

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY

Court of Common Pleas

G. Wells Dickson, Jr., Special Referee

Case No: 2005-CP-45-434

Town of Kingstree, a Body Corporate and Politic, Respondent

v.

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

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

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STATEMENT OF ISSUES IN REPLY

- I. BECAUSE THE RESPONDENT ALLEGED IN ITS PETITION DATED OCTOBER 19, 2005 THAT DEFENDANTS KELLAHAN/DUKE HAD AN EASEMENT FOR THE USE OF PORTER STREET, THE RESPONDENT IS BOUND BY THAT ALLEGATION AND THE ENTIRE BRIEF OF THE RESPONDENT SHOULD BE TOTALLY AND COMPLETELY DISREGARDED.
- II. THE RESPONDENT IS PRECLUDED FROM MAINTAINING THAT PORTER STREET WAS DEDICATED FOR PUBLIC USE IN 1903 BASED UPON THE FINDINGS AND CONCLUSIONS OF THE LOWER COURT THAT THE DEDICATION WAS A RESULT OF THE AGREEMENT BETWEEN THE PARTIES.
- III. THE EASEMENT FROM MCINTOSH TO APPELLANTS DUKE AND KELLAHAN IS NOT A DEDICATION OF A ROADWAY.
- IV. THE RESPONDENT DID NOT APPEAL THE ORDER AND FINDINGS OF THE LOWER COURT THAT THE DEDICATION OF PORTER STREET OCCURRED AS A RESULT OF THE AGREEMENT OF THE PARTIES.
- V. THE ARGUMENT THAT THE APPELLANTS' EASEMENT IS VOID IS TOTALLY AND COMPLETELY WITHOUT ANY MERIT OR SUPPORT IN THE RECORD.
- VI. THE APPLICATION OF ESTOPPEL BY THE LOWER COURT WAS ERROR, BECAUSE THE RESPONDENT DID NOT PLEAD ESTOPPEL.
- VII. THE TAKING OF THE PROPERTY RIGHTS OF APPELLANTS DUKE AND KELLAHAN WITHOUT COMPENSATION WAS ERROR, BECAUSE THE APPELLANTS KELLAHAN AND DUKE HAVE A VALID EASEMENT RIGHT THAT WAS TAKEN.
- VIII. THE FINDING THAT THE CLOSURE OF THE AREA IN QUESTION WAS IN THE BEST INTEREST OF ALL CONCERNED WAS ERROR, BECAUSE THE PUBLIC DID NOT BENEFIT FROM THE CLOSURE OF THE ROAD.
- IX. THE RESPONDENT DID NOT HAVE THE RIGHT TO PETITION TO CLOSE THE AREA IN QUESTION BECAUSE THE AREA

WAS NEVER A PUBLIC ROAD AND THERE WAS NO DEDICATION OF THE AREA IN QUESTION.

SUPPLEMENTAL STATEMENT OF CASE

Defendants Duke and Kellahan incorporate by reference the Statement of the Case from their initial Brief and supplement the same with the following:

The Order denying the Defendants Lydia F. Duke and Alice H. Kellahan's Motion for Reconsideration dated December 1, 2011 held as its conclusion:

“For the reason stated herein, the Kellahan/Duke's Motion for Reconsideration is DENIED, and the undersigned's Order dated October 22, 2010, remains the Order of this Special Referee”. **(Order Denying Lydia F. Duke's and Alice H. Kellahan's Motion For Reconsideration, dated December 1, 2011, Page 10) (R. p. 10)**

In denying the Motion of Defendants Duke and Kellahan, the Lower Court did not incorporate any portion of the Order denying the Motion as a part of the Order of the Court. Instead, the Special Referee specifically stated that the Order of October 22, 2010 was the Order of the Court.

