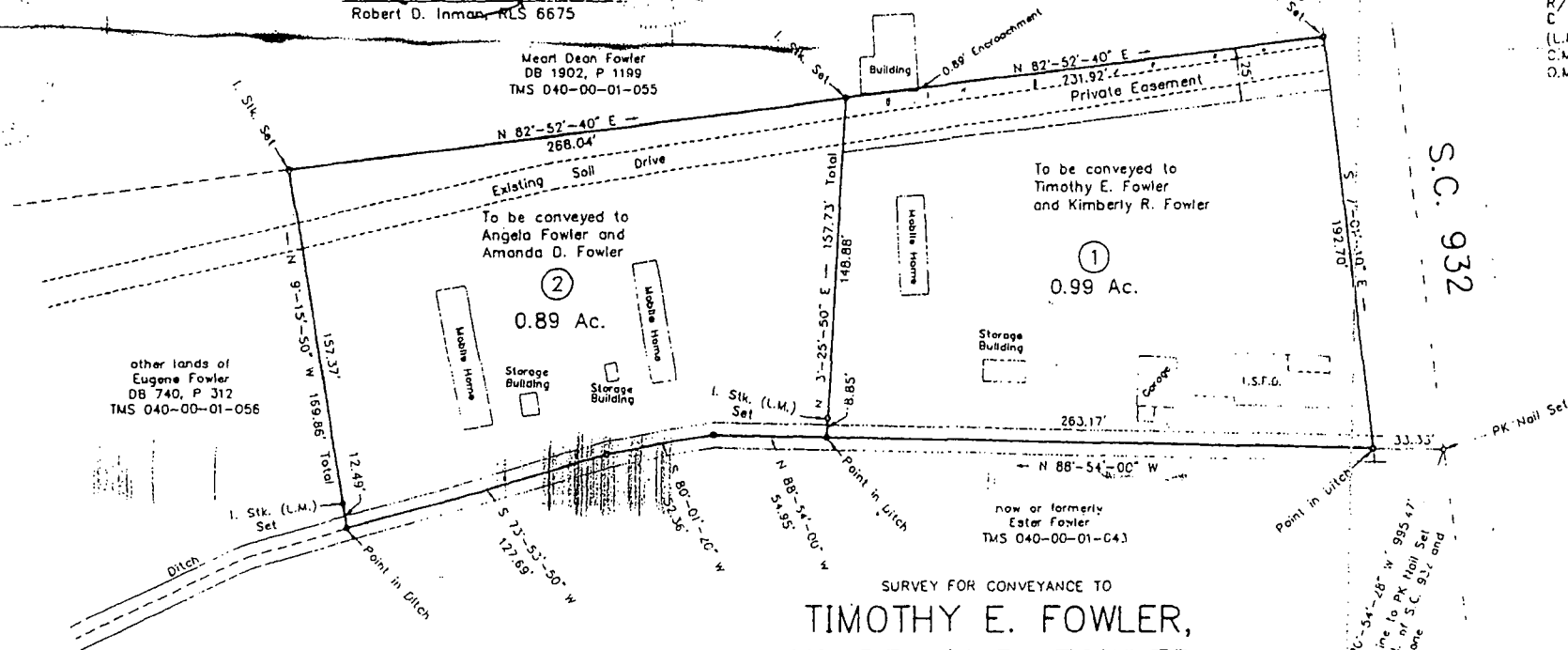
FILED
HORRY COUNTY

99 JUL 19 AM 9:50

R.M.C.

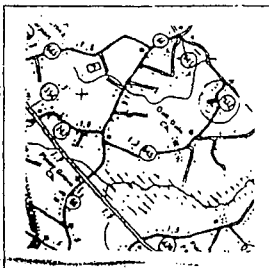
LEGEND

- I.P. = Iron Pipe
- I.Stk. = Iron Stake
- L.W. Stk. = Lightwood Stake
- Stp. = Stump
- R.R.Spk. = Railroad Spike
- Fd. = Found
- R/W = Right of Way
- C = Centerline
- (L.M.) = Line Marker
- C.M. = Concrete Monument
- O.M.L. = Old Marked Line



other lands of
Eugene Fowler
DB 740, P 312
TMS 040-00-01-056

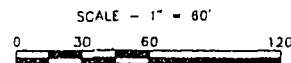
VICINITY MAP



REF: These lots being a part of
DB 740, P 312
TMS 040-00-01-056

SURVEY FOR CONVEYANCE TO
**TIMOTHY E. FOWLER,
KIMBERLY R. FOWLER,
ANGELA FOWLER and
AMANDA D. FOWLER**

LOCATED IN
SIMPSON CREEK TOWNSHIP
HORRY COUNTY, SOUTH CAROLINA
DATE OF SURVEY - 17 JUNE, 1999



INMAN SURVEYING AND MAPPING
P. O. BOX 637, TABOR CITY, NC 28463

APPROVED
for filing as an
Exempt *family transfer*

Neil Vester 7-19-99

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

FILED
HORRY COUNTY, S.C.
2005 APR 21 AM 11:23

TITLE TO REAL ESTATE

BALLERY V. SKIPPER
REGISTRAR OF DEEDS

ALL MEN BY THESE PRESENTS,

That I, **TIMOTHY E. FOWLER**, in the State aforesaid for and in consideration of the sum of One Dollar and No/100 (\$1.00) Dollar and pursuant to that certain Final Order in the Family Court for the Fifteenth Judicial Circuit in Case No. 04-DR-26-1603, to me paid by **KIMBERLY R. FOWLER, 2145 OAK DALE ROAD, LORIS, SC, 29569** (Receipt whereof is hereby acknowledged) have granted, bargained, sold and released; and by these presents do grant, bargain, sell and release unto the said, **KIMBERLY R. FOWLER**, her heirs and assigns forever the following below described property to wit:

ALL AND SINGULAR, all that certain piece, parcel and lot of land situate, lying and being in Simpson Creek Township, County and State aforesaid, shown and designated as Lot Number One, containing 0.99 acres, more or less on that certain survey prepared by Inman Surveying and Mapping, dated June 17, 1999, and recorded in the Office of the Horry County R.O.D. in Plat Book 163 at Page 228, which is incorporated herein by reference as a part and parcel hereof.

BOUNDED on the North by lands of Mearl Dean Fowler; on the South by lands now or formerly of Ester Fowler; on the East by South Carolina Highway Number 932; and on the West by Lot Two as shown on said plat.

BEING the identical property conveyed to Timothy E. Fowler and Kimberly H. Fowler by Eugene Fowler, a/k/a Claudus E. Fowler by Deed recorded in Deed Book 2175 at Page 1, Office of the Horry County R.O.D. on August 9, 1999, wherein Eugene Fowler, a/k/a Claudus E. Fowler reserved a life estate unto himself and his wife, Terry H. Fowler.

This being the same tract or parcel of land conveyed by deed recorded July 6, 2000 and recorded in Deed Book 2278 at Page 358, office of the Register of Deeds for Horry County, South Carolina.

TMS NUMBER: 040-00-01-056

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said **KIMBERLY R. FOWLER**, her heirs and assigns forever.

And I do hereby bind myself and my Heirs and Executors and Administrators, to Warrant and forever defend all and singular the said premises unto the said **KIMBERLY R. FOWLER**, her heirs and assigns forever, against me and my heirs, and all persons whomsoever lawfully claiming,

or to claim the same or any part thereof.

Witness the execution hereof by grantor this 20th day of April, 2005 in the year of our lord two thousand and four in the two hundredth and twenty-eighth year of the Sovereignty and Independence of the United States of America.

Timothy E. Fowler (Seal)
TIMOTHY E. FOWLER

SIGNED, SEALED and DELIVERED
IN THE PRESENCE OF:

Lisa Spivey
Witness

Janet Hausman
Witness

STATE OF NORTH CAROLINA

COUNTY OF Columbus

Personally appeared before me the undersigned witness and made oath that (s)he saw the within named **TIMOTHY E. FOWLER**, Sign, Seal and as his Act and Deed deliver the within written Deed; and that (s)he with the undersigned notary witnessed the execution thereof.

Sworn to before me this 20th
day of April, 2005.

June L. Edge (L.S.)
Notary Public for North Carolina
My Commission Expires: 10/3/2005

Lisa Spivey
Witness

AFFIDAVIT

1. Property located at Simpson Creek Township, bearing Horry County
Tax Map Number 040-00-01-056, was transferred by Timothy E. Fowler on the 20th
day of April, 2005.

_____ an arm's length real property transaction and the sales price paid or to be paid in money or money's worth was \$ _____ *

✓ The above transaction is exempt, or partially exempt, from the recording fee as set forth in S.C. Code Ann. Section 12-24-10 et. Seq. Because the deed is (See back of affidavit.):

As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Affixing

Purchaser, Legal Representative of the Purchaser, or
Other Responsible Person Connected with the Transaction

Notary Public for North Carolina
My Commission Expires: 10-3-2005

118

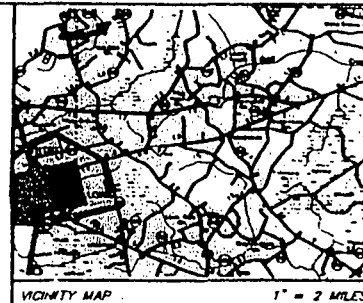
214-12

STATE OF SOUTH CAROLINA
Horry County
I, JAMES E. HAYES, JR. HEREBY STATE THAT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF THE SURVEY AS SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE MINIMUM STANDARDS MANUAL FOR THE PRACTICE OF LAND SURVEYING IN SOUTH CAROLINA AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS 2 SURVEY AS SPECIFIED THEREIN.

JAMES E. HAYES, JR. REG. # 35127
1937 MAIN STREET
LORIS, S.C. 29556

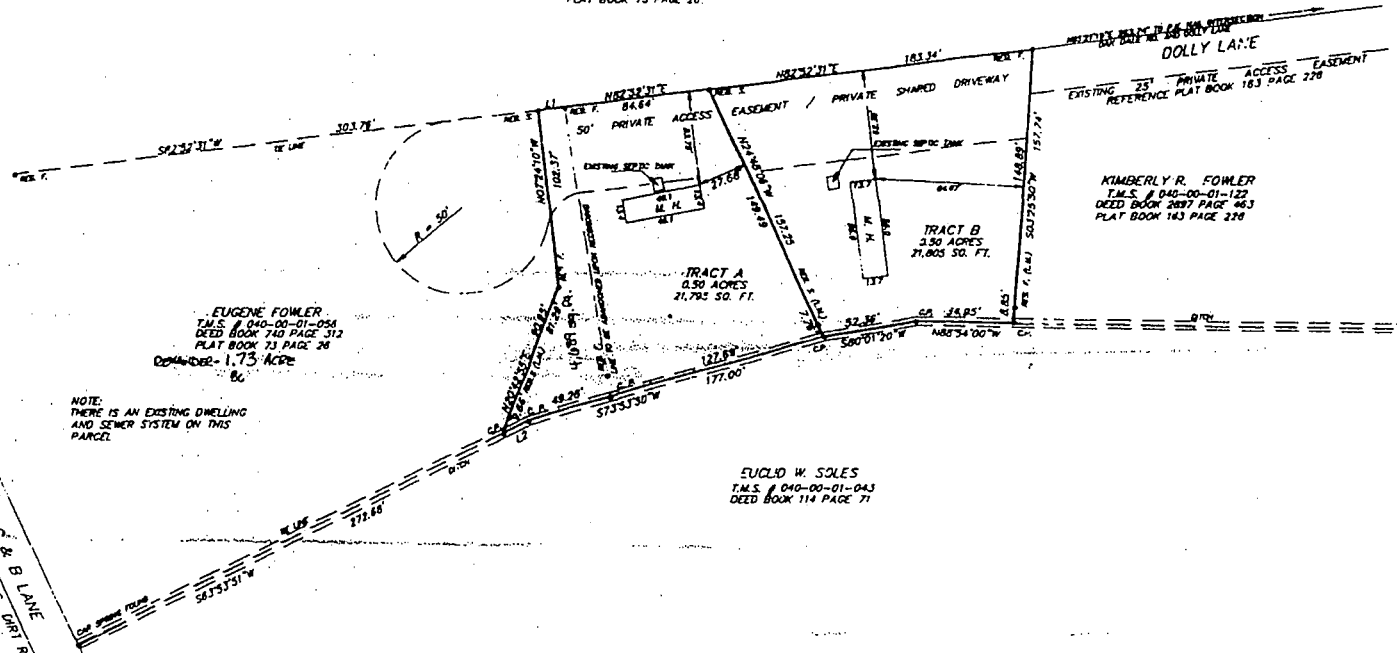
RECORDED
2005 MAY 15 AM 9:53
REGISTRAR OF DEEDS

LINE	BEARING	LENGTH
L1	N82°58'31"E	16.00'
L2	S83°54'27"W	16.47'



- LEGEND:
- REB. S. REBAR SET
 - REB. F. REBAR FOUND
 - I.P.S. IRON PIPE SET
 - I.P.F. IRON PIPE FOUND
 - P.K.S. P.K. NAIL SET
 - P.K.F. P.K. NAIL FOUND
 - C.P. COMPUTED POINT
 - R/R S. RAILROAD SPIKE SET
 - R/R F. RAILROAD SPIKE FOUND
 - CONC. S. CONCRETE MONUMENT SET
 - CONC. F. CONCRETE MONUMENT FOUND
 - L.W.S. LIGHTWOOD STAKE FOUND

JOE DALE FOWLER
T.M.S. # 040-00-01-055
DEED BOOK 2368 PAGE 72
PLAT BOOK 73 PAGE 26



- NOTES:
- 1) THIS PARCEL IS LOCATED IN FLOOD ZONE "X" AS SHOWN ON PANEL NO. 43C-00250 H DATED AUGUST 28, 1988 - FEDERAL INSURANCE ADMINISTRATION FLOOD INSURANCE RATE MAPS.
 - 2) PARENT TAX MAP NO. T.M.S. # 040-00-01-123 & 038
 - 3) DATE OF FIELD SURVEY: APRIL 18, 2006
 - 4) THIS PROPERTY IS SUBJECT TO ANY AND ALL EASEMENTS AND/OR RIGHTS-OF-WAY OF RECORD.
 - 5) OWNER OF RECORD: EUGENE FOWLER
 - 6) LAND USE: RESIDENTIAL
 - 7) TOTAL ACREAGE: 4.00 ACRES
 - 8) NO S.C. GEODETIC CONTROL FOUND WITHIN 2000'
 - 9) REFERENCE: PLAT BOOK 163 PAGE 228
PLAT BOOK 73 PAGE 26
DEED BOOK 740 PAGE 312

NOTE:
THERE IS AN EXISTING DWELLING AND SEWER SYSTEM ON THIS PARCEL.

KIMBERLY R. FOWLER
T.M.S. # 040-00-01-122
DEED BOOK 2697 PAGE 463
PLAT BOOK 163 PAGE 226

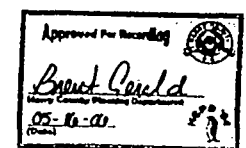
EUGENE W. SOLES
T.M.S. # 040-00-01-043
DEED BOOK 114 PAGE 71

CERTIFICATE OF OWNERSHIP AND DEDICATION
THE UNDERSIGNED HEREBY ACKNOWLEDGE THAT I AM (WE ARE) THE OWNERS OF THE PROPERTY SHOWN AND DESCRIBED HEREON AND THAT I (WE) HEREBY ADOPT THIS (PLANS OF DEVELOPMENT/PLAT) WITH MY (OUR) FREE CONSENT AND THAT I (WE) HEREBY DEDICATE ALL RIGHTS AS SPECIFICALLY SHOWN OR INDICATED ON SAID PLAT.
NAME: Eugene Fowler SIGNATURE: _____ DATE: 5-16-06
NAME: _____ SIGNATURE: _____ DATE: _____

CERTIFICATION OF APPROVAL FOR ON-SITE SEWAGE DISPOSAL SYSTEMS
THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL HAS REVIEWED AND EVALUATED THE LOTS SHOWN HEREON AND FIND THAT THE FOLLOWING LOTS _____ HAVE SUFFICIENT AREA FOR THE PLACEMENT OF A SINGLE ON-SITE SEWAGE SYSTEM.
DATE: _____ NAME: _____ OF: _____ SIGNATURE: _____

AFFILIATED SURVEYORS

LICENSED IN NORTH CAROLINA, SOUTH CAROLINA, & GEORGIA
JAMES E. HAYES, JR. PROFESSIONAL LAND SURVEYOR
1937 MAIN STREET POST OFFICE BOX 122
LORIS, SOUTH CAROLINA 29556
PHONE: (843) 756-3122



SURVEY FOR
EUGENE FOWLER
NEAR OAK DALE
HORRY COUNTY
SCALE 1" = 50'

SCOUT CAROLINA
SIMPSON CREEK TWP.
APRIL 18, 2006

GRAPHIC SCALE
(IN FEET)
1 inch = 60 ft. SFN 024-06

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Kimber R. Fowler a/k/a Kimberly R. Fowler,
Appellant,

v.

Claudius Eugene Fowler, Respondent.

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Unpublished Opinion No. 2009-UP-096
Submitted November 1, 2008 – Filed February 23, 2009

REVERSED

Kimber Fowler, of Loris, for Appellant.

Claudius Eugene Fowler, of Loris, for
Respondent.

PER CURIAM: Kimber Fowler (Appellant) planted Bradford pear trees along an easement Claudius E. Fowler (Respondent) claimed across Appellant's land. When Respondent cut limbs from those trees, Appellant filed an action for trespass and property damage. She now appeals from the master-in-equity's order finding Respondent had an easement across Appellant's land. We reverse.[1]

FACTS

I. Land Conveyances

On September 29, 1981, Respondent acquired 3.72 acres of land through a civil suit for partition of his father's estate. The estate's real property was surveyed and platted on November 9, 1981. No easement appeared either in Respondent's title or on that plat.

On June 17, 1999, Respondent's land was surveyed and platted in preparation for

conveyances Respondent intended to make to his children. The plat prepared at this time (the Inman Plat) reflects an "existing soil drive" within a twenty-five-foot private easement across the north side of the parcel. On August 6, 1999, Respondent and his wife conveyed the easternmost 0.99 acres of their land to their son and Appellant, their daughter-in-law. Respondent and his wife reserved a life estate in the conveyed land. On June 28, 2000, they released this right and conveyed their remaining interest in the land to their son and Appellant. Although the title references the Inman Plat, neither the title nor the release document indicates an easement.

Respondent's son and Appellant divorced in January 2005. On April 20, 2005, Appellant received title to the 0.99 acres solely in her name pursuant to the divorce decree. The title document executed by Respondent's son references the Inman Plat but does not indicate an easement.

On April 18, 2006, the land was surveyed again at Respondent's request. The plat prepared following this survey reflects a "private access easement" identified as "Dolly Lane" across the north side of Appellant's land and references the prior plat. Furthermore, this plat appears to indicate a proposed driveway and cul-de-sac extending from Dolly Lane across half of Respondent's property. Both the 1981 and 2006 plats show a county road either touching or defining a portion of the western boundary of Respondent's property.[2]

II. Background and Procedural History

In August 2000, Appellant planted eight Bradford pear trees approximately six feet from the existing soil drive shown on the Inman Plat. On April 5, 2005, Respondent and his grandson destroyed one of those trees. Appellant filed criminal charges against them but later withdrew those charges in an effort to "make peace with the family." On February 8, 2007, Respondent and his grandson used a chainsaw to cut branches from the remaining Bradford pear trees, leaving marks across the trunks of several of those trees. Subsequently, Appellant posted "no trespassing" signs on and near the trees. When Respondent removed them, Appellant again filed criminal charges against him and a civil suit for trespass and malicious damage to her property.

Appellant's civil suit was referred to the master, who ruled in favor of Respondent and found Respondent had "by dedication a private easement . . . for travel purposes of ingress and egress" across Appellant's land. This appeal followed.

LAW/ANALYSIS

I. Easement by Dedication

Appellant asserts the master erred in finding Respondent possessed an easement by dedication across her land. We agree.

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Hardy v. Aiken, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006).

The master erred in concluding Respondent possessed an easement by dedication. South Carolina law presumes a buyer of a lot in subdivided property has a dedicated property right in

any easements or roads shown on the plat. Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism, 377 S.C. 86, 92, 659 S.E.2d 151, 154 (2008); see also Murrells Inlet Corp. v. Ward, 378 S.C. 225, 233, 662 S.E.2d 452, 455-56 (Ct. App. 2008). While an easement by dedication may be described in a plat prepared prior to conveyance of subdivided property, no easement legally exists until the seller conveys ownership of a part of that property to a buyer. Inlet Harbour, 377 S.C. at 92, 659 S.E.2d at 154. To create this implied easement, the deed must reference the plat. Id. Once created, the easement benefits the buyer. Id.; see also Murrells Inlet Corp., 378 S.C. at 233, 662 S.E.2d at 455-56; McAllister v. Smiley, 301 S.C. 10, 12, 389 S.E.2d 857, 859 (1990).[3]

Here, Respondent prepared a plat describing the way he intended to subdivide his property into three lots, two of which were to go to his children. He ultimately conveyed ownership of only one lot and now claims an easement by dedication across it. However, because an easement by dedication benefits the buyer, this presumption is unavailable to Respondent, the seller. Consequently, Respondent does not possess an easement by dedication across Appellant's land.

II. Other Issues

Appellant additionally asserts the master erred in violating her due process rights and in failing to rule on her motions for summary judgment. Due to our disposition of Appellant's first issue, we need not address the remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

As to the issue of Respondent's easement, we find Respondent does not have an easement by dedication across Appellant's land. Therefore, we reverse the master's order on this issue.

Accordingly, the master's order is

REVERSED.

HEARN, C.J., KONDUROS, J., and GOOLSBY, A.J., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] The western end of Respondent's property does not appear on the Inman Plat.

[3] Our supreme court explored the policies underlying implied public and private easements by dedication in Cason v. Gibson, 217 S.C. 500, 61 S.E.2d 58 (1950).



OFFICE OF

TELEPHONE: (843) 915-5310
FACSIMILE: (843) 915-6310

Master In Equity
Horry County

P.O. BOX 1236
CONWAY, SC 29528

May 26, 2009

Ms. Kimber R. Fowler
2145 Oakdale Road
Loris, South Carolina 29569

Mr. Claudius Eugene Fowler
4042 G-B Lane
Loris, South Carolina 29569

Mr. Kenneth Dippel
2145 Oakdale Road
Loris, South Carolina 29569

Re: Kimber Fowler vs. Claudius Eugene Fowler
Civil Action No.: 07-CP-26-1782

Dear Ms. Fowler, Mr. Fowler and Mr. Dippel:

Enclosed please find a signed, clocked copy of the ORDER ON REMAND FROM THE SOUTH CAROLINA COURT OF APPEALS signed by the Honorable Cynthia Graham Howe, Master in Equity for Horry County.

Sincerely,

A handwritten signature in cursive script that reads "Anne Lawson".

Anne H. Lawson

Ahl
Enclosure (Order)

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
CIVIL CASE NO.: 07-CP-26-01782

KIMBER R. FOWLER,)

Plaintiff,)

v.)

CLAUDIUS EUGENE FOWLER,)

Defendant.)

ORDER ON REMAND FROM
THE SOUTH CAROLINA COURT OF
APPEALS

TRIAL JUDGE:

PLAINTIFF:

DEFENDANT:

COURT REPORTER:

DATE OF HEARING:

CYNTHIA GRAHAM HOWE
KIMBER R. FOWLER, pro se
CLAUDIUS EUGENE FOWLER, pro se
PRESTIGE COURT REPORTING SERVICE
MAY 26, 2009

FILED
2009 MAY 26 PM 2:46
KELLY HUGHINS
CLERK OF COURT

 This matter was referred to the Horry County Master in Equity by Order of the Honorable Paula H. Thomas dated April 30, 2007. This case concerns an alleged easement across Plaintiff Kimber Fowler's land. She alleges that Defendant Claudius Eugene Fowler removed a Bradford pear tree planted along the alleged easement and cut limbs and damaged several trunks of other Bradford pear trees planted along it.

In August 2007, The Honorable J. Stanton Cross issued an order holding that Defendant had an "easement by dedication" over the .99 acres of property which is the subject of this action. On appeal by unpublished opinion issued on February 23, 2009, the South Carolina Court of Appeals reversed Judge Cross, holding that Defendant "does not have an easement by dedication across" Plaintiff's land.

This matter is before me on two matters: (1) Plaintiff's Notice of Remedies Hearing dated April 1, 2009, and Kenneth Dippel's motion to intervene pursuant to Rule 24, SCRPC and/or to join as a plaintiff pursuant to Rule 18, SCRPC. Mr. Dippel appeared at the May 26, 2009, hearing and argued his motion to intervene/join as a party.

No attorneys appeared at the hearing. After carefully considering Mr. Dippel's motion, I deny the motion.

On April 1, 2009, Kenneth Dippel, Plaintiff's brother, moved to be joined as a plaintiff and/or to intervene in the lawsuit as a plaintiff. Mr. Dippel owns a trailer on his sister's property and jointly rents the trailer with his sister, the Plaintiff. He asserts he is a necessary plaintiff because the Defendant "continually claims he has an easement right", . . . , he "cannot help maintain the private driveway of [his] sister's as long as [Defendant] continually persists by claiming he actually owns this road passing by [his] trailer and by him continually persisting he has an easement through my sister's property, and the [Defendant] has in the past threatened to charge me a toll for using my own sister's driveway that leads to this trailer [he] own[s]." He asserts he has a constitutional right to defend his property against Defendant's unlawful easement claims. I disagree that Mr. Dippel should be allowed to intervene as a matter of right pursuant to Rule 24(a)(2), SCRCP, and accordingly, I deny his motion.

SC DHEC v. Columbia Organic Chemical Co., Inc., 310 S.C. 495, 427 S.E.2d 661 (1993) provides that a party moving to intervene under Rule 24(a)(2), SCRCP must (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties.

Mr. Dippel was unable to adequately explain the two-year delay in moving to intervene. Moreover, Mr. Dippel was unable to demonstrate that his interest was

inadequately represented by his sister, the Plaintiff, in this matter. In fact, just the opposite appears to be true. Plaintiff more than adequately has demonstrated her ability to represent her interests (i.e., that there was no easement) in this matter. Plaintiff's interests appear to be the same or similar as Mr. Dippel's interests, and I find that Plaintiff adequately has represented those interests during the course of this lawsuit. A failure to satisfy any one of the four requirements precludes intervention. *SC DHEC v. Columbia Organic Chemical Co., Inc.*, 310 S.C. 495, 427 S.E.2d 661 (1993).

2
CBH
Mr. Dippel's motion to join under Rule 18, SCRCP also fails him. Rule 18 is appropriate when a **party**, who has asserted a cause of action as an original claim, counterclaim, cross-claim, or third-party claim, seeks to join independent or alternate claims. Until Mr. Dippel is a party, either initially or by intervention, he may not be allowed to join his claims pursuant to Rule 18, SCRCP. Since I have concluded that Mr. Dippel should not be allowed to intervene, Mr. Dippel's motion to join under Rule 18, SCRCP also should be denied.

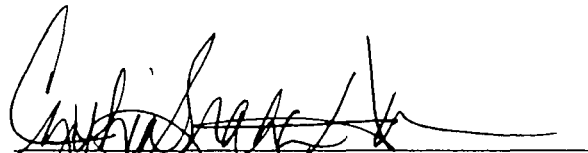
As to Plaintiff's claims, in her original complaint, Plaintiff prayed for an injunction, enjoining Defendant from using the 25 foot driveway which had been alleged to be an easement, enjoining Defendant from cutting the Bradford Pear trees planted along the 25 foot driveway, and for \$125 dollars for a Bradford Pear Tree previously planted along the 25 foot driveway, which tree Plaintiff alleged that the Defendant destroyed.