Defendants Duke and Kellahan appealed the Order of October 22, 2010, as well as the Order denying their Motion. However, the Order of October 22, 2010 establishes the findings of fact, conclusions of law, and rulings that are for review by the Court. **(Order Denying Lydia F. Duke's and Alice H. Kellahan's Motion For Reconsideration, dated December 1, 2011, R. p. 10)** The Town of Kingstree did not file an appeal and it is bound by the Order of October 22, 2010.

The Lower Court found as a matter of fact, “the remainder of Porter Street is now paved, as will be addressed herein”. **(Order for Abandonment and Closure**

of Portion of Porter Street, dated October 22, 2010, R. p. 15, Lines 12-13) The Record establishes that the paving was not completed all of the way to the area to be closed, but stops about seventy-five (75') feet short that the Lower Court ordered closed. **(Tr. 3/29/11, R. p. 187, lines 23 - 25 - R. p. 188, lines 1-10)**

The Lower Court stated that “Senator McGill was the facilitator that allowed the town council to broker an agreement with all the parties”. **(Order of October 22, 2010, R. p.17, Lines 20-21)**

As a conclusion of law, the Lower Court further stated “Porter Street is owned by the Town of Kingstree as evidenced by the deeds for the purchase of the land for the recreation complex, the negotiated agreement to re-zone the property to permit a housing project, and the paving of a substantial portion of Porter Street using public funds. **ALTHOUGH THERE WAS NEVER A PUBLIC DEDICATION OF PORTER STREET (EMPHASIS ADDED)**, Porter Street has been used by the public and all of the street except the length of one lot has been paved using public CTC funds which benefitted Defendants Duke and Kellahan. Porter Street is therefore by the agreement and the actions of the parties to this litigation a public street.” **(Order of October 22, 2010, R. p. 20, Lines 19-25 - R. p. 21, Lines 1-2)**

SUPPLEMENTAL STATEMENT OF FACTS

Appellants Duke and Kellahan incorporate by reference the Statement of Facts as set forth in the Brief of the Appellants and submit the following supplemental statement of facts as relevant to this Reply Brief of the Appellants.

The Petitioner admitted the existence and the validity of Defendants Duke and Kellahan's easement (**Defendants Duke and Kellahan, Ex. No. 11, R. p. 362**) in its Petition. (**Petition for Closure of Road, R. p.46, Paragraph 2, Lines 3-4**) The statement is clear, unequivocal and without qualification.

As to who brokered an agreement, the Special Referee specifically held that the town council brokered the agreement. (**Order of October 22, 2010, R. p. 17, Lines 20-21**).

In its Brief, the Respondent, stated "the sale to Waccamaw Housing, Inc. would not have been consummated because the housing project would not have been allowed on the property as originally zoned". (**Respondent's Brief, p. 10, Lines 3-5**) This is not correct. Although since the property was zoned for highway commercial, there is no evidence that a senior citizen project could not be built with the highway commercial zoning. The housing project would have been allowed as the property was zoned without any change.

Senator Yancey McGill did not suggest that a portion of Porter Street connecting up to Ashton Avenue be closed as indicated in the Respondent's Brief. (**Respondent's Brief, p. 8, Lines 11-13**) The minutes of the Town Council of Kingstree reflect that this suggestion was made by councilmen Richard Josey. (**Pl. Ex. No. 4, Public Hearing, R. p. 244, Lines 1-4**)

The only testimony as to the value of the taking by the Respondent, and the resulting damage to the Appellants for the closure of the area in question, was from W.N. Kellahan, Jr. Mr. Kellahan testified that the closure of the area in question

would diminish the value of the remainder of the tract of land by \$100,000.00. **(Tr. 4/26/2006, R. p. 1347, lines 5-12)** The deed transferring the property to Waccamaw Housing, Inc. stated the purchase price was Sixty Thousand and No/100 (\$60,000.00) Dollars for the 2.15 acres. **(Pl. Ex. No. 6, R. p. 247)** There is no evidence to show that the transaction was not an arm length transaction or that the purchase price was not the fair market value.

In its Brief, the Respondent states that the purchase price “was at such an inflated rate”. **(Respondent’s Brief, p. 23, Line 14)** There is no testimony or other evidence of any nature that the purchase price paid by Waccamaw Housing, Inc. for the property purchased from Defendants Duke and Kellahan was not at the fair market value that the purchase price was in any way inflated. This statement in the Respondent’s Brief is totally baseless and without any support in the record. It was obviously made with the intent to have a prejudicial effect on the Defendants Duke and Kellahan’s appeal. This baseless statement lacks any credibility.

The paving for the Senior Citizens Housing project did not extend to the area in question, but stopped approximately 75 feet short of the area that the Plaintiff seeks to close. **(Tr. 3/29/2011, R. p. 219, lines 2-13 & Tr. 3/29/2011, R. p. 187, line 24 - R. p. 188, lines 1-13)** This paved area, called Porter Street, has not been taken into the state road system. **(Tr. 4/26/2006, R. p. 110, lines 20-24)** There is no evidence in the record that either the paved or unpaved area has been accepted into any public road system.

At the hearing on April 16, 2007, Senator McGill testified that he did not

represent W. N. Kellahan, Jr. or Defendants, Alice H. Kellahan and Lydia F. Duke. **(Tr. 4/16/2007, R. p. 162, lines 16-21 & R. p. 166, lines 23-p.7, lines 1-14)**

Neither the record of the public meeting nor the minutes of the Town Council meeting, which were both held on February 2, 2004 have any implication or inference that Senator McGill appeared on behalf of W.N. Kellahan, Jr. or on behalf of Defendants Kellahan and Duke. Additionally, there is no evidence that any person at the public hearing or council meeting relied on apparent authority of Senator McGill as an agent of W. N. Kellahan, Jr. or Defendants Kellahan/Duke.

STANDARD OF REVIEW

Appellant Duke and Kellahan incorporate by reference the Standard of Review as set forth in the Brief of Appellants.

ARGUMENT

The Appellants incorporate the Brief of Appellants by reference, and submit the following, in Reply:

ARGUMENT I

BECAUSE THE RESPONDENT ALLEGED IN ITS PETITION DATED OCTOBER 19, 2005 THAT DEFENDANTS KELLAHAN/DUKE HAD AN EASEMENT FOR THE USE OF PORTER STREET, THE RESPONDENT IS BOUND BY THAT ALLEGATION AND THE ENTIRE BRIEF OF THE RESPONDENT SHOULD BE TOTALLY AND COMPLETELY DISREGARDED.

In reply to the Respondent's Brief, Defendants Duke and Kellahan restate the fact that the allegations, statements or admissions contained in the pleadings are conclusive as against the pleader and a party cannot subsequently take a position contrary to, or inconsistent with his pleadings. ***Postal v. Mann, 418 S.E.2d 322***

(Ct. App. 1992) The Respondent fails to address this fact and, the Respondent attempts to maintain that the Plat of 1903 is a dedication of a road and the easement that Defendants Duke and Kellahan obtained from McIntosh is void. **(Respondent's Brief, p. 13 - 15 and 24-25)**

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

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

For this reason and for this reason alone, the Defendants Kellahan/Duke are entitled to maintain their easement rights for full and complete access to the remainder of their property as granted to them in the written easement filed September 7, 1993, over and across the area in question. Even when a roadway is properly closed, valid easement rights remain in effect. *Hoogenboom v. City of*

Beaufort, 315 S.C. 306, 433 S.E.2d 875 (Ct. App., 1992)

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

ARGUMENT II

THE RESPONDENT IS PRECLUDED FROM MAINTAINING THAT PORTER STREET WAS DEDICATED FOR PUBLIC USE IN 1903 BASED UPON THE FINDINGS AND CONCLUSIONS OF THE LOWER COURT THAT THE DEDICATION WAS A RESULT OF THE AGREEMENT BETWEEN THE PARTIES.