Plaintiff did not offer any evidence at the hearing on remand, nor did Defendant dispute the prayer, that the Bradford Pear Tree was worth \$125.00. Plaintiff did not seek pre-judgment interest. Accordingly,

IT IS HEREBY ORDERED THAT Plaintiff be granted judgment against Defendant in the amount of \$125.00.

IT FURTHER IS ORDERED that Plaintiff be granted an injunction, enjoining Defendant, his successors, and heirs, from trespassing on Plaintiff's property, more specifically shown on Exhibit "A" attached to this Order, including a twenty-five foot soil driveway known as Dolly Lane across the north side of Plaintiff's property.

AND IT IS SO ORDERED.


Cynthia Graham Howe
Horry County Master in Equity

Conway, South Carolina
Dated: May 26, 2009

4/
CCH

EXHIBIT "A"

ALL AND SINGULAR, all that certain piece, parcel and lot of land situate, lying and being in Simpson Creek Township, County and State aforesaid, shown and designated as Lot Number One, containing 0.99 acres, more or less on that certain survey prepared by Inman Surveying and Mapping, dated June 17, 1999, and recorded in the Office of the Horry County R.O.D. in Plat Book 163 at Page 228, which is incorporated herein by reference as a part and parcel hereof.

BOUNDED on the North by lands of Mearl Dean Fowler; on the South by lands now or formerly of Ester Fowler; on the East by South Carolina Highway Number 932; and on the West by Lot Two as shown on said plat.

BEING the identical property conveyed to Timothy E. Fowler and Kimberly H. Fowler by Eugene Fowler, a/k/a Claudus E. Fowler by Deed recorded in Deed Book 2175 at Page 1, Office of the Horry County R.O.D. on August 9, 1999, wherein Eugene Fowler, a/k/a Claudus E. Fowler reserved a life estate unto himself and his wife, Terry H. Fowler.

TMS NUMBER: 040-00-01-056

HORRY COUNTY ASSESSOR

040-00-01-122

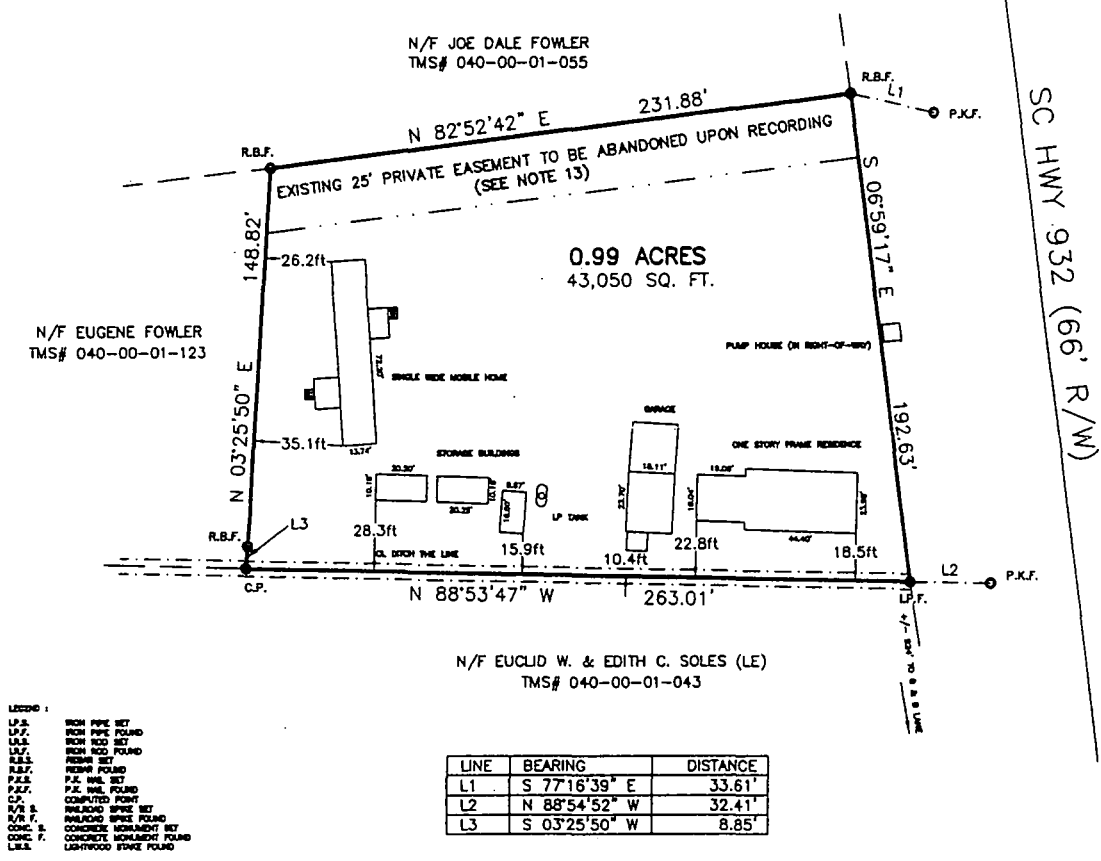
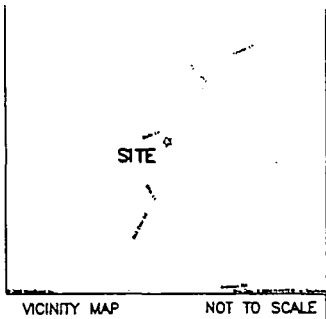
Map

Blk

Parcel

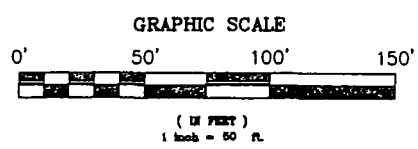
7-70077

- NOTES:
1. ALL DISTANCES ARE HORIZONTAL GROUND IN INTERNATIONAL SURVEY UNLESS OTHERWISE SHOWN.
 2. PARENT TAX MAP # 040-00-01-122
 3. PARCEL LOCATED IN SIMPSON CREEK TOWNSHIP
 4. BEARING REFERENCED TO 12-A
 5. THIS PROPERTY LIES IN ZONES X
AS SCALED FROM FLOOD INSURANCE RATE MAP
COMMUNITY PANELS #45051C0250 J
DATED SEPTEMBER 17, 2003
 6. DATE OF FIELD SURVEY : 6/04/09
 7. OWNER OF RECORD: KIMBERLY R. FOWLER
 8. TOTAL ACREAGE 0.99 ACRES
 9. SURVEYOR HAS MADE NO INVESTIGATION OR INDEPENDENT SEARCH FOR EASEMENTS OF RECORD, ENCUMBRANCES, RESTRICTIVE COVENANTS, OWNERSHIP, TITLE EVIDENCE, OR ANY OTHER FACTS THAT AN ACCURATE AND CURRENT TITLE SEARCH MAY DISCLOSE.
 10. NO S.C. GEODETIC CONTROL FOUND WITHIN 2000'
 11. SUBJECT TO ALL EASEMENTS, RIGHT OF WAYS, AND OR ENCUMBRANCES THAT MAY AFFECT THIS PROPERTY
 12. REFERENCE :
A. MAP BY INMAN SURVEYING AND MAPPING FOR TIMOTHY FOWLER, KIMBERLY FOWLER, ANGELA FOWLER, AND AMANDA FOWLER
DATED JUNE 17, 1999 (PB:163 PG:228)
B. MAP BY AFFILIATED SURVEYORS FOR EUGENE FOWLER
DATED APRIL 18, 2006 (RECORDED 05/16/06) PROVIDED BY OWNER
 13. EASEMENT ESTABLISHED PER INMAN SURVEYING AND MAPPING PLAT DATED JUNE 17, 1999
FOR TIMOTHY E. FOWLER, KIMBERLY R. FOWLER, ANGELA FOWLER, AND AMANDA D. FOWLER (PB:163 PG:228)
TO BE DELETED PER STATE OF SOUTH CAROLINA COURT OF APPEALS
UNPUBLISHED OPINION NO. 2009-UP-096 (FILED FEBRUARY 23, 2009)
KIMBERLY FOWLER vs. CLAUDIUS EUGENE FOWLER



CERTIFICATE OF OWNERSHIP AND DEDICATION

THE UNDERSIGNED HEREBY ACKNOWLEDGE THAT I AM (WE ARE) THE OWNERS OF THE PROPERTY SHOWN AND DESCRIBED HEREON AND THAT I (WE) HEREBY ADOPT THIS (PLAN OF DEVELOPMENT/PLAT) WITH MY (OUR) FREE CONSENT AND THAT I (WE) HEREBY DEDICATE ALL ITEMS AS SPECIFICALLY SHOWN OR INDICATED ON SAID PLAT



NAME: _____ SIGNATURE: _____ DATE: _____

NAME: _____ SIGNATURE: _____ DATE: _____

NAME: _____ SIGNATURE: _____ DATE: _____

CERTIFICATE OF ACCURACY

I HEREBY STATE THAT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE "MINIMUM STANDARDS MANUAL FOR THE PRACTICE OF LAND SURVEYING IN SOUTH CAROLINA", AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS "A" SURVEY.

BARRY W. SUGGS P.L.S. # 25438

DATE 6/5/09

RESURVEY FOR

KIMBERLY R. FOWLER

DATE: 6/08/09

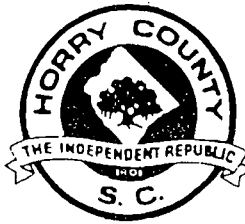
SCALE: 1"=50'

JOB# 0906-02
FIELDWORK : JB & SS
DRAWN BY : JB
CHECKED BY: BS
OFFICE LOCATION:
3807 MAIN STREET
LORR, S.C. 29500
PHONE: (843) 718-8021



SIMPSON CREEK TOWNSHIP HORRY COUNTY SOUTH CAROLINA.





PLANNING DEPARTMENT PLAT REVIEW CHECKLIST

DATE 6/16/09 NAME ON PLAT: Kimberly R. Fowler

1. TMS (Art. III, Sec. 4) 040-00-01-122

2. LOT SIZE & NUMBERS (Art. III, Sec. 4) _____

3. OWNER OF RECORD (Art. III, Sec. 4) 040-00-01-122 (Kimberly R. Fowler) 040-00-01-123, 040-00-01-173 and
040-00-01-056 (Eugene Fowler)

4. MINIMUM LOT SIZE (Art. IV, Sec. 3-2(c)) _____

5. FLOOD ZONE INFORMATION (Art. III, Sec. 4 & Art. IV, Sec. 4) _____

6. ROAD (Art. III, Sec. 3 & Art. IV, Sec. 2) (a.) Please label the existing roadway "Dolly Lane" appropriately, provide road
name, total width and indicate whether public or private Table 3-B App. A (23)

(b.) the appropriate documentation (road closure or court order) will need to be supplied to the Planning Dept. before the
roadway can be abandoned → See S.C. Court of Appeals Decision + mask in Equity Ruling

7. EASEMENTS (Art. II, Sec. 3-10 & Art. IV, Sec. 2-6(q)) to abandon the "existing 25-foot private easement":

(a.) the plat will need to be signed by all affected property owners (which include parcels 040-00-01-122, 040-00-01-123, 040-
00-01-173 & 040-00-01-056) Art. 2 Sec. 4-9 and → This does not apply because the Courts
determined there was no easement

(b.) adequate access will need to be provided for the interior parcels (040-00-01-123 and 040-00-01-173) via an alternative
easement or right-of-way which will provide the required frontage Art. 4 Sec. 3-2 (B) & Sec. 510 and meet any applicable

improvements and/or setback requirements → The burden of providing this access belongs

8. WATER/SEWER AVAILABILITY (Art. II, Sec. 3-4 & Art. III, Sec. 7-3) to Mr. Fowler. The Air Photo

9. OWNERSHIP CERTIFICATE (Art. III, Sec. 4 & Appendix B) Plainly show these parcels

10. SCALE, VICINITY MAP & NORTH ARROW (Art. III, Sec. 4) are not land locked in.

11. SURVEYORS SEAL (Art. III, Sec. 4 & Appendix B) _____

12. DISTANCE & BEARINGS ON PLAT BOUNDARIES (Art. III, Sec. 4) _____

13. DISTANCE & BEARINGS TO NEAREST INTERSECTION (Art. III, Sec. 4) _____

14. ADJACENT PROPERTY OWNERS (Art. III, Sec. 4) → The Associated Survey Map

15. DEED & PLAT BOOK REFERENCES (Art. III, Sec. 4) of Mr. Fowler does not have

16. TRACT REMAINDER ROADWAY FRONTAGE (Art. II, Sec. 3-1.2) this and does not

Reviewer: Brent Gerald

Title: Plan Reviewer

Comply.

**Planning & Zoning
Department**

1301 2nd Ave. Ste. 1D-09
Conway, SC 29526



Phone: 843-915-5340
843-205-5340

Fax: 843-915-6340

www.horrycounty.org

July 14, 2009

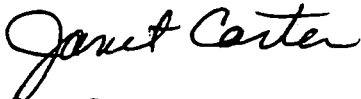
Re: Appeal to Horry County Planning Commission re Dolly Lane

Dear Resident/Property Owner:

A plat has been submitted by Ken Dippel on behalf of Kimberly Fowler to the Horry County Planning Department that would eliminate **Dolly Lane** and require all persons addressed thereon to be re-addressed. The Planning Staff denied approval of this plat for several reasons including the fact that no alternative access was shown for homes currently addressed on Dolly Lane.

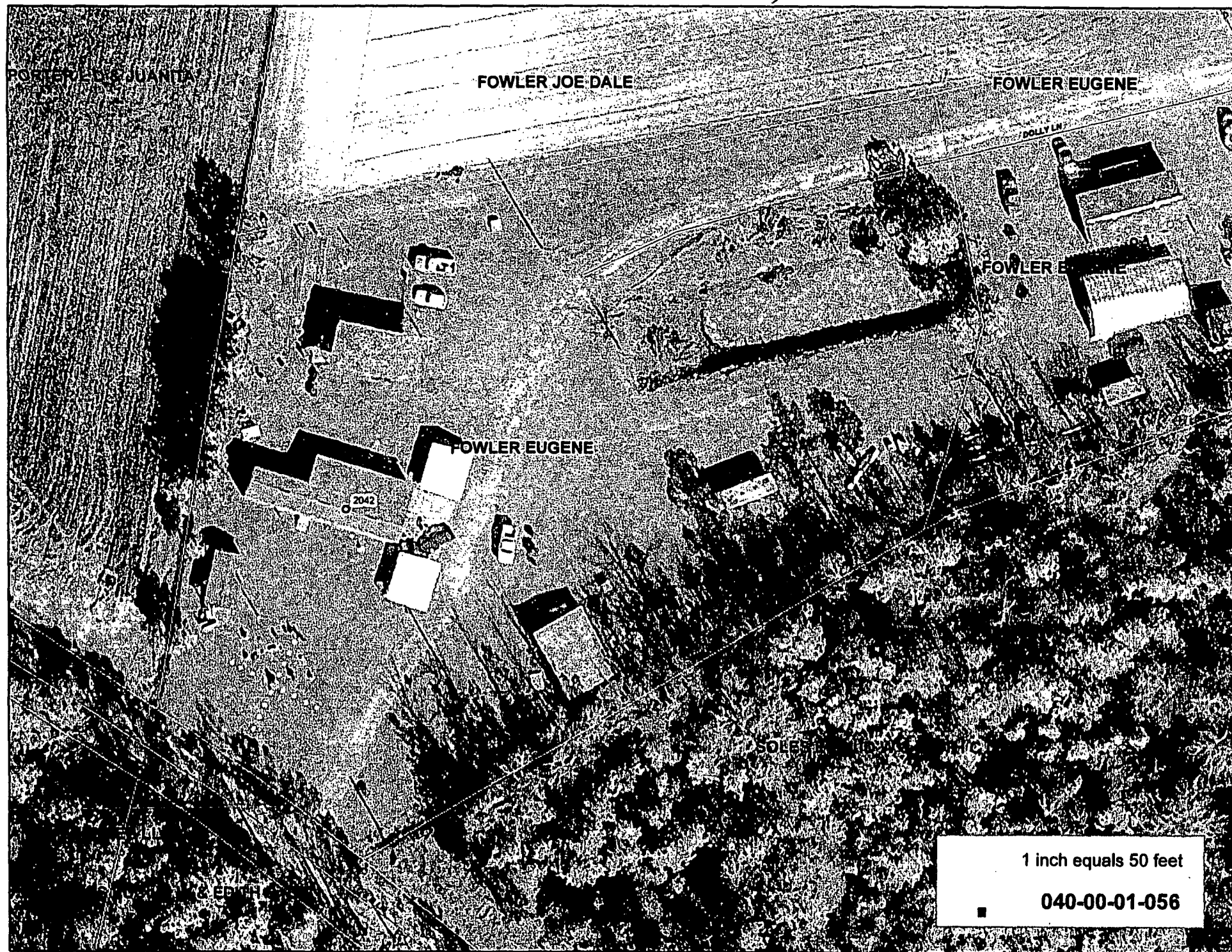
Mr. Dippel has appealed to the Horry County Planning Commission. **A hearing will be held by the Horry County Planning Commission on July 30, 2009 at 3:00 PM in Multi-Purpose Room B of the Government and Justice Center located at 1301 Second Avenue in Conway.** All persons having any interest in this matter are invited to attend.

Sincerely,



Janet Carter
Planning Director

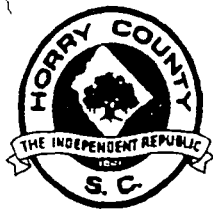




LANDS ENGINE FOWLER, CAP No. 2007-CP-26-1782



1 inch equals 200 feet



HORRY COUNTY ENGINEERING DEPARTMENT

P.O. Box 1236, Conway, SC 29528

Office 843-915-5160

Fax 843-365-2170

April 9, 2009

Ken Dippell

RE: Dolly Lane

To Whom It May Concern:

Horry County records have Dolly Lane located off of OakDale Drive as not being maintained by Horry County.

If I can be of any further assistance in this matter please do not hesitate to contact me or my office.

Sincerely

David Helms

David Helms
Engineering Tech

DWH/dh

Ownership & Location Information:

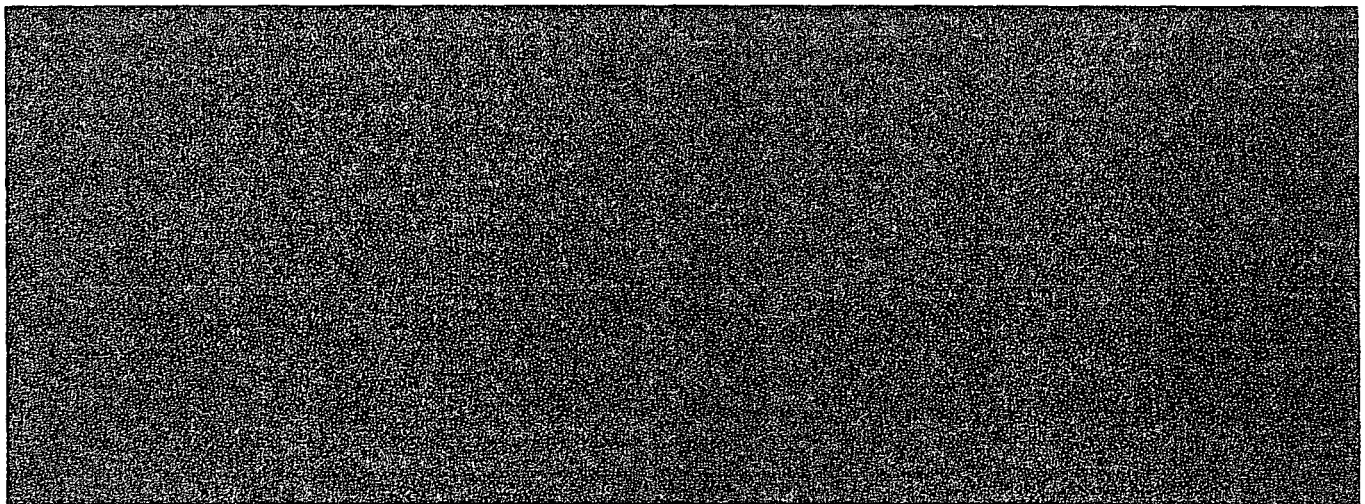
Parcel #: 0400001122
 Tax Bill Mailing Address: 2145 OAK DALE RD
 Legal Description: LT 1 OF TRACT D
 Current Owner: FOWLER KIMBERLY R
 Deed Book/Page: /
 Lender Identification: 0
 District: 200
 # Of Lots: 0
 # Of Buildings: 0

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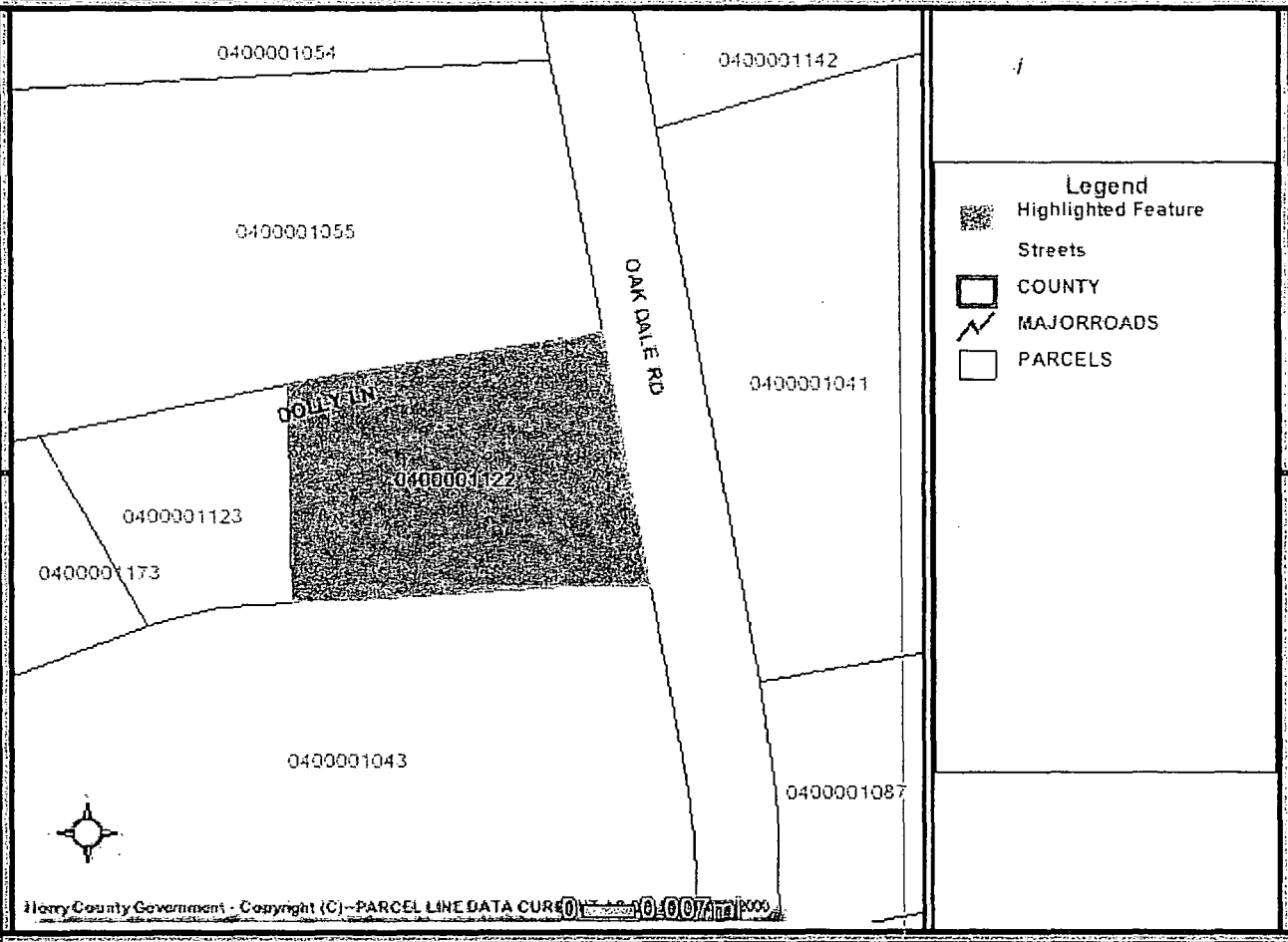
Tax Information:

Current Fair Market Value: 33,300.00
 Residential Value: 33,300.00
 Farm Use Value: 0.00
 Other Value: 0.00
 Farm Market Value: 0.00
 Last Appraisal Date:

Tax Year	Receipt Number	Assessed Value	Taxes Owed	Taxes Paid	Post Date	Collection Status	Paid Status
2008	70777	1332	159.94	163.86	10/01/2008	NONE	FULL
2007	69259	1332	159.94	159.94	10/01/2007	NONE	FULL
2006	63195	1332	204.56	204.56	10/02/2006	NONE	FULL
2005	56338	1332	197.10	213.87	10/01/2005	NONE	FULL
2004	56756	992	149.04	149.04	10/01/2004	NONE	FULL
2003	54874	992	147.05	147.05	10/01/2003	NONE	FULL
2002	53683	992	141.59	141.59	10/01/2002	NONE	FULL
2001	51128	908	129.83	129.83	10/01/2001	NONE	FULL
2001	51128A	84	38.70	38.70	01/15/2002	NONE	FULL
2000	48753A	908	111.03	111.03	01/02/2001	NONE	FULL



Kimber Fowler Property





gateway

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Assessor Ownership, Location, and Tax Information

The below information represents all pertinent assessor data based upon the parcel number that you selected. To view the real property with Mapping interface simply click the "Map/Assess.Info" button.