Without waiving their position that no action by the Defendants Duke and Kellahan amounted to a dedication of the area in question and that the Respondent is bound by its pleadings, Defendants Duke and Kellahan set forth the following in reply to the Respondent's Brief.

The Lower Court based its decision that there was a dedication of the area that the Respondent seeks to close on the findings that action's of the parties amounted to and agreement and a dedication. **(Order of October 22, 2010, R. p. 9, Lines 11-12)** Defendants Duke and Kellahan have appealed this finding and holding. However, the Plaintiff did not appeal the Order of the Lower Court. For this reason, the Plaintiff cannot now maintain that the Plat of 1903 was a dedication of the roadway. The Order of the Lower Court of October 22, 2010 did not find or conclude that there was any dedication prior to February of 2004.

ARGUMENT III

THE EASEMENT FROM MCINTOSH TO APPELLANTS DUKE AND KELLAHAN IS NOT A DEDICATION OF A ROADWAY.

The language of the McIntosh easement does not mandate or create a dedication, but only suggests the cooperation of the Grantor in making the area a public road. The easement in and of itself is strong evidence that no dedication had occurred.

The language of the easement from Samuel McIntosh makes reference to the area in question as a “proposed road or street” throughout the entire document. As to the use at the time the easement was granted in 1993, the grantor and grantees agreed:

“It is deemed to the mutual benefit and interest of the said Alice H. Kellahan and Lydia F. Duke and Samuel E. McIntosh as Personal Representative and Trustee under the Last Will and Testament of Marie L. Nelson, deceased, that said proposed fifty (50) foot road or street should be opened and remain open for the mutual use and benefit of the owners of the lands of the Estate of Marie L. Nelson now held in trust and the owners of the twenty and ninety-seven hundredths (20.97) acres this day conveyed to the Alice H. Kellahan and Lydia F. Duke.” **(Defendants Duke and Kellahan, Ex. No. 11, R. p. 362)**

As to the **future** use the McIntosh easement stated:

“Whereas the parties have agreed that efforts should be made to have said street opened and used for their benefit and members of the public who may need to use the same.” **(Defendants Duke and Kellahan, Ex. No. 11, R. p. 362)**

The easement also stated:

The grantor does agree that the grantee, their heirs or assigns may take such steps to make such improvements as may be necessary to

have said street or road opened and maintained as a public street or road and that grantor will assist in such endeavor and that said street or road when opened shall be for the mutual use and benefit of the owners of property lying on either side of the same.” (Defendants Duke and Kellahan, Ex. No. 11, R. p. 362).

The testimony provided indicates that neither the Town of Kingstree nor any other entity had taken any action to accept that property is a roadway or to actually maintain it. (Tr. 4/26/2006, R. p. 88, lines 1-9 and lines 19-24) W.N. Kellahan, Jr. testified that he could not find that there was any indication that any governmental entity had the roadway in its system, especially the South Carolina Department of Transportation. Again, the area of Porter Street which concerns this action has not been paved and was reserved by the Appellants access to the remainder of the Nelson property.

ARGUMENT IV

THE RESPONDENT DID NOT APPEAL THE ORDER AND FINDINGS OF THE LOWER COURT THAT THE DEDICATION OF PORTER STREET OCCURRED AS A RESULT OF THE AGREEMENT OF THE PARTIES.

The Respondent did not file an appeal in this matter and the Lower Court held that “although there was never public dedication of Porter Street, Porter Street has been used by public and all of the street except the length of one lot has been paved with CTC funds which benefitted Defendants Duke and Kellahan. Porter Street is therefore by agreement and the actions to the parties to this litigation of public street.” (Order of October 22, 2010, R. p. 20, Lines 19-25 - R. p. 21, Lines 1-2) While Appellants Duke and Kellahan have appealed, the Order of October 22, 2010, it is the Order of the Lower Court, which was not amended or supplemented by the

Order denying the Duke and Kellahan's Motion. (**Order Denying Lydia F. Dukes' and Alice H. Kellahan's Motion For Reconsideration, dated December 1, 2011, R. p. 10**)

The Respondent cannot contest the findings of the Order of October 22, 2010, which it did not appeal and argue that dedication occurred prior to some agreement of the parties (which these Appellants maintain did not occur).

Since the Respondent did not appeal the Order of October 22, 2010 and because the Respondent, in its Petition alleged, that the Appellants Duke and Kellahan had an easement, the argument that there was any dedication prior to the Lower Court's finding that there was an agreement of the parties, is completely and totally without any basis.

ARGUMENT V

THE ARGUMENT THAT THE APPELLANTS' EASEMENT IS VOID IS TOTALLY AND COMPLETELY WITHOUT ANY MERIT OR SUPPORT IN THE RECORD.

The Respondents argument that the easement from Samuel McIntosh to Appellants Duke and Kellahan was an express written dedication is absurd. The language of the easement cited in the supplemental facts above clearly states that the road is proposed and Appellants Duke and Kellahan can take such action to have it made a public road and that the Grantor would cooperate. It is elemental that an entire document must be read to obtain its full meaning. The three areas for the use of the area in question in the easement clearly reflect two things:

1. The easement is for the benefit of both Samuel McIntosh, the Grantor and Appellants Duke and Kellahan as the Grantees, for them to have access to their

respective parcels of property.

2. The easement deals with the future use. Additionally, the argument that the paving of the area up to the senior citizens facility certainly indicates, there is dedication where the area has occurred, but, until that time, there was no real evidence of dedication. Just because a portion of that property was paved does not mean that the other part was dedicated.

It should also be noted that the Plaintiff's argument that the easement to Appellant's Duke and Kellahan that was void (which the Appellants deny), and it is so crystal clear to the Plaintiff that the dedication had already occurred (which is most strongly denied by the Appellants Duke and Kellahan), then the Town of Kingstree would not have needed to purchase the area in question. Those deeds would be void also (Pl. Ex. No. 7, R. p. 250-317). That is just not the case. Additionally, the Town of Kingstree obtained deeds for a portion of the Nelson property which included, the road bed for Porter Street as a separate tract, also received a deed for the area in question with legally binding notice that there was an easement on record (Pl. Ex. No. 7, R. p. 250-317). The Town of Kingstree purchased the property subject to the Duke and Kellahan easement.

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

ARGUMENT VI

THE APPLICATION OF ESTOPPEL BY THE LOWER COURT WAS ERROR, BECAUSE THE RESPONDENT DID NOT PLEAD ESTOPPEL.

W.N. Kellahan, Jr. testified that Senator McGill was not authorized to take any action for him. (Tr. 4/26/06, R. p. 131, lines 7-13) Senator McGill's testimony clearly states that he did not represent Appellants, Duke and Kellahan or W.N. Kellahan, Jr. (Tr. 4/16/07, R. p. 162-163)

There is no evidence in the record to show that anyone thought that Senator McGill was acting as agent for Defendants Duke or Kellahan or for W.N. Kellahan, Jr. at meetings on February 2, 2004. W.N. Kellahan, Jr. testified on cross-examination that Senator McGill attended Town meeting to represent "his interest", not that of Alice Kellahan or Lydia Duke. (Tr. 4/26/06, R. p. 139, line 4)

At the time Appellants Duke and Kellahan purchased the property, some research was undertaken and there was no evidence that Porter Street was public road, it was not maintained by City, was primarily grown up in broom straw. (Tr. 4/26/06, R. p. 127 & 128)