Ownership & Location Information



Tax Information

[Map/Assess. Info](#)

Ownership & Location Information:

Parcel #: 0400001123
Tax Bill Mailing Address: 2042 G AND B LN
LORIS SC 29569-5485
Legal Description: TRACT B
Current Owner: FOWLER EUGENE
Deed Book/Page: /
Lender Identification: 0
District: 200
Of Lots: 0
Of Buildings: 0

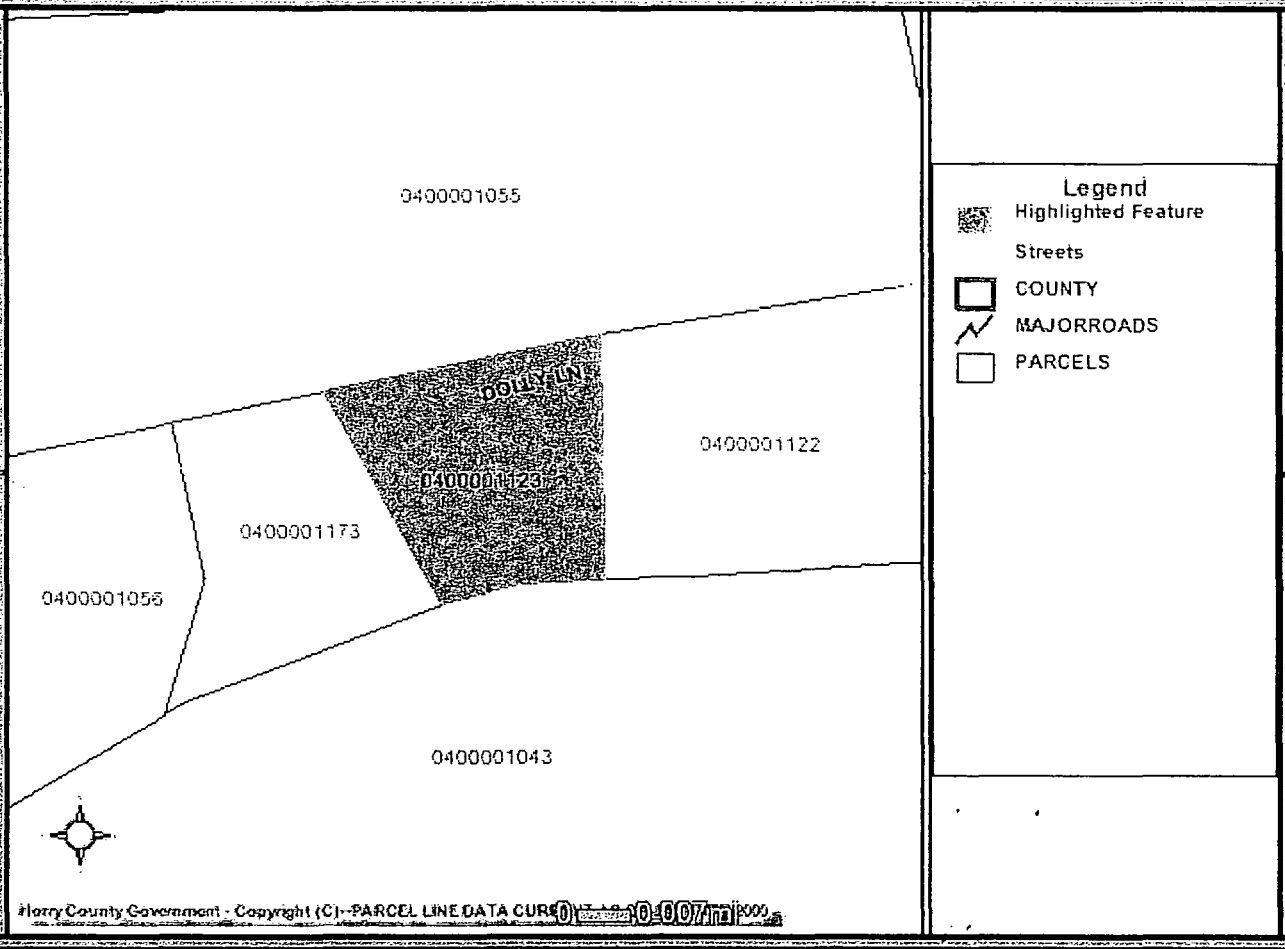
[back to top](#)

Tax Information:

Current Fair Market Value: 8,100.00
Residential Value: 0.00
Farm Use Value: 0.00
Other Value: 8,100.00
Farm Market Value: 0.00
Last Appraisal Date:

Tax Year	Receipt Number	Assessed Value	Taxes Owed	Taxes Paid	Post Date	Collection Status	Paid Status
2008	70665	486	133.06	143.43	10/01/2008	NONE	FULL
2007	69149	486	133.06	148.61	10/01/2007	NONE	FULL
2006	63081	600	151.98	155.66	10/02/2006	NONE	FULL

Tract B: Claudius E Fowler (Rental Mobile Home)





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Assessor Ownership, Location, and Tax Information

The below information represents all pertinent assessor data based upon the parcel number that you selected. To view the real property with Mapping interface simply click the "Map/Assess.Info" button.



Ownership & Location Information



Tax Information

[Map/Assess. Info](#)

Ownership & Location Information:

Parcel #: 0400001173
Tax Bill Mailing Address: 2042 G AND B LN
LORIS SC 29569-5485
Legal Description: TRACT A
Current Owner: FOWLER EUGENE
Deed Book/Page: /
Lender Identification: 0
District: 200
Of Lots: 0
Of Buildings: 1

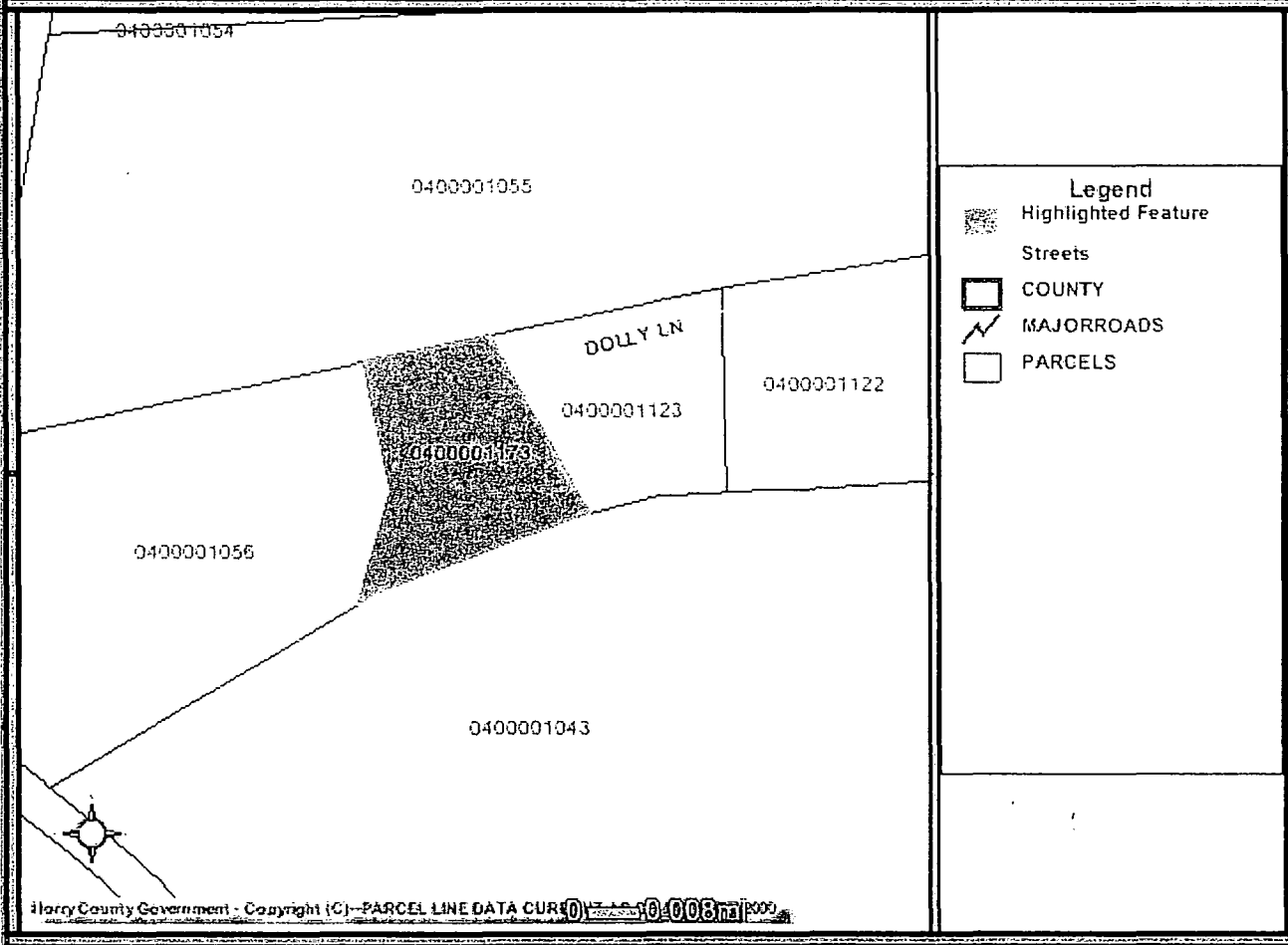
[back to top](#)

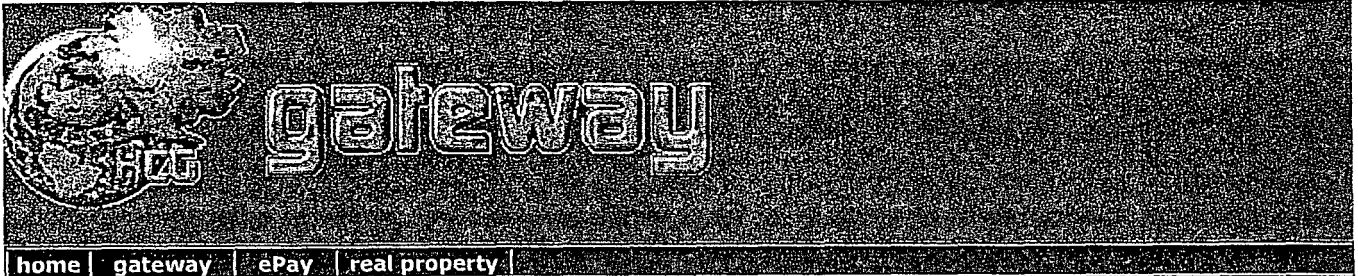
Tax Information:

Current Fair Market Value: 21,000.00
Residential Value: 0.00
Farm Use Value: 0.00
Other Value: 21,000.00
Farm Market Value: 0.00
Last Appraisal Date:

Tax Year	Receipt Number	Assessed Value	Taxes Owed	Taxes Paid	Post Date	Collection Status	Paid Status
2008	70666	486	133.06	143.43	10/01/2008	NONE	FULL
2007	69150	486	133.06	148.61	10/01/2007	NONE	FULL

Tract A: Claudius E Fowler





You are Here: homepage > gateway > real property search > assessor info

Assessor Ownership, Location, and Tax Information

The below information represents all pertinent assessor data based upon the parcel number that you selected. To view the real property with Mapping interface simply click the "Map/Assess.Info" button.



 Ownership & Location Information

 Tax Information

Map/Assess. Info

Ownership & Location Information:

Parcel #: 0400001056
 Tax Bill Mailing Address: 2042 G AND B LN
 LORIS SC 29569-5485
 Legal Description: REMAINDER OF TRACT
 D
 Current Owner: FOWLER EUGENE
 Deed Book/Page: /
 Lender Identification: 0
 District: 200
 # Of Lots: 0
 # Of Buildings: 0

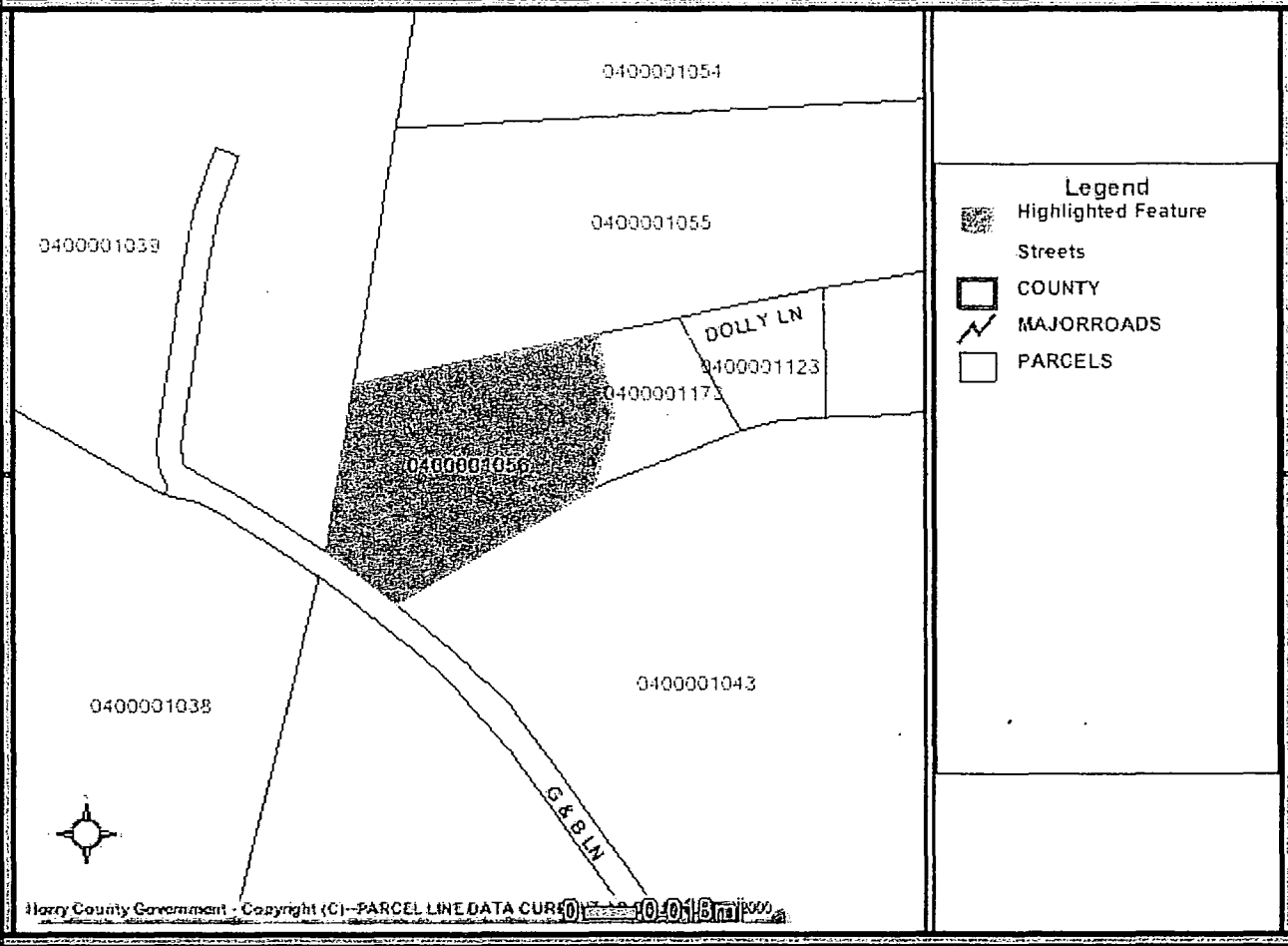
[back to top](#)

Tax Information:

Current Fair Market Value: 47,700.00
 Residential Value: 47,700.00
 Farm Use Value: 0.00
 Other Value: 0.00
 Farm Market Value: 0.00
 Last Appraisal Date:

Tax Year	Receipt Number	Assessed Value	Taxes Owed	Taxes Paid	Post Date	Collection Status	Paid Status
2008	70664	1844	29.40	29.40	10/01/2008	NONE	FULL
2007	69148	1844	29.40	29.40	10/01/2007	NONE	FULL

Claudius E. Fowler: Remainder of Tract D



Article 1 - Applicability

SECTION 9: AMENDMENTS

The Horry County Council may amend these regulations after a public hearing and three readings of County Council. The time and place of the public hearing will be duly advertised in a newspaper of general circulation in the County at least 30 days before the hearing.

No amendment shall become effective unless it shall have been submitted to the Planning Commission for review and recommendation. The Planning Commission shall have 45 days to submit its report. The County Council may waive these requirements and grant an extension of time. If the Planning Commission fails to submit a report within 45 days, the amendment shall be deemed approved.

The Planning Commission will review these regulations annually

SECTION 10: VIOLATIONS AND PENALTIES

No subdivision plat or other land development plan within Horry County may be filed in the Register of Deeds Office nor shall a building permit be issued until the plat or plan bears the stamp of the Planning Commission or signature of designated authority as stated within these regulations.

The owner or agent of the owner of any property being developed within Horry County may not transfer title to any lot(s) or part(s) of a land development unless a land development plan or subdivision has been approved by the Planning Commission or designated authority and such approved plan or plat is recorded in the Register of Deeds Office. A description by metes and bounds in the deed or other document used in the process of transfer does not exempt the transaction from the penalties cited herein.

Any person, firm, corporation, owner, or agent of the owner of any land to be developed who violates any of the provisions of these regulations or submits an unapproved plat for recording shall be guilty of a misdemeanor. Nothing herein prevents Horry County from taking other lawful action as is necessary to prevent or remedy any violation.

SECTION 11: APPEALS

Questions arising from the enforcement of these regulations by the Planning Department may be appealed to the Planning Commission for consideration. The Planning Commission will render a decision on the appeal within 60 days and the applicant will be notified, in writing, of such decision within seven business days. Any party aggrieved by a decision of the Planning Commission regarding the standards enumerated in these regulations or a ruling on a requested variance may appeal the decision to the Circuit Court of Horry County. The aggrieved party shall file a petition with the clerk of court within 30 days after a Planning Commission decision is rendered.

Article 2 - Procedures

B. Staff Review Procedure

The Planning Department Plans Expeditors will circulate all major project submittals to the appropriate reviewing department. All Horry County staff reviews shall be completed within 15 business days. The Planning Department Plans Expediter shall compile the comments and provide them to the applicant

(Ord. 08-04, § 2-2(B), 02-17-04)

C. ~~Planning Commission~~ Action on Design Modifications and Appeals

The Planning Commission will act upon any requests for a design modification or appeal of staff decision within 45 days of the date of its submission. If no action is taken by the Planning Commission within this time, the modification or appeal will be deemed approved. The applicant may waive this requirement and consent to an extension of the 45-day period. All applications for Design Modifications must be submitted the second Wednesday of each month in order to be presented to the next Planning Commission meeting.

The Planning Commission's decision regarding the design modification or appeal shall be either:

1. Approval;
2. Conditional approval;
3. Disapproval; or
4. Deferral for additional information upon agreement of the applicant.

~~The applicant will be notified in writing within seven business days of the actions taken by the Planning Commission.~~ In cases of conditional approval, the Planning Commission may require the applicant to submit a revised preliminary plan prior to the submittal of a final plat.

Withdrawn or disapproved plans shall pay applicable review fees when resubmitted.

D. Reserved

E. Preliminary Plan Approval.

Preliminary plan approval authorizes the applicant to proceed with preparation of the final plan and the installation of site improvements. Approval does not authorize the sale or transfer of lots. Site improvements shall begin only upon the authorization of the applicable regulatory agencies. The Applicant will have to satisfy all Horry County Development Review Staff comments and shall provide all regulatory permits in order to receive Preliminary Plan Approval. Upon Preliminary Plan Approval staff shall issue a letter to the project engineer and developer that the project has received Preliminary Plan Approval.

Applicants have two years, for each phase; from the date that Planning Department grants preliminary plan approval to record a final plat. If a final plat is not recorded for the approved phase within this two-year period, the preliminary plan approval becomes void. Any extension

Article 8 – Definitions

SECTION 1: GENERAL

Except as specifically defined herein, all words used in these regulations have their customary dictionary definitions. For the purposes of these regulations certain words or terms used herein are defined as follows:

Words used in the present tense include the future tense. Words used in the singular include the plural, and words used in the plural include the singular.

The word “shall” is always mandatory.

The word “may” is permissive.

The word “lot” includes the word “plot”, “parcel”, or “tract”.

The word “person” includes a firm, association, organization, partnership, trust company, or corporation as well as an individual.

The term “Planning Commission” includes “Commission” refers to the Horry County Planning Commission.

The term “Planning Department” includes “staff” and refers to the Horry County Planning Department.

The terms “Engineer”, “Engineering Department”, or “Department (Article 7 only)” refers to the Horry County Engineering Department.

SECTION 2: DEFINITIONS

AASHTO. American Association of State Highway and Transportation Officials.

ADT (Average Daily Traffic). The average number of vehicles per day that pass over a given point.

Access - A way or means of approach to provide vehicular or pedestrian entrance or exit to a property.

Access Classification - A ranking system for roadways used to determine the appropriate degree of access management. Factors considered include functional classification; the appropriate local government’s adopted plan for the roadway, subdivision of abutting properties, and existing level of access control.

Access Connection - Any driveway, street, turnout or other means of providing for the movement of vehicles to or from the public roadway system.

Article 8 – Definitions

and setback the appropriate distance as required by the zoning district in which the lot is located from street right-of-way lines, street center lines, or other boundary lines.

Cemeteries. Land that is set apart and used for the interment of the dead or in which bodies (human or other) have been buried. A cemetery may include a structure for the purpose of cremation of remains (human or other) and may include facilities for storing ashes of said remains that have been cremated or interment of the dead in sealed crypts or compartments.

Collector Street. Link local streets with the arterial street system. They collect traffic in local areas and provide the connection to arterial streets. They may also directly serve abutting land uses.

Common Area. (See open space- common).

Connection Spacing. The distance between connections, measured from the centerline of the first connection to the centerline of the second connection along the edge of the traveled way. (See Article 7)

Corner Clearance. The distance from an intersection of a public or private road to the nearest access connection, measured from the centerline of the closest edge of the pavement of the intersecting road to the centerline of the closest edge of the pavement of the connection along the traveled way. (See Article 7)

Cross Access Easement. A non-exclusive easement in which a service drive is located that provides vehicular access between two or more contiguous sites so the driver need not enter the public street system.

Cul-de-sac. A local street with only one access point and having the other end designed for the reversal of traffic movement.

Culvert. A structure designed to convey a watercourse, not incorporated in a closed drainage system, under a road, railway, or pedestrian walk.

Curb. A vertical or upward sloping edge of a roadway usually made of concrete or paving materials.

Dedication. An act of transmitting property or interest thereto.

Deed. A legal document conveying ownership of real property.

Density. The permitted number of dwelling units per acre of land to be developed.

Design Standards. Standards that set forth specific improvement requirements as well as layout criteria.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A No. 2009-CP-26-7839
KENNETH DIPPEL and	)	
KIMBER FOWLER,	)	
	)	
Plaintiffs,	)	
vs.	)	ANSWER
	)	(Jury Trial Demanded)
HORRY COUNTY PLANNING	)	
DEPARTMENT,	)	
	)	
Defendant.	)	
_____	)	

Defendant above named, responding to the Summons and Complaint filed by Plaintiffs above named, alleges and would respectfully show this Honorable Court as follows:

FOR A FIRST DEFENSE

1. The Complaint fails to state facts sufficient to constitute a cause of action and should be dismissed.

FOR A SECOND DEFENSE

2. Plaintiff Kenneth Dippel is not a real party in interest and any and all claims by him, and the Complaint lodged in his name, should be dismissed.

FOR A THIRD DEFENSE

3. The Complaint fails to timely join necessary and indispensable parties subject to joinder and should therefore be dismissed.

FOR A FOURTH DEFENSE

1 of 7

(W)

Page 11

4. There is insufficient process for the action to proceed or to give the Court jurisdiction over Defendant and the subject, and the Complaint should therefore be dismissed and denied.

FOR A FIFTH DEFENSE

5. Each and every allegation in the Complaint not hereinafter specifically and expressly admitted is hereby denied.

6. Defendant denies the preamble prayer for relief or summary of relief sought in items numbered 1 through 5 on page 1 of the Complaint, as well as characterization of the purpose and effect of the plat for which Plaintiff Kimber Fowler sought approval, and all matters set forth in the conclusory prayer for relief, numbered 1 through 4 at the end of the Complaint, starting on page numbered 19.

7. Responding to the allegations in the paragraph numbered 1 under the heading "Statement of Facts," Defendant admits allegations of the Plaintiffs' addresses, and admits allegations that Plaintiff Dipple owns a mobile home, but denies, for lack of information sufficient to form a belief, allegations concerning the occupancy of, and arrangement for occupancy of the mobile home owned by Plaintiff Dipple.

8. Responding to the allegations in the paragraph numbered 2 under the heading "Statement of Facts," Defendant denies allegations that it is a local government entity separate and apart from Horry County, admits allegations of the mailing address for the Horry County Planning Department, denies the Department makes all decisions concerning approval of plats for recording, admits that staff determinations may be reviewed by and determined by the Horry County Planning Commission, and admits that determinations of the Horry County Planning Commission may be appealed, under

2 of 7 

certain circumstances, and subject to certain requirements, to the Court of Common Pleas for Horry County; further responding to the allegations, Defendant craves reference to S.C. Code Sections 6-29-1150 and 6-29-1155, as well as the Horry County Code of Ordinances.

9. Responding to the allegations in the paragraph numbered 3 under the heading "Statement of Facts," Defendant denies the allegations that copies of deeds were attached to the Complaint served on Defendant, craves reference to the public record citations alleged for their contents and denies any allegations inconsistent therewith, denies for lack of sufficient information the allegations regarding rental of a mobile home, and denies all remaining allegations.

10. Responding to the allegations in the paragraphs numbered 4, 5, 6, 8, 9, 10, 11, and 12 under the heading "Statement of Facts," Defendant denies the allegations that deeds or plats or other documents were attached to the Complaint served on Defendant, craves reference to the public records specifically cited for their precise and complete contents, and denies all remaining and all inconsistent allegations.

11. Responding to the allegations in the paragraph numbered 7 under the heading "Statement of Facts," Defendant lacks information sufficient to form a belief as to truth or falsity thereof, and therefore denies the same.

12. Responding to the allegations in the paragraph numbered 13 under the heading "Statement of Facts," Defendant lacks information sufficient to form a belief as to Plaintiffs' alleged purposes, intents, or motivations, and denies same; Defendant also denies attachment of any plat to the Complaint served on Defendant; Defendant craves

3 of 7 (W)

reference to official records of plat submission; Defendant also denies all remaining allegations.

13. Responding to the allegations in the paragraph numbered 14 under the heading "Statement of Facts," Defendant admits staff members of its Planning Department denied approval of the plat submitted by or on behalf of Kimber Fowler, and provided comments as to additional requirements for approval; Defendant denies any decision was attached to the Complaint served on Defendant; Defendant craves reference to official records of action taken on plat submission and appeal; and, Defendant denies all remaining allegations.

14. Responding to the allegations in the paragraph numbered 15 under the heading "Statement of Facts," Defendant admits Plaintiffs appeared before the Planning Commission and the Commission did not approve the plat as submitted; Defendant craves reference to the official records of that appearance and determination; Defendant admits only that this action is an attempted appeal of the Planning Commission's determination; and Defendant denies all remaining allegations.

15. Responding to the allegations in the First, Second and Third Causes of Action, Defendant denies the same, and craves that same be stricken or made more definite and certain as set forth in Defendant's accompanying motion to dismiss, or strike and make more definite.

FOR A SIXTH DEFENSE

16. Each and every allegation of the Fifth Defense is incorporated herein.

17. Plaintiff Kenneth Dippel does not own the property on which re-platting approval was sought from Defendant and, he therefore lacks standing to maintain this action and

4 of 7 (W)

should be dismissed therefrom, and all claims by him and in his name should be denied and dismissed.

FOR A SEVENTH DEFENSE

18. Each and every allegation of the Fifth Defense is incorporated herein.

19. Defendant's determination of Plaintiff's application and appeal was based on evidence, complied with law, ~~and was not arbitrary or capricious.~~

FOR AN EIGHTH DEFENSE

20. Each and every allegation of the Fifth Defense is incorporated herein.

21. Any claim for inverse condemnation is not ripe and is improperly joined in appeal of a Planning Commission determination.

FOR A NINTH DEFENSE

22. Each and every allegation of the Fifth Defense is incorporated herein.

23. No request for mediation was made before or at time of commencement of this action, as required by S.C. Code Ann. Section 6-29-1150 and 6-29-1155, and therefore, the action should be dismissed.

FOR A TENTH DEFENSE

24. Each and every allegation of the Fifth Defense is incorporated herein.

25. Property owner(s) affected by Plaintiff's plat submission, who appeared before the Planning Commission, and in whose favor the Planning Commission determination was made, are not joined as required by law, and were not timely notified of this appeal of the Planning Commission determination as required by law, and this action should, therefore, be dismissed.

FOR AN ELEVENTH DEFENSE

5 of 7 (W)

26. Each and every allegation of the Fifth Defense is incorporated herein.

27. Defendant is not a person subject to suit for action under color of law allegedly depriving Plaintiff(s) of any rights.

~~X~~ FOR A TWELFTH DEFENSE

28. Each and every allegation of the Fifth Defense is incorporated herein.

29. Defendant is a department and part of a governmental entity as defined in the S.C. Tort Claims Act, and is entitled to sovereign immunity except as expressly and specifically waived by the S.C. Tort Claims Act, S.C. Code Ann. Section 15-78-10, et. seq., which immunizes, exempts, and limits liability of this Defendant, including exempting Defendant from alleged loss allegedly resulting from nuisance; compliance, enforcement or failure to comply with or enforce law or ordinance; administrative action or inaction; exercise of discretion; legislative, judicial or quasi-judicial action or inaction; enforcement of court orders; acts of non-employees; institution or prosecution of any administrative proceeding; and from liability beyond set monetary limits; and from liability for punitive damages; and Defendant pleads sovereign immunity, and pleads the foregoing exemptions from liability permitted by the S.C. Tort Claims Act, and limitations on liability and recovery established by the S.C. Tort Claims Act, as a bar, or limit, to Plaintiff's claims, which should be dismissed, or limited, accordingly.

FOR A THIRTEENTH DEFENSE

30. Each and every allegation of the Fifth Defense is incorporated herein.

31. Defendant was not a party to the prior judicial proceedings alleged, and is not in privity with any party, and Plaintiff's claims based on alleged issue preclusion should be denied and dismissed accordingly.

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FOR A FOURTEENTH DEFENSE

32. Each and every allegation of the Fifth Defense is incorporated herein.

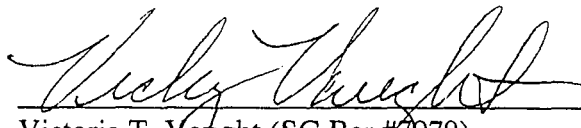
33. Defendant has not taken any affirmative act to deprive Plaintiff(s) of any property and has not delayed in any regulatory activity concerning Plaintiff's property, and Plaintiff's claims based on alleged taking of private property should be denied and dismissed accordingly.

FOR A FIFTEENTH DEFENSE

34. Each and every allegation of the Fifth Defense is incorporated herein.

35. If Defendant is in privity with a third party against whom Plaintiff(s) already litigated claim(s) regarding "Dolly Lane," Plaintiff(s) are precluded from pursuing new and additional claims in this action and the action should be dismissed accordingly based on res judicata, collateral estoppel or issue preclusion.

WHEREFORE, having fully responded to the Complaint of Plaintiff(s), Defendant respectfully prays the Court inquire into the matters and things alleged, dismiss the Complaint, dismiss Plaintiff Dipple as a party to this action, strike offensive allegations from the Complaint, require Plaintiff to make any remaining allegations more definite and certain by complying with requirements of the South Carolina Rules of Civil Procedure for setting forth specific allegations separately, grant Defendant judgment, award Defendant costs for defending this action, and/or for such other and further relief as the Court deems just and proper.



Victoria T. Vaught (SC Bar #7979)

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September 11, 2009

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON
PLEAS

CIVIL CASE NO: 2009-CP-26-7839

KENNETH DIPPEL &
KIMBER FOWLER,
Plaintiffs

vs.

HORRY COUNTY PLANNING
DEPARTMENT
Defendant,

PLAINTIFFS' REPLY TO
DEFENDANTS' MOTION TO
STRIKE & REPLY TO DEFENDANTS'
DISMISSAL REQUESTS CONTAINED
IN DEFENDANTS' ANSWER
TO PLAINTIFFS' COMPLAINT

FILED
HORRY COUNTY
2009 SEP 21 PM 1:13
JILLIANE HUGGINS
CLERK OF COURT

Plaintiffs above named, responding to Defendant's motion to strike and Defendant's pleadings to dismiss 1-42 (pages 1-7) on their Answer to the Plaintiffs' Summons and Complaint will show to this Honorable Court the following:

1: Plaintiffs are informed and believe **Defendants' first defense identified as #1 on page 1 of their answer should be denied and should be dismissed.** Also, all of Defendants' Motion to Dismiss or Strike and Make More Definite statements regarding the Plaintiffs' complaint pursuant to **Rule 12;** **SCRCP** should be denied and dismissed. **Plaintiffs respectfully state to this Honorable Court they have more than adequately pleaded sufficient facts to constitute a cause of action.**

Plaintiffs are informed and respectfully believe Defendants' denial of not receiving attached exhibits to the Complaint is moot. Plaintiffs rely on **Rule 10**

(c), SCRCP providing in part: “a copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading”. **See also Lee v. Kelley, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989) (by virtue of Rule 10(c), SCRCP, the attachment became a part and parcel of the complaint.”).**

Plaintiffs are informed and believe the burden is on Defendants to prove that there are insufficient facts to constitute a cause of action. Plaintiffs are informed and believe when the Court **solely examines the allegations** set forth in the complaint Plaintiffs have adequately pleaded sufficient facts to constitute a cause of action. **See Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007).**

Plaintiffs also in part rely on the facts, conclusions of law, and orders from the South Carolina Court of Appeals and Judge Cynthia Howe, Master in Equity to support the Plaintiffs’ contentions they have adequately stated facts sufficient to constitute a cause of action. Plaintiffs are informed and believe Defendants’ separate motion to strike does not adequately point out any alleged defects regarding Plaintiffs’ Complaint. Plaintiffs rely on **Rule 12, SCRCP** which requires a party through motion to point out the defects complained of.

Wherefore, base upon consideration of the foregoing, Plaintiffs pray to this Honorable Court to **dismiss with prejudice Defendants’ first defense on page 1 of their answer, and to deny their Rule 12, SCRCP motion to strike.**

Plaintiffs must respectfully state to this Honorable Court that Plaintiffs reserve the right to amend their Complaint pursuant to **SCRCP, Rule 15(a)** if the Court deems it necessary. Plaintiffs respectfully must state to this Honorable Court that Plaintiffs reserve the right to supplement their Complaint pursuant to **Rule, SCRCP 15(d)**.

2. Plaintiffs are informed and respectfully believe Plaintiff; Kenneth Dippel is a real party in interest. Plaintiff, Kenneth Dippel holds title to a mobile home which is located on Kimber Fowler's property. **A copy of the deed along with property tax records will be provided to the Court at the hearing scheduled for October 6, 2009.** Plaintiff, Kimber Fowler and Plaintiff, Kenneth Dippel jointly rent the mobile home out to tenants.

As a result of Defendants' actions in denying the Crescent Moon Survey Plat Plaintiff, Kenneth Dippel cannot at any time build on to his mobile home nor can he even build a driveway or anything in the near future. He cannot make any improvements at all such as pouring a paved patio, building a shelter, building an enclosed patio, etc or anything which is linked to increasing the value of the mobile home. **Title 6, S.C. Code, SECTION 6-29-1140 specifically states to the effect no building permit will be issued if a plat is not approved by the Horry County Planning Department or Commission.**

No structure or fence of any kind can be erected within the continued imposition of a 25 foot private access easement known as "Dolly Lane".

Plaintiffs are informed and respectfully believe that Plaintiff, Kenneth Dippel is a real party in interest. Plaintiff, Kenneth Dippel is now a joint owner of the land which is the subject of this Court's jurisdiction. A copy of the official deed will be offered as evidence at the hearing scheduled on October 6, 2009.

Based upon consideration of the foregoing, Plaintiffs move this Honorable Court to dismiss all of Defendant's allegations in their motion claiming lack of standing concerning Plaintiff, Kenneth Dippel or alleged lack of real property interest concerning Plaintiff, Kenneth Dippel.

3. Plaintiffs are informed and believe Defendants' allegations claiming Plaintiffs failed to provide timely joinder or timely notification to indispensable parties pursuant to **Rule 19(c), SCRCF** should be denied and dismissed with prejudice in its entirety.

Plaintiffs are informed and believe Mr. Claudius E. Fowler, his heirs, successors, and assignees are prohibited from having joinder based on res judicata (claim preclusion) or collateral estoppel (issue preclusion). Plaintiffs respectfully rely on **the final decision by the South Carolina Court of Appeals and the final ruling issued by Judge Cynthia Howe, Master in Equity which enjoined Mr. Fowler, his successors, and heirs from trespassing on Plaintiff, Kimber Fowler's property including the soiled driveway known as "Dolly Lane"**.

Plaintiffs are informed and believe the alleged property owners affected by the plat submission, and who appeared before the Planning Commission referred

to at #25 on Defendants' answer to the complaint (Tenth Defense on page 5) do not own any real property, and therefore are not real parties in interest.

Plaintiffs are informed and believe there was no specific due process or procedural due process notifications contained in the Horry County Land Development Regulations that clearly explains in detail to Plaintiffs what needed to be done when the Planning Commission did not approve their Plat. **Title 6, S.C. Code, Section 6-29-1150 states: “The land development regulations adopted by the governing authority must include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff”.**

Wherefore, based upon consideration of the foregoing, Plaintiffs respectfully move this Honorable Court to deny Defendants' motion to dismiss for alleged lack of Plaintiffs' providing timely joinder or timely notice to indispensable parties identified as #3 on their third defense (page 1) and Defendants' Tenth Defense identified on page 5.

4. Plaintiffs are informed and believe Defendants' allegations of insufficient process and lack of subject matter jurisdiction (Fourth Defense) should be dismissed. Plaintiffs properly served Defendants' a copy of the Summons and Complaint on August 11, 2009. Proof of service has already been provided to the Court. Defendants accepted and received a copy of the Summons and Complaint on August 12, 2009. In fact, Defendants pleaded their defenses after being served by Plaintiffs with the Summons and Complaint. The Plaintiffs are informed and believes any alleged claim of insufficient process by Defendants is harmless error.

Plaintiffs are informed and believe that this Court has jurisdiction over the entire subject matter in this case. Plaintiffs respectfully rely on in part Article 1, Section 11 of the Land Development Regulations (LDR) and **Title 6, S.C. Code, Section 6-29-1150(4). Title 6, S.C. Code, Section 6-29-1150(4)** in regards to jurisdiction on subject matter provides:

*“When an appeal includes no issues triable of right by jury or when the parties consent, the appeal must be placed on the non-jury docket. A judge, upon request by any party, may in his discretion give the appeal precedence over other civil cases. **Nothing in this subsection prohibits a property owner from subsequently electing to assert a pre-existing right to trial by jury of any issue beyond the subject matter jurisdiction of the planning commission, such as, but not limited to, a determination of the amount of damages due for an unconstitutional taking”.***

Wherefore, based upon consideration of the foregoing, Plaintiffs respectfully move this Honorable Court to deny and dismiss Defendants’ fourth defense.

5. With respect to Defendant’s fifth defense at #8 on page 2, Plaintiffs are informed and believe The Horry County Planning Department reviews and makes decisions on Plats submitted prior to recording. A Plat without the approval of the Horry County Planning Department cannot be **filed with the Register of**

Deeds for recording and no building permit will be issued. See Article 1, Section 10 page 10 of the Horry County Land Development Regulations and Title 6, SECTION 6-29-1140.

Plaintiffs are informed and believe the Court should dismiss Defendants' craved reference to S.C. Code Section 6-29-1150 as well as 6-29-1155 identified on #8, page 3 of Defendants' defense. Section 6-29-1150 (D) (2) which Defendants' allege to crave reference provide as follows:

"A property owner whose land is the subject of a decision of the planning commission may appeal by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-1155".

*"A notice of appeal and request for pre-litigation mediation must be filed within thirty days **after decision of the board is mailed**".*

Section 6-29-1155 is only triggered when the decision is mailed (emphasis added). Plaintiffs respectfully state they were never mailed or provided a copy the Planning Commissions' decision. Plaintiffs are informed and believe they were never provided a notification specifically setting forth their appeal rights and were never provided any kind of notification specifically directing them in addition to filing within 30 days a notice of appeal to the circuit; a request for mediation also had to be filed. **See Title 6, SC Code Sections 6-29-1150(A)** ("land development regulations adopted by the governing authority must include **a specific procedure** for the submission and approval or **disapproval by the planning commission** or designated staff") & Title 6, SC Code Sections 6-29-1150(B) (developer must be notified in writing).

See also Article 1, Section 11 page 10 of the Horry County Land Development Regulations.

Plaintiffs are informed and believe Article 1, Section 11 page 10 of the Horry County Land Development Regulations is at odds with S.C. Code Section 6-29-1150 as well as 6-29-1155. **Article 1, Section 11 (Appeals) page 10** of the Horry County Land Development Regulations does not state at all that a request for pre-litigation mediation must be filed. It only says the aggrieved **party shall file a petition with the clerk of court within 30 days after a Planning Commission decision is rendered.** Defendants' have no appeal procedures published in their Land Development Regulations setting forth specifically a request for mediation has to be filed nor do they have anything published specifically setting forth what the rights of a party are concerning an unapproved Plat. See again Title 6, SC Code Sections 6-29-1155(A).

Plaintiffs are informed and believe Section 6-29-1555(A)(2) is not in accordance with this Court's rules concerning mediation. Plaintiffs are informed and believe appeals such as the one in this instant case at bar, are not subject to Court mediation under this Courts' rule, and even if this case were subject to mediation the Plaintiffs were not required to request mediation at the very onset of the commencement of the action. This Court rule pertaining to cases subject to mediation states: *"The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of the Court shall then appoint a primary and secondary mediator from the current roster on rotating bases*

from among those agreeing to accept cases in the county in which the action is filed”.

6. Plaintiffs are informed and believe Defendants’ Fifth Defense identified as #15 on page 4 of their answer to the Complaint should be denied or dismissed. Defendants have not pointed out any specific defects regarding Plaintiffs’ complaint and have not provided any details they desire in a motion. Rule 12(e), SCRPC provides: **“The motion shall point out the defects complained of and the details desired”**. Plaintiffs are informed and respectfully believe Defendants’ have not complied with **Rule 12(e), SCRPC**.

Furthermore, Plaintiffs reserve the right to amend or supplement pursuant to **Rule 15, SCRPC if the Court deems it necessary**. Plaintiffs again respectfully remind the Court that they have adequately pleaded their cause of action concerning an appeal of the Planning Commission decision.

Plaintiffs respectfully remind the Court as well that Defendants have not published any kind of specific language in their Land Development Regulations requiring an Appellate to plead with specifics to this Court concerning an Appeal involving a Planning Commission decision. Plaintiffs are informed and believe that there are no specifics as to how the Court should proceed concerning the subject review and to how the decision is to be reviewed. Plaintiffs are informed and believe that Defendants’ have not complied with Title 6, SC Code Sections 6-29-1155(A) by not including in their Land Development regulations any details or wording explaining what needs to be done, what rights an individual has, scope of

review of the Court, how the Court is to review the decision (whole record test or de novo), etc.

7. Plaintiffs are informed and believe Defendants' sixth defense at number 16 on page 4 is in part dependent upon their Fifth Defense identified as #8 on page 2 and 3 (defendants' same craved reference to S.C. Code Section 6-29-1150 as well as 6-29-1155 on #8, page 3 of Defendants' Fifth defense). Plaintiffs are also informed and believe that Defendants' claim that Plaintiff, Kenneth Dippel lacks standing is the same defense set forth on #2, page 1 of Defendants' defense. Plaintiffs respectfully are informed and believe #16 in part as well as all of #17 is redundant.

Wherefore, based upon consideration of the foregoing, Plaintiffs respectfully move the Court pursuant to Rule 12(f), SCRPC to strike #16 as it relates in part to the Fifth Defense #8 and also to strike #17 of Defendants' defense. **See Rule 12(f), SCRPC (the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter).**

8. Plaintiffs are informed and believes #18 (Seventh Defense), #20 (Eighth Defense), #22 (Ninth Defense), #24 (Tenth Defense), #26 (Eleventh Defense), #28 (Twelfth Defense), #30 (Thirteenth Defense), #32 (Fourteenth Defense), and #34 pertaining to the incorporation of the Fifth Defense are all redundant. Plaintiffs respectfully move the Court to strike all of these defenses pursuant to **Rule 12(f), SCRPC.**

9. Plaintiffs are informed and believe that any inverse condemnation claim is ripe for review and constitutes a cause of action. Plaintiffs rely on **Title 6, Section 6-29-1150(4)** which in part provides **nothing in this subsection prohibits a property owner from subsequently electing to assert a pre-existing right to trial by jury or any issue beyond the subject matter jurisdiction of the planning commission, such as, but not limited to, a determination of the amount of damages due an unconstitutional taking.**

Plaintiffs also in part rely on Cobb v. South Carolina Dep't of Transp., 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005) and Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005) in support that the Court has jurisdiction over the subject matter of inverse condemnation.

Plaintiffs reserve the right to supplement their pleadings regarding any inverse condemnation pursuant to **Rule 15, SCRPC 15.**

10. Plaintiffs are informed and believe Defendants' Ninth Defense at #23 is redundant. This is the same Defense brought forward at #8 (Fifth Defense) as it intertwined with Defendants' craved reference to S.C. Code Ann. Section 6-29-1150 and S.C. Code Ann. Section 6-29-1150. Plaintiffs respectfully move the Court pursuant to Rule 12(f), SCRPC to strike all of #23 (Ninth Defense) on the grounds of being redundant.

11. Plaintiffs in response to Defendants' Eleventh Defense identified as #27 respectfully call the Court's attention to **Title 6, S.C. Code, Section 6-29-1160:**

"The county official whose duty it is to accept and record real estate deeds and plats may not accept, file, or record a land development plan or subdivision plat involving a land area subject to land development regulations adopted pursuant to this chapter unless the development plan or subdivision plat has been properly approved". "If a public official violates the provisions of this section, he is, in each instance, subject to the penalty provided in this article and the affected governing body, private individual, or corporation has rights and remedies as to enforcement or collection as are provided, and may enjoin any violations of them".

Plaintiffs also respectfully rely on **Title 6, S.C. Code, Section 6-29-1160(4)**. Plaintiffs are informed and respectfully believe Title 6, S.C. Code, Section 6-29-1160(4) does not limit the subject matter jurisdiction to just Defendants' as a whole body.

Wherefore, based upon consideration of the foregoing, the Plaintiffs respectfully move the Court to strike Defendants' entire defense at #27 (Eleventh Defense).

12. Plaintiffs in response to Defendant's Twelfth defense found on page 6 identified as #29, move the Court to deny Defendant's request to dismiss or limit liability under the S.C. Torts Act.

Under the Tort Claims Act, a governmental entity is liable for its torts "in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations . . . contained herein." S.C. Code Ann. § 15-78-40. Defendants have apparently interpreted the South Carolina Torts Act to mean that they are automatically completely shielded from immunity.

Sovereign immunity is not always automatic as Defendants appear to try to persuade the Court. There are exceptions to sovereign immunity. One of which for example pertains to discretionary immunity.

Mere room for discretion on the part of the entity is not sufficient to invoke the discretionary immunity provision. **Summer v. Carpenter**, 328 S.C. 36, 492 S.E.2d 55 (1997). Discretionary immunity is contingent on **proof the government entity, faced with alternatives**, actually weighed competing considerations and made a conscious choice using accepted professional standards. *Wooten ex rel. Wooten v. South Carolina Dep't of Transp.*, 333 S.C. 464, 511 S.E.2d 355 (1999). The governmental entity bears the burden of establishing discretionary immunity as an affirmative defense. *Summer v. Carpenter*, *supra*.

Defendants in this instant case have not at this time proven that when **they were faced with alternatives (in this instant case for example placing the "Dolly Lane" sign on Mr. Fowler's driveway which links up to G & B Lane)**, they actually weighed competing considerations and made a conscious choice using accepted professional standards when Defendants denied the approval of Plaintiffs' Crescent Moon Survey Plat.

Plaintiffs also call the Court's attention to **Title 6, S.C. Code, Section 6-29-1160** which clearly under this statute states public officials can be subject to penalty. Plaintiffs in this instant case are informed and believe they have rights and remedies pursuant to **Title 6, S.C. Code, Section 6-29-1160**.

13. Plaintiffs respectfully move the Court to deny Defendants' Thirteenth Defense identified as #31 on Defendants' Answer to the Complaint, page 6 or in the alternative should defer any ruling on this matter. Plaintiffs have not been given a full and fair opportunity to fully plead res judicata, collateral estoppel, or the doctrine of laches. Nevertheless, Plaintiffs will briefly address res judicata and collateral estoppel as a counter defense to Defendants claim herein the subsequent paragraphs.

Defendant appears to argue that the fact they were not a part of the prior judicial proceedings involving Mr. Claudius Fowler automatically shields them from any preclusive effects from these decisions. Plaintiffs respectfully must state this assumption is erroneous and is not in accordance with the common law. **Defendants' assertion it is not a privity with any party is also error. Defendants' definition or idea of a party in privy does not meet the correct legal definition in which our Courts have consistently defined.**

Defendants clearly are an apparent **silent partner** with Claudius E. Fowler in this litigation. Defendants from the very start of this private dispute have been aligned with Mr. Claudius E. Fowler and they continue to do so. They have the

very interest or relationship to the subject matter of litigation which is to continually impose a private easement known as "Dolly Lane" on Plaintiff, Kimber Fowler's property.

Plaintiffs are informed and believe Defendants' clearly are trying to fight Mr. Claudius E. Fowler's battle or at the very least are trying to provide Mr. Claudius E. Fowler a "second bite of the apple" to sustain his claimed private access easement known as "Dolly Lane", and are also doing this to provide him equitable relief from those judgments even when the South Carolina Court of Appeals and the Master in Equity determined he did not have an easement right across Plaintiff, Kimber Fowler's property. The relationship to the subject matter of this litigation (enforcement of a private 25 foot easement known as "Dolly Lane") is even more evident by the fact Defendants in their Tenth Defense (#25, page 5) are **silently demanding** that Mr. Claudius E. Fowler must be enjoined in this cause of action. Plaintiffs respectfully remind the Court that the subject matter of jurisdiction (a 25 foot private access easement concerning Mr. Fowler) is the very same subject matter that was decided by the South Carolina Court of Appeals and the Master in Equity.

Plaintiffs are informed and believe Defendants' have arbitrarily injected themselves into a private dispute for the sole purpose of continually preserving Mr. Claudius E. Fowler a 25 foot private access private easement known as "Dolly Lane". This the Plaintiffs believe is being done without the Defendants' meeting the burden of demonstrating that there is a substantial public interest at stake to the citizens of Horry County and also without Defendants' detailing what is the substantial public benefit to the citizens of Horry County by continually imposing

a 25 five foot private access easement known as “Dolly Lane” on Plaintiffs. The bottom line in this case is that there is no substantial public interest or substantial benefit to the citizens of Horry County. The only citizens who will benefit with the continued enforcement of a 25 foot access easement known as “Dolly Lane” on Plaintiffs will be Mr. Claudius E. Fowler, his family members who are heirs, and his successors.

Throughout Defendants’ list of defenses they never clearly provided any kind of adequate defense explaining why they are completely shielded from any preclusive effects resulting from the South Carolina Court of Appeals findings of facts, conclusions of law, and final determination that no private legally enforceable easement existed for Mr. Claudius E. Fowler. An easement by implication is predicated upon the premise that a “seller of a lot” (a grantor) intends for a “buyer” (grantee) to have access to all roads, streets, and right of ways. **Mr. Fowler no matter how they want to argue cannot be the beneficiary of any private easement.**

Even if he were to convey his land out at some later date in the future he would still have no legally enforceable easement of any kind. The South Carolina Court of Appeals clearly pointed this out in their ruling. Further, our Supreme Court in ***Windham v. Riddle*, Opinion #26586 (January 20, 2009)** affirmed a decision by the SC Court of Appeals, ***Windham v. Riddle*, 370 S.C. 415, 419; 635 S.E.2d 558, 560 (Ct. App. 2006)** which relied on the long-standing common law rule that an easement cannot exist where both the purported servient and dominant estates are owned by the same person. The common law has made it clear that when the dominant estate and servitude estate is lodged to

the same person, such as is in this instant case at bar, no legally enforceable easement exists. **See also Haselden v. Schein, 167 S.C. 534, 539, 166 S.E. 634, 635 (1932).**

Defendants' did not abide at all to our Master in Equity ruling. Judge Cynthia Howe our Master in Equity issued an injunction **enjoining** Mr. Claudius E. Fowler, his heirs, and his successors from trespassing on the private soiled driveway known as "Dolly Lane". Defendants (Horry County Planning Department) who is a department within Horry County had no legal standing to overturn the South Carolina Court of Appeals' ruling and the Master of Equity ruling. This is exactly what happened when Defendants (Horry County Planning) made a decision to deny Plaintiffs' Plat on the grounds Plaintiff Kimber Fowler had to continually provide access to all of Claudius E. Fowler's tracts of land.

Plaintiffs are informed and believe this Court and including Defendants should be legally bound by those findings of facts, conclusions of law, and final determinations contained in the South Carolina Court of Appeals and the Master in Equity. Plaintiffs are informed and believe this Court should not just ignore those findings of fact, conclusions of law, and orders by tossing them in the trash can as Defendants desire to do so, and then start "anew" by allowing Defendants to either have a very expensive jury trial or non jury trial for purposes of determining again "anew", whether Mr. Claudius E. Fowler has a private enforceable 25 foot easement, which was the very same subject matter of two final judicial proceedings.

Plaintiff, Kimber Fowler would be substantially harmed because those two judicial decisions were specifically issued to grant her relief from the continued

illegal enforcement of a private access easement known as “Dolly Lane”. The Master of Equity of ruling was very clear: “Mr. Claudius E. Fowler, his successors, and heirs were not to trespass on the property of Plaintiff, Kimber Fowler including the soiled driveway known as “Dolly Lane”. Throwing this order in the trash can as Defendants want this Court to do would be prejudicial error and would unjustly deprive Plaintiff, Kimber Fowler of the necessary relief she was granted by Judge Cynthia Howe, Master in Equity. It would also harm Plaintiff, Kenneth Dippel.

The US Supreme Court, our federal courts, our State Courts including this Court have traditionally adhered to the related doctrines of **res judicata** (claim preclusion) and **collateral estoppel** (issue preclusion). Federal Courts, our Supreme Court, the South Carolina Court of Appeals including this Court have recognized, res judicata and collateral estoppel relieve parties of the costs and vexation of multiple lawsuits, conserve judicial resources, prevents inconsistent decisions, and also encourages reliance on prior Court decisions. **Those final prior Court decisions become the law of the land in any and all subsequent litigation on related claims or issues.**

Res judicata is a judicially created doctrine that determines the effect of prior judgments on parties in subsequent litigation or adjudications. *Gene R. Shreve & Peter Raven-Hansen, Understanding Civil Procedure 106 (2d ed. 1994)*. Res judicata deals with **“how a judgment can foreclose subsequent opportunities to bring a claim or cause of action”**. Under res judicata, a final judgment on the merits of an action precludes the parties or their **privies** from relitigating issues that were **or could have been raised in that action.**

Under South Carolina law, the doctrine of res judicata extends to include **privy parties**. *Nunnery v. Brantley Constr. Co., Inc.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986). A party in privy is a party who has or who may have the same or similar legal interest in a legal proceeding.

In the context of res judicata, the term **privy** does not refer to “relationships between persons or entities, but rather **it deals with a relationship to the subject matter of the litigation.**” *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986). The term can also refer to a party so identified in interest with another that he represents the same legal rights. *Wyndham v. Lewis*, 292 S.C. 6, 8, 354 S.E.2d 578, 579 (Ct. App. 1987).

In South Carolina, *res judicata* commonly known as claim preclusion applies when: (1) there is a final judgment on the merits in a prior action, and (2) the second action is based on the same claim as the issues actually litigated or **which might have been litigated in the first action.** *Liberty Mutual Insurance Company v. Employers Insurance of Wausau*, 284 S.C. 234, 325 S.Ed 566, 568 (S.C.Ct.App.1985), quoting Stewart, *Res Judicata and Collateral Estoppel in South Carolina*, 282 S.C.L.Rev. 451, 452 (1977). To establish res judicata, the following elements must be established: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the claim in the former suit. *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). Res judicata bars the parties to that suit from bringing subsequent actions on either the adjudicated issues or any issues that might have

been raised in the first suit. Plott v. Justin Ent., 374 S.C. 504, 511, 649 S.E.2d 92, 95 (Ct. App. 2007).

Collateral estoppel deals with how a judgment can prevent re-litigation of an issue of fact or law. *Gene R. Shreve & Peter Raven-Hansen, Understanding Civil Procedure 106 (2d ed. 1994)*. Collateral estoppel in practice “simply means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties or **parties in privity in any future lawsuit.**” Under collateral estoppel once a Court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to a case.

Collateral estoppel, or issue preclusion, prohibits a court from adjudicating an issue that was “actually litigated and determined by a valid and final judgment” in a prior suit. Zurcher v. Bilton, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008). Collateral estoppel applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same. Id. A party is precluded from re-litigating an issue under the doctrine of collateral estoppel unless he lacked a full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to re-litigate the issue.