The Plaintiff's argument concerning apparent authority and estoppel should be rejected. As an affirmative defense, estoppel must be pled or it is waived. (Rule 8(c) and Rule 12, SCRCP) There has been no motion to conform the pleadings to any proof of estoppel. Additionally, in order to allow such an amendment, there must be proof to which the pleadings can be conformed. There has been no showing of any action by Appellants Duke or Kellahan or W.N. Kellahan, Jr. on their behalf

to the Respondent, the Kingstree Town Council or any third other person at the public hearing or council meeting on February 2, 2004, that Senator Yancey McGill was acting on their behalf as their agent. This is an essential and required element of apparent authority. (*R&G Construction, Inc. vs. Low Country Regional Transportation Authority*, 343 SC 424, 540 SE2d 113 2000). The burden of proof is upon the Petitioner to show this agency and the Petitioner has failed to have any evidence of representation by Appellants Duke or Kellahan or W.N. Kellahan, Jr. that Senator Yancey McGill was their agent at the hearing and public meeting.

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

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

The testimony of W.N. Kellahan, Jr. was concerning Senator McGill's action at the meeting and hearing was to represent him and testified specifically that Mr. Kellahan did not send him with any authority to act on behalf of the Appellants. (**Tr. 4/26/2006, R. p.151, lines 25 - R. p. 152, lines 1-2**) Senator McGill also confirmed the fact that he did not have any authority to act on the behalf W.N.

Kellahan, Jr. or Appellants Duke or Kellahan. **(Tr. 4/16/2007, R. p.162, lines 16-21)**

The Plaintiff is trying to “Bootstrap” agency, and apparent authority to its petition and to those claims, it is trying to “Bootstrap” estoppel. *Collins Entertainment, Inc. v. White*, 363 S.C. 546, 611 S.E.2d 262 (S.C. App.,2005)

ARGUMENT VII

THE TAKING OF THE PROPERTY RIGHTS OF APPELLANTS DUKE AND KELLAHAN WITHOUT COMPENSATION WAS ERROR, BECAUSE THE APPELLANTS KELLAHAN AND DUKE HAVE A VALID EASEMENT RIGHT THAT WAS TAKEN.

The March 1903 plan for John T. Nelson plan did not designate the (50') foot wide area in between Lots 13 and 14 in any manner. It was not designated as a street or road it should be emphasized and restated that the filing of a plat does not constitute dedication. **S.C. Code Ann. 6-29-1170.**

The Appellants counterclaimed for taking of a property right stated a claim inverse condemnation. The property right sought to be taken was a fifty (50) easement granted to Defendants Duke and Kellahan by a written easement dated September 7, 1993 from Samuel E. McIntosh recorded in Deed Book A-311 at page 235.

The property in question has not been paved and has not been dedicated to public use. Appellants Duke and Kellahan hold a valid easement and that the Plaintiff admitted was valid in its pleadings. The Plaintiff cannot now disavow that admission in this case.

Under the laws and the Constitution of our state and the Constitution of The United States, no private property may be taken without just compensation.

Under the Eminent Domain Law no private property right may be taken without compensation. South Carolina recognizes the doctrine of inverse condemnation, whereby owners may suffer a taking as a result of a change in access to their property. This doctrine is recognized in the ***City of Rockhill vs. Cothran***, **209SD 357 40 SE2d 2369**, cited in the Court of Appeals decision in *Hardin vs. SCAPT*, **359 SC 244 597 SE2d 814**.

The property was acquired by Appellants Duke and Kellahan for commercial development and the acquisition and development was predicated on access to said property along Porter Street with ingress and egress being available on both Ashton Avenue and Nelson Boulevard. The Appellants Duke and Kellahan have established by uncontroverted testimony that special injury will occur to their property if their access to Porter Street is terminated and they are entitled to recover damages for such injury in the amount of One Hundred Thousand and No/100 (\$100,000.00) Dollars. **(Tr. 4/26/2006, R. p. 134, lines 5-12)** This damage is supported by the purchase price of the property that was sold for the senior citizen housing. **(Pl. Ex. No. 6, R. p. 247)**

ARGUMENT VIII

THE FINDING THAT THE CLOSURE OF THE AREA IN QUESTION WAS IN THE BEST INTEREST OF ALL CONCERNED WAS ERROR, BECAUSE THE PUBLIC DID NOT BENEFIT FROM THE CLOSURE OF THE ROAD.