“The doctrine of nonmutual collateral estoppel” applies in South Carolina when: (1) there is a final judgment on the merits in a prior action, and (2) the second action is based on a different claim, but is based on an issue that was actually litigated and directly determined in a prior action, if (3) the party had a

full and fair opportunity to litigate the issue in the first action and there are no circumstances that justify affording him a second opportunity to retry the issue. *Irby v. Richardson*, 278 S.C. 484, 485, 298 S.E.2d 452, 454 (1982); *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 450 S.E.2d 616, 619 (1994).

With respect to this case at bar, Plaintiffs are informed and believes that Defendants' claim of any kind of private easement concerning Mr. Claudius E. Fowler is prohibited by either res judicata (claim preclusion) or collateral estoppel (issue preclusion). Wherefore, Plaintiffs with respect to Defendants' Thirteenth Defense, **move the Court to estop Defendants' from bringing forth as a Defense a claimed 25 foot private easement with respect to Mr. Claudius E. Fowler.**

14. Plaintiffs move the Court to strike all of Defendants' Fourteenth Defense identified as #33 on page 7 on the grounds of redundancy. Plaintiffs rely on **Rule 12(f), SCRCP**. Defendants' defense at #33 to their answer to the Complaint is intertwined with #21 on page 5 of their Answer to the Complaint. Further, Plaintiffs rely on **Title 6, Section 6-29-1150(4)**.

Wherefore upon consideration of the foregoing, the Plaintiffs move the Court to deny Defendants' demand to dismiss and further move the Court to stay Plaintiffs' inverse condemnation claim.

15. Plaintiffs move the Court to dismiss Defendants' Fifteenth Defense identified as #35 on page #11. **Title 6, Section 6-29-1150(4)** in part provides nothing in this subsection prohibits a property owner from subsequently electing to assert a

pre-existing right to trial by jury or any issue beyond the subject matter.

Furthermore, Plaintiffs reserve the right to take leave to amend as may be deemed necessary pursuant to Rule 15(a), SCRCP and also reserve the right to supplement pursuant Rule 15(d), SCRCP.

CONCLUSION

Wherefore, having fully responded to Defendants' motion to strike and to Defendants' numerous dismissal requests, Plaintiffs move the Court to strike, deny and or dismiss the allegations contained in Defendants' motion to strike and Defendants' numerous dismissal requests contained in their answer to Plaintiffs' Complaint.

Sept. 21st, 2009
Conway, South Carolina

R. Allen Beverly Jr.

R. Allen Beverly, Jr., LLC (SC Bar # 72528)
Attorney at Law
900 C Main Street
Conway, SC 29526 (843) 248-2089

CERTIFICATE OF SERVICE

Plaintiffs hereby certify that a copy of the Plaintiffs' Response to Defendant's Motion to Strike and Response to Defendants' Dismissal Requests contained in their Defenses in Answering the Complaint was provided to the Defendants by mailing a copy to the Defendants by first class US mail, restricted delivery addressed as follows:

Attention: Attorney Victoria T. Vaught
Battle & Vaught
PO Box 530
Conway, SC 29528

Attention: Attorney John L. Weaver
PO Box 1236
Conway, SC 29528

FILED
CLERK OF COURT
MELANIE HUGGINS
2009 SEP 21 PM 1:18
CURRY COUNTY

9-21-09
(Date)

R. Allen Beverly Jr.
(Signature)

R. Allen Beverly, Jr., LLC (SC Bar # 22528)
Attorney at Law
900 C Main Street
Conway, SC 29526 (843) 248-2089

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

**TITLE TO REAL ESTATE
NO CERTIFICATION OF TITLE**

WHEREAS, there is an easement shown on Plat Book 163 at Page 228; and

WHEREAS, the Court of Appeals and the Master-in-Equity have ruled that the easement does not exist and is not legally held by the adjoining land owner Claudius Eugene Fowler as evidenced by the attached decisions; and

WHEREAS, the purpose of this deed is to show that the easement does not legally exist on the above cited plat and to convey a half interest in the property to Kenneth Dippel,

NOW,

KNOW ALL MEN BY THESE PRESENTS,

That **Kimberly R. Fowler**, in the State aforesaid for and in consideration of the sum of FIVE and No/100 ----- (\$5.00) DOLLARS to me paid by **Kimberly R. Fowler and Kenneth Dippel** in the State aforesaid, (Receipt whereof is hereby acknowledged) have granted, bargained, sold and released; and by these presents do grant, bargain, sell and release unto the said **Kimberly R. Fowler and Kenneth Dippel**, as joint tenants with the right-of-survivorship, and not as tenants-in-common, the following described property to wit:

SEE PROPERTY DESCRIPTION RIDER

Grantees Address:

2145 Oak Dale Rd.

Loris, SC 29569

**Instrument#: 2009000101122, DEED BK:
3421 PG: 1862 DOCTYPE: 001 09/22/2009
at 10:31:14 AM, 1 OF 4, EXEMPT,
BALLERY V. SKIPPER, HORRY COUNTY,
SC REGISTRAR OF DEEDS**

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said **Kimberly R. Fowler and Kenneth Dippel**, as joint tenants with the right-of-survivorship, and not as tenants-in-common, their Heirs and Assigns forever.

And I do hereby bind myself and my Heirs and Executors and Administrators, to Warrant and forever defend all and singular the said premises unto the said **Kimberly R. Fowler and Kenneth**

Dippel, as joint tenants with the right-of-survivorship, and not as tenants-in-common, their Heirs and Assigns, against me and my Heirs, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

Witness the execution hereof by grantor this 22nd day of September in the year of our Lord Two Thousand and Nine and in the Two Hundred and Thirty-Third year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered
in the Presence of:

Misty G. Nolan
Jan. W. Lush

Kimberly R. Fowler (L.S.)
Kimberly R. Fowler

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

PERSONALLY appeared before me the undersigned witness, and made oath that (s)he saw the within named **Kimberly R. Fowler**, Sign, Seal and as her Act and Deed deliver the within written Deed; and that (s)he with the undersigned notary, witnessed the execution thereof.

Sworn to before me this 22nd

day of September A.D. 2009.

Jan. W. Lush (L.S.)
Notary Public for South Carolina
My Commission Expires: 5-1-13

Misty G. Nolan

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

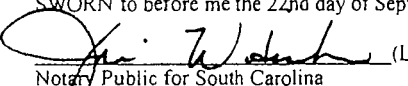
1. I have read the information on this affidavit and I understand such information.
2. The property being transferred is located in Simpson Creek Township, Horry County Tax Map Number #040-00-01-122, and was transferred by Kimberly R. Fowler to Kimberly R. Fowler and Kenneth Dippel on September 22nd, 2009.
3. Check one of the Following: The Deed is
 - (a) _____ Subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
 - (b) _____ Subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
 - (c) XX _____ Exempt from the deed recording fee because (See Information section of this affidavit): DEED OF GIFT: CONSIDERATION LESS THAN \$100.00

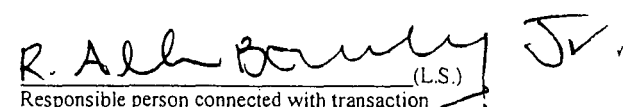
(If exempt, please skip items 4-7, and go on to item 8 of this affidavit.)

If exempt under exemption # 14 as described in the information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase realty? Check Yes _____ or No _____

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit):
 - (a) _____ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$ _____
 - (b) _____ The fee is computed on the fair market value of the realty which is _____
 - (c) _____ The fee is computed on the fair market value of the realty as established for property tax purposes which is _____
5. Check Yes or No XX to the following: A lien or encumbrance existed on the land, tenement or realty before the transfer and remained on the land, tenement or realty after the transfer. If "Yes," the amount of the outstanding balance of this lien or encumbrance is: _____
6. The deed recording fee is computed as follows:
 - (a) Place the amount listed in item 4 above here: _____
 - (b) Place the amount listed in item 5 above here: _____
(If no amount is listed, place zero here.)
 - (c) Subtract line 6(b) from line 6(a) and place result here: _____
7. The deed recording fee due is base on the amount listed on Line 6(c) above and the deed recording, fee due is:
8. As required by Code Section, 12-24-70, I state I am a responsible person who was connected with the transaction as Attorney.
9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

SWORN to before me the 22nd day of September, 2009

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 5-1-13

 (L.S.)
Responsible person connected with transaction
R. Allen Beverly, Jr., Attorney
print or type name here

PROPERTY DESCRIPTION RIDER

ALL AND SINGULAR, all that certain piece, parcel and lot of land situate, lying and being in Simpson Creek Township, County and State aforesaid, shown and designated as Lot Number One, containing 0.99 acres, more or less on that certain survey prepared by Inman Surveying and Mapping, dated June 17, 1999, and recorded in the Office of the ROD in Plat Book 163 at Page 238, which is incorporated herein by reference as a part and parcel hereof.

BOUNDED on the North by lands of Mearl Dean Fowler; on the South by lands now or formerly of Ester Fowler; on the East by South Carolina Highway Number 932; and on the West by Lot Two as shown on the plat.

THIS BEING the identical property conveyed to Kimberly R. Fowler by Deed of Timothy E. Fowler recorded April 21st, 2005 in the Office of the ROD for Horry County in Deed Book 2897 at Page 463.

TMS#040-00-01-122

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Kimber R. Fowler a/k/a Kimberly R. Fowler,
Appellant,

v.

Claudius Eugene Fowler, Respondent.

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Unpublished Opinion No. 2009-UP-096
Submitted November 1, 2008 – Filed February 23, 2009

REVERSED

Kimber Fowler, of Loris, for Appellant.

Claudius Eugene Fowler, of Loris, for
Respondent.

PER CURIAM: Kimber Fowler (Appellant) planted Bradford pear trees along an easement Claudus E. Fowler (Respondent) claimed across Appellant's land. When Respondent cut limbs from those trees, Appellant filed an action for trespass and property damage. She now appeals from the master-in-equity's order finding Respondent had an easement across Appellant's land. We reverse.[1]

FACTS

I. Land Conveyances

On September 29, 1981, Respondent acquired 3.72 acres of land through a civil suit for partition of his father's estate. The estate's real property was surveyed and platted on November 9, 1981. No easement appeared either in Respondent's title or on that plat.

On June 17, 1999, Respondent's land was surveyed and platted in preparation for

<http://www.judicial.state.sc.us/opinions/displayUnPubOpinion.cfm?caseNo=2009-UP-096> 7/5/2009

conveyances Respondent intended to make to his children. The plat prepared at this time (the Inman Plat) reflects an "existing soil drive" within a twenty-five-foot private easement across the north side of the parcel. On August 6, 1999, Respondent and his wife conveyed the easternmost 0.99 acres of their land to their son and Appellant, their daughter-in-law. Respondent and his wife reserved a life estate in the conveyed land. On June 28, 2000, they released this right and conveyed their remaining interest in the land to their son and Appellant. Although the title references the Inman Plat, neither the title nor the release document indicates an easement.

Respondent's son and Appellant divorced in January 2005. On April 20, 2005, Appellant received title to the 0.99 acres solely in her name pursuant to the divorce decree. The title document executed by Respondent's son references the Inman Plat but does not indicate an easement.

On April 18, 2006, the land was surveyed again at Respondent's request. The plat prepared following this survey reflects a "private access easement" identified as "Dolly Lane" across the north side of Appellant's land and references the prior plat. Furthermore, this plat appears to indicate a proposed driveway and cul-de-sac extending from Dolly Lane across half of Respondent's property. Both the 1981 and 2006 plats show a county road either touching or defining a portion of the western boundary of Respondent's property. [2]

II. Background and Procedural History

In August 2000, Appellant planted eight Bradford pear trees approximately six feet from the existing soil drive shown on the Inman Plat. On April 5, 2005, Respondent and his grandson destroyed one of those trees. Appellant filed criminal charges against them but later withdrew those charges in an effort to "make peace with the family." On February 8, 2007, Respondent and his grandson used a chainsaw to cut branches from the remaining Bradford pear trees, leaving marks across the trunks of several of those trees. Subsequently, Appellant posted "no trespassing" signs on and near the trees. When Respondent removed them, Appellant again filed criminal charges against him and a civil suit for trespass and malicious damage to her property.

Appellant's civil suit was referred to the master, who ruled in favor of Respondent and found Respondent had "by dedication a private easement . . . for travel purposes of ingress and egress" across Appellant's land. This appeal followed.

LAW/ANALYSIS

I. Easement by Dedication

Appellant asserts the master erred in finding Respondent possessed an easement by dedication across her land. We agree.

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Hardy v. Aiken, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006).

The master erred in concluding Respondent possessed an easement by dedication. South Carolina law presumes a buyer of a lot in subdivided property has a dedicated property right in

<http://www.judicial.state.sc.us/opinions/displayUnPubOpinion.cfm?caseNo=2009-UP-096> 7/5/2009

any easements or roads shown on the plat. Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism, 377 S.C. 86, 92, 659 S.E.2d 151, 154 (2008); see also Murrells Inlet Corp. v. Ward, 378 S.C. 225, 233, 662 S.E.2d 452, 455-56 (Ct. App. 2008). While an easement by dedication may be described in a plat prepared prior to conveyance of subdivided property, no easement legally exists until the seller conveys ownership of a part of that property to a buyer. Inlet Harbour, 377 S.C. at 92, 659 S.E.2d at 154. To create this implied easement, the deed must reference the plat. Id. Once created, the easement benefits the buyer. Id.; see also Murrells Inlet Corp., 378 S.C. at 233, 662 S.E.2d at 455-56; McAllister v. Smiley, 301 S.C. 10, 12, 389 S.E.2d 857, 859 (1990). [3]

Here, Respondent prepared a plat describing the way he intended to subdivide his property into three lots, two of which were to go to his children. He ultimately conveyed ownership of only one lot and now claims an easement by dedication across it. However, because an easement by dedication benefits the buyer, this presumption is unavailable to Respondent, the seller. Consequently, Respondent does not possess an easement by dedication across Appellant's land.

II. Other Issues

Appellant additionally asserts the master erred in violating her due process rights and in failing to rule on her motions for summary judgment. Due to our disposition of Appellant's first issue, we need not address the remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

As to the issue of Respondent's easement, we find Respondent does not have an easement by dedication across Appellant's land. Therefore, we reverse the master's order on this issue.

Accordingly, the master's order is

REVERSED.

HEARN, C.J., KONDUROS, J., and GOOLSBY, A.J., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] The western end of Respondent's property does not appear on the Inman Plat.

[3] Our supreme court explored the policies underlying implied public and private easements by dedication in Cason v. Gibson, 217 S.C. 500, 61 S.E.2d 58 (1950).

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
CIVIL CASE NO.: 07-CP-26-01782

KIMBER R. FOWLER,)
)

Plaintiff,)

v.)

CLAUDIUS EUGENE FOWLER,)
)

Defendant.)
)

ORDER ON REMAND FROM
THE SOUTH CAROLINA COURT OF
APPEALS

TRIAL JUDGE:

PLAINTIFF:

DEFENDANT:

COURT REPORTER:

DATE OF HEARING:

CYNTHIA GRAHAM HOWE

KIMBER R. FOWLER, pro se

CLAUDIUS EUGENE FOWLER, pro se

PRESTIGE COURT REPORTING SERVICE

MAY 26, 2009

FILED
CLERK OF COURT
2009 MAY 26 PM 2:46

1
CCH

This matter was referred to the Horry County Master in Equity by Order of the Honorable Paula H. Thomas dated April 30, 2007. This case concerns an alleged easement across Plaintiff Kimber Fowler's land. She alleges that Defendant Claudius Eugene Fowler removed a Bradford pear tree planted along the alleged easement and cut limbs and damaged several trunks of other Bradford pear trees planted along it.

In August 2007, The Honorable J. Stanton Cross issued an order holding that Defendant had an "easement by dedication" over the .99 acres of property which is the subject of this action. On appeal by unpublished opinion issued on February 23, 2009, the South Carolina Court of Appeals reversed Judge Cross, holding that Defendant "does not have an easement by dedication across" Plaintiff's land.

This matter is before me on two matters: (1) Plaintiff's Notice of Remedies Hearing dated April 1, 2009, and Kenneth Dippel's motion to intervene pursuant to Rule 24, SCRCRCP and/or to join as a plaintiff pursuant to Rule 18, SCRCRCP. Mr. Dippel appeared at the May 26, 2009, hearing and argued his motion to intervene/join as a party.

No attorneys appeared at the hearing. After carefully considering Mr. Dippel's motion, I deny the motion.

On April 1, 2009, Kenneth Dippel, Plaintiff's brother, moved to be joined as a plaintiff and/or to intervene in the lawsuit as a plaintiff. Mr. Dippel owns a trailer on his sister's property and jointly rents the trailer with his sister, the Plaintiff. He asserts he is a necessary plaintiff because the Defendant "continually claims he has an easement right", . . . , he "cannot help maintain the private driveway of [his] sister's as long as [Defendant] continually persists by claiming he actually owns this road passing by [his] trailer and by him continually persisting he has an easement through my sister' property, and the [Defendant] has in the past threatened to charge me a toll for using my own sister's driveway that leads to this trailer [he] own[s]." He asserts he has a constitutional right to defend his property against Defendant's unlawful easement claims. I disagree that Mr. Dippel should be allowed to intervene as a matter of right pursuant to Rule 24(a)(2), SCRCPP, and accordingly, I deny his motion.

SC DHEC v. Columbia Organic Chemical Co., Inc., 310 S.C. 495, 427 S.E.2d 661 (1993) provides that a party moving to intervene under Rule 24(a)(2), SCRCPP must (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties.

Mr. Dippel was unable to adequately explain the two-year delay in moving to intervene. Moreover, Mr. Dippel was unable to demonstrate that his interest was

inadequately represented by his sister, the Plaintiff, in this matter. In fact, just the opposite appears to be true. Plaintiff more than adequately has demonstrated her ability to represent her interests (i.e., that there was no easement) in this matter. Plaintiff's interests appear to be the same or similar as Mr. Dippel's interests, and I find that Plaintiff adequately has represented those interests during the course of this lawsuit. A failure to satisfy any one of the four requirements precludes intervention. *SC DHEC v. Columbia Organic Chemical Co., Inc.*, 310 S.C. 495, 427 S.E.2d 661 (1993).

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CBH
Mr. Dippel's motion to join under Rule 18, SCRPC also fails him. Rule 18 is appropriate when a party, who has asserted a cause of action as an original claim, counterclaim, cross-claim, or third-party claim, seeks to join independent or alternate claims. Until Mr. Dippel is a party, either initially or by intervention, he may not be allowed to join his claims pursuant to Rule 18, SCRPC. Since I have concluded that Mr. Dippel should not be allowed to intervene, Mr. Dippel's motion to join under Rule 18, SCRPC also should be denied.

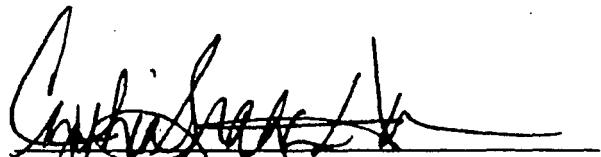
As to Plaintiff's claims, in her original complaint, Plaintiff prayed for an injunction, enjoining Defendant from using the 25 foot driveway which had been alleged to be an easement, enjoining Defendant from cutting the Bradford Pear trees planted along the 25 foot driveway, and for \$125 dollars for a Bradford Pear Tree previously planted along the 25 foot driveway, which tree Plaintiff alleged that the Defendant destroyed.

Plaintiff did not offer any evidence at the hearing on remand, nor did Defendant dispute the prayer, that the Bradford Pear Tree was worth \$125.00. Plaintiff did not seek pre-judgment interest. Accordingly,

IT IS HEREBY ORDERED THAT Plaintiff be granted judgment against Defendant in the amount of \$125.00.

IT FURTHER IS ORDERED that Plaintiff be granted an injunction, enjoining Defendant, his successors, and heirs, from trespassing on Plaintiff's property, more specifically shown on Exhibit "A" attached to this Order, including a twenty-five foot soil driveway known as Dolly Lane across the north side of Plaintiff's property.

AND IT IS SO ORDERED.


Cynthia Graham Howe
Horry County Master in Equity

Conway, South Carolina
Dated: May 26, 2009

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CST

4

EXHIBIT "A"

ALL AND SINGULAR, all that certain piece, parcel and lot of land situate, lying and being in Simpson Creek Township, County and State aforesaid, shown and designated as Lot Number One, containing 0.99 acres, more or less on that certain survey prepared by Inman Surveying and Mapping, dated June 17, 1999, and recorded in the Office of the Horry County R.O.D. in Plat Book 163 at Page 228, which is incorporated herein by reference as a part and parcel hereof.

BOUNDED on the North by lands of Mearl Dean Fowler; on the South by lands now or formerly of Ester Fowler; on the East by South Carolina Highway Number 932; and on the West by Lot Two as shown on said plat.

BEING the identical property conveyed to Timothy E. Fowler and Kimberly H. Fowler by Eugene Fowler, a/k/a Claudus E. Fowler by Deed recorded in Deed Book 2175 at Page 1, Office of the Horry County R.O.D. on August 9, 1999, wherein Eugene Fowler, a/k/a Claudus E. Fowler reserved a life estate unto himself and his wife, Terry H. Fowler.

TMS NUMBER: 040-00-01-056

HORRY COUNTY ASSESSOR

040-00-01-122

Map

Blk

Parcel

7-70077

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM HORRY COUNTY
Court of Common Pleas**

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-26-7839

KENNETH DIPPËL &
KIMBER FOWLER,

APPELLANTS

v.

HORRY COUNTY PLANNING
DEPARTMENT,

RESPONDENTS.

BRIEF OF APPELLANTS

Kenneth Dippel & Kimber Fowler
PO Box 622
Loris, SC 29569
Phone: (843) 716-0699

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STATEMENT OF THE ISSUES

1. Whether the Circuit Court order dismissing Appellants' case is arbitrary, capricious, an abuse of discretion, or is otherwise not in accordance with the law.
2. Whether the Circuit Court order dismissing Appellants' unconstitutional taking claim is arbitrary, capricious, an abuse of discretion, or is otherwise not in accordance with the law.
3. Whether the Circuit Court order dismissing Appellants' cause of action against Respondents is prejudicial error.
4. Whether the form order signed by the Honorable Judge Culbertson denying Appellant's order of reference and motion to change venue is arbitrary, capricious, an abuse of discretion, or is otherwise not in accordance with the law.

STATEMENT OF THE CASE

On August 11, 2009 Appellants commenced an action against Respondents in the Court of Common Pleas in Horry County (R. at 80 – 102). Appellants brought the action in response to the Horry County Planning Department and the Horry County Planning Commission not approving a new resurvey plat (known herein as the Crescent Moon Survey Plat (R. at 129). On September 14, 2009 Respondents submitted responses to the Appellants' Complaint, and in their pleading requested dismissal of Appellants' cause of action (R. at 148 – 154). On September 21, 2009 Appellants submitted a cross reply in response to Respondents' motion to dismiss (R. at 155 – 177). Appellants also subsequently

submitted a motion to transfer their case to the Master in Equity and a motion to change venue (R. at 52 – 55).

On October 6, 2009 this matter came to a motion hearing before the Honorable Benjamin Culbertson in Horry County. Judge Culbertson on October 7, 2009 issued a form order denying Appellants' motion for order of reference and also issued a form motion denying Appellants' motion for change of venue (R. at 6). Judge Culbertson in response to Respondents' motion to dismiss ordered the parties to submit proposed orders within 15 days (R. at 6).

On October 9, 2009 Appellants through their Counsel submitted a motion for summary judgment (R. at 35 – 51). Appellants through their Counsel filed a motion to stay (R. at 32 -34). The parties to this case subsequently submitted their proposed order to Judge Culbertson. On October 22, 2009 Judge Culbertson signed Respondents' proposed order and on October 26, 2009 this signed order was filed with the Clerk of Court (R. at 1-5). Judge Culbertson did not rule on Appellants' motion for stay or motion for summary judgment.

The order signed by Judge Culbertson dismissed Appellants entire case against Respondents. The Appellants on October 29, 2009 filed a timely appeal to this Court (R. at 56 – 65) in response to the October 2009 orders signed by Judge Culbertson. Respondents were properly served by Appellants a Notice of Appeal on October 29, 2009. Appellants on October 29, 2009 also filed a notice of appeal (R. at 66 – 79) with the lower Court (Court of Common Pleas). This Appeal is a review of the lower circuit court order issued by the Honorable Judge Culbertson dismissing Appellants' action against Respondents. Also, this Appeal

is a review of the Honorable Judge Culbertson's issuance of a form order denying a motion for order of reference and change of venue.

FACTS

The Appellant, Kimber Fowler resides at 2145 Oakdale Road, Loris, SC and is a citizen of Horry County, South Carolina. The Appellant, Kenneth Dippel resides at 4931 Forest Drive, Loris, SC 29569 and owns a mobile home on Kimber Fowler's property (R. at 102). Both Plaintiffs rent this mobile home out to tenants. Appellants are also joint owners of the property that there is a continued dispute regarding a private access easement or soiled driveway known as "Dolly Lane". The recorded deed notes there is no legally enforceable easement for Mr. Claudius E. Fowler pursuant to this Court's ruling and the Master in Equity Ruling (R. at 178 – 189).

On September 29, 1981 Mr. Claudius E Fowler acquired land by civil suit (Tract D of PF Fowler Estate). **Deed Book 740, Page 312 (R. at 103 – 104), and Plat Book 73, Page 27 (R. at 105).** The 1982 plat did not show any kind of soiled driveway or road between tract C and D. No easement is depicted on this Plat and no easement is noted in the deed or release papers. No private or public street named Dolly Lane is noted on this Plat (R. at 105)

On August 6, 1999 Mr. Claudius E. Fowler surveyed his property. The Inman Survey Plat was recorded at the Horry County Register of Deeds. No dedication or transfer of property occurred. Mr. Claudius E. Fowler reserved unto himself and his wife a lifetime right. **Deed Book 2175, Page 001 (R. at 106 – 109) and Plat Book 163 at Page 228 (R. at 115).** The deed nor

release papers did not contain any reference to a private easement or any public access easement known as "Dolly Lane". **The Inman Survey Plat did not depict "Dolly Lane" running through any property.** The western end of Mr. Claudius E. Fowler's property and the public road G & B Lane were not depicted on the Inman Survey Plat.

On July 6, 2000 Mr. Claudius E Fowler removed his lifetime right and conveyed the entire .99 acres of Lot 1 to Timothy E. Fowler (Claudius E Fowler's son) and to the Appellant, Kimber Fowler who at that time was married to Claudius E Fowler's son. **Deed Book 2278, Page 0358 (R. at 110 -114) and Plat Book 163 at Page 228 (R. at 115).** The deed nor release documents did not contain any reference to a private or public access easement known as "Dolly Lane". **The Inman Survey Plat did not depict a private or public street named "Dolly Lane" running through any property.**

On January 19, 2005 the Appellant, Kimber Fowler was granted a divorce from Claudius E Fowler's son, Timothy Fowler. As a result of the divorce Timothy Fowler conveyed the entire .99 acres of Lot 1 and the home to Appellant, Kimber Fowler. **TMS #0400001122 (R. at 136 – 137), Deed Book 2897 at Page 463 (R. at 116 – 118), Plat Book 163 at Page 228 (R. at 115).** No public or private access easement known as Dolly Lane is noted in the deed or release papers.

On or about May 16, 2006 Mr. Claudius E Fowler re-surveyed the remainder what was previously known as Tract D of the PF Fowler Estate. Mr. Claudius E. Fowler subdivided his property into three tracts of land (Tract A, Tract B, and the Remainder of the PF Fowler Estate). **Plat Book 214, Page 12.**

The Plat herein known as the Affiliated Plat depicted a 50 foot private easement and a private shared driveway running through Tract A and Tract B of Mr. Claudius E. Fowler's property and also depicted "Dolly Lane" running through the Appellant, Kimber Fowler's property (R. at 119).

According to the Affiliated Surveyors' Plat, Dolly Lane ended at the western boundary line of Appellants' property. Dolly Lane according to this Plat did not run through any of Mr. Claudius E Fowler's property. **This marked the first time that Dolly Lane was officially recognized and approved by the Horry County Planning Department for recording plat purposes concerning the PF Fowler Estate.** Mr. Fowler did not convey any property out.

On March 21, 2007 Kimber Fowler brought an action for trespass and damage to personal property to the Court of Common Pleas in Horry County against Claudius E. Fowler. On April 24, 2007 the case was transferred to the Master-In-Equity. On August 15, 2007 Judge J. Stanton Cross Jr., the Master-In-Equity ruled Mr. Claudius Eugene Fowler had an individual private dedicated easement. On August 20, 2007 the Appellant, Kimber Fowler appealed to the SC Court of Appeals.

On February 23, 2009 this Court in a unanimous unpublished opinion reversed Judge Stanton J. Cross's decision (R. at 120 – 122). This Court found that Mr. Claudius did not have an easement by dedication. This Court also found that he ultimately only conveyed property to Appellant, Kimber Fowler (the grantee or buyer). This Court held an easement by dedication or implication

would only benefit the buyer (R. at 121 – 122). Mr. Claudius E. Fowler did not file a timely appeal. A remitter was subsequently issued by the SC Court of Appeals.

On May 26, 2009 a hearing was conducted by the new Master in Equity, Judge Cynthia Graham Howe. The Master in Equity at this hearing repeatedly told all parties there was no easement. Judge Cynthia Graham Howe issued an order as follows:

“IT FURTHER IS ORDERED that Plaintiff be granted an injunction, enjoining Defendant, his successors, and heirs, from trespassing on Plaintiff’s property, more specifically shown on Exhibit “A” attached to this “Order”, including a twenty-five foot soil driveway known as Dolly Lane across the north side of Plaintiff’s property” (R. at 127 – 128).

The property of Appellant, Kimber Fowler was subsequently resurveyed by Crescent Moon Surveyors as a result of the Master in Equity Ruling. The Plat herein known as the Crescent Moon Survey Plat depicts the removal of a private access easement pursuant to this Court’s order (R. at 129). The Crescent Moon Survey Plat was submitted by Appellants to the Horry County Planning Department for approval for recording.

On June 16, 2009 the Horry County Planning Department denied the approval of the Crescent Moon Survey Plat. The Horry County Planning Department held in part Appellant, Kimber Fowler had to get the signature of Claudius E. Fowler to remove the private easement off her property and also held in part she had to continually provide an alternative access to all of Claudius E.

Fowler's land (R. at 130). Appellants timely appealed to the Horry County Planning Commission.

On July 30, 2009 the Appellants appeared before the Planning Commission. The Planning Commission apparently voted to deny Appellants' appeal. The Planning Commission never mailed out any written decision to Appellants nor did Appellants ever receive any written decision. A timely appeal to the Circuit Court followed challenging the actions of the Horry County Planning Department and the Horry County Planning Commission.

ARGUMENT

TIME LIMITS TO APPEAL, FILE A REQUEST FOR MEDICATION, ENJOIN ALL EFFECTED PROPERTY OWNERS DOES NOT BEGIN TO RUN UNTIL RESPONDENTS' PLANNING COMMISSION MAILES OUT A WRITTEN DECISION TO APPELLANTS

The Horry County Planning Commission never took the appropriate action within 60 days on Appellants' appeal of the Horry County Planning Department staff decision denying the approval of Appellants' Crescent Moon Survey Plat. The provisions found in **Section 6-29-1150** mandated for the Horry County Planning Commission within 60 days to issue a written decision and to provide notification in writing of any action taken by the Planning Commission **by mailing out a written decision to Appellants.**

In this instant case, Appellants were never notified in writing of any Horry County Planning Commission action on their appeal of the Horry County Planning Staff decision. The Planning Commission also did not mail out any written decision to the Appellants. Appellants' Attorney pointed this out at the hearing to Judge Culbertson (R. at 23, Lines 12 – 20) and in their motion for

summary judgment (R. at 36 - 51). The provisions in **Section 6-29-1150** required Respondents' Planning Commission to take action within 60 days by issuing a written decision and also required mailing out a written decision to Appellants (emphasis added). **Section 6-29-1150** provided as follows:

SECTION 6-29-1150. Submission of plan or plat to planning commission; record; appeal.

(A) The land development regulations adopted by the governing authority must include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff. These procedures may include requirements for submission of sketch plans, preliminary plans, and final plans for review and approval or disapproval. Time limits, not to exceed sixty days, must be set forth for action on plans or plats, or both, submitted for approval or disapproval. Failure of the designated authority to act within sixty days of the receipt of development plans or subdivision plats with all documentation required by the land development regulations is considered to constitute approval, and the developer must be issued a letter of approval and authorization to proceed based on the plans or plats and supporting documentation presented. The sixty-day time limit may be extended by mutual agreement.

(B) A record of all actions on all land development plans and subdivision plats with the grounds for approval or disapproval and any conditions attached to the action must be maintained as a public record. In addition, the developer must be notified in writing of the actions taken.

(C) Staff action, if authorized, to approve or disapprove a land development plan may be appealed to the planning commission by any party in interest. The planning commission must act on the appeal within sixty days and the action of the planning commission is final.

(D)(1) An appeal from the decision of the planning commission must be taken to the circuit court within thirty days after actual notice of the decision.

(2) A property owner whose land is the subject of a decision of the planning commission may appeal by filing a notice of appeal with the

circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-1155.

A notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is mailed.

The Horry County Land Development Regulation, Article 8 - **Definitions at page 136** define a developer as the legal or beneficial owner(s) of a lot of any land included in a proposed development and also defines a developer as the holder of an option or contract to purchase, or any person having enforceable proprietary interest in such land. Section 6-29-1150(A) specifically states that if no action is taken within 60 days the Plat shall constitute an approval and the developer must be issued a letter of approval and authorization based on the Plat submitted (emphasis added).

The Horry County Land Development regulations also required for Respondents' Planning Commission to take action on an appeal by issuing a written decision and by mailing out a copy of a written decision within seven business days. Respondents are bound by these land development regulations pursuant to **Article 1 – Applicability: Section 1 (Title) page 1; Section 2 (Authority) page 1; Section 3 (Jurisdiction) page 1.** Please see also *Morton v. Ruiz*, 415 U.S. 199, 234 (1974) ("where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures").

Article 1, Section 11 (Appeals): page 10 of the Horry County Land Development Regulations (R. at 144) provide:

SECTION 11: APPEALS

Questions arising from the enforcement of these regulations by the Planning Department may be appealed to the Planning Commission for consideration. **The Planning Commission will render a decision on the appeal within 60 days and the applicant will be notified, in writing, of such decision within seven business days.** Any party aggrieved by a decision of the Planning Commission regarding the standards enumerated in these regulations or a ruling on a requested variance may appeal the decision to the Circuit Court of Horry County. **The aggrieved party shall file a petition with the clerk of court within 30 days after a Planning Commission decision is rendered.**

Article 2 (Procedures) 2.2 (C) on page 15 (R. at 145) provides as follows:

C. Planning Commission Action on Design Modifications and Appeals

The Planning Commission will act upon any requests for a design modification **or appeal of staff decision within 45 days of the date of its submission. If no action is taken by the Planning Commission with this time, the modification or appeal will be deemed approved.** The applicant may waive this requirement and consent to an extension of the 45-day period. All applications for Design Modifications must be submitted the second Wednesday of each month in order to be presented to the next Planning Commission meeting.

The Planning Commission's decision regarding the design modification or appeal shall be either:

1. Approval;
2. Conditional approval;
3. Disapproval; or
4. Deferral for additional information upon agreement of the applicant.

The applicant will be notified in writing within seven business days of the actions taken by the Planning Commission.

The provisions found in Section 6-29-1150 along with the Horry County Land Development Regulations clearly mandated for Respondent's Planning

Commission to provide Appellants a written decision of their action and also required Respondents' Planning Commission to mail out that decision to Appellants. Please see *Massey v. City of Greenville Bd. of Zoning Adjustments*, 341 S.C. 193, 201, 532 S.E.2d 885, 889 (Ct. App. 2000) (noting a Zoning Board vote and transcript of hearing does not constitute a written decision) (**R. at 45 – 50**). In *Massey*, the Court also held a Zoning Board final decision must be in writing with separate findings of fact and conclusions of law.

In this instant case at bar, the time limit to appeal, request for mediation, enjoin indispensable parties if it is required, and alleged requirement to plead with specifics to constitute a cause of action as noted in the proposed order signed by Judge Culbertson, only begin to run when Respondents mailed out a written decision to Appellants. **Please see *Hamm v. South Carolina Public Service Commission*, 287 S.C. 180, 336 S.E.2d 470 (1985), *Cox v. County of Florence*, 337 S.C. 340, 344, 523 S.E.2d 776, 778 (1999) (noting a party has thirty days after written notice of a decision to bring an appeal, rather than thirty days after a decision is made in which to file an appeal), and SECTION 1-23-380. Rule 74, South Carolina Rules Civil Procedure (SCRCP) also clearly state the appeal process involving a Planning Commission action begin to run within thirty (30) days after receipt of written notice of the judgment, order or decision appealed from.**

Wherefore based upon consideration of the foregoing, the Appellants respectfully must assert the proposed order prepared by Respondents which was

subsequently signed by Judge Culbertson is arbitrary, capricious, an abuse of discretion, or is otherwise not in accordance with the law.

RESPONDENTS' LAND DEVELOPMENT REGULATIONS DO NOT INCLUDE SPECIFIC PROCEDURES REGARDING PLANNING COMMISSION APPEALS

Section 6-29-1150(A) mandated for Horry County to include in its land development regulations specific procedures detailing what is required to perfect an appeal to the circuit court when a party is aggrieved by a Planning Commission decision. **Section 6-29-1150(A)** in part provides: **"The land development regulations adopted by the governing authority must include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff"**. There are only two remote sections in the Horry County Land Development Regulations that mention Horry County Planning Commission Appeals. **Please see Article 1, Section 11 (Appeals): page 10 (R. at 144) and Article 2 (Procedures) 2.2 (C) on page 15 (R. at 145) of the Horry County Land Development Regulations.**

Nowhere in these provisions of the Horry County Land Development Regulations does it provide that a party aggrieved by a Planning Commission decision must request for mediation within 30 days of appealing to the Circuit Court nor do the regulations state an aggrieved party must plead with specifics to constitute a cause of action, and must enjoin all effected property owners. The governing statutes found at Title 6, Chapter 29 pertaining to the appeal of Horry County Planning Commission actions also do not provide that an aggrieved party

must plead with specifics and must enjoin persons who may be directly affected by the Horry County Planning Commission's determination.

The lack of specific procedures in Respondents' Land Development Regulations violates **Section 6-29-1150(A)** and also violates fundamental constitutional substantive due process rights as well as procedural due process rights. **Article 1, Section 22 of the South Carolina State Constitution** provides: *"No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review"*.

Without any substantive due process and procedural due process notifications in Respondents' Land Development Regulations any party aggrieved by a Horry County Planning Commission decision would never be able have their day in Court and would never be able to defend their property. Every appeal involving a Planning Commission determination would be dismissed. Fundamental fairness and due process of law required for Respondents to set forth in their land development regulations specific procedures and detail on what is required to appeal a Horry County Planning Commission decision to the Circuit Court. **See again Section 6-29-1150(A); S.C. Dep't of Soc. Servs. v. Holden, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995) (rights of due process not only include notice, but also an opportunity to be heard in a meaningful way, and judicial review).**

The dismissal order signed by Judge Culbertson (**R. at 2 – 5**) ignores the obvious fact Respondents violated fundamental substantive and procedural due process rights of Appellants by not complying with **Section 6-29-1150(A)**. The order ignores this by citing to *Doe v. Greenville County School District*, **375 S.C. 63, 651 S.E. 2d 305 (2007)** as a basis for dismissal (**R. at 3**). The Doe case is factually distinguishable from the Appellants' case. The Doe case involved a cause of action based on emotional distress and loss of consortium. The Appellants' case is a review of a Planning Commission action regarding the denial of an appeal of a platting decision rendered by the Horry County Planning Department that is subject to a different standard of review.

The Circuit Court's review of a Planning Commission decision is generally reviewed under the arbitrary, capricious, abuse of discretion, or otherwise not in accordance with the law standard. *Peterson Outdoor Advertising v. City of Myrtle Beach*, **327 S.C. 230, 235, 489 S.E. 2d 630, 633 (1997)**. Nowhere in Doe did the Court address what due process an aggrieved party is entitled to pursuant to **Section 6-29-1150(A)**.

Wherefore, based upon consideration of the foregoing, Appellants respectfully assert the proposed decision to dismiss drafted by Respondents which was subsequently signed by Judge Culbertson is arbitrary, capricious, an abuse of discretion, or is otherwise not in accordance with the law.

RESPONDENTS FAILED TO PROVIDE THE COURT A COPY OF THE RECORD THAT WAS BEFORE THE PLANNING COMMISSION

Rule 75, SCRCP specifically required Respondents to provide the Circuit Court within 30 days upon the filing of the appeal by Appellants a certified copy

of the original record that was before the Horry County Planning Commission. The Circuit Court should have never dismissed the Appellants' case without requiring Respondents to provide the Circuit Court with an original certified record that was utilized by the Horry County Planning Commission. It was error for the Circuit Court judge to dismiss Appellants' case without having a certified record that was before the Planning Commission.

Wherefore, based upon consideration of the foregoing, the Appellants respectfully assert the proposed decision to dismiss drafted by Respondents which was subsequently signed by Judge Culbertson is arbitrary, capricious, an abuse of discretion, or is otherwise not in accordance with the law.

DISMISSAL VIOLATES FINALITY DOCTRINE, RES JUDICATA, AND DUE PROCESS OF LAW

The order signed by Judge Culbertson improperly dismissed Appellant's second cause of action in their complaint on the grounds that Appellants failed to state a claim for which relief could be granted. **See Rule 12(f), SCRPC.** Appellant's second cause of action in their complaint was based on the Respondents' failure to comply with two previous final Court orders (**R. at 120 – 122; R at 127 – 128**) that addressed the ultimate question as to whether Mr. Claudius Eugene Fowler had a legally enforceable private easement. The proposed order prepared by Respondents which was subsequently signed by Judge Culbertson erroneously concluded that the South Carolina Court of Appeals' decision and the Master in Equity Ruling was not binding on Defendants without addressing any preclusive effects (claim preclusion or res judicata) these orders had in Appellants' cause of action. Based upon this faulty

rationale, the order concluded the two final order orders were impertinent and immaterial (R. at 3 -4).

The South Carolina Court of Appeals in a unanimous unpublished opinion determined that Mr. Claudius E. Fowler did not have an easement by dedication. The Court also determined that the other type easement claims were not dispositive to the appeal (**R. at 120 – 122**). Mr. Claudius E. Fowler did not appeal this ruling. Judge Cynthia Howe, Horry County Master in Equity subsequently issued an injunction order specifically stating as follows:

*“IT FURTHER IS ORDERED that Plaintiff be granted an injunction, enjoining Defendant, his successors, and heirs, from trespassing on Plaintiffs property, more specifically shown on Exhibit "A" attached to this Order, including a twenty-five foot soil driveway known as Dolly Lane across the north side of Plaintiff's property”. (**R. at 127 – 128**).*

Appellants as a result of the South Carolina Court of Appeals' ruling and the injunction order re-surveyed Appellant, Kimber Fowler's property with the specific purpose of removing the private access easement that prior to the two final Court orders supposedly were claimed to be reserved for Mr. Claudius E. Fowler's use. The Plat was prepared by Crescent Moon Surveyors. The Crescent Moon Survey Plat in the note section makes reference to the South Carolina Court of Appeals' decision and also shows the deletion of the private access easement known as "Dolly Lane" (**R. at 129**).

This Plat was subsequently submitted to Respondents' Horry County Planning Department. Respondents (the Horry County Planning Department) refused to approve Appellants' plat. Respondents concluded that Appellant, Kimber Fowler had to continually provide access to all three of Mr. Claudius Eugene Fowler's tracts of land. Respondents concluded that Appellant, Kimber

Fowler had to obtain Mr. Claudius Eugene Fowler's signature to remove the so called private access easement or private soiled driveway known as "Dolly Lane" (R. at 130).

Appellants filed an appeal to the Horry County Planning Commission and at the hearing before the Planning Commission the Horry County Planning Department Director took the position that the South Carolina Court of Appeals' decision and the injunction order issued by the Master in Equity were not binding on the County. The Horry County Planning Commission as a result of this presentation apparently voted to deny Appellants' appeal. **The Horry County Planning Commission never mailed out a written decision to Appellants.** The Respondents disregarded the order issued by this Court and also the injunction order (R. at 120 – 122; R. at 127 – 128).

Both of these final judgments addressed as to whether Mr. Claudius E. Fowler had a legally enforceable private easement. Appellants in their Complaint more than adequately stated facts sufficient to constitute a cause of action. Appellants' cause of action was predicated upon **the finality of orders** issued by the South Carolina Court of Appeals' and the injunction order issued by the Master in Equity against Mr. Claudius E. Fowler. Appellants indeed would prevail in their cause of action against Respondents if the lower court would have simply correctly applied claim preclusion and res judicata.

These two Court orders had preclusive effects with respect to the question as to whether Mr. Claudius E. Fowler (the third party Respondents have conspired with and who they are in privy with) has a legally enforceable private easement across Appellants' property. The South Carolina Court of Appeals

determined that Mr. Claudius E. Fowler did not have an easement by dedication and the Master in Equity subsequently issued an injunction order specifically prohibiting Mr. Fowler, his heirs, and successors from using the private access easement known as “Dolly Lane” (**R. at 127 – 128**).

Respondents have taken the position that the private soiled driveway known as Dolly Lane is still for Mr. Claudius E. Fowler’s use and for his tenants, and continually are enforcing a private easement for the benefit of Mr. Claudius E. Fowler. The so-called “Dolly Lane” has never been dedicated by Respondents for public use nor do Respondents maintain it (**R. at 135**). The private soiled driveway known as “Dolly Lane” is private property belonging to Appellants (**R. at 178 – 189**).

Mr. Claudius E. Fowler had every opportunity to adequately present all of his easement claims and he had every opportunity to appeal these Court decisions. He failed to timely appeal these decisions, and as a result these two final Court decisions or judgments they are the law of the land. *See Clark v. S.C. Dep’t of Public Safety*, 362 S.C. 377, 608 S.E. 2d. 573 (2005) (an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Bowman v. Bowman*, 357 S.C. 146, 152, 591, 657 S.E. 2d 654 (Ct. App. 2004) (holding South Carolina’s strong policy towards finality of judgments trumps a party’s ability to set aside a judgment), *Town of Mt. Pleasant v. Jones*, 335 S.C. 295, 298-99, 516 S.E. 2d 468, 470 (Ct. App. 1999) (finding an unappealed ruling becomes the law of the case, and the appellant court must assume the ruling was correct).

In this instant case at bar, the proposed order signed by Judge Culbertson violates the finality doctrine and claim preclusion. Respondents in this case have continually conspired with Mr. Claudius E. Fowler by continually enforcing an illegal private access easement (the so called Dolly Lane) with the sole purpose to provide Mr. Claudius E. Fowler and his family an alternative route to his property when none of his parcels are land locked in **(R. at 132 – 134)**. This is also intentionally being continually done despite this Court's final ruling concerning Mr. Fowler's alleged easement and also is continually being done despite the issuance of a final injunction order against Mr. Claudius E. Fowler which specifically was granted by the Master in Equity as a form of relief to Appellant, Kimber Fowler **(R. at 127 – 128)**.

The injunction order was issued to stop the trespassing by Mr. Claudius E. Fowler, his heirs, and successors on Appellant, Kimber Fowler's property including the soiled driveway known as "Dolly Lane". "Dolly Lane" does not belong to the County nor does the County maintain it **(R. at 135)**. "Dolly Lane" was never intended for public use nor was it reserved for Mr. Claudius E. Fowler's use. This Court declared in its final order that Mr. Claudius E. Fowler did not have an easement by dedication and the Master in Equity issued an injunction order specifically prohibiting Mr. Fowler, his heirs (who are his family members), and successors from using "Dolly Lane" **(R. at 127 – 128)**. Respondents have never dedicated "Dolly Lane" for public use.

Respondents by denying the approval of Appellants' Crescent Moon Plat **(R. at 129)** have robbed Appellant, Kimber Fowler of the relief she was granted in the injunction order issued by the Horry County Master Equity. Respondents

have violated a fundamental constitutional right of Appellants (**see *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (the right to exclude others from using private property is a fundamental constitutional right)**) by disregarding the two final Court orders that were issued against Mr. Fowler regarding his claimed private easement. This was all fully addressed in Appellant's Complaint against Respondents and was plead with sufficient facts constituting a cause of action (R. at 84 – 96). Furthermore, this was addressed fully in Appellants' response to the Respondents' motion to dismiss (**#13, R. at 168 – 174**).

Respondents by taking the position with respect to Mr. Claudius E. Fowler's claimed private easement and by continually imposing an illegal private easement are parties in privy to Mr. Claudius E. Fowler. *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E. 2d 164, 166 (1986) (in the context of res judicata privity deals with a parties relationship to the subject matter of the litigation); *Wyndham v. Lewis*, 292 S.C. 6, 8, 354 S.E. 2d 578, 579 (Ct. App. 1987) (privy refers to a party so identified in interest with another that he represents the same legal rights). Under South Carolina law, the doctrine of res judicata extends to include **privy parties**. *Nunnery v. Brantley Constr. Co., Inc.*, 289 S.C. 205, 209, 345 S.E. 2d 740, 743 (Ct. App. 1986); *Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E. 2d 455, 458 (Ct. App. 1997) (holding, in determining whether *res judicata* applies, the identity of the parties in the first lawsuit also includes persons in privity with the named parties).

In South Carolina, *res judicata* commonly known as claim preclusion applies when: (1) there is a final judgment on the merits in a prior action, and (2)

the second action is based on the same claim as the issues actually litigated or **which might have been litigated in the first action.** *Liberty Mutual Insurance Company v. Employers Insurance of Wausau*, 284 S.C. 234, 325 S. Ed 566, 568 (Ct. App. 1985), quoting Stewart, *Res Judicata and Collateral Estoppel in South Carolina*, 282 S.C.L. Rev. 451, 452 (1977). To establish res judicata, the following elements must be established: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the claim in the former suit. *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E. 2d 106, 109 (1999). Res judicata bars the parties to that suit and parties in privy from bringing subsequent actions on either the adjudicated issues or any issues that might have been raised in the first suit. *Plott v. Justin Ent.*, 374 S.C. 504, 511, 649 S.E. 2d 92, 95 (Ct. App. 2007).

In this instant case at bar, the order issued by this Court as it pertains to Mr. Claudius E. Fowler's private easement and the injunction order issued by the Horry County Master in Equity was binding on Respondents and on the Circuit Court. See *Town of Mt. Pleasant v. Jones*, 335 S.C. 295, 298-99, 516 S.E. 2d 468, 470 (Ct. App. 1999) (finding an unappealed ruling becomes the law of the case, and the appellant court must assume the ruling was correct); *Medlock v. Love Shop Ltd.*, 286 S.C. 486, 487, 334 S.E. 2d 528, 529 (Ct. App. 1985) (holding that one circuit judge does not have the power to review, modify, affirm, or reverse findings of another circuit court judge). The Respondents stand in privy with Mr. Claudius E. Fowler, a third party to the prior proceedings (an appeal ruled on by this Court and a Master in Equity ruling resulting in an injunction) concerning the existence of a private easement for Mr. Claudius E. Fowler.

The subject matter is the same as was before in the prior litigation that is whether Mr. Fowler has a legally enforceable private easement across Appellant, Kimber Fowler's property. Respondents have continually imposed this private easement to benefit Mr. Claudius E. Fowler. This Court rendered a decision holding Mr. Fowler did not have an easement by dedication and the Master in Equity issued an injunction against Mr. Fowler, his heirs, and successors which specifically prohibited their use of the so called "Dolly Lane". The so-called private access easement known as "Dolly Lane" cannot exist as a result of this Court's ruling and the Master in Equity Ruling. The claimed private access easement depicted on the Appellants plat is now void ab initio.

The subject matter jurisdiction is made clear by examining the Horry County Planning Department's decision to deny Appellants' plat in which the Horry County Planning Department held the joint Appellant; Kimber Fowler had to continually provide access to all of Mr. Claudius Eugene Fowler's property (**R. at 130**) (040-00-01-0123 (**R. at 138 – 139**), 040-00-01-173 (**R. at 140 – 141**), 040-00-01-056 (**R. at 142 – 143**)). In summary, Respondents made it abundantly clear that they were siding with Mr. Fowler by requiring as a condition to approve the plat Appellant Kimber Fowler had to obtain Mr. Fowler's signature to remove the private access easement known as "Dolly Lane", and by Respondents requiring Appellant Kimber Fowler to provide an alternate access to all three of Mr. Claudius E. Fowler's tracts of land.

Appellant; Kimber Fowler was entitled to the full relief granted to her by the Master in Equity. The Master in Equity ruling put a permanent stop to the continued unlawful private easement claimed by Mr. Claudius E. Fowler (**R. at**

127 – 128). Please see *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004) (noting the purpose of an injunction is to prevent irreparable harm). Respondents by their actions and by the lower Court's dismissal order have stripped Appellant, Kimber Fowler of the relief she was granted by the Master in Equity. The order signed by Judge Culbertson essentially ignores the finality of this Court's final order and the injunction order issued by the Master in Equity that clearly prohibits Respondents from continually enforcing a private easement for the benefit of Mr. Claudius E. Fowler.

Furthermore, there is no law or regulation cited in the dismissal order that gives Respondents' Horry County Planning Department or the Horry County Planning Commission the legal authority to ignore or overrule the two final Court orders that addressed whether there was a legally enforceable easement for Mr. Claudius E. Fowler. Respondents have no discretionary power to overrule final decisions rendered by our courts in private matters nor do they have the authority to give Mr. Claudius Fowler relief from the injunction order by requiring Appellants to provide an alternative access to Mr. Fowler's property.

Respondents clearly had a **ministerial duty** to comply with the two final Court orders that addressed the enforceability of Mr. Claudius E. Fowler's claimed private easement when they made a decision on Appellant's Crescent Moon Survey Plat. A ministerial duty is absolute, certain, and imperative involving merely the execution of a specific duty arising from fixed and designated facts. *Redmond v. Lexington County Sch. Dist. No. Four*, 314 S.C. 431, 445 S.E. 2d 441 (1994).

The proper execution by Respondents of this Court's order and the Master in Equity ruling when Appellants' submitted their new plat was a ministerial duty. Please see *BPS Guard Services, Inc. v. NLRB*, 942 F. 2d. 519, 523 (8th Cir. 1991) ("an agency's decision to refuse to follow a ruling by an Appellate Court hardly can be characterized as an exercise in discretion"); *Allegheny General Hospital v. NLRB*, 608 F. 2d. 965, 970 (3rd Cir. 1979) (an agency cannot act on its own view of the law; and to reject the decisions rendered by our courts is "to operate outside the law").

The lower Court's ruling dismissing Appellants' case cannot be sustained because the Court erred by determining Respondents were not bound to follow this Court's ruling and the injunction order issued by the Master in Equity. See *McEachern v. Black*, 329 S.C. 642, 647, 496 S.E. 2d 659, 661 (Ct. App. 1998) (A trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law). The lower Court by endorsing Respondent's proposed dismissal order fundamentally violated the separation of powers doctrine found at **Article 1, Section 8 of the South Carolina State Constitution**, and also violated Appellants' constitutional right to defend their property, as well as violated their rights to have full use and enjoyment of their property.