Section 57-9-20 of the S.C. Code of Laws 1976 as amended, requires that the closing of a street must be in the best interests of all concerned. Clearly, the closing of the street is not in the best interest of Appellants Duke and Kellahan. The only people that really benefit from the closing are the owners of the property on Ashton Avenue that will receive an additional twenty-five (25') feet of property. The only Town of Kingstree citizens who testified, Defendants Gary W. Chapman, Jr. and Terilyn J. McClary, no longer own Lots 13 or 14, respectively.

The need for emergency vehicles to have an alternative exit from Nelson Boulevard and the recreational center will benefit the people of the Town of Kingstree by having that area open, closing that access would be to the detriment of many more people than those two who speculated about injury, which was personal to them. The close proximity of the hospital and other medical providers on Hwy. 377 and Nelson Blvd. makes the closure detrimental to the citizens of the town and county. This area needs to remain open for the benefit of all concerned. The Respondent failed to present any credible testimony that refusing to close the area in question would create an unsafe situation.

ARGUMENT IX

THE RESPONDENT DID NOT HAVE THE RIGHT TO PETITION TO CLOSE THE AREA IN QUESTION BECAUSE THE AREA WAS NEVER A PUBLIC ROAD AND THERE WAS NO DEDICATION OF THE AREA IN QUESTION.

The area in question appeared on the 1903 plat along with three other areas to provide access to a large tract of land retained by the property owners of the lots that were shown on an unnamed street which later became Ashton Avenue. The plat

of the property clearly reflects that those areas were not streets, but only access points.

W.N. Kellahan did not testify that the road was shown as proposed road on the maps. He stated that if the area had been used as a road since 1903, it would be a public road. **(Tr. 4/26/2006, R. p. 148, lines 25- R. p. 149, lines 1-4)** There is no testimony in the record to indicate that the road had been used since 1903. It is important to reiterate the fact that the City Planner for the Town of Kingstree and one of the Petitioner's primary witnesses, Michael Kirby, testified:

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

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

Q. Mr. O'Bryan: When you say now.

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

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

A. Mr. Kirby: That's correct.

(Tr. 4/26/2006, R. p. 88, lines 1-9 and lines 19-24)

Also, important is the fact that the Town of Kingstree purchased the roadways from the devisees of Marie L. Nelson. **(Pl. Ex. No. 7, R. p. 250-317)** In purchasing this property in August of 1998, the Town of Kingstree was charged with the knowledge and notice under **S.C. Code Ann. §30-7-10** that Defendants Duke and Kellahan held a valid easement dated September 7, 1993 and recorded September

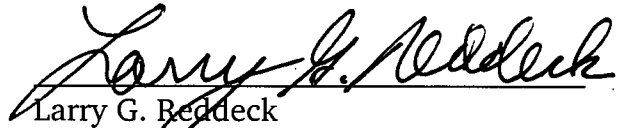
8, 1993 in Book A311 at Page 235, office of the Clerk of Court for Williamsburg County. (Def. Ex. No. 11, R. p. 362) That is precisely why the Town of Kingstree, in its Petition, alleged that the Defendants Duke and Kellahan held an easement. (Petition for Closure of Road, Paragraph 2, R. p. 46)

CONCLUSION

Based upon the foregoing Reply Brief and the Brief of Appellants, the Appellants Duke and Kellahan respectfully request that the decision of the Lower Court be reversed.

Lake City, S.C.

July 5, 2012.



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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM WILLIAMSBURG COUNTY

Court of Common Pleas
G. Wells Dickson, Jr., Special Referee

Case No: 2005-CP-45-434

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SC Court of Appeals

Town of Kingstree, a Body Corporate and Politic, Respondent

v.


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

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

CERTIFICATE OF COUNSEL

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

July 12, 2012


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