Wherefore based upon consideration of the foregoing, Appellants respectfully must assert the proposed dismissal order prepared by Respondents which was subsequently signed by Judge Culbertson is arbitrary, capricious, an abuse of discretion, or is otherwise not in accordance with the law.

APPELLANTS' INVERSE CONDEMNATION CLAIM WAS RIPE FOR REVIEW

The proposed order prepared by Respondents which was subsequently endorsed by the lower court noted: "*Until an administrative determination by a planning department or commission is successfully appealed, an inverse condemnation claim is not ripe and will not lie*" (**R. at 3**). The dismissal order also noted in order for Appellants' inverse condemnation claim to be ripe Appellants would have to receive a favorable decision from the Horry County Planning Department or Horry County Planning Commission. The order relied on *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165, 656 S.E. 2d 346 (2008) (**R. at 3**).

Kurschner is factually distinguishable from this instant case at bar. *Kurschner* involved a planning commission decision to deny an application to subdivide property. In this instant case at bar, the Horry County Planning Department issued a final decision denying the approval of Appellants' Plat which was submitted to the Horry County Planning Department to remove a private access easement off their property. The Horry County Planning Department citing to various Horry County Land Development regulations concluded that the Appellant, Kimber Fowler had to continually provide access to Mr. Claudius Eugene Fowler's three tracts of land (**R. at 130**).

This decision was made even when this Court in a unanimous decision determined that Mr. Claudius E. Fowler did not have an easement by dedication, and was done even when the Horry County Master in Equity, Judge Cynthia Graham Howe issued an injunction order which specifically prohibited Mr.

Claudius E. Fowler, his heirs, and successors from using the private access easement known as "Dolly Lane". The proper application of these two final Court orders was a ministerial duty and was not discretionary as was in *Kurschner*.

Appellants in this instant case at bar appealed the Horry County Planning Department final decision to the Horry County Planning Commission. The Horry County Planning Commission apparently voted to deny Appellants' appeal. Respondents' Planning Commission never mailed out a written decision pursuant to **Section 6-29-1150(D) (2)** to Appellants. Nevertheless, Appellants filed an appeal to the Circuit Court to preserve their appeal rights and to restore their constitutional right to exclude others using private property.

The Appellants in their appeal asserted that Respondents' Horry County Planning Department and the Horry County Planning Commissions' actions constituted a judicial taking. Appellants asserted in their complaint that the Horry County Planning Department and the Horry County Planning Commission violated their constitutional rights as property owners because they were effectively denied full use and enjoyment of their property. One of those fundamental constitutional rights Appellants asserted in their complaint was that the right to exclude other individuals from using their property was taken away from them by Respondents (**R. at 84 - 87**).

The South Carolina Supreme Court decision in *Kurschner* does not stand for the proposition that in each and every case an inverse condemnation case is never ripe for review when it is enjoined as a cause of action in a case concerning a review of a Planning Commission decision nor does it stand for the proposition

that a prerequisite for ripeness in an inverse condemnation claim is plat approval by the governmental entity. **Section 6-29-1150(D) (4)** states: “*Nothing in this subsection prohibits a property owner from subsequently electing to assert a pre-existing right to trial by jury of any issue beyond the subject matter jurisdiction of the planning commission, such as, but not limited to, a determination of the amount of damages due for an unconstitutional taking*”. **Section 6-29-1140(D) (4)** allows a judicial taking claim to be a part of an appeal of a planning commission decision. The South Carolina Supreme Court in *Kurschner* did not address **Section 6-29-1140(D) (4)** nor has this Court attempted to do so.

The Supreme Court in *Kurschner* did not address the test for ripeness as set forth by our United States Supreme Court. The United States Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 105 S. Ct. 3108, 3116, 87 L. Ed. 2d 126, 139 (1985) held regulatory takings claim “is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.” *Id.* The Supreme Court of South Carolina has also used a two-factor test for determining ripeness: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *Waters v. South Carolina Land Resources Conservation Comm’n*, 321 S.C. 219, 227, 467 S.E. 2d 913, 917 (1996) (explaining a “justiciable” controversy is real and substantial controversy appropriate for judicial determination).

With respect to this instant case at bar, Respondents' Horry County Planning Department and Respondents' Horry County Planning Commission's actions constituted a final decision that adversely effected Appellants' constitutional right to have full use and enjoyment of their property. Appellants as a result of Respondents' action will have to permanently be burdened with an illegal private easement enforced by Respondents for the sole explicit purpose to privately benefit Mr. Claudius E. Fowler. This was not the case in *Kurschner*. The government entity was not forcing the property owners to allow another property owner permanent private use of their property.

Appellants as a result of Respondents' actions will have to continually allow Mr. Claudius E. Fowler, his family, heirs, and successors use of their property which is prohibited under Article I, Section 13(A) of the South Carolina State Constitution (*"Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property"*). The right to exclude others from using Appellants' property has been permanently stripped away from Appellants. Without the Court ever exercising jurisdiction on Appellant's judicial taking claim Appellants will never be able to regain their constitutional property right which is to exclude others from using their property.

Furthermore, Appellants have exhausted their administrative remedies. Please refer to **Section 1-23-380** providing judicial review under the doctrine of exhaustion. There are no other avenues available in which Appellants could pursue to obtain the relief they seek which is to restore their constitutional right

to exclude others from using their property. Filing an appeal of the planning commission action and an unconstitutional taking claim was proper in this case. Even if the Appellants were to separately file an unconstitutional taking claim Respondents would again move for dismissal claiming that Appellant's plat approval would be a prerequisite for ripeness. The order (**R. at 2 - 5**) erroneously dismisses the judicial taking claim and at the same time places Appellants in a "catch 22".

Wherefore, based upon consideration of all the foregoing, Appellants respectfully assert the proposed order prepared by Respondents that was subsequently signed by Judge Culbertson is arbitrary, capricious, and abuse of discretion, or otherwise is not in accordance with law.

DISMISSING APPELLANTS' APPEAL FOR FAILURE TO ENJOIN PERSONS WHO WERE DIRECTLY AFFECTED BY THE PLANNING COMMISSION IS NOT IN ACCORDANCE WITH THE LAW

The dismissal issued by the lower Court erroneously sub silentio does not even name who the supposed parties Appellants should have enjoined in their complaint against Respondents (**R. at 4 -5**). The Respondents named just two individuals at the motion hearing who they alleged should have been enjoined. This is noted in the hearing transcript. These two citizens named by Respondents at the hearing were Mr. Claudius E. Fowler and Mr. Joe Dale Fowler who is the brother of Mr. Claudius E. Fowler (**R. at 22, Lines 1 – 6**).

It is erroneous in this instant case to assume that Mr. Claudius E. Fowler and Mr. Joe Dale Fowler should have been enjoined in Appellants' action. First, the Court should not nowhere within the statutes does it provide that anyone appealing a Horry County Planning Commission determination must enjoin all

effected property owners. Nowhere within Respondents' Horry County Land Development Regulations does it provide that anyone appealing a Horry County Planning Commission determination must enjoin all effected property owners.

Second, Mr. Claudius Eugene Fowler and Mr. Joe Dale Fowler in order to be enjoined in this case would have to file a motion to intervene pursuant to **Rule 24(A), SCRCF. Section 6-29-1155(A)** provides in part as follows: "*A person who is not the owner of the property may petition to intervene as a party, and this motion must be granted if the person has a substantial interest in the decision of the planning commission*". **Section 6-29-1155(B)** in part provides as follows: "*The property owner or his representative, any other person claiming an ownership interest in the property or his representative, and any other person who has been granted leave to intervene pursuant to subsection (A)* or his representative must be notified and have the opportunity to attend the mediation".

Mr. Claudius E. Fowler and Mr. Joe Dale Fowler never filed a petition to intervene with the Circuit Court. Accepting the proposition in the dismissal order that Appellants were required to enjoin all affected property owners would render **Section 6-29-1155(A) and Section 6-29-1155(B)** a nullity. Mr. Claudius E. Fowler and Joe Dale Fowler's full compliance **with Section 6-29-1155(A) and Section 6-29-1155(B)** is a prerequisite in order to be enjoined as effected property owners in Appellants' appeal of the Horry County Planning Commission.

Third, it was error to dismiss Appellants' case without first addressing the preclusive effects this Courts' prior final decision and the injunction order issued

by the Master in Equity had on Mr. Claudius E. Fowler and Joe Dale Fowler. Mr. Claudius E. Fowler and Joe Dale Fowler cannot be enjoined in the Appellants' case because of res judicata or collateral estoppel. Mr. Claudius E. Fowler already had his day in Court. Please see *Plott v. Justin Ent.*, 374 S.C. 504, 511, 649 S.E. 2d 92, 95 (Ct. App. 2007); *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E. 2d 106, 109 (1999).

This Court determined that Mr. Claudius E. Fowler did not have a private easement by dedication and the Master in Equity issued an injunction specifically stating "*Mr. Fowler, his heirs, and successors are not to trespass on Appellant, Kimber Fowler's property including a private soiled driveway known as "Dolly Lane"* (R at 127 – 128). See *Town of Mt. Pleasant v. Jones*, 335 S.C. 295, 298-99, 516 S.E. 2d 468, 470 (Ct. App. 1999) (finding an unappealed ruling becomes the law of the case, and the appellant court must assume the ruling was correct). Enjoining Mr. Claudius E. Fowler in Appellants' case would allow Mr. Fowler to evade the finality of this Court's final order and the Master in Equity Ruling. Enjoining Mr. Claudius E. Fowler would give him a "third bite of the apple" to again make a case he has a private easement across Appellants' property. Res judicata or collateral estoppel bars Mr. Claudius E. Fowler from being enjoined in Appellants' appeal of the Planning Commission.

Mr. Joe Dale Fowler cannot be enjoined because Respondents' Planning Department decision never noted prior to the filing of Appellants' appeal to the Circuit Court that Joe Dale Fowler was considered an effected property owner. The Horry County Planning Department decision only noted Appellant, Kimber Fowler had to provide access to all of Mr. Claudius E. Fowler's property.

Respondents in their planning department decision noted: *“to abandon the existing 25-foot private easement the plat will need to be signed by all affected property owners (which include parcels 040-00-01-122, 040-00-01-123, 040-00-01-0173 & 040-00-01-056)”* (#7, **R. at 130**). Parcel 040-00-01-122 now belongs to Appellants (**R. at 136 – 137**). Parcels 040-00-01-123 (**R. at 138 – 139**), 040-00-01-0173 (**R. at 140 – 141**), and 040-00-01-056 (**R. at 142 – 143**) all are owned by Mr. Claudius E. Fowler.

Mr. Joe Dale party is also a party in privy to Mr. Claudius E. Fowler because he is the brother of Mr. Claudius Eugene Fowler. Mr. Joe Dale Fowler is also a party in privy to Mr. Claudius Eugene Fowler because he has the same interest as Mr. Claudius Eugene Fowler which is to continually impose and enforce an illegal access easement known as “Dolly Lane” with Respondents’ blessing to do so. Thus, Mr. Joe Dale Fowler as a party in privy cannot be enjoined in Appellants’ appeal of the Horry County Planning Commission action. Res judicata or collateral estoppel bars Mr. Joe Dale Fowler as a party in privy from being enjoined in Appellants’ case. Two previous final orders addressed the question as to whether there was a legally enforceable private easement for Mr. Claudius E. Fowler.

Furthermore, Mr. Joe Dale Fowler cannot be joined because he has never claimed he has a private easement across Appellants’ property nor has he held unity of title concerning the Appellant’s property. See *Kennedy v. Bedenbaugh*, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002) (noting unity of title is one of the requirements to have an easement by necessity). Mr. Joe Dale Fowler owns an adjacent parcel of land running along the northern boundaries of Appellant’s

property and Mr. Claudius E. Fowler. He owns 3.72 acres of land, has his own private driveway that provides access to his property and to a public road (Oakdale Road). Mr. Joe Dale Fowler has the capability to build another driveway to provide access to his rental trailer. Thus, he is not considered an effected property owner, and as such was not required to be enjoined in Appellants' case against Respondents.

Fourth, Mr. Claudius Eugene Fowler cannot be enjoined because he is not an effected property owner. Mr. Claudius Eugene Fowler owns three tracts of land. These three tracts of land are not land locked parcels. The Air Photos plainly show that Mr. Fowler has access to all of his property using his own private driveway that connects to all of his property (**R. at 132 – 134**). The driveway connects to G & B Lane, which is a public road. Mr. Claudius E. Fowler's tracts of land would not be land locked parcels if "Dolly Lane" were removed off Appellants' property. The Affiliated Plat (R. at 119) that was prepared by Mr. Claudius E. Fowler's surveyor does not properly show this. The Plat is an outright fraud or at the very least is an outright misrepresentation of Mr. Claudius E. Fowler's property. The Air Photos (**R. at 132 – 134**) plainly show that the cul-de-sac depicted on Mr. Claudius Eugene Fowler's Affiliated Plat (**R. at 119**) does not physically exist. Mr. Claudius E. Fowler has access to all of his property without the use of "Dolly Lane" and as such is not an effected property owner.

Wherefore, based upon consideration of all of the foregoing, Appellants respectfully assert the proposed order prepared by Respondents that was

subsequently signed by Judge Culbertson is arbitrary, capricious, and abuse of discretion, or otherwise is not in accordance with law.

THE DISMISSAL ORDER FAILS TO NOTE WHETHER APPELLANT'S CASE WAS DISMISSED WITH OR WITHOUT PREJUDICE

The dismissal order (**R. at 1-5**) sub silentio dismisses Appellant's case against Respondents without indicating whether dismissal is with or without prejudice. The court should note that Appellants will not be able to re-file their cause of action against the County because a re-file will simply result in Respondents again moving for dismissal on the following grounds: failing to file a timely appeal of the Planning Commission action, failing to request medication, and failing to enjoin effected property owners. Respondents would also again move to dismiss the inverse condemnation claim. The dismissal order places Appellants in a "catch 22" by never ever allowing them to have their day in Court to defend their property against Respondents unlawful action of enforcing a private easement for Mr. Claudius E. Fowler across their property.

The order clearly sub silentio precludes any future attempts for Appellants' to re-file their case against Respondents. The dismissal sub silentio allows Respondents to permanently evade any judicial review concerning an inquiry into their illegal actions of stripping Appellants' constitutional right to exclude others from using their property. See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) in which the United States Supreme Court declared "*the right to exclude is a fundamental constitutional right characterized as a property right*".

Appellants have been unduly prejudiced as a result of the lower court dismissal order and will continue to be unduly prejudiced by the lower court

dismissal order. The order dismissing Appellants case is prejudicial error. Appellants respectfully request for this Honorable Court to issue a clear and concise ruling fully addressing Appellants' arguments in this brief.

DISMISSAL ORDER IS PREJUDICIAL ERROR

Appellants prior to the endorsement by Judge Benjamin Culbertson of the proposed order prepared by Respondents filed a motion to stay pending resolution of their motion for summary judgment (**R. at 32 - 34**). Judge Culbertson never issued any ruling on the motion for stay or motion for summary judgment (**R. at 35 - 51**). The motion for summary judgment was clearly a dispositive motion that would have impacted the outcome on the proposed dismissal order prepared by Respondents. Judge Culbertson ignored the Appellants' motions.

Judge Culbertson did not read any of the complaint filed by the Appellants nor did he read any responsive pleadings that were filed by Appellants. Judge Culbertson also made very inappropriate comments that would give an appearance of bias. Respondents stated that in order to perfect an appeal to the Circuit Court Appellants would have to request mediation (**R. at 19, Lines 19 – 21**). Judge Culbertson's response to Respondents was "I did not know that" (**R. at 20, Lines 21 – 23**).

Judge Culbertson should have never made that kind of comment in the court in light of the fact he never factored in the obvious fact Appellants never received an actual written decision by Respondents' Planning Commission. Appellants through counsel pointed out that the time limits to request for mediation only begins to run whenever a written decision is mailed out by the

Planning Commission (**R. at 23, Lines 12 – 20**). All of this was brushed under the rug. The actions of Judge Culbertson and the manner in which he handled this case is prejudicial error.

DENIAL OF APPELLANTS' MOTION TO TRANSFER TO THE MASTER IN EQUITY AND THE DENIAL OF THE MOTION TO CHANGE VENUE WAS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION OR IS OTHERWISE NOT IN ACCORDANCE WITH THE LAW

Appellants filed a complaint against the Respondent demanding a non-jury trial (**R. at 80 – 101**). Respondents thirty days later after being properly served by the Appellants filed their response with a motion to dismiss and motion to strike (**R. at 148 – 154**). The pleadings filed by Respondents were filed well outside the 10 days required to demand a jury trial. Appellants filed a motion to transfer to the Master in Equity and a change of venue.

Rule 38, SCRCP required Respondents to demand a jury trial in writing not later than 10 days after the pleadings submitted by Appellants. **Rule 38, SCRCP** provides in part: *"Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue".* Respondents failed to timely file a demand for jury trial and did not properly serve a demand for jury trial on Appellants.

Rule 38, SCRCP does not automatically guarantee Respondents a trial by jury. Only issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by jury. Pursuant to **Rule 39(b), SCRCP**, *"issues of a law may be referred to a master as*

provided in Rule 53". An appeal involving a planning commission action must be placed on the nonjury docket when the appeal includes no issues triable by right of jury. **Only the amount of damages in an unconstitutional taking is triable by right of jury.** Section 6-29-1150(D) (4) provides: ("**When an appeal includes no issues triable of right by jury or when the parties consent, the appeal must be placed on the nonjury docket**").

Respondents were not entitled to have a jury trial with respect to the question as to whether there still exists a legally enforceable easement for Mr. Claudius E. Fowler. This Court determined Mr. Claudius E. Fowler did not have an easement by dedication and also the Master in Equity determined that Mr. Claudius E. Fowler did not have an easement by issuing an injunction prohibiting Mr. Fowler, his heirs, and successors from using "Dolly Lane" ever again. The enforceability and claim preclusion effects of the Master in Equity ruling was a question of law which should have been placed on the non jury docket and should have been referred to the Master in Equity pursuant to **Rule 53(a), SCRPC** ("***the court upon an application of any party may direct a reference of some or all of the causes of action in a case***").

Regarding the change of venue denial, Appellants requested the case be transferred to the Master in Equity in neighboring Georgetown County. Appellants at the hearing specifically pointed out that they could not get a fair trial in Horry County because of Respondents' Attorney John Weaver's relationship and political influence in the County (**R. at 26, Lines 20-25**) (**R. at 27, Lines 1-4**). Mr. Weaver served as County Attorney and also Acting County Administrator. Appellants also pointed out that Respondents' Attorney,

Victoria Vaught worked as a partner or coworker in the same law firm where Judge Cynthia Howe, Master in Equity use to work (**R. at 53**). Pursuant to **Section 15-7-100 (2)**, “the Circuit Court may change the place of a trial if there is reason to believe that a fair and impartial trial cannot be had”.

Judge Culbertson denied Appellants’ motion for order of reference and motion to change venue by signing a form order with only a short conclusory statements (“Plaintiffs’ motion for order of reference is denied”; “Plaintiffs’ motion for change of venue is denied”) (**R. at 6**). Judge Culbertson’s form motion has no rationale or any evidentiary support. An abuse of discretion occurs when the trial judge rulings has no evidentiary support. *State v. Manning*, 329 S.C. 1, 7, 495 S.E. 2d. 191, 194 (1997).

This form order did not set forth properly any reasons and bases for the denial of Appellants’ motions. The form motion signed by Judge Culbertson fails to comply with **Rule 52(a), SCRPC** that mandates for the reviewing Court to set forth reasons and bases and also findings of fact. *See In the Matter of Treatment and Care of Luckabaugh*, 351 S.C. 122, 568 S.E. 2d. 338 (2002) (meaningful appellate review mandates for the lower court to set forth its detailed findings and reasons and bases); *Bowen v. Lee Process Systems Co.*, 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000) (a trial court must set forth its reasons for its decision), and also **Rule 1, SCRPC (stating these rules govern the procedures in all South Carolina courts in all suits)**.

Wherefore based upon consideration of all of the foregoing, Appellants respectfully assert the form order signed by Judge Culbertson denying the order

of reference and the motion to change venue is arbitrary, capricious, an abuse of discretion, or is otherwise not in accordance with the law.

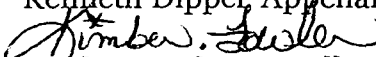
CONCLUSION

Wherefore, based upon all of the foregoing, Appellants pray this Honorable Court will:

1. Vacate and reverse the proposed dismissal order prepared by Respondents that was subsequently signed by the Honorable Benjamin Culbertson.
2. Vacate and reverse the dismissal concerning Appellants' unconstitutional taking claim.
3. Vacate or reverse the denial of Appellants' motion to transfer their case to the Master in Equity and the denial of the Appellants' motion to change venue or in the alternative to vacate and remand these orders with specific instructions ordering the lower Court to provide adequate reasons and bases along with sufficient findings of fact.

Respectfully submitted,


Kenneth Dippel, Appellant


Kimber Fowler, Appellant

CERTIFICATE OF SERVICE (PROOF OF SERVICE)

I **Kenneth Dippel** and **Kimber Fowler**, Appellants, hereby certify that on Feb. 19, 2010 we properly served a copy of the Appellants' final brief in this appeal on Respondents by mailing a copy by US first class mail in an envelope with sufficient postage affixed to Respondents' Attorney, addressed as follows:

John L. Weaver,
Horry County Attorney
PO Box 1236
Conway, SC 29526

Feb. 19, 2010
(Date)

Kenneth Dippel / Kimber Fowler
(Signature(s))

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM Horry County
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-26-7839

Kenneth Dippel and Kimber Fowler

Appellants

v

Horry County Planning Department

Respondent

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court properly grant Respondent County's Motion to Strike and Dismiss all allegations in the Complaint not related to Appellants' direct appeal of the Planning Commission's actions where that Complaint contained very few relevant facts and only the appeal from the Planning Commission's decision constituted a cause of action for which relief could be granted?
- II. Did the circuit court properly dismiss the third cause of action which amounts to an appeal from the Planning Commission's determination concerning plat approval where Appellants failed to satisfy the jurisdictional filing requirements and further failed to join necessary and indispensable parties?
- III. Did the circuit court properly deny Appellants' motion for an order of reference to the Master-In-Equity and motion for a change of venue where the dismissal of the Complaint was a question of law and venue was proper pursuant to the South Carolina Tort Claims Act?

STATEMENT OF THE CASE

This action arises from the dismissal of Appellants' Complaint by the Circuit Court for defects in pleading, failure to state claims for which relief could be granted, and the lack of having met the statutorily mandated jurisdictional requirements for perfecting an appeal from a Planning Commission decision, and failure to join necessary parties. At its heart, the twenty page Complaint amounts to an appeal from the decision of the Horry County Planning Commission which, in turn, denied Appellant's appeal from the Planning Department's denial of plat approval. Judge Culbertson denied Appellants' motions for an order of reference and to change venue and granted Respondent's Motion to Strike and to Dismiss that Complaint. This appeal follows.

FACTS

Appellants have been embroiled in private litigation for a number of years concerning a road “Dolly Lane” previously platted of record in Horry County. That private dispute generated two separate rulings, one from this Court and one from the Horry County Master-in-Equity concerning the relative rights of the private party litigants and the existence, or lack thereof, of easements. (Both such orders were attached to the Complaint.) Neither of those actions joined the County as a party and neither considered the County’s interests. Both prior orders pre-dated the request for plat approval which is the subject of this litigation. That request for plat approval was made to the Horry County Planning Department and denied “because it did not meet the requirements of the Horry County Land Development Regulations.” (Planning Commission Minutes, 30 July 09). The County Planning Commission heard the Appellant’s position and affirmed the ruling of the Planning Department. (Planning Commission Minutes, 30 July 09). Appellants then, in turn, filed the Complaint in this case. Judge Culbertson denied Appellants’ motions for an order of reference and to change venue granted Respondent’s Motion to Strike and to Dismiss and this appeal follows.

ARGUMENT

I. The circuit court properly granted Respondent’s Motion to Strike.

As recently restated by this Court in *Robeson v. Code*, 384 S.C. 582, 682 S.E.2d 495 (Ct. App. June 12, 2009):

A motion to strike, challenging a theory of recovery in the complaint, is comparable to a motion to dismiss under Rule 12(b)(6), SCRCP. *McCormick v. England*, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct.App.1997). "Where a pleading is attacked for an alleged failure to state a cause of action, the pleading must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences to be drawn therefrom entitle the pleader to relief on any theory of the case." *Burns v. Wannamaker*, 286 S.C. 336, 339, 333 S.E.2d 358, 360 (Ct.App.1985). A court should not strike a cause of action merely because the court doubts the plaintiff will prevail in the action. *McCormick*, at 633, 494 S.E.2d at 434. However, the matter of striking from a pleading is largely within the discretion of the trial judge. *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975). Thus, the grant of a motion to strike will not be reversed except for an abuse of discretion or error of law. *Id.* at 194-95, 213 S.E.2d at 728.

Id. at 496.

The matter of striking from a pleading is largely within the discretion of the trial judge. *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975). Thus, the grant of a motion to strike will not be reversed except for an abuse of discretion or error of law. *Id.* at 194-95, 213 S.E.2d at 728. Here, the Circuit court quite properly found that the Complaint did not "comply with procedural rules for pleading, particularly Rule 8(a), SCRCP, because the Complaint does not contain a short, concise statement of facts and relief sought . . ." (R.p.2, lines 10-12) Moreover, the Circuit Court also found that the various allegations and legal conclusions which peppered the Complaint amounted to no viable theory for which relief can be granted other than the third cause of action which the Circuit Court liberally construed as an appeal of the adverse determination made by the Horry County Planning Commission concerning Appellant's request for plat approval. (R.p.4, lines 4-6). The balance of Appellant's arguments on appeal contain allegations irrelevant to Judge Culbertson's ruling or were not presented to him for decision and, therefore, are not preserved for review by this Court.

II. The Circuit Court properly dismissed Appellant's third cause of action for failure to meet the jurisdictional filing requirements and for failure to join necessary and indispensable parties.

A. Appellants failed to satisfy the statutory requirements for appealing from the Planning Commission's decision concerning their demand for plat approval.

Appellants' third cause of action essentially complains that the Horry County Planning Commission erroneously denied their appeal from the Planning Department's decision to deny plat approval. S. C. Code Section 6-29-1150 sets forth the requirements for appeal from an adverse determination by a local government planning commission. Specifically, subsection (D) provides:

- (1) An appeal from the decision of the planning commission must be taken to the circuit court within thirty days after actual notice of the decision.
- (2) A property owner whose land is the subject of a decision of the planning commission may appeal by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-1155. A notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is mailed.

This section makes clear through the use of the mandatory "must" that certain prerequisites to filing a valid, actionable appeal must be undertaken by the appealing party. Namely, the appellant is required to file a "request for prelitigation mediation in accordance with Section 6-29-1155." That section in turn provides as follows:

(A) If a property owner files a notice of appeal with a request for pre-litigation mediation, the request for mediation must be granted, and the mediation must be conducted in accordance with South Carolina Circuit Court Alternative Dispute Resolution Rules and this section. A person who is not the owner of the property may petition to intervene as a party, and

this motion must be granted if the person has a substantial interest in the decision of the planning commission.

(B) The property owner or his representative, any other person claiming an ownership interest in the property or his representative, and any other person who has been granted leave to intervene pursuant to subsection (A) or his representative must be notified and have the opportunity to attend the mediation. The governmental entity must be represented by at least one person for purposes of mediation.

(C) Within five working days of a successful mediation, the mediator must provide the parties with a signed copy of the written mediation agreement.

(D) Before the terms of a mediation settlement may take effect, the mediation settlement must be approved by:

- (1) the local legislative governing body in public session; and
- (2) the circuit court as provided in subsection (G).

(E) Any land use or other change agreed to in mediation which affects existing law is effective only as to the real property which is the subject of the mediation, and a settlement agreement sets no precedent as to other parcels of real property.

(F) If mediation is not successful or if the mediated settlement is not approved by the local legislative governing body, a property owner may appeal by filing a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The petition must be filed with the circuit court within thirty days of:

- (1) the report of an impasse as provided in the South Carolina Circuit Court Alternative Dispute Resolution Rules; or
- (2) the failure to approve the settlement by the local governing body.

(G) The circuit court judge must approve the settlement if the settlement has a rational basis in accordance with the standards of this chapter. If the mediated settlement is not approved by the court, the judge must schedule a hearing for the parties to present evidence and must issue a written opinion containing findings of law and fact. A party may appeal from the decision:

- (1) in the same manner as provided by law for appeals from other judgments of the circuit court; or
- (2) by filing an appeal pursuant to subsection (F).

While the use of “if” in the first sentence of S.C. Code § 6-29-1155 may at first glance appear to render the pre-litigation mediation requirement merely permissive, a closer reading of both relevant sections suggests otherwise.

The contents of these sections, when read together, clearly indicate that the General Assembly intended to divert initially any and all appeals from Planning Commission decisions into an alternative dispute resolution procedure, possibly for the purpose of limiting revenue-draining litigation costs borne by local governments, which are frequently targets of litigation due to the perceived “deep pockets” of the government’s coffers. The thoroughness and detail inherent in this pre-litigation mediation procedure prescribed by the General Assembly indicate the level of importance attached to this requirement. Moreover, the “request” is rendered more firmly a requirement with the removal of discretion from the trial court considering the “request”; the first subsection makes it clear that all requests for mediation *must* be approved.

The Appellants in the present case failed to file such request with the complaint/appeal to the trial court from the Planning Commission’s decision. The procedures detailed by the applicable statutes are both jurisdictional and controlling. *Friends of McLeod, Inc. v. City of Charleston*, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2009)(vacated following settlement, 682 S.E.2d 488); see also SCRCP 74. Thus, the Circuit Court properly concluded that Appellants failed to perfect the appeal from the Planning Commission decision, (Order at 3), and should be affirmed.

B. The Circuit Court properly dismissed the Appeal for failure to join necessary and indispensable parties.

Likewise, the Circuit Court properly dismissed the appeal for failing to name or join a necessary party. Appellants failed to join the adjoining land owners as parties in interest. The legal interests of those neighboring land owners were necessarily impacted by the decision of the Planning Commission and would also be affected by any appeal. In *Spanish Wells Property Owners v. Board of Adjustment of Town of Hilton Head*, 367 S.E.2d 160, 295 S.C. 67 (1988), our Supreme Court held that a permittee is a necessary party to an action to revoke a development permit. Noting that there then existed a split of authority on the question from other jurisdictions, the Court went on to state “The emerging majority view is that the permittee is a necessary party. See 3 Rathkopf, *The Law of Zoning and Planning* § 42.05[3] (4th Ed. 1980 & Supp. 1987) (citing numerous cases espousing ‘ascending’ view); 101A C. J. S. *Zoning and Planning* § 301 (1979).” *Spanish Wells Property Owners*, 367 S.E.2d at 161, 259 SC at 68. The same reasoning holds true in the present case. In his order dismissing the appeal, Judge Culbertson cited the *Spanish Wells Property Owners* decision and found that: “These parties occupy an analogous position to an owner whose application approval is appealed, since appeal could result in reversal of the access rights recognized by the Planning Commission.” (Order 3-4).

While normally the failure to join necessary parties should be cured by the addition of those parties, *Charleston County Parents for Public Schools, Inc. v. Moseley*, 343 S.C. 509, 541 S.E.2d 533 (S.C. 2001), here, the County was not in a position to add party-defendants. Rule 14(c), SCRCPP, does not authorize a defendant to add, as a fellow defendant, a party outside of the current litigation. *BancOhio Nat. Bank v. Neville*, 310 S.C. 323, 426 S.E.2d 773 (S.C. 1993)(Landowners excepting to the closure of a public road did not waive their motion to dismiss for failure to join the state and the town as indispensable parties by failing

to join those parties themselves, even though they could have been joined without defeating jurisdiction, because Rule 14(c), SCRPC, does not authorize a defendant to add, as a fellow defendant, a party outside of the current litigation.) Thus, the Circuit Court's decision to dismiss the appeal for failure to join the adjoining property owners was proper and should be affirmed.

III. The Circuit Court properly denied Appellants' motions for an order of reference and to change venue.

A. The Circuit Court properly denied Appellant' motion for an order of reference to the master-in-equity

Appellants' allege that the Circuit Court's denial of its motion for an order of reference to the master-in-equity was arbitrary and capricious and amounts to an abuse of discretion. However, the single viable cause of action left in the Complaint after the grant of the motion to strike, concerns an appeal from a Planning Commission's decision. Such appeals involve questions of law and not properly referred to the Master. Therefore, the Court's denial of the Motion for an Order of Reference was proper and should be affirmed.

B. The Circuit Court properly denied the motion to change venue.

Likewise, the Circuit Court properly denied the motion to change venue. Motions to change the venue of a trial are addressed to the sound discretion of the trial court. *Garrett v. Packet Motor Express Co.*, 263 S.C. 463, 210 S.E.2d 912 (1975). Appellate courts will not disturb the trial judge's decision on appeal unless a manifest abuse of discretion is found resulting in an error of law. *Graham v. Beverly*, 235 S.C. 222, 110 S.E.2d 923 (1959). Moreover, the error of law must be so opposed to the trial judge's sound discretion as to

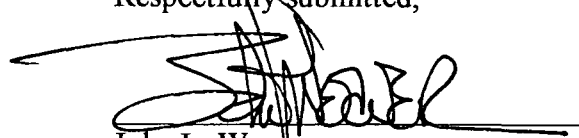
amount to a deprivation of the legal rights of the party. *O'Shields v. Caldwell*, 208 S.C. 245, 37 S.E.2d 665 (1946). Here, Horry County and its various departments are arms of the State and are only subject to suit pursuant to the terms of the South Carolina Tort Claims Act. S.C.Code Ann. § 15-78-100 *et seq.*. Pursuant to Section 15-78-100(b), venue is proper only in the County where the alleged acts or omissions complained of occurred; in this case, Horry County. Therefore, the Circuit Court's decision was entirely proper and should be affirmed.

CONCLUSION

For any and all of the foregoing reasons, the Circuit Court properly denied the motions for an order of reference and to change venue and granted Respondent County's Motion to Strike and to Dismiss. Therefore, the Circuit Court's orders should be affirmed.

March 12, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. L. Weaver", with a long horizontal line extending to the right.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-26-7839

Kenneth Dippel & Kimber
Fowler,

Appellants,

v.

Horry County Planning
Department,

Respondents.

REPLY BRIEF OF APPELLANTS

Kenneth Dippel
Kimber Fowler

Loris, SC 29569
(843) 716-0699

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PREFACE

Here come now the Appellants in reply to Respondents' brief. "AB" will designate herein the Appellant's initial brief. "RB" herein will designate the Respondents' brief.

ARGUMENTS

1. THERE IS NO PUBLIC INTEREST IN RESPONDENTS ENFORCING A PRIVATE EASEMENT

Respondents brief starts out with allegations of fact that are not supported by the evidence in this case. Respondents stated with respect to the South Carolina Court of Appeals' decision and the Master in Equity Rulings that these rulings did not join the County as a party and neither considered the County's interests. **"RB" at page 2.** This Honorable Court should note throughout the Respondents' brief they did not explain, because they could not explain, or did not want to explain, what the County's interests are. The fact of the matter is that there never has been any substantial public interest for the County.

Respondents' sole interest in this case is to continually at all costs to fight Mr. Claudius Eugene Fowler's battle for him in keeping the so called "Dolly Lane" open so that Mr. Claudius Eugene Fowler can continually have an alternative access to all his property. This is clearly evident by the Court examining the initial decision by the Horry County Planning Department. There is nothing in that decision detailing any public interest to Horry County.

Appellants stand by their Argument raised in their brief (**AB at 15 – 24**) asserting Respondents because they are trying to enforce a claimed private easement (the so called “Dolly Lane”) for the sole benefit of Mr. Claudius Eugene Fowler should be considered parties in privy. Therefore, res judicata prohibited Respondents from raising any kind of easement claim for the benefit of Mr. Claudius E. Fowler or continually enforcing a private easement for the sole purpose to provide an alternative route to Mr. Claudius Eugene Fowler’s property. This was more than adequately plead in Appellants’ complaint (**R. at 90 – R. 95**) against the Respondents.

Respondents’ Planning Department had a mandatory duty to comply with the rulings issued by this Court and the Master in Equity concerning the existence of an easement in favor of Mr. Claudius Eugene Fowler. It would be a blatant violation of the Separation of Powers doctrine if this Court were to do as Respondents in their brief want this Court to do, and the ruling issued by Judge Culbertson desires to do, which is to have this Honorable Court ignore the two previous Court decisions by throwing these decisions in the waste basket. The Separation of Powers doctrine as this Honorable Court is fully aware prohibits one branch of government from usurping the power and authority of another. **See *Knotts v. South Carolina Department of Natural Resources*, 348 S.C. 1, 558 S.E. 2d 511 (2002).**

With respect to this case at bar, the Horry County Planning Department nor the Horry County Planning Commission have no legal authority to disturb the rulings issued by this Court or the Master in Equity with respect to a private easement. This Honorable Court and the Master in

Equity ultimately decided the question as to whether Mr. Claudius Eugene Fowler has a legally enforceable easement. Neither the Horry County Planning Department nor the Horry County Planning Commission have legal authority to be the judge, juror, and executioner with respect to continually enforcing a private easement with the explicit sole interest to benefit their “pal” Mr. Claudius Eugene Fowler.

Respondents do not own, and have never owned the private driveway known as “Dolly Lane”, they do not maintain it, and it has never been dedicated for public use. The letter from David Helms at the Horry County Engineering Department confirms this (**R. at 135**). Mr. Claudius E. Fowler does not own the so called “Dolly Lane” and there is no legally enforceable easement for him. *See Shaw v. Hardy*, 270 S.C. 298, 241 S.E. 2d 906 (1978); *McLeod v. Baptiste*, 315 S.C. 246, 433 S.E. 2d 834 (1993) (**grantor lacks standing to enforce a covenant against a remote grantee when the grantor no longer owns real property**).

This Court’s ruling (**R. at 120 – R. 123**) and the Master in Equity (**R. at 123 – 128**) clearly found Mr. Claudius E. Fowler does not have a legally enforceable private easement across Appellants’ property. The so called “Dolly Lane” is private property belonging to Appellants. It is the Appellants who pay property taxes on the so called “Dolly Lane” to Horry County.

Appellants in their Complaint (**R. at 90 – R. 101**) against the County more than adequately complied with **Rule 8 (a), SCRC**P and also more than adequately pleaded sufficient facts to constitute a cause of action. The Appellants’ Complaint specifically noted that the Horry County Planning

Department and Horry County Planning Commission actions denying the approval of their plat were clearly erroneous or was not in accordance with the law (**R. at 90 – R. 101**) . The dismissal order acknowledges this as a legally cause of action and Respondents in their brief acknowledged this by noting the following:

*“Moreover, the Circuit Court also found that the various allegations which peppered the Complaint amounted to no viable theory for which relief can be **granted other than the third cause of action which the Circuit Court liberally construed as an appeal of the adverse determination made by the Horry County Planning Commission concerning Appellant’s request for plat approval**”. (RB at page 3).*

Respondents’ throughout their brief did not explain, because they could not explain, why the order signed by Judge Culbertson (**R. at 2 – R. 5**) made no factual findings as to whether res judicata barred Respondents’ Planning Department from continually enforcing a private easement for the exclusive benefit of Mr. Claudius E. Fowler. This should be of no surprise to the Court because it is the Respondents who prepared the order (**R. at 6**) which was cherry picked and signed by Judge Culbertson (**R. at 1 – R. 5**) without given any of Appellants’ filings any serious consideration.

Judge Culbertson without even taking any time to read any of the pleadings of the Appellants arbitrarily signed the proposed order. This is confirmed by the obvious fact there never was no ruling issued on “Appellants’ Motion for Stay” (**R. at 32 – R. 34**) and “Appellants’ Motion for Summary Judgment” (**R. at 35 – R. at 51**). Both of these motions were submitted long before the signing of the order dismissing Appellants’ case. Both of these motions should have been ruled on before any proposed

dismissal order was signed. **See Cannon 2(B) (8), Rule 501, SCACR** commentary noting *“a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay”*.

Appellants’ stand by their argument in their initial brief that the dismissal orders that was conjured up by Respondents, and which was subsequently hastily cherry picked and signed by Judge Culbertson without little or no regard to Appellants’ property rights and right of judicial review, was arbitrary, capricious, an abuse of discretion, or otherwise was not in accordance with the law.

2. THE CIRCUIT COURT IMPROPERLY DISMISSED APPELLANTS’ THRID CAUSE OF ACTION FOR FAILURE TO MEET THE JURISDICTIONAL FILING REQUIREMENTS AND FOR FAILURE TO JOIN NECESSARY AND INDESPENSIBLE PARTIES

Appellants’ third cause of action as Respondents noted in their brief **(RB at 4)** complains that the Horry County Planning Commission erroneously denied their appeal from the Planning Department’s decision to deny plat approval. Respondents throughout their rampage **(RB at page 4 – 8)** assert just like the cherry picked order they prepared, which was subsequently signed by Judge Culbertson, that Appellants failed to timely request mediation, and failed to timely join necessary and indispensable parties. Respondents’ brief including the proposed order they prepared which was arbitrarily cherry picked and signed by Judge Culbertson are both littered with a comedy of legal errors.

Both Respondents' brief (**RB at 6**) and including the silver platter order and cherry picked order graciously signed and handed out by Judge Culbertson for Respondents' favoritism cited to ***Friends of McLeod Inc. v. City of Charleston***, 376 S.C. 610, 658 S.E. 2d 544 (Ct. App. 2009) (vacated following settlement, 682 S.E. 2d 488). Respondents' brief just like the unlawful order (**R. at 2 – R. 5**) signed by Judge Culbertson intentionally ignores the obvious fact that **Appellants were never mailed out a written decision by the Horry County Planning Commission which was obviously required to be done by Respondents' Planning Commission pursuant to S.C. Code Section 6-29-1150 (D)(2).**

The ruling in ***Friends of McLeod Inc.*** is factually distinguishable from Appellants' case. In ***Friends of McLeod Inc.*** the Court did not address if, how or when **Friends** received notice of the Board's decision (emphasis added). The Court in ***Friends*** noted in footnote #1 the following: **"We recognize section 6-29-280 provides that the time for appeal runs from the date of the mailing (apparently to the parties). We do not know how or when Friends received notice of the decision of the Board, but "the date Friends received notice of the Board's decision is not an issue on appeal".**

With respect to the Appellants' case before this Honorable Court, the question as whether the Horry County Planning Commission mailed out a written decision to Appellants is an issue unlike ***Friends*** cited in the cherry picked order signed by Judge Culbertson. The time limits to appeal, request for mediation, and enjoining all necessary and indispensable parties (if

required as Respondents allege and the signed dismissal order notes) only begin to run either when the Planning Commission mails out a written decision to the Appellants or at the very latest when there is actual proof of receipt in the mail by Appellants of the Planning Commission determination. Appellants prior to the ceremonial signing of Respondents' proposed cherry picked order by Judge Culbertson repeatedly called this to the lower Court's attention. Judge Culbertson in signing Respondents' cherry picked proposed dismissal order totally disregarded that **there was no written decision ever mailed out to Appellants by Respondents' Planning Commission.** There was no ruling at all on Appellants' motion for summary judgment (R. at 35 – R. at 51) which clearly addressed the Respondents' failure to mail out a timely written decision by the Planning Commission.

Respondents' in their brief (**RB at 7**) just like the proposed cherry picked dismissal order unlawfully signed by Judge Culbertson (**R. at 5**) cited to *Spanish Wells Property Owners v. Board of Adjustment of Town of Hilton Head*, 295 S.C. 67, 367 S.E. 2d 160 (1988). Respondents including Judge Culbertson's cherry picked dismissal order both ignores that the ruling in *Spanish Wells* is inapplicable to the Appellants' case for several reasons. First, again the Appellants respectfully remind this Honorable Court that there was no issue as to whether a party had been properly mailed out a decision in *Spanish Wells*. In this instant case at bar, **neither Appellants nor the so called necessary and indispensable parties were mailed out a written decision by the Planning**

Commission. Respondents offered no evidence at the hearing that there ever was proof of receipt by the parties of any decision by the parties.

Second, in ***Spanish Wells*** the lower Circuit Court made a factual finding that a developmental permittee was only a necessary and indispensable party. This was done only when the effected property owner or owners (developmental permittee) were **granted leave to intervene by the lower Circuit Court (emphasis added)**. The lower circuit court dismissed an appeal from a decision of the Hilton Head Island Planning Commission for failure to name the developmental permittee **but had allowed fifteen days leave to add the permitte as a party (emphasis added)**. See ***Spanish Wells Property Owners v. Board of Adjustment of Town of Hilton Head***, 295 S.C. 67, 367 S.E. 2d 160, 161 (1988). The Appellant dissatisfied with the factual finding that the developmental permittee was a necessary party then appealed the court's ruling that the developmental permittee was a necessary party (**emphasis added**).

Our supreme court in their ruling **only addressed the one sole issue and that was whether the developmental permittee was a necessary party**. Our supreme court held the developmental permittee was a necessary party. **Id. at 69, 367 S.E. 2d at 161**. Our state supreme court **did not hold in *Spanish Wells* that in each and every case a party who appeals a Planning Commission decision must in each and every case enjoin anybody and everybody who may be a necessary party** as Respondents assert in their brief and in their proposed conjured

cherry picked dismissal order which was erroneously given the stamp of approval by Judge Culbertson.

The Appellants' case before this Court is clearly completely opposite of ***Spanish Wells***. The Court should note that Respondents in their brief just like the proposed order signed by Judge Culbertson (**R. at 4 – R. 5**) does not name who the so called necessary and indispensable party or parties are that possibly should have been joined by Appellants. There is also no factual finding in the proposed dismissal order signed by Judge Culbertson as to whether Mr. Claudius Eugene Fowler or Mr. Joe Dale Fowler is indispensable parties. The so called necessary parties never filed any kind of petition to intervene nor were they granted leave to intervene by the lower Court. See **S.C. Code Section 6-29-1150(D) (2), S.C. Code Section 6-29-1155(A), and S.C. Code Section 6-29-1155(B). S.C. Code Section 6-29-1150(D) (2) provides:**

"A property owner whose land is the subject of a decision of the planning commission may appeal by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-1155".

"A notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is mailed".

S.C. Code Section 6-29-1155(A) provides:

"If a property owner files a notice of appeal with a request for pre-litigation mediation, the request for mediation must be granted, and the mediation must be conducted in accordance with South Carolina Circuit Court Alternative Dispute Resolution Rules and this section. A person who is not the owner of the property may petition to intervene as a party, and this motion must be granted if the person has a substantial interest in the decision of the planning commission".

S.C. Code Section 6-29-1155(B) provides:

“The property owner or his representative, any other person claiming an ownership interest in the property or his representative, and any other person who has been granted leave to intervene pursuant to subsection (A) or his representative must be notified and have the opportunity to attend the mediation. The governmental entity must be represented by at least one person for purposes of mediation”.

The order signed by Judge Culbertson and Respondents’ brief either intentionally misinterprets or does not make any effort to properly construe **S.C. Code Section 6-29-1150(D) (2), S.C. Code Section 6-29-1155(A), and S.C. Code Section 6-29-1155(B)** as a whole reading. The content of these sections when read together clearly indicate that the General Assembly never intended a property owner aggrieved by a local planning commission decision to be caught up in a “ponzi scheme” where a local government authority takes extreme measures to ensure at all costs that a party never has its day in Court. They never intended property owners like these Appellants to be subject to playing “hop scotch” and playing a guessing game who a necessary and indispensable party or parties may be that possibly should be enjoined in the suit, and then at a later date have the Attorney representing the local governing authority play an *“I got you dismissal ponzi scheme game asserting failure to enjoin necessary and indispensable parties”* for the sole benefit of a private citizen who already had his days in Court.

The proper statutory interpretation of **S.C. Code Section 6-29-1150(D) (2), S.C. Code Section 6-29-1155(A), and S.C. Code Section 6-29-1155(B)** is that parties who may have a substantial interest and who have been granted leave must be joined in the mediation

(emphasis added). The words in **Section 6-29-1155(B)** make this perfectly clear. The necessary parties must only be enjoined in the mediation of an appeal of a local planning commission decision when the Court **grants leave to intervene**. The alleged necessary parties were never granted leave to intervene in this instant case at bar before the lower court. This very fact is detrimental to Respondents' brief and to the cherry picked order signed by Judge Culbertson.

Third, this Honorable Court should note that our Supreme Court in ***Spanish Wells*** in determining the developmental permittee was a necessary party did not address whether res judicata or collateral estoppel barred enjoining the developmental permittee as a necessary party. Respondents in their brief just like the cherry picked order signed by Judge Culbertson did not explain, because neither one of them can explain, why Mr. Claudius Eugene Fowler who already had his day in Court or Joe Dale Fowler (brother of Claudius Eugene Fowler) should be joined as a necessary party when this Court's ruling and the Master in Equity ruling (**R. at 127**) clearly prohibited these individuals from using the so called "Dolly Lane" which is a private driveway belonging to Appellants (**R. at 178 – R. 189**).

There is no factual finding at all in the signed cherry picked order of Judge Culbertson addressing res judicata or collateral estoppel barring the alleged necessary parties being enjoined in Appellants' appeal of the Horry County Planning Commission. Appellants pointed this out in their initial brief. On the other hand, Respondents cannot provide this Court in their brief any logical rationale that allows Mr. Joe Dale Fowler and Mr. Claudius

Eugene Fowler to be required to be enjoined as a necessary party. They cannot and never will be able to cite any law or case law which gives them the ultimate legal authority to overrule final Court orders in private matters. Appellants stand by their argument in their initial brief that Mr. Joe Dale Fowler and Mr. Claudius Eugene Fowler are not necessary parties and cannot be joined because res judicata or collateral estoppel bars enjoining them in Appellants' appeal of the Planning Commission.

Finally, the Court should the rulings in ***Friends of McLeod*** or ***Spanish Wells*** did not address or interpret **S.C. Code Section 6-29-1150(A) providing:**

"The land development regulations adopted by the governing authority must include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff. These procedures may include requirements for submission of sketch plans, preliminary plans, and final plans for review and approval or disapproval".

Appellants in their brief clearly pointed the fact that Respondents' land development regulations do not contain specific procedures at all when it comes to an aggrieved party appealing a Horry County Planning Commission determination on a plat. There is nothing in the Horry County Land Development regulations which specifically state that a request for mediation must be filed and all effected property owners must be joined as necessary parties when an aggrieved party appeals a Horry County Planning Commission determination. In summary, there are no substantive and procedural due process safeguards set forth in the Horry County Land

Development Regulations which would allow an aggrieved property owner to have any meaningful judicial review.

Wherefore, based upon consideration of the foregoing, and upon consideration of the Appellants' brief, the Appellants must respectfully assert to this Honorable Court that the dismissal order is arbitrary, capricious, an abuse of discretion, or otherwise is not in accordance with the law.

3. APPELLANTS' ARGUMENTS ON APPEAL ARE RELEVANT TO JUDGE CULBERTSON'S RULING AND WERE MORE THAN ADEQUATELY PRESENTED TO JUDGE CULBERTSON

Respondents in their initial brief stated *"the balance of Appellant's arguments on appeal are irrelevant to Judge Culbertson's ruling or were not presented to him for decision and, therefore, are not preserved for review by this Court"*. Respondents' one line "whirlwind zinger" statement is all bun but not hamburger. In other words, Respondents one line conclusory statement lacks any supportive rationale and is not supported by the facts and law of this case. The proper review for this Court in a dismissal order is under the arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law standard. Respondents in their brief acknowledged this: *"Thus, the grant of a motion to strike will not be reversed except for an abuse of discretion"* (RB at 3).

An abuse of discretion arises when the trial court was controlled by an error of law or when the order is without evidentiary support. ***Goodson v. Am. Bankers Ins. Co.*, 295 S.C. 400, 402, 368 S.E. 2d 687, 689 (Ct. App. 1988)**. Appellants in this instant case at bar have more than

adequately stated and provided evidentiary support in their initial brief and this reply brief that the dismissal ruling is littered with errors of law and is without evidentiary support. Therefore, the arguments presented in Appellants' brief as well as this reply brief are properly before the Court and are preserved for review by this Court.

Furthermore, by Respondents' alleging Appellants' did not raise their arguments in their brief to Judge Culbertson at the lower Court is disingenuous. Appellants clearly did present the very same arguments. **Please see Appellants' complaint (R. 81 – R. 100), Appellants' reply to Respondents' motion to dismiss (R. at 155 – R. 176), transcript of hearing (R at 23: Lines 15 -20), and motion for summary judgment (R. at 36 – R. 51).**

4. THE CIRCUIT COURT IMPROPERLY DENIED APPELLANTS' MOTIONS FOR ORDER OR REFERENCE AND TO CHANGE VENUE

Respondents in their reply brief to Appellants' brief had no answer to counter Appellants' convincing argument that Judge Culbertson's one line conclusory statement is an abuse of discretion or otherwise is not in accordance with the law. As previously noted in Appellants' brief, there are no supportive reasons and bases or any rationale reasons as to why Judge Culbertson denied the Appellants' motion for order of reference or change of venue.

Respondents' continue to ignore in their brief just like the one line conclusory order signed by Judge Culbertson that a right to trial by jury is not

an absolute. **Rule 38 (b), SCRCF** required the Respondents within no later than 10 days of the Appellants' complaint to demand a jury trial. Respondents did not properly demand a jury trial as required under **Rule 38 (b), SCRCF** and never properly timely served Appellants' with a demand for jury trial.

Furthermore, the relevant question in determining the right to trial by jury is whether an action is legal or equitable. There is no right to jury trial for equitable actions. *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). If the complaint is equitable and the counterclaim legal and compulsory, the defendant has a right to a jury trial on the counterclaim (emphasis added). *C & S Real Estate Servs. v. Massengale*, 290 S.C. 299, 302, 350 S.E. 2d 191, 193 (1986).

With respect to this instant case at bar, Respondents did not submit any kind of counterclaim when they filed their answer to Appellants' complaint. Therefore, they were not entitled to a jury trial with respect to the Appellants' Appeal of the Planning Department and Planning Commission.

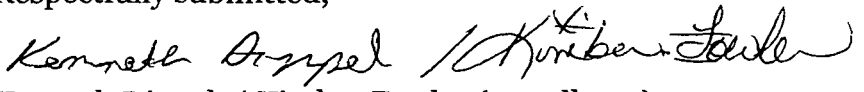
CONCLUSION

Wherefore, based upon consideration of the foregoing, and upon consideration of the Appellants' initial brief, the lower Circuit Court ruling dismissing Appellants' case should be vacated and reversed.

Wherefore, based upon consideration of the foregoing, and upon consideration of the Appellants' initial brief, the lower Court ruling denying an order of reference and change of venue should be either vacated and reversed or vacated and remanded.

Respectfully submitted,

February 22, 2010


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CERTIFICATE OF SERVICE (PROOF OF SERVICE)

I **Kenneth Dippel** and **Kimber Fowler** hereby certify that a copy of Appellants' reply brief was properly served on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on Feb. 22, 2010 addressed as follows:

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Feb. 22, 2010
(Date)

(2-22-10)
(Date)

Kenneth Dippel
(Signature)

Kimber Fowler
(Signature)